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Editors in Chief

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April, 1919.

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AMERICAN LAW REPORTS ANNOTATED

PICTURE PLAYS THEATER COMPANY OF TAMPA, Appt.,
v.
T. WILLIAMS.

Florida Supreme Court—April 18, 1918.

(— Fla. —, 78 So. 674.)

Evidence — answer in chancery.

1. An answer in chancery is both a discovery and a pleading. As to matters of discovery, it is evidence for the defendant; as to matters of pleading, it is not.

[See note on this question beginning on page 39.]

Same — weight.

2. An answer in chancery, although positive, and directly responsive to an allegation in the bill, may be outweighed by circumstances, especially if it be respecting a fact which, in the nature of things, cannot be within the personal knowledge of the defendant.

Same — new matter.

3. New matter, or matter merely in confession and avoidance, relates to acts, transactions, or happenings which occur subsequent to the acts complained of in the bill, and which do not form a part of the original contract or transaction, but are independent of it, and relate to a different transaction. Where such new matters are set out in the answer, they are not such responsive averments as will be taken as true when the case is heard on bill, answer, and replication.

Pleading — answer — responsiveness.

4. But where the averments relate to or are a part of the original act, contract, or transaction upon which complainant predicates his cause of action, or are concerning matters stated or inquired of in the bill, and state all the particulars of the acts, contracts, or transactions charged and inquired into by the bill, they are responsive.

Same — effect of answer.

5. On a final hearing of a cause in equity upon bill, answer, and replication, after the time for taking testimony has expired, every allegation in the answer responsive to the bill is taken as true.

Same — responsiveness.

6. Where an answer is confined to such facts as are necessarily required by the bill, and those inseparably connected with them, forming a part of one and the same transaction, the answer is responsive to the bill as well when it discharges as when it charges the defendant.

Headnotes by BROWNE, Ch. J.

APPEAL by defendant from a decree of the Circuit Court for Hillsborough County in favor of complainant in a suit to have the action of the board of directors of the defendant company, canceling plaintiff's stock, declared void, and to declare complainant owner of the stock and entitled to the rights and privileges of a stockholder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **McKay, Withers, & Phipps,** for appellant:

On a hearing on bill and answer, when the cause is set down by the complainant, and where no replication has been filed, all allegations in the answer, whether responsive or not, are admitted.

1 Enc. Pl. & Pr. 924; Maxwell v. Jacksonville Loan & Improv. Co. 45 Fla. 425, 34 So. 255; Lee v. Bradley Fertilizer Co. 44 Fla. 787, 33 So. 456; 3 Enc. L. & P. 1426; 16 Cyc. 383; 1 Whitehouse, Eq. Pr. § 281; Shipman, Eq. Pl. pp. 133, 138; 1 Beach, Eq. Pr. § 368.

The general denial in the answer is sufficient to make an issue on material allegations in the bill not admitted in the answer, and to which no especial response is made. Such allegations cannot be taken as admitted to be true, but must be proved by at least a preponderance of the testimony.

Parken v. Safford, 48 Fla. 290, 37 So. 567; Pinney v. Pinney, 46 Fla. 559, 35 So. 95; Mitchell v. Mason, 65 Fla. 208, 61 So. 579; Godwin v. Phifer, 51 Fla. 441, 41 So. 597.

Affirmative averments in an answer that are not required by the bill of complaint, that do not grow out of any transaction or facts alleged in the bill or admitted in the answer, and that are not inseparably connected therewith, constitute new matter not responsive to the bill of complaint, and, if not proved, cannot avail the defendant.

Griffith v. Henderson, 55 Fla. 618, 45 So. 1008; Tyler v. Toph, 51 Fla. 597, 40 So. 624; Davis v. Horne, 57 Fla. 396, 49 So. 505; Leuders v. Thomas, 35 Fla. 518, 48 Am. St. Rep. 255, 17 So. 633; Parsons v. Ramsey, 53 Fla. 1055, 43 So. 503; Mitchell v. Mason, 65 Fla. 208, 61 So. 579; Mayo v. Hughes, 51 Fla. 495, 40 So. 499; Prittman v. Milton, 69 Fla. 304, 68 So. 658.

On a hearing on bill, answer, and replication after the time for taking testimony has expired, every allegation in the answer responsive to the bill will be taken as true.

Maxwell v. Jacksonville Loan & Improv. Co. 45 Fla. 425, 34 So. 255; Southern Lumber & Supply Co. v. Verdier, 51 Fla. 570, 40 So. 676; Mayfield v. Wernicke Chemical Co. 65 Fla. 113, 61 So. 191, Ann. Cas. 1917A, 1193; Myers v. Julian, 57 Fla. 493, 48 So. 998; Garcia v. Garcia, 57 Fla. 421, 49 So. 749; Haile v. Venable, 53 Fla. 788, 44 So. 76; Lee v. Bradley Fertilizer Co. 44 Fla. 787, 33 So. 456; Godwin v. Phifer, 51 Fla. 441, 41 So. 597; Griffith v. Henderson, 55 Fla. 625, 45 So. 1003; Pierce v. J. M. Brunswick & B. Co. 23 Fla. 283, 2 So. 366; Ropes v. Jenerson, 45 Fla. 556, 110 Am. St. Rep. 79, 34 So. 955; Hart v. Sanderson, 18 Fla. 103; Lykes v. Beauchamp, 49 Fla. 333, 38 So. 603; 3 Enc. L. & P. 1428, 1429; 1 Beach, Eq. Pr. § 367; Watson v. Bair, — Fla. —, 74 So. 317; Garrison v. Parsons, 45 Fla. 335, 33 So. 525; Braxton v. Liddon, 49 Fla. 280, 38 So. 717; 1 Enc. Pl. & Pr. 916, 918; Reid v. McCallister, 49 Fed. 16; Rowley's Appeal, 115 Pa. 150, 9 Atl. 329; Merritt v. Brown, 19 N. J. Eq. 286; Beals v. Illinois, M. & T. R. Co. 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314; Schwarz v. Wendell, Walk. Ch. (Mich.) 267; Rich v. Austin, 40 Vt. 416; Shown v. McMackin, 77 Tenn. 601, 42 Am. Rep. 680; Cooper v. Tappan, 9 Wis 361; Robinson v. Cromelein, 15 Mich. 316; Branch Bank v. Marshall, 4 Ala. 60; Bell v. Farmers Deposit Nat. Bank, 131 Pa. 318, 18 Atl. 1079; Prentiss Tool & Supply Co. v. Godchaux, 13 C. C. A. 420, 30 U. S. App. 68, 66 Fed. 234; Comstock v. Herron, 45 Fed. 660.

And this is true, even though the answer is not under oath, the bill having waived such answer under oath.

Lykes v. Beauchamp, 49 Fla. 333, 38 So. 603; Griffith v. Henderson, 55 Fla. 618, 45 So. 1008; Mayfield v. Wernicke Chemical Co. 65 Fla. 113, 61 So. 191, Ann. Cas. 1917A, 1193; Lee v. Bradley Fertilizer Co. 44 Fla. 787, 33 So. 456; Parken v. Safford, 48 Fla. 290, 37 So. 567; Indian River Mfg. Co. v. Wooten, 55 Fla. 745, 46 So. 185; 3 Enc. L. & P. 1427.

Messrs. **Shackleford & Shackleford** for appellee.

Browne, Ch. J., delivered the opinion of the court:

T. Williams the appellee brought a suit in chancery in the circuit court of Hillsborough county, against the Picture Plays Theater Company, to have the action of the board of directors of the company forfeiting and canceling his stock declared null and void, and that the thirteen shares of stock be declared valid outstanding stock of the company, and that he be declared the owner thereof, and entitled to all rights and privileges of a stockholder; that the corporation be required to bring its books into court for examination, that an accounting be had, and that the corporation be required to pay him his dividends.

The defendant answered, and the complainant filed a general replication; and, after the expiration of the time for taking testimony, the defendant set the cause down for hearing on bill, answer, and replication.

The chancellor rendered a decree granting the prayer of the complainant, and the defendant appealed.

The case presented on the assignments of error and the record involves the application of the settled rule that "when a cause is heard on bill, answer, and replication, after the time for taking testimony has expired, every allegation in the answer responsive to the bill will be taken as true."

The bill, in substance, charges that the complainant became seised and possessed and the absolute owner of thirteen shares of the capital stock of the defendant company, of the par value of $100 per share, which was fully paid and nonassessable; that he by the issuance of such stock certificate was duly recognized as the owner of such shares of stock, until on or about the 5th day of April, 1911; that on or about that date a meeting of the board of directors of the defendant company was held in the city of Tampa, and that a copy of the minutes of said meeting is attached to the bill, marked Exhibit B, and "prayed to be taken and made as much a part thereof as if set forth herein, in hæc verba;" that by a resolution adopted at such meeting, a copy of which is set forth in the minutes, the directors attempted to cancel the complainant's stock, and deprive him of it, and all right, title, and interest therein; that since the date when the resolution was adopted the corporation has contended that his stock was forfeited and canceled, and refuses to recognize him as a stockholder, and claims that he has no right, title, or interest in the shares, and no interest in the company; that all the acts of the company and its directors are absolutely null and void; that at the time of the passage of the resolution the stock was and is now of great value; that he never committed any act which would entitle the company to cancel his stock, and that the action of the company and its directors was entirely without any foundation of right; that the business of the company has been carried on for profit, and dividends declared on the capital stock, but no dividend has been paid or offered to him; that he has never been permitted to see the books of the company; that the company has refused and prevented him from being present at any of its corporation meetings, and refused to disclose to him the financial condition of the company, the amount of its earnings, or its net profits, or any statement of the affairs of the corporation; that the company has sufficient money available for such purposes to pay him his proportionate share of the dividends; that on or about the 3d day of April, 1911, he made an assignment of his stock to one E. H. Calley, and that he made it for the purpose of giving Calley authority to represent him in obtaining a settlement with the company, or authority to sell his stock, and that Calley was informed of and fully understood the purpose of the assignment, and received the assignment solely for such purpose; that no interest in the stock was conveyed to Calley, who never claimed

it, and never had any title or interest in it, and that Calley returned the stock certificate to the complainant, and ceased to represent him, and that by mutual understanding between him and Calley the authority or power given to him by such assignment has been wholly terminated. The certificate of stock is attached to the bill. Answer under oath was expressly waived.

Exhibit B to the complainant's bill purports to be a copy of the minutes of the adjourned meeting of the board of directors of the Picture Plays Theater Company held on the 5th day of April, 1911, and contains a resolution setting out at length and in detail the organization of the Picture Plays Theater Company, and all the facts and transactions connected with the issuance of its stock, and the acquisition by T. Williams of the thirteen shares of capital stock of the company, which he is seeking to have recognized as valid and bona fide outstanding stock of the defendant company. The matters stated in the resolution, if true, make out a case of fraud in the issuance of seventy-five shares of the stock, of which the complainant claims to hold thirteen shares.

The defendant's answer, which was not under oath, denied "that the complainant on or about the 10th day of June, 1910, became seised and possessed and the absolute owner of thirteen shares of capital stock" of the defendant company, and "avers the truth to be that a certificate for thirteen shares of stock was procured to be issued to the said complainant through fraud, covin, and deceit, . . . and, although said certificate was issued to the complainant, he never did become in equity and good conscience the owner of the stock represented thereby;" "that it admits certificate No. 5, of which Exhibit A attached to the bill is a substantial copy, was issued to the complainant, but says that said certificate was procured through fraud, covin, and deceit, as hereinafter set forth, and denies that it ever recognized the said complainant as the owner of the shares of stock represented by said certificate, after it discovered the said fraud;" it admits that a meeting of the board of directors of the defendant company was held in Tampa, Florida, on April 5, 1911, and that Exhibit B attached to the amended bill is substantially a correct copy of the minutes of such meeting, and that ever since the resolution adopted at the meeting became effective it has declined to recognize the complainant as the owner of the stock represented by certificate No. 5, and declined to permit him to participate in the affairs of the company, and denies that its acts in so doing are null and void, and avers the truth to be that it was right and proper that the action taken by the board of directors, as set forth in the minutes of the meeting, should be had; that it is immaterial whether or not the stock claimed by complainant is of great value, because complainant has no legal or equitable right, title, or interest therein, and is not entitled to know the real value thereof; it admits that notice was served by its attorney on the complainant subsequent to the passage of the resolution, but says it is not true that the complainant has never committed any act which would entitle the respondent to cancel the stock, and denies that its action in canceling the stock was entirely without foundation or right, and denies that it is now actively engaged in the operation of the business for which it was incorporated, and avers the truth to be that for a long time the business was operated at a loss, and that it finally sold its physical assets for a sum of money less than cost, a part only of which has been paid, and the sums so paid have been used in discharging company liabilities; it admits that no dividend has been paid or offered to complainant, and avers that complainant has never been legally entitled to receive a dividend, because he has never been in equity and good conscience the owner of the stock, and admits that the complainant

has never been permitted to see the books or be present at corporate meetings, but, inasmuch as the complainant is not the owner of any stock in the company, he has not been entitled to make such examination of the books or be present at any corporate meetings, and, for the same reason, respondent was under no obligation to disclose its financial condition to the complainant, and denies that complainant has ever been entitled to a share of the profits or any dividend, and admits that it has treated the stock of the complainant as canceled and forfeited, and has refused to recognize him as a stockholder; that it is not proper for its books to be brought into court for examination, because complainant is not entitled to any equitable interest as stockholder or otherwise in the company; that respondent is not informed about the transfer of the stock to E. H. Calley, but demands full and complete disclosure and proof of the transaction. The answer then proceeds to set forth fully and in detail all the transactions connected with the organization of the defendant corporation, which it claims constituted the fraud charged against the complainant, substantially as the same is set forth in the resolution adopted by the board of directors at the meeting held on April 5, 1911, which is attached to and made a part of the complainant's bill.

Counsel on both sides have filed very full briefs, in which they discuss the rule governing the effect of the allegations of a responsive answer, when a case is heard on bill, answer, and demurrer, after the time for taking testimony has expired, and cited many decisions where the rule has been considered.

Some of the courts seek to lay down general rules by which its applicability can be determined. Thus, some say that the true test is, if the whole subject-matter of the statement or allegation in the answer might have been left out, without thereby furnishing just ground of exception to the answer, such allegations are not responsive to the bill. Bellows v. Stone, 18 N. H. 465; Eaton's Appeal, 66 Pa. 483. Mr. Justice Sharswood in Eaton's Appeal, supra, says the test is "whether, as a witness on examination, he could be cross-examined as to the matter which he states in anticipation of his defense on a trial at law." See also Dunham v. Gates, 1 Hoffm. Ch. 185. These rules, however, only tend to open new grounds for controversy, and extend the scope of investigation, by giving two rules to apply, when in the end regard must always be had to the case made in the bill under consideration, in determining what is and what is not responsive. The rule has been much discussed by the courts and, while there is no controversy over what it is, there is considerable discrepancy in its application. This discrepancy arises, to some extent, from the double purpose performed by an answer in chancery, which is both a discovery and a pleading. As to matters of discovery, it is evidence for the defendant; as to matters of pleading, it is not.

Evidence—answer in chancery.

While the rule is that, on a hearing on bill, answer, and replication, all averments in the answer which are responsive to the bill, and which are not by way of defense or in avoidance, by matters which are not a part of the original act, contract, or transaction in which the cause of action originated, shall be taken as true, there are some qualifications to be considered in applying the rule. Thus Mr. Chief Justice Marshall said: "An answer in chancery, although positive, and directly responsive to an allegation in the bill, may be outweighed by circumstances, especially if it be respecting a fact which, in the nature of things, cannot be within the personal knowledge of the defendant." Clark v. Van Riemsdyk, 9 Cranch, 153, 3 L. ed. 688.

Same—weight.

Of like effect is the qualification stated in Dunham v. Gates, supra:

"But the question of credibility is very different from that of admissibility. The court is not compelled to believe the answer, though bound to receive it. It may carry its refutation within itself; and of course the court is to decide whether the facts as sworn to make out a case to bar the relief."

That portion of the rule which says that the answer will not be taken as true with respect to unresponsive allegations which are alleged by way of defense or in avoidance of the bill has often been considered by the courts, and has been most pregnant of litigation. There seems to be no adequate rule by which all answers can be measured, as the questions which may be presented are as limitless as the number of causes of action that may accrue and the methods adopted by pleaders in presenting and meeting them; so in the end we must be governed by the case made by the pleadings in each case. The authorities are varied, and at times approach very nearly to open conflict, although all try to steer by the same particular star.

The main contention in this case is whether the statements in the answer are responsive to the bill, or new matter in defense or by way of avoidance.

New matter, or matter merely in confession and avoidance, relates to acts, transactions, or happenings which occur subsequent to the acts complained of in the bill and which do not form a part of the original contract or transaction, but are independent of it, and relate to a different transaction. Where such new matters are set out in the answer, they are not such responsive averments as will be taken as true when the case is heard on bill, answer, and replication. But where the averments relate to or are a part of the original act, contract, or transaction upon which complainant predicates his cause of action, or are concerning matters stated or inquired of in the bill, and state all the particulars of the acts, contracts, or transactions charged and inquired into by the bill, they are responsive.

Same—new matter.

Pleading—answer—responsiveness.

This is illustrated by Lord Chancellor Eldon in Thompson v. Lambe, 7 Ves. Jr. 587, 32 Eng. Reprint, 236, who remarked: "Upon the other point, I am clearly of opinion, a person charged by his answer cannot by his answer discharge himself, nor even by his examination, unless it is in this way: If the answer or examination states that upon a particular day he received a sum of money, and paid it over, that he may discharge him; but if he says that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge, for it is a different transaction."

We give a few citations from some of the leading authorities:

"An answer in stating the particulars of a transaction charged and inquired into by the bill is responsive." Merritt v. Brown, 19 N. J. Eq. 286.

"It has been repeatedly held that whatever is fairly a reply to the general scope of the claim set up in the bill, whether in the stating or charging part, and whether by way of denial, excuse or avoidance, is evidence for the defendant." Rich v. Austin, 40 Vt. 416.

In Eaton's Appeal, supra, Mr. Justice Sharswood said: "Thus, if a plaintiff state an act, transaction, or contract as the foundation of his equity, the defendant has a right to state the whole of such act, transaction, or contract as in truth it was. . . . But another subsequent, independent and distinct fact, not stated in the bill, is not responsive, and therefore not within the rule." Hart v. Ten Eyck, 2 Johns. Ch. 62.

It is true that in Green v. Hart, 1 Johns. 580, it was held that where a bill alleged that the complainant had paid a full and valuable consideration for a note indorsed to him by Green, who, in his answer to this charge and the interrogatory found-

ed upon it, alleged that part of the consideration for indorsing the note was usurious, the allegation of usury was merely in avoidance. This court has not followed the conclusion in that case, but we hold that an answer that sets up usury as a defense in a suit to foreclose a mortgage is responsive to the case made by the bill. Maxwell v. Jacksonville Loan & Improv. Co. 45 Fla. 425, 34 So. 255.

In Bellows v. Stone, supra, the court said: "The true distinction is between allegations upon those subjects upon which the bill requires some answer, and allegations of new matter, not stated or inquired of in the bill, but introduced by the defendant in his defense."

On a bill to redeem stock, alleging that it had been pledged for $500, an answer that the stock was pledged for $800, in addition to the $500 alleged in the bill, was held to be responsive, and not the setting up of a distinct and new matter, in avoidance of the equity admitted by the answer. Dunham v. Jackson, 6 Wend. 22.

Shipman, in his work on Equity Pleading, thus states his deduction from all the authorities: "An answer, so far as it gives discovery, must be responsive, and not evasive. It must be full, direct, and sufficient so far as the inquiries of the bill extend. An answer will, in general, be responsive when it is confined to such facts as are necessarily required by the bill, and those that are inseparably connected with them, forming a part of the same transaction, including, in some cases, new or affirmative matter."

The case of Reid v. McCallister (C. C.) 49 Fed. 16, was a suit to enforce the lien of a mortgage against a husband and wife; the wife answered, admitting that she signed the instrument, but only upon the false and fraudulent representation of the complainant's agent who obtained her signature and acknowledgment, and that she was ignorant and unable to read. A general replication was filed and the case heard on the pleadings alone. It was "held that the allegations of fraud were not new matter in avoidance, but were responsive to the bill, and were sufficient to prove that the wife did not execute the mortgage." In the opinion, Judge Deady said: "In this connection matter in avoidance is something subsequent to and distinct from or dehors the fact admitted; but, if the admission and the avoidance constitute one single fact or transaction, the answer is evidence of both."

In Rowley's Appeal, 115 Pa. 150, 9 Atl. 329, a bill was filed against Rowley, the Hero Fruit Jar Company, and Kennedy, the defendants, to compel them to admit the complainant as a stockholder in the Hero Fruit Jar Company. The bill alleged, among other things, that the capital stock of the company consisted of 5,000 shares, and that plaintiff as one of the alleged stockholders subscribed for 100 shares, and that the defendants refused to give him a certificate, and confederated to deprive him of his right as a shareholder. The answer of Rowley, one of the defendants, denied that the plaintiff was ever the real owner of any of the shares, and alleged that plaintiff consented to the use of his name as subscriber for 100 shares of stock under an agreement that, upon demand, he would transfer and assign them to Rowley as the true and equitable owner, which he has since refused to do. In deciding in favor of the responsiveness of the answer, the court said: "This is not subsequent matter alleged in avoidance; if true, it is a material portion of the facts in the case of the plaintiff which he accidentally omitted. We think the answer is responsive."

The rule in this state is the same as that which generally prevails in all of the courts in this country, that "on a final hearing of a cause in equity upon bill, answer, and replication, after the time for taking testimony has expired, every averment in the answer responsive

Same—effect of answer.

to the bill is taken as true." Lykes v. Beauchamp, 49 Fla. 333, 38 So. 603; Griffith v. Henderson, 55 Fla. 625, 45 So. 1003; Southern Lumber & Supply Co. v. Verdier, 51 Fla. 570, 40 So. 676; Maxwell v. Jacksonville Loan & Improv. Co. 45 Fla. 425, 468, 34 So. 255, 269; Ropes v. Jenerson, 45 Fla. 556, 110 Am. St. Rep. 79, 34 So. 955; Pierce v. J. M. Brunswick & B. Co. 23 Fla. 283, 2 So. 366; Mayfield v. Wernicke Chemical Co. 65 Fla. 113, 61 So. 191, Ann. Cas. 1917A, 1193.

And this is true, even if the answer is not under oath, the bill having waived answer under oath. Griffith v. Henderson, 55 Fla. 625, 45 So. 1003; Lykes v. Beauchamp, supra; Parken v. Safford, 48 Fla. 290, 37 So. 567; Mayfield v. Wernicke Chemical Co. 65 Fla. 113, 61 So. 191, Ann. Cas. 1917A, 1193; Indian River Mfg. Co. v. Wooten, 55 Fla. 745, 46 So. 185.

The question of when an answer is responsive to a bill has been discussed by this court in several cases, and the decisions are in line with the overwhelming weight of authority. In the case of Maxwell v. Jacksonville Loan & Improv. Co. 45 Fla. 425, 34 So. 255, the fourth headnote is: "Where an answer is confined to such facts as are necessarily required by the bill, and those inseparably connected with them, forming a part of one and the same transaction, the answer is responsive to the bill, as well when it discharges as when it charges the defendant."

Same—responsiveness.

In the body of the opinion the court says: "The next contention involves a consideration of the effect of the answer in this case. It is stated in Cooper v. Tappan, 9 Wis. 361, that 'where an answer in chancery admits facts which charge the defendant, and sets up also matters which discharge him, the latter is not evidence for him, unless the charge and discharge arise out of one and the same transaction, in which case the answer may state the whole transaction, and it will be held responsive to the bill, and be evidence in favor of the defendant.'"

In the case of Southern Lumber & Supply Co. v. Verdier, 51 Fla. 570, 40 So. 676, the court says: "We think that the answer, as far as it goes, is responsive to the bill. One says there was no consideration, the other responds there was a consideration, and explains what that consideration was."

It requires very little change in this language to make it fit the instant case, where the complainant says there was no fraud, and the defendant responds that there was fraud, and explains what the fraud consisted of. This court has gone further than some of the other courts in determining what statements are responsive to a bill, and gives to a defendant greater latitude. Thus, they say that the defense of failure of consideration set up in an answer, being something that occurred subsequent to the original transaction, is not responsive to the bill, but that a denial of consideration would be. This court, however, says that where "a chancery cause is set down for hearing, and is heard upon the bill, answer, and replication, no evidence having been taken by either party, and the time has expired for taking testimony, and the answer sets up a failure of the consideration for which the instrument sued on was given, it is erroneous to decree a foreclosure in favor of complainant." [Braxton v. Liddon, 49 Fla. 280, 38 So. 717.]

Applying the principles laid down in the foregoing decisions to the pleadings in the instant case, we reach the conclusion, after very careful consideration, that the statements in the answer are responsive to the allegations of and the case made by the bill.

The bill alleges that on or about the 10th day of June complainant became seised and possessed and the absolute owner of the stock; the answer denies this, and avers the truth to be that the certificate for thirteen

shares of stock was procured to be issued to the complainant through fraud, covin, and deceit, and he never became in equity and good conscience the owner of the stock represented thereby. The charge of fraud is but a conclusion, and the defendant, therefore, set forth all the facts and circumstances connected with the issuance of the stock, and with the organization of the company, which it claims constituted the fraud. This was clearly responsive to the allegations of the bill, as it was a part of the acts and transactions inquired of by the complainant.

The complainant alleged that there was a meeting of the board of directors of the defendant company, and attached his bill, and made a part thereof was what he charged was a correct copy of the minutes of such meeting. The resolution which was recited in the minutes set forth all the acts connected with the organization of the company and the issuance of the stock to complainant, which it was alleged constituted the fraud, and charged that the acts of the board of directors in declaring that the stock was obtained through fraud were null and void. The defendant denied that the acts of the corporation were null and void, and set forth everything that it claimed was fraudulently done in the organization of the company by complainant and others, in support of its denial of the statements in the bill.

The bill charges that the defendant declines to permit the complainant to participate in the affairs of the company, and that the acts of the board of directors in refusing to recognize him as a stockholder were null and void; the answer admits that the defendant declines to permit complainant to participate in the affairs of the company, or to recognize him as a stockholder, but denies that its acts in so doing are null and void, but says it was right and proper for such action to be taken by the board, as is shown by the minutes of the meeting which the complainant attached to and made a part of his bill.

The bill charged that the action of the board of directors was null and void, and the allegations in the answer in relation to the alleged fraud in the organization of the company and the issuance of the stock to the complainant were necessary averments to show that the defendant's action was not null and void.

Briefly, the case presented by the bill is that the complainant was the owner of thirteen shares of capital stock of the defendant corporation, and that the defendant, at a meeting of its board of directors, declared that the stock so held by the complainant was obtained by him through fraud, which the complainant denied; that a resolution was adopted by the board of directors at such meeting which declared the stock canceled, and sought to prevent complainant from acting in the capacity of a stockholder, and denying his right to any dividend; that such action by the board of directors of the defendant company was null and void.

These are the specific matters to which the defendant was required to make full, true, and perfect answer. This he did, and the answer relates to the acts and transactions set forth in and inquired of by the bill.

It is contended by the appellee that such parts of the bill as concern anticipated matters of defense should be disregarded as surplusage, and that, consequently, anything in the answer relative to such allegations is not responsive to the bill. We cannot accept that contention, especially as the anticipated matters of defense set out in the bill do not relate to anything that arose after or is disconnected with the matter constituting the primary basis of the suit, but constitute a part thereof, and are inseparable therefrom. 10 R. C. L. § 207, says: "Allegations inserted in the bill concerning anticipated matters of defense must be answered, as well as matter con-

stituting the primary basis of the suit."

It is contended by the appellee that should this court hold that the answer is responsive to the bill, that the decree of the chancellor ought to be affirmed, because the attempted cancelation of the stock by the defendant corporation was void and unauthorized by the statutes of this state, or the charter or by-laws of the corporation, and that cancelation of stock by a corporation is not a common-law remedy.

The view which we take of this case from the statements of the answer, which we find were responsive to the bill, makes out a case of fraud against the complainant in the very acquisition of this stock, and a court of equity will not entertain a suit by a person holding stock which he acquired through fraud, to attack the validity of the action of the board of directors with regard to the stock.

If he has any rights with respect to his fraudulently acquired stock, a court of equity is not the place for him to contend for them. On the case presented by the bill, answer, and replication on which this cause was heard and determined by the chancellor, he has not come into court with clean hands. He stands as the fraudulent holder of certain shares of the stock of the defendant corporation, and he cannot be heard, in a court of equity, to claim any relief from the action of the board of directors of the corporation with regard to such stock. A person who comes into court with a claim which the pleadings show to have had its origin in a fraudulent transaction cannot ask a court of equity to act upon the conscience of a defendant, and force him to do right towards one whose own legal conscience is not void of offense.

In discussing the maxim that he who comes into a court of equity must do so with clean hands, Mr. Pomeroy, in his work on Equity Jurisprudence, § 398, says: "The principle involved in this maxim is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence. We have seen that in the origin of the jurisdiction the theory was adopted that a court of equity interposes only to enforce the requirements of conscience and good faith with respect to matters lying outside of, or sometimes, perhaps, opposed to, the law. . . . . Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days that while the court of chancery would interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to these rules, while it could act upon the conscience of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim, He who comes into a court of equity must come with clean hands."

The answer which was responsive to the bill makes out a case of fraud in the acquisition of the thirteen shares of stock by the complainant, and he is therefore entitled to no relief in a court of equity.

The decree is reversed.

Taylor, Whitfield, Ellis, and West, JJ., concur.

J. E. LATHAM COMPANY, Appt.,
v.
E. C. ROGERS.

FIRST NATIONAL BANK OF MULLINS, South Carolina, Intervener.

North Carolina Supreme Court—December 1, 1915.

(170 N. C. 239, 87 S. E. 34.)

Evidence — pleading in garnishment proceeding.

1. One garnished in an action for damages for procuring the acceptance of drafts by fraud, for the proceeds of such drafts as indorsee of the defendant, and claiming title to them as a bona fide holder, cannot read in evidence statements in the defendant's answer, tending to show his bona fides.

[See note on this question beginning on page 39.]

Bills and notes — drafts procured by fraud.

2. One purchasing drafts, the acceptance of which was procured by fraud, must, in order to retain the proceeds, prove that he is a bona fide purchaser without knowledge of the infirmity.

APPEAL by plaintiff from a judgment of the Superior Court for Guilford County in favor of intervener in an action brought to recover damages for alleged false and fraudulent representations of the grades of a certain lot of cotton, covered by invoices attached to certain drafts. *New trial ordered.*

The issues upon which the action was tried are as follows:

"(1) Did the defendant E. C. Rogers procure from the plaintiff J. E. Latham Company the acceptance and payment of the draft described in the complaint by falsely and fraudulently representing by his invoice the grades of the cotton covered by said invoices, and paid for by said drafts? Answer: Yes.

"(2) What amount of damages, if any, is plaintiff entitled to recover of the defendant? Answer: $1,000.

"(3) Did the intervener, the First National Bank of Mullins, South Carolina, purchase said drafts for value before maturity in good faith, and without notice of any infirmity, defect, or fraud therein? Answer: Yes."

Messrs. **Brooks, Sapp, & Williams,** for appellant:

When it is shown that the title of any person who negotiated an instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course.

Standing Stone Nat. Bank v. Walser, 162 N. C. 53, 77 S. E. 1006; American Nat. Bank v. Fountain, 148 N. C. 592, 62 S. E. 738; Myers v. Petty, 153 N. C. 467, 69 S. E. 417; Third Nat. Bank v. Exum, 163 N. C. 203, 79 S. E. 498; Vaughan v. Exum, 161 N. C. 494, 77 S. E. 679; Park v. Exum, 156 N. C. 231, 72 S. E. 309; Fidelity Trust Co. v. Ellen, 163 N. C. 45, 79 S. E. 263; Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522; Merchants' Nat. Bank v. Branson, 165 N. C. 348, 81 S. E. 410; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A.

(N.S.) 193, 65 Atl. 641; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081; German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Consolidation Nat. Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353.

When the court, in instructing the jury, states a correct proposition on a certain point of law, and then, upon the same point, in another part of the charge, states a proposition which is incorrect or defective, a new trial will be granted, as the jury are not supposed to know when the judge states the law correctly.

Tillett v. Lynchburg & D. R. Co. 115 N. C. 662, 20 S. E. 480, 6 Am. Neg. Cas. 121; Taylor v. Taylor, 112 N. C. 27, 16 S. E. 924; Williams v. Haid, 118 N. C. 482, 24 S. E. 217; State v. Fuller, 114 N. C. 885, 19 S. E. 797; Patterson v. Nichols, 157 N. C. 406, 73 S. E. 202; Anderson v. Meadows, 159 N. C. 404, 74 S. E. 1019.

Messrs. **Justice & Broadhurst** and **Thomas S. Beall** for intervener.

Brown, J., delivered the opinion of the court:

This action is brought to recover damages against defendant Rogers, on account of false and fraudulent representation of the grades of a certain lot of cotton, covered by invoices attached to certain drafts. The jury assessed the damages of the plaintiff against the defendant at the sum of $1,000.

As there is no appeal by defendant Rogers, it must be taken that there are no errors arising upon the findings of the jury in respect to him. The only assignments of error, therefore, to be discussed, relate to the third issue.

The first assignment of error is because the court allowed the intervener to introduce in evidence upon the trial four paragraphs of the defendant Rogers' answer. These paragraphs tend to prove that the intervener paid Rogers full value for the drafts, the proceeds of which have been garnisheed in this action. The issue of fraud having been found against defendant Rogers, the burden of proof then rested upon the intervener to satisfy the jury that it paid full value for the drafts, and that it was a bona fide purchaser without knowledge of the infirmity. American Nat. Bank v. Fountain, 148 N. C. 590, 62 S. E. 738; Third Nat. Bank v. Exum, 163 N. C. 203, 79 S. E. 498.

Bills and notes—drafts procured by fraud.

The case of First Nat. Bank v. Brown, 160 N. C. 24, 75 S. E. 1086, is relied upon by the intervener to establish the proposition that the burden rests upon the plaintiff to show that the intervener had knowledge of the infirmity. In that case there was no finding of fraud and no evidence tending to show it, and therefore the burden of proof was not shifted, and if the construction placed upon that opinion by the intervener's counsel is warranted, then the language used by the judge was inadvertently used. It is undoubtedly well settled that, where fraud is shown in the execution of the note, or other evidence of debt, the holder thereof who claims to be a bona fide purchaser for value without notice must satisfy the jury of those facts.

We think the assignment of error must be sustained. There was no issue raised by the pleadings or submitted to the jury between the intervener and defendant Rogers. The whole contest in respect to the third issue was between the plaintiff and the intervener. Rogers' answer was therefore nothing more than ex parte affidavit, and was evidently offered for the purpose of getting before the jury Rogers' statement to the effect that the intervener was a bona fide purchaser of the drafts for value. The proper method would have been to have put Rogers on the witness stand, or to have taken his deposition in the regular way.

Evidence—pleading in garnishment proceeding.

It is said, however, that the court admitted the answer only as against Rogers, and not as against the plaintiff. Assuming that to be true, the court should then have given the plaintiff's prayer for instruc-

tion, namely, that if the jury believe the evidence, they should answer the third issue, "No;" for there was no other evidence offered by the intervener except the answer of Rogers, and if that was offered only against Rogers, then there was no evidence as against the plaintiff, tending to prove that the intervener was a bona fide purchaser in good faith for value.

So, whichever way you take it, there was error, for which there must be a new trial.

AUSTIN CLOTHING COMPANY et al., Appts.,
v.
J. L. POSEY et al.

Mississippi Supreme Court—January 19, 1914.

(105 Miss. 720, 64 So. 5.)

Evidence — affirmative matter in answer.

1. Affirmative matters set up in a sworn answer to a bill in equity are unavailing unless established by proof.

[See note on this question beginning on page 39.]

Same — answer as.

2. The rule that an answer must be taken as true when the case is set down by complainant for hearing on bill and answer without proof, before the time for taking testimony has expired, does not apply, where it does not appear upon whose direction the cause was set down for final hearing, but it does appear that the time for taking testimony had expired, except that after being taken under advisement the cause had been remanded to rules with permission to either party to take testimony.

Fraudulent conveyance — effect of unrecorded deed.

3. An unrecorded conveyance from husband to wife is not valid against a judgment recovered against him by a stranger.

APPEAL by complainants from a decree of the Chancery Court for Neshoba County dismissing a bill filed to set aside certain alleged fraudulent conveyances. *Reversed.*

A decision was reached and opinion handed down on October 20, 1913, which, in view of the conclusion reached in the opinion reported herewith, becomes immaterial.

The facts are stated in the opinion of the court.

Messrs. **Huddleston & Austin** and **L. Brame** and **Huddleston & Austin** for appellants.

Messrs. **G. E. Wilson** and **Wells, May, & Sanders** for appellee.

Reed, J., delivered the opinion of the court:

This case was affirmed on October 20, 1913. In the opinion reported in 105 Miss. 720, 63 So. 224, we stated that the chancellor was correct in dismissing the bill, for the reason that the case had been set down for final hearing by the complainant upon bill and answer only, no proof having been taken, on a date which then appeared to us to be before the expiration of the time allowed for taking testimony, and that the answer presented a full denial of the allegations of the bill.

In the suggestion of error it is pointed out that, while the answer was filed on August 21, 1911, in the order rendered on July 4, 1911,

overruling the demurrer, defendants were given sixty days in which to answer the bill, as of that term, and also that after the cause was set down for final hearing on November 13, 1911, it was, on November 16, 1911, by order of the court, taken under advisement, to be decided by the chancellor in vacation; and afterwards, by order dated December 18, 1911, remanded to rules, with permission to either party to take testimony. This we overlooked in our examination of the record in the former consideration of this case.

The final decree shows that the cause was heard upon bill and answer, no proof being taken by either complainants or defendants. The record does not show upon whose direction the cause was set down for final hearing. It appears from the final decree that complainants abandoned their efforts for cancelation of all the several conveyances, except the deed executed to Mrs. M. F. Posey, by J. L. Posey her husband, conveying a house and lot in the town of Philadelphia, Mississippi. The contest in this case is confined to that property.

Evidence—answer as.

On January 15, 1910, J. L. Posey executed a deed to his wife Mrs. M. F. Posey, conveying to her the property involved. This deed was not filed for record until April 23, 1910. In the meantime, on February 15, 1910, the Austin Clothing Company obtained a judgment in the circuit court of Neshoba county against J. L. Posey, for $319.85 and costs, $17.90, which judgment was enrolled on March 1, 1910. The rendition and enrolment of this judgment are alleged in the bill and also fully set forth in Exhibit A thereto. It will be seen that the judgment was a valid and subsisting lien against property owned by J. L. Posey, before the deed which he made to his wife was filed for record. A conveyance of land between husband and wife is not valid as against third persons, unless it is duly filed for record, in such manner as a mortgage or deed of trust is required to be filed. Possession of the property is not equivalent to filing the instrument for record. Code 1906, §§ 2522, 2787.

Fraudulent conveyance—effect of unrecorded deed.

A closer inspection of the bill and answer convinces us that all of the material averments of the bill are not fully and specifically answered by the defendants. We do not find that the allegations in the bill, showing that the Austin Clothing Company had an enrolled and valid judgment lien before the deed from J. L. Posey to his wife became effective by being filed for record, are fully and specifically denied. In truth, after rereading the pleadings, we fail to find in the answer any sufficient defense to the claim of the Austin Clothing Company, that its judgment is a first and valid lien on the property. Answers to bills in chancery should be full, direct, and explicit. Section 584 of the Code of 1906 requires that "the defendant shall answer fully all the allegations of the bill without being specially interrogated," and also provides that "all matters of fact averred in the bill and not denied by the answer otherwise than by the general traverse, may be taken at the hearing as admitted." We do not find that the allegations of the answer are adequate to show any title, legal or equitable, in Mrs. Posey, sufficient to defeat the claim of the Austin Clothing Company, a creditor holding a judgment lien enrolled prior to the filing for record of the deed from her husband.

It is contended by counsel for appellees that the answer, sworn to, was effective proof of the defense of equitable title in Mrs. Posey, on the hearing of this case upon bill and answer. The matters set up in the answer, as such defense, are affirmative. The burden of proving all affirmative allegations in an answer devolves upon the respondent. Wofford v. Ashcraft, 47 Miss. 641;

Osborne v. Crump, 57 Miss. 622. It was incumbent upon appellees to prove such affirmative matters. Unless proved, they were unavailing. No proof was adduced to establish the defense. The answer, though duly sworn to, is not the proof required. The assertion of the new and affirmative matter in the answer was not proof thereof. Brooks v. Gillis, 12 Smedes & M. 538; Miller v. Lamar, 43 Miss. 383; Park v. Bamberger, 52 Miss. 565; Rodd v. Durbridge, 53 Miss. 694; Dyer v. Williams, 62 Miss. 302.

Evidence—affirmative matter in answer.

All of the judgments in favor of the other creditors, complainants with Austin Clothing Company in the original bill, were rendered and enrolled after the deed from J. L. Posey to his wife was filed for record. The conveyance was effectual as to all these liens.

The record discloses that the residence property in Philadelphia conveyed by J. L. Posey to his wife is not now claimed by him to be exempt as a homestead. In his answer, he claims that the tract of land which is situated in the country is his homestead.

The suggestion of error is sustained, and the decree of the Chancellor, in so far as it affects the claim of the Austin Clothing Company, is reversed, and judgment will be entered here in favor of the Austin Clothing Company, subjecting the house and lot in the town of Philadelphia to its judgment lien.

AMERICAN SECURITIES COMPANY, Impleaded, etc., Appt., v. SAMUEL S. GOLDSBERRY.

Florida Supreme Court—February 3, 1915.

(69 Fla. 104, 67 So. 862.)

Evidence — Burden of proof.

1. Matters set up in an answer by way of avoidance, but which are not responsive to the bill, must be proved by the defendant; the burden being upon him to establish such matters by a preponderance of the testimony.

[See note on this question beginning on page 39.]

Mortgage — extension of time — effect.

2. An agreement between a mortgagee and mortgagor for an extension of the time for the payment of the indebtedness secured by the mortgage, based on a valid consideration, is a good defense in a suit to enforce the mortgage lien before the expiration of the extended time, against a purchaser of the mortgaged property who has assumed the mortgage debt.

Evidence — answer as.

3. The rule making an answer evidence in favor of the defendant, where the case is heard on bill, answer, and replication, requires that the answer should be responsive, direct, positive, and unequivocal.

Mortgage — assumption of debt — rights.

4. One who purchases a part of the mortgaged premises and assumes the payment of the entire mortgage debt has no equitable right to demand that the mortgaged premises be segregated and sold separately.

Reference — master — ascertaining expenses.

5. In a proceeding to enforce a mortgage lien, where the mortgage provides for the payment to the mortgagee of attorneys' fees and expenses incurred in enforcing the payment of

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Headnotes by ELLIS, J.

the mortgage debt, a master may be appointed to ascertain what expenses have been incurred and what is a reasonable attorney's fee in the case, and report such finding to the court, although the time prescribed by the rule for taking testimony has expired.

Interest — on mortgage.

6. In adjudicating the amount due on a mortgage debt for interest, the rule is, the debt bears interest at the contract rate to the date of the final decree, after which date the total amount found by the decree to be due for principal, interest, attorneys' fees, and expenses bears interest at the rate prescribed by the statute.

Judgment — construction — pleadings.

7. Reference may be made to the pleadings and orders in a cause to explain any ambiguity in the final decree, and for the purpose of construing its language.

On Application for Rehearing.

Mortgage — foreclosure — expense of abstract.

8. Expense incurred in obtaining an abstract of the title to mortgaged property from the date of the mortgage to the beginning of a foreclosure proceeding to enforce the lien of the mortgage is a proper item of expense to be allowed the mortgagee or his assigns in such proceeding, where the mortgage provides for the payment of attorneys' fees and all expenses the mortgagee may reasonably incur or pay because of the failure of the mortgagor or his assigns to comply with the agreements and covenants contained in the mortgage.

Appeal — burden of showing error.

9. In appellate proceedings the burden is upon the appellant to make the error apparent; the presumption being in favor of the chancellor's decree.

APPEAL by the defendant company from a decree of the Circuit Court for Duval County in favor of complainant in a suit to foreclose a mortgage. *Affirmed.*

Statement by **Ellis, J.:**

Samuel S. Goldsberry filed his bill to foreclose a mortgage in the circuit court for Duval county, against Charles D. Mills and Etta F. Mills, his wife, and the American Securities Company, a corporation organized under the laws of Florida. The bill alleges that on or about the 19th day of March, A. D. 1910, the defendant Charles D. Mills made and delivered to the complainant his promissory note whereby he agreed to pay to the complainant $12,500, with interest at the rate of 7 per cent per annum from date until paid, interest payable semiannually according to the tenor of six interest coupon notes of $437.50, attached thereto; a copy of the note being attached to the bill as exhibit A, and made a part thereof; that on the 4th day of May, 1910, the defendant Charles D. Mills paid on the note $4,500, thereby reducing the principal sum of said note to $8,000. In paragraph 2 of the bill it is alleged that to secure the payment of the note, with interest, the said Charles D. Mills, and his wife executed and delivered to the complainant a certain mortgage upon certain lots in the city of Jacksonville; that in and by the mortgage Charles D. Mills covenanted and agreed to pay the said promissory note, with interest thereon when due, as provided in the note and the coupons thereto attached, and that the mortgage further provided that the said Mills should pay all the costs and expenses, including reasonable attorneys' fees, incurred by the complainant in the collection and enforcement of the mortgage; the original mortgage being attached to the bill and marked exhibit B, and made a part thereof. In paragraph 3 it is alleged that the complainant, by an instrument dated May 2, 1910, released from the lien of the mortgage the east 100 feet of fractional block 114, Springfield, being situated near the corner of Main and Tenth streets, and fronting 53 feet on Main street and 100 feet on Tenth street, but that the mortgage remains in full force and effect as to the remaining property described therein.

The fourth paragraph alleges that the indebtedness evidenced by the promissory note set forth in paragraph 1, after the credit of $4,500 has been made thereon, became due and payable on the 19th day of March, A. D. 1913, and that the same was not paid at maturity, and has not been paid since, but remains as to the $8,000 of the principal of said note, due and payable; that the interest is also due from the 19th day of March, 1913, on said sum; that the said several sums of money have not been paid. The bill then continues as follows:

"(5) And your orator alleges further that he is informed and believes, and from such information and belief alleges, that the defendant the American Securities Company has entered into a contract of purchase of the property described above from the defendants Charles D. Mills and Etta F. Mills, and has been let into possession of said premises by the said Charles D. Mills under the said contract, and claims some interest in the said premises, and your orator is informed and believes, and upon such information and belief alleges, that in the said contract of purchase from the said Charles D. Mills and wife the defendant the American Securities Company covenanted and agreed to assume and pay the note and mortgage hereinbefore referred to to your orator, and that the said defendant the American Securities Company has accepted whatever rights they have in and to the property aforesaid, subject to the prior claim of your orator under and by virtue of the mortgage aforesaid.

"Therefore, the premises considered, your orator prays that an account may be had and taken by and under the direction of this honorable court to ascertain the amount due your orator on account of said note and mortgage and for attorneys' fees, and that a decree may be made and entered requiring the aforesaid defendants to pay the amount found to be due, or, in default thereof, that the said mortgaged premises be sold by a master of this court, at public sale, in accordance with law, and further decreeing that after said sale a master's deed be made and executed to the purchaser at said sale, and that all defendants and all parties claiming by, through, or under them shall be forever barred and foreclosed of all right, title, interest, and right of redemption in and to the aforesaid mortgaged premises."

Then follows prayer for subpœna and general relief.

Decree pro confesso was entered against C. D. Mills and Etta F. Mills, his wife. On the 1st day of September, 1913, the defendant American Securities Company filed its answer, which, omitting the venue and title, is as follows:

"This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is or are material or necessary for it to make answer thereto, answering, says:

"(1) It admits the allegations of the first, second, and third paragraphs of said bill.

"(2) It also admits that it is the equitable owner in fee of said lands described in the bill as east half of fractional block 113, Springfield, and lots 5, 6, and 7, in block 2, Warren; that it is in possession thereof under a contract of purchase between Charles D. Mills, of the first part, and J. A. Holloman and D. H. McMillan, of the second part, assigned to it by said Holloman and McMillan; that it assumed, as did its assignors, to pay the said mortgage indebtedness sought to be collected through said bill. And your orator further says, upon information and belief, that at the time of making said contract of purchase aforesaid between said Mills, the mortgagor in said mortgage, and the assignors of this defendant, to

wit, February 12, 1913, prior to the maturity of said note, the mortgagee, Samuel S. Goldsberry, agreed with the mortgagor to extend the time of payment of said note for one year, and which said promise was communicated to said Holloman and McMillan by said mortgagor, Charles D. Mills, and, relying thereon, said Holloman and McMillan assumed the payment of said note and mortgage, and in turn said promise and agreement was communicated to this defendant, and, relying thereon, it assumed the payment of said note and mortgage; wherefore, and by reason whereof, this defendant says the said note and the indebtedness evidenced thereby is not due and payable.

"And this defendant, further answering, denies that the complainant is entitled to the relief, or any part thereof, in said bill of complaint demanded, and prays to be dismissed with its reasonable costs and charges in this behalf most wrongfully sustained."

The answer was under the seal of the corporation and sworn to by its president.

On the 21st day of October, 1913, the complainant, Goldsberry, filed his general replication to the answer of the American Securities Company, and on the 22d day of January, 1914, the complainant filed his præcipe setting down the cause for hearing on bill, answer, and replication.

On the 19th day of February, 1914, the court made and entered a decree as follows, omitting venue and title:

This cause coming on to be heard upon the bill, the answer of the American Securities Company, and the complainant's replication thereto, and the pro confesso against the defendants Charles D. Mills and Etta F. Mills, and the same having been argued by counsel: It is ordered, adjudged, and decreed that the equities of the cause are with the complainant, and that the complainant is entitled to a decree foreclosing the mortgage set forth in the bill of complaint, and is entitled to have this cause referred to a special master to take and state the account of the moneys due to the complainant, and in pursuance of the said right it is ordered, adjudged, and decreed that Carl Noble be, and he is hereby, appointed special master in the above-entitled cause, with directions to take and state an account of all moneys due the complainant on the note and mortgage set forth in the bill of complaint, together with a reasonable attorney's fee to be allowed complainant's solicitors for their services in this cause, and to ascertain whether or not there are any other or further sums due the complainant for or on account of any of the terms or conditions contained in the mortgage set forth in the bill of complaint; said master to report his findings to this court with all convenient speed. Done and ordered this 19th day of February, A. D. 1914.

Daniel A. Simmons, Judge.

On the 24th day of February, 1914, the special master filed his report, in which he stated that, pursuant to notice, a hearing was held in his office in Jacksonville on the 23d day of February, 1914, for the purpose of taking such evidence as might be introduced by the respective parties; that both parties were represented by counsel; and that, after receiving in evidence the promissory note signed by C. D. Mills and a receipted bill for an abstract, and hearing the testimony of two witnesses as to a reasonable attorney's fee, all of which being fully set out in the report, his findings were as follows:

Findings.

Your master would further specially report that under and by virtue of said decree he is required to take an account of moneys due to the complainant on the note and mortgage set forth in the bill of

complaint. Your master finds the accounting to be as follows:

On account of principal	$8,000.00
Interest for eleven months and four days	519.55
Solicitors' fees	800.00
Amount paid by complainant for abstract	8.60
Interest on same	.25
Total	$9,328.40

Respectfully submitted,
Carl Noble, Special Master.

To the report was attached the receipted bill for the abstract and the promissory note of C. D. Mills.

On the 14th day of March, 1914, the defendant filed its exceptions to the master's report, in the following words, omitting the venue, title, and formal parts:

"1. The defendant objects and excepts to the introduction in evidence (page 2 of the report) of receipted bill for an abstract of the Peninsular Title Company for $8.60, and also moves to strike the same from the record, upon the following grounds:

"(a) The same is immaterial and irrelevant, and is not authorized by the mortgage averred in the bill of complaint to be due.

"(b) The time for taking testimony had expired in this cause on, to wit, January 21, 1914; and the cause had been set down by complainant for hearing on bill of complaint, answer, and replication on January 22, 1914, and heard by the court on final hearing as thus set down on February 18, 1914.

"(c) That the decree appointing the special master, dated February 19, 1914, does not and did not authorize the special master to take or receive any testimony.

"(2) The defendant objects, and excepts to the testimony of L. W. Baldwin, as to reasonable attorneys' fees in this cause, and also moved to strike the same from the record, upon the same grounds set forth in the first exception herein.

"(3) The defendant objects, and excepts to the testimony of A. H. King, as to reasonable attorneys' fees in this cause, and also moves to strike the same from the record, upon the same grounds set forth in the first exception herein.

"(4) The defendant objects, and excepts to each and every the following items in the findings of the special master in stating the account in this cause, to wit:

Solicitors' fees	$800.00
Amount paid by complainant for abstract	8.60
Interest on same	.25
	$808.85

—and moves to exclude and strike the same from the statement of said account, upon the same grounds set forth in the first exception herein."

On the 3d day of April, 1914, the court made and entered its decree overruling the exceptions filed by the defendant to the report of the special master, adjudicating the amount due and owing to the complainant —

"On account of the note and mortgage sued on, for principal and interest up to the 24th day of February, 1914, the sum of eight thousand five hundred and nineteen and $^{55}/_{100}$ dollars ($8,519.55), and the further sum of eight and $^{85}/_{100}$ dollars ($8.85), expense incurred by the complainant for the purchase of abstract of title, with interest on the same from the time of its payment, and the further sum of eight hundred dollars ($800.00) for the services of complainant's solicitors in this suit.

"And it is further ordered, adjudged, and decreed that, unless the defendants do forthwith pay to the complainant the said sum of eight thousand five hundred and nineteen and $^{55}/_{100}$ dollars ($8,519.55), and the further sum of eight and $^{85}/_{100}$ dollars ($8.85) hereinbefore referred to, together with interest thereon at the rate of 8 per cent per annum from the 24th day of February, 1914, and the further sum of eight hundred dollars ($800.00) for the services of the solicitors for the complainant, the mortgaged premises described in the bill of complaint—to wit, the east half of fractional block one hundred and

thirteen (113), Springfield, and lots five (5), six (6), and seven (7), in block two (2) of Warren, all of which is situated at the northwest corner of Tenth and Hubbard streets, in the city of Jacksonville, and measuring two hundred and nine (209) feet on Tenth street by 400 feet on Hubbard street, and also lot twenty-four (24) in block eighteen (18), Campbell's addition to Jacksonville, and being at the northwest corner of Argyle and Van Buren streets, in the said city of Jacksonville, county of Duval, and state of Florida—be sold by a master of this court at public sale before the door of the courthouse of Duval county, Florida, on a legal sales day, during the legal hours of sale, and that said master, prior to said sale, give notice of the same by publication in a newspaper published in Duval county, Florida, for four consecutive weeks prior to said sale, giving the time and place of sale and a description of said mortgaged premises, and that after said sale said special master shall execute and deliver to the purchaser at said sale a good and sufficient deed for said mortgaged premises.

"It is further ordered, adjudged, and decreed that after said sale the said defendants, Charles D. Mills, Etta F. Mills, and the American Securities Company, a corporation, and all persons claiming by, through, or under them since the commencement of this suit, shall be forever barred and foreclosed of all right, title, claim, interest, or right of redemption in and to the said mortgaged premises.

"It is further ordered, adjudged, and decreed that after said sale the said special master shall distribute the proceeds arising therefrom as follows."

Then follow the directions as to the disbursement of the proceeds.

From these decrees the defendant American Securities Company entered its appeal on the 30th day of April, 1914.

Messrs. **Gibbons, Maxwell, McGarry, & Daniel** for appellant.

Messrs. **Axtell & Rinehart**, for appellee:

An answer, in order to be evidence so as to require something more than the evidence of a witness to overcome it, must be distinct, positive, and of matter which may be within the knowledge of the defendant.

Fletcher, Eq. Pl. & Pr. § 645.

No testimony is necessary where all the allegations of the bill are admitted by answer or by decree pro confesso.

Clarkson v. Louderback, 36 Fla. 660, 19 So. 887.

An appellate court is not called upon to reverse a decree for a trifling omission, which could have been easily and certainly remedied if a specific objection upon this ground had been interposed.

Brevard Naval Stores Co. v. Commercial Bank, 67 Fla. 281, 64 So. 943.

Ellis, J., delivered the opinion of the court:

Under the first assignment the appellant contends that the averments in the answer in respect to the alleged agreement of the complainant, Samuel S. Goldsberry, with the mortgagor, to extend the time of payment of the note for one year, should have been accepted by the chancellor as true, and the bill dismissed. The answer does not deny the execution of the note by Charles D. Mills, the delivery of it to the complainant, the execution and delivery of the mortgage by Mills and wife to the complainant to secure the payment of the note, nor the assumption by the American Securities Company of the mortgage indebtedness described in the bill, but avers, upon information and belief, that at the time of making the contract of purchase for a part of the mortgaged premises, "between the said Mills, the mortgagor in said mortgage, and the assignors of this defendant, to wit, February 12, 1913, prior to the maturity of said note, the mortgagee, Samuel S. Goldsberry, agreed with the mortgagor to extend the time of payment of said note for one year, and which said promise was communicated to said Holloman and

McMillan by said mortgagor, Charles D. Mills, and, relying thereon, said Holloman and McMillan assumed the payment of said note and mortgage, and in turn said promise and agreement was communicated to this defendant, and, relying thereon, it assumed the payment of said note and mortgage." It is perfectly clear that the principal fact in the quoted part of the answer is the alleged agreement between Goldsberry, the mortgagee, and Mills, the mortgagor and maker of the note, whereby Goldsberry agreed to extend the time of payment of said note for one year. If the agreement was not made, it would be of no importance that Mills made such representation to Holloman and McMillan, and that such representation was made to the American Securities Company. The answer does not allege that Goldsberry told Holloman and McMillan or the American Securities Company that he had made such agreement with Mills, although Goldsberry is the man against whom the agreement is invoked.

Mortgage—extension of time—effect.

There is no doubt that an agreement between the complainant Goldsberry and the defendant Mills for an extension of the time for the payment of the indebtedness, based upon a good consideration, would be valid and a good defense. But such an allegation would be an affirmative one of new matter, and not responsive to the bill, and the burden would have rested upon the defendant to establish it by a preponderance of the testimony. Pinney v. Pinney, 46 Fla. 559, 35 So. 95; Tyler v. Toph, 51 Fla. 597, 40 So. 624; Parsons v. Ramsey, 53 Fla. 1055, 43 So. 503; Griffith v. Henderson, 55 Fla. 625, 45 So. 1003.

Evidence—burden of proof.

If the complainant had told Holloman and McMillan or the American Securities Company at the time the indebtedness was assumed that there was such an agreement between Goldsberry and Mills, that would have been a good defense upon the principle of estoppel. Such an allegation would have been responsive to the bill, would have set up matter which discharged the defendant, and would have shown that the matter charging him and discharging him grew out of the same transaction, and would have been evidence in favor of the defendant. Maxwell v. Jacksonville Loan & Improv. Co. 45 Fla. 425, 34 So. 255. But the rule making an answer evidence in favor of the defendant where a case is heard on bill, answer, and replication, requires that it should not only be responsive, but direct, positive, and unequivocal. Southern Lumber & Supply Co. v. Verdier, 51 Fla. 570, 40 So. 676; Kellogg v. Singer Mfg. Co. 35 Fla. 99, 17 So. 68. The averments of the answer in this regard were neither direct, positive, nor unequivocal. The averments are that Mills told Holloman and McMillan of such an agreement, and that "in turn said promise and agreement was communicated to this defendant," etc. By whom it was communicated to defendant the answer does not state. It is not permissible to infer that it was communicated to it by Goldsberry. The averment that Mills told Holloman and McMillan of the agreement is immaterial, and not responsive to the bill. Goldsberry was not bound by any statement made to Holloman and McMillan or the American Securities Company by Mills, in the absence of any showing in the answer that Mills acted with authority from Goldsberry.

Same—answer as.

The cause was heard on bill, answer, and replication; the allegations of the bill necessary to entitle the complainant to relief were admitted by the answer. The averment of the answer as to the alleged agreement between Goldsberry and Mills concerning an extension of time for the payment of the indebtedness evidenced by the note, not being responsive to the bill, and being an affirmative allegation of new

matter set up by way of defense upon information and belief, was not evidence for the defendant, and the chancellor rightfully declined to accept it as true. Neither was the averment in the answer as to the communication of such an alleged agreement to Holloman and McMillan by Mills, nor the communication of such information to the defendant, evidence for the defendant. Orman v. Barnard, 5 Fla. 528; 1 Enc. Pl. & Pr. 920.

Under the second subdivision of the first assignment of error, the appellant urges that, inasmuch as the bill alleges that the American Securities Company had entered into a contract of purchase of the property described in the bill from Charles D. Mills and his wife, and had been let into possession of the premises and claims some interest in the premises, and had assumed to pay the note and mortgage, and that the answer set up a contract of purchase of a part of the premises from Mills, and an assignment of the contract to the American Securities Company, and an assumption of the indebtedness by the company, that the complainant should have submitted evidence as to the contract alleged in the bill, and that without such evidence the decree was erroneous in view of the averments in the answer.

We do not agree with appellant's solicitors on this point. The assumption of the indebtedness by the appellant placed it in the same situation with reference to the property purchased as the defendant Mills occupied with reference to it. The lien of the mortgage existed upon all of the property without any right of the appellant to insist that the one part of the premises or the other should be sold first. The American Securities Company assumed the indebtedness, the debt thereupon became its debt, so far as the mortgagor Mills was concerned, and it was the failure of the American Securities Company to pay it when it became due that brought about the foreclosure. Mills might have complained with some reason, but we think that appellant had no equity as to this feature of the case.

Mortgage—assumption of debt—rights.

Under the second assignment of error several questions are discussed by appellant's solicitors relating to the decree of April 3, 1914. It is urged that the appellant's exceptions to the master's report, based upon the allowance of $8.60 for an abstract of the property, and $800 for solicitors' fees, should not have been overruled; but that the exceptions, on the contrary, should have been sustained, and the items disallowed. The bill alleges, and the mortgage which is attached to the bill and made a part of it recites, that the mortgagor should pay all costs and expenses, including reasonable attorneys' fees, incurred by the mortgagee in the collection and enforcement of the mortgage. The decree of February 19, 1914, adjudged the equities to be with the complainant; that he was entitled to a foreclosure of the mortgage, and to have the cause referred to a special master to take and state an account of the moneys due to the complainant. A special master was appointed, with directions to take and state an account of all moneys due the complainant on the note and mortgage set forth in the bill of complaint, together with a reasonable attorney's fee to be allowed complainant's solicitors for their services in the cause, and to ascertain whether there were any other or further sums due the complainant for or on account of any of the terms or conditions in the mortgage set forth in the bill of complaint, with directions to the master to report his findings to the court.

The master proceeded to ascertain by the testimony of witnesses what sum should be allowed as a reasonable attorney's fee for complainant's solicitors. This was objected to by defendant American Securities Company on the grounds that the testimony was immaterial and irrelevant; that the time for

taking the testimony had passed; and that the decree did not authorize the master to take such testimony. The complainant offered a receipted bill for $8.60 for an abstract of the property. This was also objected to by the defendant upon the same grounds. The note was received without objection.

These objections were again urged by the defendant upon exceptions to the master's report. The master's report was made on the 24th day of February, 1914, and found the amount due on the note and mortgage to the complainant to be $8,000 for principal; $519.55 interest for eleven months and four days; solicitor's fee, $800; amount paid by complainant for abstract, $8.60, and 25 cents interest on the same,—making a total sum of $9,328.40. The exceptions to the report also contained a motion to exclude and strike from the statement of the account the amount found by the master for solicitors' fees, the amount paid by complainant for the abstract, and the interest on same; also to strike from the record the testimony as to attorneys' fees.

These objections and exceptions were not well taken. The decree of February 19, 1914, adjudged that the complainant was entitled to the relief prayed. It determined the equities in the cause. The matter of ascertaining the amount due under the terms of the mortgage was a mere matter of detail to be worked out by a master before a decree could do full and complete justice. There was no objection offered to the introduction of the receipt for the amount paid for the abstract upon the grounds of incompetency; the objection related only to its relevancy or materiality. Expense incurred in obtaining an abstract of the title to the property was a legitimate item of expense under the terms of the mortgage, and appellant does not show that the item allowed was improper. In taking testimony as to the reasonableness of an attorney's fee to be allowed complainant's solicitor, and receiving evidence as to the expense to which complainant had been subjected by reason of the failure of the mortgagor or his assigns to comply with the agreement and covenants in the mortgage, the special master complied with the directions and instructions of the court. It is difficult to perceive how he could have proceeded in any other way. The amount of the attorney's fee, or the amount of expense to which the mortgagee had been subjected because of the failure of the mortgagor or his assigns to perform the agreements on their part to be performed, were not matters upon which the equities of the case were determined, but mere matters of detail to be ascertained by a master and reported to the court in order that a decree doing full justice might be made and entered. Equity rule 71, requiring testimony to be taken within three months, relates to the testimony to be taken on the issues presented by the bill and answer and replication which must be determined to settle the equities in the cause. The master's duties are clerical, not judicial. The evidence in examinations before him is required to be taken down in writing and filed with his report. This is for the purpose of enabling the chancellor to determine the correctness of his findings. It is contended that the decree of April 3, 1914, was erroneous in allowing interest upon the amount reported by the special master to be due, at 8 per cent per annum, from the date of the report, instead of 7 per cent, the rate specified in the note. The amount of the indebtedness on the note and mortgage found by the special master to be due, exclusive of interest, should have continued to bear interest at the contract rate to the date of the final decree, which was April 3, 1914; that is to say, the principal should bear interest at the contract rate to the date of the final decree, after which the total indebtedness, including prin-

Reference—master—ascertaining expenses.

Interest—on mortgage.

cipal and interest, attorneys' fees and expenses adjudged by the decree to have been incurred, bears interest at the rate prescribed by the statute.

The error complained of consists in allowing interest on the amount found by the master to be due, at 8 per cent per annum, from the date of the report, instead of at 7 per cent, the contract rate, and the period during which the interest was compounded. This error amounted to approximately $11 in the complainant's favor, in a decree involving $9,328. This error was not called to the attention of the court. It was partly corrected by the master in his report of the sale. It does not appear that the error caused injury to the appellant, or handicapped or prevented him from paying or tendering the amount actually due before the sale took place. It does not appear to have in any way affected the price the property brought at the sale, which was considerably less than the amount adjudged to be due. This small error in the calculation of interest was one which should have been brought to the attention of the circuit court. See Brevard Naval Stores Co. v. Commercial Bank, 67 Fla. 281, 64 So. 943. If a deficiency decree is entered for the complainant, the correction may be made.

The appellant contends that the decree is erroneous because it does not find from whom the amounts found to be due are due to complainant; that the decree does not require the special master to sell the property to the highest bidder; that it does not fix the terms and conditions of the sale; nor does it require notice of the terms to be given. There is no merit in any of these objections. While the decrees could have been prepared with more clearness than they were, we think that the decrees of February 19th and April 3d show that the defendants are required to pay the amount found to be due on the note and mortgage for principal, interest, attorneys' fees, and expenses; that the latter required a public sale for cash because the master was required to distribute the proceeds arising from the sale, as directed in the decree, and was required to give notice of the sale by publication in a newspaper.

Judgment—construction—pleadings.

The decree is affirmed.

Taylor, Ch. J., and **Shackleford, Cockrell**, and **Whitfield**, JJ., concur.

A petition for rehearing having been filed, **Ellis**, J., on February 23, 1915, handed down the following response:

Appellant filed a petition for a rehearing on the ground that this court overlooked the fact that the bill of complaint did not allege any expense incurred by the complainant for obtaining an abstract of the title to the mortgaged property, nor for attorneys' fees. The mortgage, which was attached to the bill of complaint and made part of it, provided for the payment of attorneys' fees and all expenses the mortgagee "may reasonably incur or pay because of the failure of the mortgagor or his assigns to comply with the agreements, covenants," etc., of the promissory note. The record does not disclose that the bill for the abstract did not relate to the property. It was the duty of appellant to make the error apparent. The presumption obtains in favor of the correctness of the chancellor's decree.

Mortgage—foreclosure—expense of abstract.

Appeal—burden of showing error.

The application for rehearing is denied.

Taylor, Ch. J., and **Shackleford, Cockrell, and Whitfield**, JJ., concur.

R. L. FARRELL, Appt.,
v.
FOREST INVESTMENT COMPANY.

Florida Supreme Court—January 31, 1917.

(— Fla. —, 74 So. 216.)

Evidence — sworn answer.

1. A sworn answer is evidence in the defendant's favor, in so far as its statements are responsive to the allegations of the bill. Under rule 41 of the rules of practice in the courts of equity of the United States as prescribed by the Supreme Court of the United States, and amended in 1871, which by statute were made the rules of practice in courts of equity in this state, the complainant, in order to avoid the effect of an answer, was required expressly to waive in the bill the oath of the defendant to the answer.

[See note on this question beginning on page 39.]

Equity — jurisdiction — consent.

2. Where a court of equity hears and determines a controversy of such character that jurisdiction may be given by consent, and the parties, without objection or question as to the mode of procedure, go on to a hearing, neither should be heard to complain afterwards as to the court's jurisdiction.

Same — partition — full relief.

3. Where a bill in equity has for its principal object a partition of lands, and other questions arise as to complainant's interests, which are sought to be determined as incidental to the main relief, and such questions arose out of the relations existing between complainant and defendant at the time when the incidents occurred giving rise to the differences between them, the court will determine the entire controversy.

Pleading — multifariousness.

4. A bill in equity is not necessarily multifarious because there may be united in it several causes of action. If all the different causes of action united in the bill grew out of the same transaction, and all the defendants are interested in the same rights, the bill will be maintained.

Same — waiver.

5. The objection of multifariousness, when made for the first time at the hearing, will not be sustained, where the real point in the controversy can be determined as well in the one cause as if there were many separate suits, and the objection does not appear to be so grave as to interpose an obstacle to the proper administration of justice.

Same — when objection allowed.

6. In considering the question of multifariousness, the matter particularly involved is convenience in the administration of justice, and if this can be accomplished by the mode of procedure adopted, an objection for multifariousness should not be allowed.

Equity — full relief.

7. Where a court of equity takes jurisdiction of a cause for one purpose, it will proceed with the determination of all the matters presented.

Partnership — validity — partition of property.

8. Where a corporation entered into copartnership with an individual, and the copartnership transacted business and dissolved, and one of the copartners seeks a partition of lands held by the members of the partnership in common, the court will not consider the question of the validity of such copartnership, where the interests of third parties are not involved.

Appeal — chancellor's findings.

9. The chancellor's findings and conclusions on the facts will not be reversed, unless it clearly appears that he erred in such conclusions.

Headnotes by ELLIS, J.

Pleading — answer under oath — effect.

10. Where an answer to a bill in equity is made under oath, the averments contained in it which are responsive to the bill, and set up facts to which other testimony could be received, are to be taken as true, unless disproved by evidence of greater weight than the testimony of one witness.

Same — waiver of answer under oath.

11. The new rules of practice for the courts of equity in the United States, as promulgated by the Supreme Court of the United States in November, 1912, make no provision for the complainant waiving in his bill an answer under oath; and as the new rules abrogated the old ones, and as there is no provision in the rules prescribed by this court on the subject, as applied to the practice in the courts of this state, a complainant cannot deprive the defendant of the benefit of his answer under oath by expressly waiving it in the bill.

Evidence — sworn answer — effect.

12. A sworn answer does not have the effect of evidence in defendant's behalf as to averments of fact set up by way of affirmative defense, nor as to averments of fact which testimony would not be admissible to prove.

Corporation — foreign — right to sue.

13. Section 2682 of the General Statutes of Florida 1906 does not expressly prohibit a foreign corporation from bringing a suit in this state until it has complied with the requirements of the statute.

Pleading — right to sue.

14. When the defendant desires to raise the question of a foreign corporation's right to maintain a suit in this state, the defense should be specifically made.

APPEAL by defendant from a decree of the Circuit Court for St. Johns County in plaintiff's favor in a suit for the partition of certain lands and for an accounting for the proceeds from the sale of cypress timber, taken by defendant from the lands. *Affirmed.*

Statement by **Ellis, J.**:

The Forest Investment Company, a foreign corporation, commenced its suit in the circuit court for St. Johns county in November, 1913, against R. L. Farrell, for partition of certain lands, to declare a trust in certain of them, and for an accounting for the proceeds arising from the sale of cypress timber taken from the said lands by the defendant.

The bill alleges that the complainant Forest Investment Company, the appellee here, is a foreign corporation doing business in the state of Florida, "having duly complied with the laws pertaining to foreign corporations;" that the complainant and R. L. Farrell, the appellant here, are owners in fee simple as tenants in common of the following described lands, viz.: All of sections 5, 6, 7, 8, 16, and 18, and all of section 17 except the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, all in T. 9 S., R. 29 E., in St. Johns county, and consisting of about 4,447 acres of land. Also all of sections 32 and 33, and all of section 31 except the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ in T. 8 S., R. 29 E. That Farrell acquired the title to said land, except 120 acres in section 31 described as the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, from R. C. Wilson and wife, and conveyed to complainant an undivided one-third interest in it; that the 120 acres above described were purchased by Farrell from the Model Land Company, a corporation, but that before the purchase Farrell represented to complainant the necessity for the purchase of that tract by complainant and Farrell, and after complainant agreed that it should be bought by Farrell & Co., in which complainant had a third interest, Farrell took the title in his own name; that $400 of the purchase price of the land was paid with the funds of the company, and complainant was ready to pay and tendered the balance of its part in the purchase price; that by reason of these facts complainant was entitled to a third interest in the 120-acre tract, and Farrell should be de-

clared to hold the same in trust for complainant.

That the S. ½ of section 8 T. 9 S., R. 29 E., was sold by complainant and Farrell to Charles Yelvington, upon Farrell's representation that it was to their interest to sell; that it was sold for a price lower than its value, of which complainant was ignorant; and that after the sale Farrell, within a month, purchased it from Yelvington in his own name, and thereby sought to profit by the transaction at the expense of complainant. The complainant offered to return to Farrell the money received by it from the sale, and claimed that by reason of this transaction Farrell should convey to complainant a third interest in said lands. The complainant prayed that both the above-described tracts of land be included in the petition.

The bill also alleged that in February, 1911, the complainant conveyed to Farrell its "undivided third interest in the license and right to cut, box, and work for turpentine purposes all the pine timber suitable for such purposes for a period of three (3) years" upon all the lands above described, except the W. ½ of the N. W. ¼ and the S. E. ¼ of N. W. ¼ of section 31 in T. 8 S., R. 29 E. The bill further alleges that the lands above described are owned by the complainant and Farrell in common, the complainant having a one-third interest and Farrell a two-thirds interest; that Farrell has cut, removed, and sold the cypress and other timber, other than the pine timber, from the land without authority from complainant; that the proceeds have been applied to defendant's own use and never accounted to complainant for the same.

The bill waives an answer under oath, and prays that the complainant may be decreed to have a third interest in common with Farrell in the S. ½ of S. W. ¼ and N. W. ¼ of S. W. ¼ of section 31, T. 8 S., R. 29 E., upon the payment by complainant to Farrell of $266.67, tendered as alleged; that Farrell be required to convey to the complainant a third interest in the S. ½ of section 8, T. 9 S., R. 29 E., upon the payment to Farrell of the money received by complainant, with interest, as its share of the price of same received from Yelvington; that a partition of the lands be decreed to be made, and that, if the land cannot be partitioned without injustice to the parties, it be sold and the proceeds of the sale, after paying costs and a reasonable attorney's fee, be divided between the complainant and defendant, according to their respective rights; that their rights be ascertained and declared, and that an account be taken of the cypress and other timber, except pine timber, that has been cut, removed, and sold by Farrell, and that he be decreed to pay to the complainant its part thereof that may appear to be due, the complainant on its part to pay to the defendant what, if anything, shall appear to be due from it to the defendant upon taking the account; that Farrell be restrained from collecting and receiving any money from the sale and disposition of any more cypress and other timber, except pine timber, from the said lands, and for general relief and subpœna.

The bill was answered by Farrell under oath, in which it was admitted that complainant and defendant owned sections 5, 6, 7, 8, 16, and 17, except N. E. ¼ of S. E. ¼, and section 18 in T. 9 S., R. 29 E. The answer denied that they owned any lands in sections 31, 32, and 33 in T. 8 S., R. 29 E. It avers: That defendant bought the land in section 31 during the spring of 1910 from the Florida East Coast Railway Company, for the sum of $1,200, upon the following terms, viz.: One-third cash, and interest on deferred payments. That defendant drew a draft on the Peninsular Naval Stores Company for $400 of the purchase price, and the same was charged to the turpentine account of Farrell & Co. That about the same time he bought 40 acres of land in section 31, and gave his check for

a third of the purchase price. That in February, 1911, he bought the turpentine interest of Farrell & Co. from the complainant, in which the draft for $400 was charged to defendant, who paid the amount in full. That in 1911 he paid the Florida East Coast Railway in full, and received a deed from the Model Land Company for the 120 acres. It denies that complainant has any interest in any lands in section 31, and admits that defendant and his wife conveyed to complainant an "undivided one-third interest in and to the lands then owned by the defendant."

The answer denies that defendant in 1911 made any representations to the complainant as to the necessity for the purchase of the 120 acres in section 31, but in 1910 defendant did represent the necessity of the purchase of the land for an outlet to their lands, but complainant complained of the price, and defendant purchased it on his own account. It admits that complainant sold its interest in the turpentine licenses in 1911 as alleged, but that the account of Farrell & Co. was charged to defendant, in which the $400 paid for the 120 acres in section 31 was included, and that when the sale was made all licenses had expired except upon sections 6, 7, and 18, in T. 9 S., R. 29 E. It denies that complainant was ignorant of the value of the land sold to Yelvington, the S. ½ of section 8, T. 9 S., R. 29 E.; that the sale was made in good faith, as was also the sale back from Yelvington to defendant. The answer avers that the sale was made because of the remoteness of the land from railroad and postoffice conveniences, and sets out the facts attending the sale and reasons therefor, of all of which, it is alleged, complainant had full knowledge. It is averred that, when the land was sold, the log road of the Upchurch Lumber Company was regarded as the south line of the section, and the land was sold to Yelvington with that understanding between complainant and defendant; after the sale a survey showed that the line was further south, and "took in the house" in which defendant was living; that defendant then purchased the land back from Yelvington, paying him for all improvements he had made; "that this purchase had nothing to do with the partnership matters of R. L. Farrell & Co., and was done with the full understanding of petitioner and its officers." The answer denies that all the lands described in the bill are subject to partition, and denies that complainant has a third interest in all of the lands described in the bill. The answer denies the allegations of the bill as to ownership in common between complainant and defendant, of the lands described; that the defendant has tried to make a settlement with complainant of the "personal and real property in which it has an interest," but the complainant has refused all offers of the defendant. It admits that the defendant has cut the cypress timber from the lands to the extent of about "34,000 or 35,000 ties," but that the cypress timber was his separate property, which he bought from R. C. Wilson and wife when he purchased the "other timber" from them, and defendant paid them therefor, and complainant never paid any part of the price thereof; that defendant stated these facts to complainant, who knew that it had no interest in the cypress timber on the lands of "R. L. Farrell & Co.;" and denies that complainant is entitled to any part of the money which defendant realized from the sale thereof; that in 1907, when defendant purchased the lands in T. 9 S., R. 29 E., from R. C. Wilson and wife, "together with the turpentine privilege and leases," that Wilson claimed that the cypress timber belonged to the estate of his father H. S. Wilson, and defendant then purchased it; that the cypress timber was not mentioned in the deed, and formed a separate transaction. The tenth paragraph of the answer is given herewith in full; it is as follows:

"This defendant, further answering, says: That during January or February, 1908, Peninsular Naval Stores Company sent a man to inspect the lands and timber purchased by the defendant from Wilson, and it was proposed to the defendant that the Peninsular Naval Stores Company would buy a half interest in the said lands, and that said company would put in the money to finance it, and would also buy 11,000 acres of land adjoining the lands bought by the defendant from Wilson. The defendant refused to give a one-half interest, but did agree to sell the Peninsular Naval Stores Company an undivided one-third interest, upon the condition that they would put up the cash to buy the 11,000 acres of land when the business needed the timber. That the defendant sent the deed he received from R. C. Wilson and wife to complainant, and that the deed which was drawn by complainant's officers was from the defendant and wife to Forest Investment Company; the cypress timber was not accepted from that deed, and was not included in the deed. This defendant further says that when he approached the complainant and requested it to buy the 11,000 acres adjoining the Wilson land purchased by defendant, Mr. Blount, one of complainant's officers, said the price was too high, and refused to buy it, but that said land has since sold for a much greater price, and that said refusal greatly endamaged the defendant, and that said complainant then and there failed and refused to keep its partnership promise and to buy said land or to advance the money for the purchase of the same."

The answer then denies that the complainant is entitled to the relief prayed, or any part thereof, prays the same advantage of the answer as if he had pleaded or demurred to the bill, and prays to be dismissed with costs.

The record does not show that any replication was filed, but does contain a recital of an order by the court appointing a special master.

The special master attached to the report of his findings all the evidence adduced before him. The report sets out fully the special master's findings, and the reasons upon which he based them, and contains a statement that it had been agreed by the solicitors for the respective parties that, if the master should find that the complainant was entitled to an accounting, he should state in the report the "amounts he found due, without further testimony."

The special master reported his findings to be: First, that the 120 acres of land located in section 31, and particularly described in both the bill and answer, was paid for partly with funds of the complainant and defendant as R. L. Farrell & Co., whose account was carried with the Peninsular Naval Stores Company, naval stores factors, and was not paid by the defendant individually; second, that the S. ½ of section 8, which the complainant and defendant agreed to sell to Yelvington because of the reasons advanced by the defendant, but which, shortly after the execution of the deed, were discovered to be unfounded, and was thereupon repurchased by Farrell from Yelvington, should be held by the defendant for the benefit of himself and complainant. The master does not find that there was any misrepresentation by the defendant to the complainant in this transaction, but found that, in view of the mistaken circumstances under which the sale was made to Yelvington, and the relations existing between complainant and defendant, the latter should have recovered the land for their joint benefit. It was also pointed out by the master, whose report was very thorough and comprehensive and showed a most careful examination and analysis of the evidence, that the deed from the complainant and defendant to Yelvington did not describe the land at all, and that the legal title therefore

did not pass. And although the pleadings did not mention the mistaken description, the master found the equities to be with complainant, and that the deed to Yelvington should be treated as a nullity; the legal title remaining in the defendant and complainant, as before the attempted conveyance. The master did not allow defendant credit for any improvements upon the land which were made for the purpose of agriculture, upon the ground that the evidence showed that the land was unfit for agriculture, because of the impossibility of draining it, which defendant knew; that drainage was a remote possibility, and that "complainant should not be charged, nor defendant credited, with the expense of improvements which must have been so obviously ill-advised;" third, the master found against the defendant's contention that the complainant had no interest in the cypress timber upon the lands, but found that the complainant had a one-third interest therein, and was therefore entitled to one third of the proceeds derived from the sale of the crossties made therefrom and sold by defendant; that the complainant should pay to the defendant one third of the price which defendant paid to Yelvington upon the repurchase of the S. ½ of section 8, with interest; that the complainant was entitled to a partition of the lands described in the amended bill; that the value of the lands was $20,000; that the value of the crossties and cedar cut from the lands by the defendant was $4,220.78, of which the complainant was entitled to one third; that the complainant had paid taxes upon the lands, and was entitled to a refund of two thirds of the amount from defendant, the amount of which the master found to be $240.46. The master allowed an attorney's fee of $2,400, two thirds of which should be paid by the defendant, and the costs, amounting to $72, should be paid in like proportion by them.

The defendant by his solicitor filed exceptions to this report, and in such exceptions pointed out particularly the finding of the master to which exception was taken. The exceptions questioned the correctness of the master's findings: First, as to the interest of complainant in the 120 acres of land in section 31; second, as to complainant's interest in the S. ½ of section 8, involved in the Yelvington transaction; third, as to the number and value of the crossties cut from the land and the complainant's interest therein; fourth, as to the finding that the defendant never repaid the $400 to the Peninsular Naval Stores Company, which amount was used to make the first payment on the 120 acres purchased in section 31; fifth, as to the finding in which defendant was not allowed credit for expenses for improvements on the south half of section 8; sixth, as to the value of the lands; seventh, as to the finding that defendant had received $4,220.78 from timber cut from the land, "in which the complainant is entitled to one third;" eighth, as to the amount of solicitors' fees; ninth, as to the finding that complainant was entitled to the relief prayed, subject to the modifications and conditions stated in the report; and, tenth, as to each and every of the findings and report of the master.

The final decree, which was rendered in June, 1915, confirmed the master's report and findings as to the facts and equities, with some modifications. The decree adjudged that the defendant held an undivided third interest in the 120-acre tract in section 31 in trust for the complainant, and ordered a conveyance thereof to complainant upon the payment by it to the defendant of $266.67, with legal interest from May 25, 1911, to the date of payment; that the defendant held an undivided one-third interest in the S. ½ of section 8, T. 9 S., R. 29 E., in trust for complainant, and conveyance thereof should be made by defendant to complainant, upon payment by the latter to the former of the sum of $266.67, with legal interest from June 22, 1911; that the

equities were with the complainant as to the matter of the accounting for the proceeds of the sale of the cypress and cedar sold by the defendant from the land, and approved the finding of the master as to the amount received by the defendant therefrom, namely, $4,220.78, and ordered the defendant to pay to the complainant one third of that amount, and, in default of the payment for thirty days, the complainant to have execution therefor, and a lien upon the lands of defendant set apart to him in the partition or, in the event of a sale of the lands under the court's order, upon the defendant's share of the proceeds of the sale; that the defendant owes to the complainant $240.46 on account of the taxes paid by complainant on the lands, which amount defendant was required to pay within thirty days, and in default thereof the complainant should have execution therefor, and a lien upon the defendant's lands set apart to him in the partition, or upon his part of the proceeds of the sale of the lands as before. The sum of $2,000 was allowed as solicitors' fees, two thirds of which was decreed to be paid by the defendant, for which the solicitors were decreed to have a lien upon the lands involved in the suit, in the event of the failure of the parties to pay the same within thirty days; that the special master be allowed $222 for his services, to be paid in the same proportion by complainant and defendant, and a lien, as aforesaid, upon the lands or proceeds of the sale thereof, and the costs to be paid in the proportion of one third by complainant and two thirds by the defendant; that upon the payments being made by complainant to defendant, as decreed, and the deeds executed by defendant to complainant, as decreed, the complainant will be entitled to and lawfully seised in fee simple of an undivided one-third interest, and the defendant of an undivided two-thirds interest, in the 120 acres of land in and to the S. W. ¼ and the N. W. ¼ of S. W. ¼ of section 31, T. 8 S., R. 29 E., and the S. ½ section 8, T. 9 S., R. 29 E.; that the complainant is seised in fee simple of an undivided one-third interest, and the defendant of an undivided two-thirds interest, in the following described lands: All of sections 5, 6, 7, N. ½ of section 8, all of section 16, and all of section 17, except the N. E. ¼ of S. E. ¼ thereof, and all of section 18 in township 9 S., Range 29 E. Partition of the lands was ordered to be made as soon as the payments were made by the complainant and conveyances executed by the defendant as directed. Commissioners were appointed to make partition and report their actions and doings to the court. From this decree an appeal was taken by the defendant.

Mr. William W. Dewhurst, for appellant:

Not having demurred or pleaded, or set up the want of equity in the bill as a defense in the answer, defendant may now question the power of the court to grant the relief prayed in the bill.

Barker v. Dacie, 6 Ves. Jr. 681, 31 Eng. Reprint, 1256; Findlay v. Hinde, 1 Pet. 244, 7 L. ed. 130; Mattair v. Payne, 15 Fla. 682; Langdell, Eq. Pl. § 95; Morawetz, Priv. Corp. 1882 ed. § 221; 2 Beach, Priv. Corp. §§ 842, 843; Taylor, Priv. Corp. 5th ed. § 130; Bishop v. American Preservers' Co. 157 Ill. 284, 48 Am. St. Rep. 334, 41 N. E. 765.

If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing.

United States v. Low, 16 Pet. 168, 10 L. ed. 925; Young v. Grundy, 6 Cranch, 51, 3 L. ed. 149; Brown v. Pierce, 7 Wall. 205, 19 L. ed. 134; Warfield v. Gambrill, 1 Gill & J. 510; Slater v. Maxwell, 6 Wall. 268, 18 L. ed. 796; Rogers v. Marshall, 13 Fed. 59; Brooks v. Byam, 1 Story, 297, Fed. Cas. No. 1,947; Lovell v. Johnson, 82 Fed. 206; Stackpole v. Hancock, 40 Fla. 380, 45 L.R.A. 814, 24 So. 914; Hill v. Walker, 6 Coldw. 424, 98 Am. Dec. 468; Smith v. St. Louis Mut. L. Ins. Co. 2 Tenn. Ch. 599; Lykes v. Beauchamp, 49 Fla. 338, 38 So. 603; Gartman v. Jones, 24 Miss. 234; Hood v. Pimm, 4 Sim. 101, 58 Eng. Reprint, 39, 9 L. J. Ch. 63; Bank of Jamaica v. Jefferson, 92 Tenn. 537, 36 Am. St. Rep. 100, 22 S. W. 211.

The bill is multitarious.

Oliver v. Piatt, 3 How. 412, 11 L. ed. 658; Nelson v. Hill, 5 How. 132, 12 L. ed. 83.

A disputed equitable claim must first be established before the claimant can go into partition.

Cartwright v. Pultney, 2 Atk. 380, 26 Eng. Reprint, 630; Wild v. Milne, 26 Beav. 504, 53 Eng. Reprint, 993, 11 Mor. Min. Rep. 207; Crawshay v. Maule, 1 Swanst. 495, 36 Eng. Reprint, 479, 1 Wils. Ch. 181, 37 Eng. Reprint, 79, 18 Revised Rep. 126, 19 Eng. Rul. Cas. 467, 11 Mor. Min. Rep. 223; Darby v. Darby, 3 Drew. 495, 61 Eng. Reprint, 992, 25 L. J. Ch. N. S. 371, 2 Jur. N. S. 271, 4 Week. Rep. 413.

When real estate is purchased by partners with partnership funds for partnership use and convenience, in the absence of express agreement or of circumstances showing an intent that such estate shall be held for the partners' separate use, it will be considered and treated in equity as vesting in them in their partnership capacity, clothed with an implied trust, and be applied to the payment of partnership debts.

Robertson v. Baker, 11 Fla. 225; Price v. Hicks, 14 Fla. 580; Dyer v. Morse, 10 Wash. 492, 28 L.R.A. 107, 39 Pac. 138.

Mr. **H. L. Anderson** also for appellant.

Messrs. **MacWilliams & Bassett** and **David R. Dunham**, for appellee:

Defendant has no right to raise the question of jurisdiction at the present time.

Rivas v. Summers, 33 Fla. 539, 15 So. 319; De Cottes v. Clarkson, 43 Fla. 1, 29 So. 442; Williams v. Wetmore, 51 Fla. 625, 41 So. 549; Tubb v. Fort, 58 Ala. 277; 1 Dan. Ch. Pl. & Pr. 6th Am. ed. p. 555; Howell v. Commercial Bank, 51 Fla. 460, 40 So. 76; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; 11 Rose's Notes (U. S.) 743.

Complainant had the right to pray for an accounting in the bill for partition.

Carlton v. Hilliard, 64 Fla. 228, 60 So. 220; Arcadia Mercantile Co. v. Branning, 59 Fla. 428, 52 So. 588; Murrell v. Peterson, 57 Fla. 480, 49 So. 31; Atkinson v. Schilman, 60 Fla. 301, 53 So. 844, 56 So. 274; Law v. Taylor, 63 Fla. 487, 58 So. 844; Christopher v. Mungen, 61 Fla. 513, 55 So. 273.

Complainant had the right to enter into partnership with defendant and to hold lands in Florida in joint ownership with him.

Ulmer v. First Nat. Bank, 61 Fla. 460, 55 So. 405; Circular Advertising Co. v. American Mercantile Co. 66 Fla. 96, 63 So. 3; Indian River Mfg. Co. v. Wooten, 55 Fla. 745, 46 So. 185.

Defendant cannot object for the first time in the appellate court that plaintiff is a foreign corporation which has not complied with the statutes relating to foreign corporations, and, therefore, such foreign corporation was without standing to maintain such action.

Holmes v. Standard Oil Co. 183 Ill. 70, 55 N. E. 647, affirming 82 Ill. App. 476; Minneapolis Trust Co. v. Verhulst, 74 Ill. App. 350; City Trust, Safe Deposit & Surety Co. v. Wilson Mfg. Co. 58 App. Div. 271, 68 N. Y. Supp. 1004; Crystal River Lumber Co. v. Consolidated Naval Stores Co. 63 Fla. 119, 58 So. 129; Malsby v. Gamble, 61 Fla. 327, 54 So. 766; Mizell Live Stock Co. v. J. J. McCaskill Co. 59 Fla. 322, 50 So. 547; Hartford F. Ins. Co. v. Hollis, 58 Fla. 268, 50 So. 985; Putnam v. Morgan, 57 Fla. 503, 48 So. 629; Patrick v. Kirkland, 53 Fla. 768, 125 Am. St. Rep. 1096, 43 So. 969, 12 Ann. Cas. 540; Hoodless v. Jernigan, 51 Fla. 211, 41 So. 194; Marsh v. Bennett, 49 Fla. 186, 38 So. 237; Robinson v. Springfield Co. 21 Fla. 203; Monk v. Horne, 38 Miss. 100, 75 Am. Dec. 94; Jackson ex dem. Van Schaick v. Davis, 5 Cow. 123, 15 Am. Dec. 451; Barrett v. Wills, 4 Leigh, 114, 26 Am. Dec. 315.

Since the powers of corporations are derived solely from statutes, every person is bound, in dealing with a corporation, to take notice of the extent of its powers.

Durkee v. People, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626; National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; 7 R. C. L. § 515; 3 Cook, Corp. 7th ed. 2338; Skinner v. Southern Home Bldg. & L. Asso. 46 Fla. 547, 35 So. 69.

Ellis, J., delivered the opinion of the court:

The appellant insists that the bill shows upon its face that the court was without jurisdiction, and therefore upon the final hearing should have been dismissed, notwithstanding the answer. It is contended that

the bill merely seeks an accounting between copartners, while praying for partition of lands, and that partition of partnership lands cannot be decreed until the equities between the partners have been settled; that the bill seeks to adjudicate the rights of the parties upon such a variety of subjects so different in character that they should not be litigated in one suit. It is pointed out that the bill seeks to establish a resulting trust in certain lands, an accounting between copartners, to surcharge a partnership account and a partition of lands held by copartners. It is true that the answer contains no demurrer to the bill upon any specific ground; but, inasmuch as the answer sets up many matters of defense, counsel seek the benefit therefrom either by way of answer, plea, or demurrer. If the court was not wholly incompetent to grant the relief sought in the bill, the method pursued to question the form of the bill, or the court's jurisdiction, we think, would not avail. No question was raised until after the testimony was taken (if then) as to whether the court had jurisdiction to entertain a bill for partition, to establish a resulting trust, and for an accounting. There are subjects which a court of equity has no power to hear and determine, even by consent of parties; but if the subject-matter be of such character that jurisdiction may be conferred by consent, the defendant will not be heard to complain if he makes no objection to a hearing, but participates in it. In this case a master was appointed, much testimony was taken, and a decree rendered upon the merits against the defendant, who then makes objection here to the court's jurisdiction. See Central Elevator Co. v. People, 174 Ill. 203, 43 L.R.A. 658, 51 N. E. 254; Brewster v. Colegrove, 46 Conn. 105; Page v. Young, 106 Mass. 313; Detroit Motor Co. v. Third Nat. Bank, 111 Mich. 407, 69 N. W. 726; Whiting v. Root, 52 Iowa, 292, 3 N. W. 134; Cutting v. Dana, 25 N. J. Eq. 265; Baron v. Korn, 127 N. Y. 224, 27 N. E. 804; Mayo v. Murchie, 3 Munf. 358; United Shoe Machinery Co. v. Holt, 185 Mass. 97, 69 N. E. 1056; Richmond v. Bennett, 205 Pa. 470, 55 Atl. 17. The rule has several times been recognized by this court. See Griffin v. Orman, 9 Fla. 22; Williams v. Wetmore, 51 Fla. 614, 41 So. 545; De Cottes v. Clarkson, 43 Fla. 1, 29 So. 442; Rivas v. Summers, 33 Fla. 539, 15 So. 319. See also 10 R. C. L. 368 and authorities cited.

Equity—jurisdiction—consent.

This bill had for its principal object a partition of the lands owned in common by appellant and appellee, which, exclusive of the lands in T. 8 S., R. 29 E., amounted to 4,447.41 acres, a one-third interest in which Farrell conveyed to the Forest Investment Company in 1908. The acreage in T. 8 S., R. 29 E., amounted to about 1800 acres, according to the deed from Farrell to the Forest Investment Company, which lands were also described in the bill. So far as the acreage was concerned, a tenancy in common was alleged to exist between the complainant and defendant as to all of it. There were two tracts of land embraced in the lands above referred to, concerning which questions had arisen as to complainant's interest, which questions the court was asked to determine as incidental to the main relief sought by the bill. Those questions arose out of the relations existing between complainant and defendant at the time when the incidents occurred giving rise to the differences between them. The Forest Investment Company and the defendant were interested together as copartners in a turpentine business; their joint account was carried by the Peninsular Naval Stores Company under the name of R. L. Farrell & Co. In this business the Forest Investment Company owned a one-third interest. It owned as purchaser from Farrell an undivided one-third interest in the lands described. As incident to the turpentine business of this partner-

ship, by reason of considerations which arose affecting that interest and business, the two transactions, one involving the S. ½ of section 8, and the other the S. ½ and N. W. ¼ of S. W. ¼ of section 31, occurred. According to complainant, these transactions were of such character and so affected by the trust relation which existed between the two parties that, in equity and good conscience, the act of the defendant was the act of the partners, and the transactions were for their joint interest. This question was incidental to the main relief sought, and cannot, in the view we have of the evidence, be considered as the principal object of the suit; it certainly was not according to the bill. The partnership had terminated. The parties were merely tenants in common of the lands. One of them sought a partition which he had a right to ask for. It was discovered that his cotenant had, not as partner in the turpentine business, but as one of the owners of the land, denuded it of a large quantity of cypress and cedar, which he sold, and converted the proceeds thereof to his own use, to the exclusion of his cotenant. The accounting prayed for in this transaction of the defendant was the other matter concerning which complainant asked relief. It was incident to the main purpose of the bill, and grew out of the relations of the parties as cotenants of the lands sought to be partitioned.

Same—partition—full relief.

The objection that the bill was multifarious, we think, is not well founded. A bill is not necessarily multifarious because there may be united in it several causes of action. If all the different causes of action united in the bill grew out of the same transaction, and all the defendants interested in the same rights, etc., the bill will be maintained. Where the subject-matter of the controversy is encumbered with many conflicting claims, equity will entertain a suit for determining and adjusting all these interests at once. The objection of multifariousness, when made for the first time at the hearing, will not be allowed, where the real point in controversy can be determined as well in the one court as if there were many separate suits. The objection in this cause does not appear to be so grave as to interpose an obstacle to the proper administration of justice, and therefore should not be allowed. See 10 R. C. L. 429–435; Nelson v. Hill, 5 How. 127, 12 L. ed. 81; Briges v. Sperry, 95 U. S. 401, 24 L. ed. 390; Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 747, 31 L. ed. 309, 8 Sup. Ct. Rep. 337; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; Henderson v. Farley Nat. Bank, 123 Ala. 547, 82 Am. St. Rep. 140, 26 So. 226; Fies v. Rosser, 162 Ala. 504, 136 Am. St. Rep. 57, 50 So. 287; Emerson v. Gaither, 103 Md. 564, 8 L.R.A. (N.S.) 738, 64 Atl. 26, 7 Ann. Cas. 1114; Johnson v. Black, 103 Va. 477, 68 L.R.A. 264, 106 Am. St. Rep. 890, 49 S. E. 633. In dealing with the question of multifariousness, the matter particularly to be considered is convenience in the administration of justice, and if this is accomplished by the mode of procedure adopted, the objection will not lie. This is the principle upon which the courts act in determining the validity of an objection of that character. It is no objection that there are several causes of action. They arose from the holding of this large tract of land in common between the complainant and defendant. Convenience was subserved, and expenses and costs reduced, by the procedure adopted. No one can be said to have been inconvenienced, and the court had power to settle all the questions presented. Having taken jurisdiction of the cause for one purpose, the court had pow-

Pleading—multifariousness.

Same—waiver.

Same—when objection allowed.

er to proceed with the determination of all the matters presented. See Taylor v. Florida East Coast R. Co. 54 Fla. 635, 16 L.R.A.(N.S.) 307, 127 Am. St. Rep. 155, 45 So. 574, 14 Ann. Cas. 472; Miller v. Louisville & N. R. Co. 83 Ala. 274, 3 Am. St. Rep. 722, 4 So. 842; Allen v. Elder, 76 Ga. 674, 2 Am. St. Rep. 63; Thomas v. Thomas, 250 Ill. 354, 35 L.R.A.(N.S.) 1158, 95 N. E. 345, Ann. Cas. 1912B, 344; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; Griffin v. Fries, 23 Fla. 173, 11 Am. St. Rep. 351, 2 So. 266; Capital City Bank v. Hilson, 64 Fla. 206, 60 So. 189, Ann. Cas. 1914B, 999; Carlton v. Hilliard, 64 Fla. 228, 60 So. 220. Under the statutes of this state, courts of equity have jurisdiction to order the partition of lands. Gen. Stat. 1906, Fla. Comp. Laws 1914, § 1939; Christopher v. Mungen, 61 Fla. 513, 55 So. 273.

Equity—full relief.

The question of the right of a corporation to enter into a copartnership with an individual is not involved in this proceeding. Whether there was any power in the corporation to do so or not, the copartnership was formed, transacted business, and dissolved. This complainant does not seek by the bill to open any partnership accounts, nor does it seek an accounting as of one partner from another; but, after terminating a partnership arrangement in a certain business, it found itself tenant in common of certain lands with appellant, and filed a bill for partition, seeking an account from its cotenant of the profits derived by him from the sale of certain timber from the common property. The first assignment of error is not sustained.

Partnership—validity—partition of property.

The assignments of error numbered from 2 to 8, inclusive, attack the decree as being erroneous for not sustaining certain exceptions to the master's report; for confirming the report as to its findings of fact and equities; for finding the equities to be with complainant; and for decreeing that complainant was entitled to an undivided third interest in the 120 acres of land in section 31, and the south half of section 8; and for adjudging that the complainant was entitled to an accounting from the defendant as to the proceeds of the sale of the timber from the lands, and as to the amount of such proceeds; and in ordering the defendant to pay to complainant a certain sum on account of taxes paid by the complainant on the land. These assignments of error, as well as the remaining ones, twelve in number, involve an examination of the evidence. The exceptions to the master's report are based upon the proposition that the evidence did not justify the different findings. Counsel in their brief, and during the oral argument, urged that the report of the master and the decree following it were unsupported by the evidence. We think it would be of no interest to the parties to discuss the evidence, which was quite voluminous and conflicting. The master carefully examined it, and made an exhaustive and clear analysis of it. His report, we think, was fully sustained by the evidence, and the decree which followed the master's findings contains no error that we have discovered. There was ample evidence to support the finding that the defendant and complainant, as Farrell & Co., made the first payment on the purchase price of the 120 acres in section 31, and that the land was purchased at the time for the benefit and use of the partnership; and to support the theory of the bill that the defendant was in conscience bound to have repurchased the south half of section 8 for the benefit of himself and complainant. While the copartnership between complainant and defendant had terminated when the sale was made to Yelvington, yet it was made on defendant's representations some time before the dissolution of copartnership, which representations were afterwards discovered to be untrue. Not that there was any design on defend-

ant's part to misrepresent to his cotenant any facts; but the fact remains that the statements he did make constituting the reasons for selling were discovered to be unfounded, whereupon he repurchased the lands in his own name. He should not be permitted to profit in that manner at the expense of his cotenant.

The chancellor's conclusions on the facts will not be reversed, unless it clearly appears that he erred in such conclusions. Jacksonville v. Huff, 39 Fla. 8, 21 So. 774; Waterman v. Higgins, 28 Fla. 660, 10 So. 97; Lucas v. Wade, 43 Fla. 419, 31 So. 231; Fuller v. Fuller, 23 Fla. 236, 2 So. 426; Sarasota Ice, Fish, & Power Co. v. Lyle & Co. 58 Fla. 517, 50 So. 993. But appellant contends that, although the bill waived an answer under oath, the defendant made oath to his answer, and was therefore entitled to the benefit of an answer under oath. Where an answer is made under oath, the allegations contained in it which are responsive to the bill, and which set up facts to which other testimony could be received, are to be taken as true, unless disproved by evidence of greater weight than the testimony of one witness. See Carr v. Thomas, 18 Fla. 736; Carter v. Bennett, 6 Fla. 214; Day v. Jones, 40 Fla. 443, 25 So. 275; Pinney v. Pinney, 46 Fla. 559, 35 So. 95. The above rule rests upon the equitable principle that, if defendant is put upon his oath by his adversary, credit shall be given to his own declarations unless they are contradicted by at least two witnesses, or by written documents, or by evidence greater than the testimony of one witness. See White v. Walker, 5 Fla. 478. To have this weight, however, the answer must be direct and positive, must be under oath, and relate to such facts as other testimony could be received to establish. It should not, as an example, be permitted to show that the intent and meaning of the parties to a written agreement was contrary to what appears, on the face of it, as said by the court in Carter v. Bennett, 6 Fla. 214. The modern rule, according to the American decisions, is that the sworn answer is evidence in the defendant's favor, in so far as its statements are responsive to the allegations of the bill. In other words, when the material allegations of a bill are met by a responsive answer under oath, the allegations of the bill must be supported by the testimony of two witnesses, or one witness and corroborating circumstances, otherwise the defendant's answer will prevail and the bill be dismissed. The practice of answering under oath is of ancient origin, and in this country is universally required, except where the practice has been changed by statute or rule. Union Bank v. Geary, 5 Pet. 99, 8 L. ed. 60; Conley v. Nailor, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; Dravo v. Fabel, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170. In order for the plaintiff to avoid the effect of an answer, that is, if he was unwilling that it should have the effect of evidence against him, he was required to expressly waive in the bill the oath of the defendant to the answer. Conley v. Nailor, supra. This was the effect of rule 41 of the rules of practice in the courts of equity of the United States, as prescribed by the Supreme Court of the United States, and amended in 1871.

Appeal—chancellor's findings.

Pleading—answer under oath—effect.

Evidence—sworn answer.

Section 1877, of the General Statutes of Florida 1906, Florida Compiled Laws 1914, provides as follows: "In the absence of provisions of the law or rules of practice of this state, the rules of practice in the courts of equity of the United States, as prescribed by the Supreme Court thereof, under the act of Congress of the 8th of May, one thousand seven hundred and ninety-two, shall be rules for the practice of the courts of this state when exercising equity jurisdiction; and

when the rules of practice so directed by the Supreme Court do not apply, the practice of the courts shall be regulated by the practice of the high court of chancery of England."

In the case of Kahn v. Weinlander, 39 Fla. 210, 22 So. 653, this court, speaking of the above act, which was passed in 1828 and has been continued as law in this state down to the adoption of the General Statutes of 1906, said: "The purpose of the act referred to was to make the rules of practice adopted by the Supreme Court of the United States in the equity courts of the United States applicable in chancery causes in the courts of this state, where provision was not made on the subject by the act, and it makes no difference whether the rules provided for were adopted before or after the passage of the act, provided there is no statutory provision covering the subject. We are of the opinion that such was the purpose of the act, and it should be so construed."

Under the provisions of the Act of 1873, chapter 1938, the supreme court of Florida adopted rules governing the practice and proceedings in the circuit courts of Florida in equity. The Supreme Court of the United States had, prior to that time, however, amended rule 41, providing that the complainant may in his bill waive an answer under oath, in which case the answer should not be evidence in his favor unless the cause was set down for hearing on bill and answer only. The result of all this, as said by this court in the case above cited, is that the amendment to rule 41, as adopted by the Supreme Court of the United States, is in force in the courts of chancery of this state, because no rule of this court adopted under the Act of 1873 was in irreconcilable conflict with it. Now, counsel for appellant contends, and we think correctly, that as the new rules of practice for the courts of equity of the United States, promulgated by the Supreme Court of the United States in November, 1912, make no provision for the complainant waiving in his bill an answer under oath; and as the new rules abrogated the old ones, and as there is no provision in the rules prescribed by the supreme court of Florida on the subject, a complainant cannot deprive the defendant of the benefit of his answer under oath by expressly waiving it in the bill.

Pleading—waiver of answer under oath.

In the case of Clements v. Moore (Clements v. Nicholson) 6 Wall. 299, 18 L. ed. 786, the court, through Mr. Justice Swayne, said that it was the defendant's right to answer under oath, and the complainant could not deprive her of it; that such was the settled equity practice where there was no regulation to the contrary. This announcement of Judge Swayne, based upon an opinion by Judge Kinney in Armstrong v. Scott, 3 G. Greene, 433, seems to be in accordance with the weight of authority on that point in the United States. See 10 R. C. L. 545–549. Why an answer not under oath should have any greater force than any other pleading in a cause is not apparent. If the oath was waived under the old rule, the complainant was still required to prove the allegations of his bill. As the purpose of requiring an answer under oath was for the complainant's advantage, in that it required the defendant to purge his conscience upon the matters alleged, and as the price of that advantage was the benefit to the defendant of his responsive averments as evidence in his behalf, the reason of the old rule adopted in this and other jurisdictions, which permitted the waiving in the bill of the oath to the answer, is obvious, and was exceedingly salutary. But although the appellant's contention is correct upon this point, viz., that the complainant cannot, since the adoption of the new rules by the Supreme Court of the United States, deprive the defendant of the "right"

of swearing to his answer, and thereby have more than the benefit of one witness in his behalf, the sworn answer does not have that effect as to new matter, set up by way of affirmative defense; nor as to averments of facts which testimony would not be admissible to prove. The answer in this case contains many such averments, and certainly cannot, as to such averments, be given the same effect as a sworn answer which is responsive to the allegations of the bill. We think the evidence offered by the defendant to contradict the terms of the deed from Wilson to Farrell, and from Farrell to complainant, was properly rejected; that the master's conclusion, which was confirmed by the court as to the value of the timber cut from the lands, cannot be disturbed, in view of the answer of the defendant and the evidence in the case, and that the matter of requiring the defendant to refund to the complainant his proportion of the taxes paid by the complainant on the lands was proper under the prayer for general relief.

Evidence—sworn answer—effect.

It was contended in the oral argument that the burden was upon the complainant to prove that it was authorized to do business as a corporation in this state; and, in the absence of any evidence on the subject, it must be held to be without such authority. The bill expressly alleges that the complainant is so authorized; the answer does not deny the allegation. The statutes of this state (Gen. Stat. 1906, §§ 2682 et seq.) do not expressly prohibit a foreign corporation from bringing a suit in this state until it has complied with the requirements of the statute. The reason for the omission may have been to enable such corporation to have the aid of the courts in the protection of its property rights, where the court does not have to give force or validity to an executory contract by such a corporation. The rule seems to be that when the defendant wishes to raise the question of the corporation's right to maintain a suit in this state, he should make the defense specially. See 12 R. C. L. 98–101. The point raised by appellant that a corporation cannot enter into a copartnership with an individual, and therefore is not entitled to an accounting from its so-called partner, we think, is not involved in this case. The partnership between the Forest Investment Company and the appellant, which existed from 1908 to some time in 1911, had been dissolved, its affairs settled, and all obligations discharged, so far as the pleadings and evidence show. The contracts which the partnership made have been executed. The partners were left as tenants in common of certain lands. The relations which they bore to each other as tenants in common required the exercise of good faith toward each other in all transactions pertaining to the common property, and, because of these relations and the reciprocal duties and obligations, the court undertook to settle the disputed question as to complainant's interest in the S. ½ of section 8 and the 120 acres in section 31, and require an accounting for the value of the timber cut from the common property, and in the exercise of the jurisdiction we think the court acted clearly within its power, and that the evidence does not show that the conclusions reached were erroneous. So the decree is affirmed.

Corporation—foreign—right to sue.

Pleading—right to sue.

Browne, Ch. J., and **Taylor, Shackleford,** and **Whitfield, JJ.,** concur.

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I. Scope.

The admissibility of pleadings for purposes other than the establishment of the facts set out therein,[1] and the admissibility as evidence of pleadings, as containing declarations against interest,[2] will form the subject of notes in subsequent volumes of this series. Pleadings whose admissibility is urged notwithstanding self-serving declarations contained therein are the subject of this note. From the first, however, a careful distinction should be made between the use of pleadings as evidence of the facts stated therein, upon an issue of fact arising under the pleadings, and the "taking as true" of facts set out in an answer in equity, the truth of which is admitted, as by a demurrer in an action at law, by the setting down of the case for hearing upon bill and answer.[3] In the latter situation there is, of course, no question of evidence, although occasional courts and some text-writers have apparently viewed it as such. Not infrequently, upon the setting down of a cause upon bill and answer, there arises some question as to the extent of the facts admitted thereby, and rules analogous to the rules of evidence applying in like situations are applied. Such rules, however, are rules of pleading, and not of evidence; and the fact that some question is made of the propriety of "taking as true" all of the answer in question does not change the question from one of pleading to one of evidence. This matter will be touched upon more specifically in the discussion of points where confusion is likely to arise.

II. Admissibility in general.

Except in the case of verified pleadings praying injunction,[4] and verified answers sworn to, as a matter of necessity, upon the opponent's request,[5] self-serving declarations contained in pleadings are, as a general rule, inadmissible. This is in accordance with the rule of evidence applying to self-serving declarations in general. In pursuance of this rule, self-serving declarations in bills in equity,[6] and in

[1] See the note to Reese v. Qualtrough, — A.L.R. —.

[2] See the note appended to Craig v. United R. Co. — A.L.R. —.

[3] See 3 Wigmore, Ev. p. 2872. Also 16 Cyc. 383.

[4] See infra, notes 12–14, and the accompanying text.

[5] Infra, III. b, 1.

[6] Cawsey v. Driver (1848) 13 Ala. 818; Wiegart v. Franck (1885) 56 Mich. 200, 22 N. W. 303; Fields v. Colby (1894) 102 Mich. 449, 60 N. W. 1048; Pearce v. Suggs (1887) 85 Tenn. 724, 4 S. W. 526.

The petition in an action for di-

petitions[7] and answers[8] in actions at law, have been held inadmissible. And

vorce, it is held in Schmidt v. Schmidt (1878) 29 N. J. Eq. 496, is not evidence of any fact stated in it.

So, in Mutual Nat. Bank v. Moore (1900) 104 La. 150, 29 So. 103, the petition of defendant for an injunction, although admitted into evidence without objection, is held to make proof only of the allegations made for injunction, and not of the facts alleged.

It is held in Blair v. Caldwell (1834) 3 Mo. 353, that if the record, in an action on a judgment, contains a bill in chancery filed by the defendant against the plaintiff, the defendant will not be permitted to read the bill in evidence, it being "evidence made by the party who offered it."

And in Turner v. Miller (1846) 6 Ark. 463, it is said that the petition in a bill of discovery is not evidence.

An answer and cross bill, it is held in Bledsoe v. Jones (1906) 145 Ala. 685, 40 So. 111, are not admissible in evidence on behalf of the cross complainant.

[7] Wesner v. St. Louis & S. F. R. Co. (1913) 177 Mo. App. 117, 163 S. W. 298; Wilkins-Ricks Co. v. McPhail (1915) 169 N. C. 558, 86 S. E. 502 (obiter); Hocking Valley R. Co. v. Helber (1915) 91 Ohio St. 231, 110 N. E. 481.

In Stevens v. Beals (1852) 10 Cush. (Mass.) 291, 57 Am. Dec. 108, an averment by plaintiff in his declaration, that the note sued upon has been indorsed to him by the payee, is held to be no evidence of that fact on behalf of the pleader.

So, in Green v. Morse (1899) 57 Neb. 391, 73 Am. St. Rep. 518, 77 N. W. 925, a supplemental petition filed by the defendant is held to be no evidence in his behalf.

In Roscoe Lumber Co. v. Standard Silica Cement Co. (1901) 62 App. Div. 421, 70 N. Y. Supp. 1130, plaintiff's bill of particulars is held inadmissible on his behalf. With respect to the bill of particulars being a part of the pleading, it is said: "When the bill is furnished it is deemed a part of the declaration, plea, or notice to which it relates, and is construed in the same way as though it had originally been incorporated in it. The particulars cannot be evidence against the party furnishing them, in any case, or for any purpose, where the pleading or notice to which the bill relates would not be evidence."

And in Johnson v. Stone (1892) 69 Miss. 826, 13 So. 858, an action by the purchaser of a farm and the stock thereon, to replevy the stock from the vendor, the declaration of the plaintiff in a prior action of replevin against the same defendant, to recover possession of the deed to the land, is held inadmissible on the pleader's behalf. "The allegations of the declaration were the merest statements of the pleader," the court says, "and even if they were the statements of the plaintiff, they would be only hearsay."

In Sein v. Krause (1900) 13 S. D. 530, 83 N. W. 583, it is said that whether or not the bill of particulars required from the plaintiff should "be regarded as a part of the complaint, it was clearly not admissible as evidence, on the part of the plaintiff, in support of his cause of action."

The admission on behalf of plaintiff of a petition embracing the same cause of action, by the same plaintiff, against the same defendant, filed in another court and never acted upon, is improper. Bennett v. Marion (1903) 119 Iowa, 473, 93 N. W. 558.

In an action on a covenant to pay rent, the defendant cannot introduce a petition filed by him to obtain an order staying a writ of possession obtained by the plaintiff, until the expiration of his term, to show that plaintiff had obtained such writ of possession. Hart v. Smith (1820) 2 A. K. Marsh. (Ky.) 301.

[8] In Quinn v. Neeson (1892) 48 N. Y. S. R. 570, 21 N. Y. Supp. 106, an action for damages, the answer is held not to be evidence against the plaintiff.

A bill of items claimed by the defendant as counterclaim in an action in the justice's of the peace court is held, in Stewart v. Demming (1898) 54 Neb. 7, 74 N. W. 265, not to be admissible on behalf of defendant, in the district court, for the purpose of providing evidence of allegations set out in the counterclaim filed in that court, but lost; neither the unsworn pleading in the justice's court, nor the lost counterclaim filed in the higher court, being evidence of allegations on behalf of the pleader.

The plea of defendant, in an action for a balance due, is held in Hartsell v. Masterson (1902) 132 Ala. 275, 31

the same rule has been applied to a petition for a rehearing in equity.[9]

III. Exceptions.

a. Effect of verification, generally.

The rule against permitting one to make evidence for himself applies, as in the case of self-serving declarations generally, to self-serving declarations contained in pleadings. And this rule is, in general, not abrogated by the fact that the pleading in question is verified,[10] especially under a statute providing that a pleading shall not be evi-

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So. 616, not to be admissible in his behalf, in an action subsequently brought by him against the plaintiffs therein, in which the account sued upon in the former action is pleaded as a set-off.

See, in this connection, infra, VI. d.

[9] On the ground that it is nothing but the mere statement of the pleader, a petition for a rehearing in a suit in equity is held, in Francis v. Hazlerig (1817) 1 A. K. Marsh. (Ky.) 93, to be inadmissible on his behalf, in a subsequent action at law brought against him by the defendants in the former suit, and others.

[10] A petition in equity asking that a decree be opened and that the petitioner be admitted to answer, though sworn to, is no evidence of the facts contained in it. Carpenter v. Muchmore (1862) 15 (N. J.) Eq. 123.

And upon application, in equity, to set aside a sale, the petition verified by the petitioner, affords no evidence in his behalf. Coxe v. Halsted (1840) 2 N. J. Eq. 311.

So, in Johnson v. First Nat. Bank (1890) 28 Neb. 792, 45 N. W. 161, a petition sworn to by plaintiff's attorney was held inadmissible on behalf of plaintiff.

It is held, in McDowell v. Turney (1857) 5 Sneed (Tenn.) 225, that a party who seeks by certiorari to have quashed an execution, issued against him as a stayor, cannot make his sworn petition for that writ, evidence for himself, upon the trial before the jury.

The warrant filed by plaintiff, commencing an action of trover before a justice of the peace, is not admissible on behalf of the plaintiff, it is held in Oppenheimer v. Edney (1848) 9 Humph. (Tenn.) 385, to help him make out his case as to the value or kind of the goods contained in the box converted.

In Mosser v. Mosser (1856) 29 Ala. 313, an action for divorce, it is said: "The appellant was not required by law to swear to his answer; and he cannot claim any advantage, or demand fuller proof, by reason of such unauthorized oath."

And, after stating the rule with respect to an answer in equity as evidence, in Evans v. Bicknell (1801) 6 Ves. Jr. 174, 31 Eng. Reprint, 998, it is said: "Not so at law. There the defendant is not heard. One witness proves the case; and, however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him."

In Kittanning v. Kittanning Consol. Natural Gas Co. (1904) 26 Pa. Super. Ct. 355, defendant's affidavit of defense in an action of assumpsit is held to constitute no evidence on his behalf.

So, in Jacoby v. North British & M. Ins. Co. (1899) 10 Pa. Super. Ct. 366, the affidavit of defense, filed in an action of assumpsit on an insurance policy, is held inadmissible on behalf of the defendant.

In Smith v. Smith (1904) 33 Pa. Co. Ct. 113, it is said that the defendant's affidavit of defense, not having been offered by the plaintiff, "who alone could have offered it," it "is no part of the evidence, and not to be considered."

It is said in the syllabus of the unreported case of Austin v. Ferst's Sons Co. (1907) 2 Ga. App. 91, 58 S. E. 318, that "evidence that the defendant admitted that the account sued upon was correct is not rebutted by the defendant's plea, although sworn to. . . . Affirmative statements made by him in his own behalf have no probative value, when in conflict with sworn testimony delivered on the trial."

"A plea which avoids the discovery prayed for is no evidence in the defendant's favor, even when it is under oath, and negatives a material averment in the bill." Farley v. Kittson (1887) 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534.

In holding, in Heartt v. Corning (1832) 3 Paige (N. Y.) 566, that the waiver of an answer under oath is inapplicable to a plea, it is said that "a plea never was considered as evi-

dence upon the trial.[11] It is true that the pleader will be less likely to make false evidence upon oath, but, even then, the temptation is so great and the reliability of the evidence so inconsiderable that, as a general rule, mere verification will not render admissible a pleading otherwise inadmissible because containing a self-serving declaration. To this general rule there is but one exception. In most courts, both at common law[12] and under the Code,[13] a verified pleading praying injunction is looked upon as an affidavit, upon an application for an injunction pendente lite, or upon motion to dissolve an injunction granted pendente lite. In one jurisdiction,[14] this ex-

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dence in behalf of the defendant, as to the facts stated therein."

In Sweetzer v. Claflin (1889) 74 Tex. 667, 12 S. W. 395, the sworn pleas of defendant, denying the execution of the note sued on, are held inadmissible on behalf of defendant, especially since they were formally withdrawn by defendant's counsel during the progress of the trial.

In Jordan v. Thompson (1880) 67 Ala. 469, where decedent's relative had petitioned court for the appointment of sheriff as administrator, it is held error for the court to have permitted petitioner to have read his sworn petition as evidence against the contestants. "It was, at most, an ex parte affidavit," the court says, "and not legal evidence, that its averments were true."

[11] It is held in Taylor v. Weingartner (1916) 223 Mass. 243, 111 N. E. 909, that under a statute providing that "pleadings shall not be evidence on the trial," an allegation of a sworn bill in equity is not admissible on behalf of the pleader.

[12] Under a statute providing for the issuing of temporary injunction upon the affidavit of the plaintiff, the petition, if properly verified, may be used as such affidavit. Atchison v. Bartholow (1866) 4 Kan. 124; Conley v. Fleming (1875) 14 Kan. 381; Olmstead v. Koester (1875) 14 Kan. 463; Center Twp. v. Hunt (1876) 16 Kan. 430; Howard v. Eddy (1896) 56 Kan. 498, 43 Pac. 1133; State ex rel. Burton v. Missouri & K. Teleph. Co. (1908) 77 Kan. 774, 95 Pac. 391.

So, in Anderson v. Englehart (1910) 18 Wyo. 409, 108 Pac. 977, a petition properly sworn to is held to be an affidavit, within the meaning of a statute, providing for the granting of a preliminary injunction, upon its appearing satisfactorily to the court, by affidavit of the plaintiff, that he is entitled thereto.

And in McAmis v. Gulf C. & S. F. R. Co. (1916) — Tex. Civ. App. —, 184 S. W. 331, the sworn petition in an action for injunction is held an affidavit, upon an application for a preliminary injunction.

Under a statute, providing for the granting of an injunction, "at the time of issuing the summons on the complaint, and at any time afterward before judgment, upon affidavits," it is held, in Smith v. Stearns Rancho Co. (1906) 129 Cal. 58, 61 Pac. 662, that an "amended complaint is itself an affidavit."

And it is said in Willis v. Lauridson (1911) 161 Cal. 106, 118 Pac. 530, a suit for injunction, that, "where the verified complaint is the basis for the relief sought, it takes the place of an affidavit, and must be treated as such."

[13] Roome v. Webb (1848) 3 How. Pr. 327, 1 N. Y. Code Rep. 114; Minor v. Terry (1851) 6 How. Pr. 208, N. Y. Code Rep. N. S. 384; Levy v. Ely (1858) 15 How. Pr. N. Y. 395, 6 Abb. Pr. 89; Rome, W. & O. R. Co. v. Rochester (1887) 46 Hun, N. Y. 149; Clark v. Herbert Booth King & Bro. Pub. Co. (1899) 40 App. Div. 405, 57 N. Y. Supp. 975; Foster v. Retail Clerks' International Protective Asso. (1902) 39 Misc. 48, 78 N. Y. Supp. 860.

In Millikin v. Cary (1851) 5 How. Pr. 272, 3 N. Y. Code Rep. 250, however, it is held that the terms "pleading" and "affidavit" are not synonymous, and that verified complaints are not affidavits within the meaning of the Code provision, requiring affidavits in support of complaints, praying injunction. This case is opposed by the cases cited in the preceding paragraph, all of which arise in the same jurisdiction.

[14] It is held in Lloyd v. Heath (1852) 45 N. C. (Busbee, Eq.) 39, that, on a motion to dissolve an injunction to stay an injury that is irreparable, as distinguished from an injunction to stay the mere collection of money, the verified bill is properly read as an affidavit on the part of the plaintiff.

And the principle laid down in the preceding case is followed in Capehart v. Mhoon (1852) 45 N. C. (Bus-

ception is held to apply only to injunctions brought to restrain irreparable injury, as distinguished from those brought merely to prevent the collection of money. And nowhere does it extend to the use of the petition upon final hearing.[15] No other exception to the general rule denying admissibility to self-serving declarations, because of verification, exists. What at first seems to be an exception, in the case of verified answers making a discovery, is seen upon closer inspection not to be such.[16]

b. In answers making discovery.

1. Admissibility in general.

(a) Answers to allegations in bill in equity.

(1) Answers as evidence.

(a) *At common law.*

From the earliest times, it has been the common-law rule that a verified answer in equity is evidence of the self-serving declarations set out therein, on behalf of the defendant filing the pleading.[17] But the mere fact of

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bee, Eq.) 30; Wright v. Grist (1853) 45 N. C. (Busbee, Eq.) 203; Wilson v. Mace (1854) 55 N. C. (2 Jones Eq.) 5; Troy v. Norment (1856) 55 N. C. (2 Jones, Eq.) 318; Peterson v. Matthis (1856) 56 N. C. (3 Jones Eq.) 31); Howerton v. Sprague (1870) 64 N. C. 451.

[15] "The verification of the petition cannot be treated as evidence, on the final hearing" of a suit for injunction. Jones v. Johnson (1897) 57 Kan. 629, 47 Pac. 523.

So, it is said in Roberts v. Miles (1864) 12 Mich. 297: "A bill in chancery is never evidence in favor of complainant, whether sworn or unsworn. The oath of complainant verifying it is only needed where required by some statute or rule of practice, and can then only avail in obtaining an injunction, or other preliminary relief. It is no evidence on the hearing, unless confessed or admitted." The bill involved in that case was sworn.

And it is held in Scales v. Gulf, C. & S. F. R. Co. (1896) — Tex. Civ. App. —, 35 S. W. 205, that, on the final hearing of a suit for injunction, the verified petition is not evidence for the plaintiff.

"The complainant's bill," it is said in Nichols v. Daniels (1826) Walk. (Miss.) 224, involving the admissibility of a verified bill on final hearing, "can have no weight, although sworn to for the purpose of obtaining an injunction, because a plaintiff is, in no case, permitted to make evidence for himself."

[16] Infra, III. b, 1.

[17] **Alabama.**—Paulling v. Sturgus (1830) 3 Stew. 95; Driver v. Fortner (1837) 5 Port. 9; Branch Bank v. Marshall (1842) 4 Ala. 60; Powell v. Powell (1845) 7 Ala. 582, on later appeal in (1846) 10 Ala. 900; Hogan v. Smith (1849) 16 Ala. 600; Ware v. Jordan (1852) 21 Ala. 837; Keiffer v. Barney Bros. (1857) 31 Ala. 192; Henderson v. McVay (1858) 32 Ala. 471; Frazer v. Lee (1868) 42 Ala. 25; Marshall v. Croon (1875) 52 Ala. 554; Turner v. Flinn (1880) 67 Ala. 529; Pattison v. Bragg (1891) 95 Ala. 55, 10 So. 257.

Arkansas.—Clark v. Oakley (1842) 4 Ark. 236; Wallar v. Scott (1853) 13 Ark. 644; King v. Payan (1857) 18 Ark. 583; Morrison v. Peay (1860) 21 Ark. 110; Stilwell v. Badgett (1860) 22 Ark. 164; Marshall v. Green (1866) 24 Ark. 410; Johnson v. Walker (1868) 25 Ark. 196; Magness v. Arnold (1876) 31 Ark. 103.

District of Columbia.—McCartney v. Fletcher (1897) 10 App. D. C. 572; Albaugh v. Litho-Marble Decorating Co. (1899) 14 App. D. C. 113; Dewey Hotel Co. v. United States Electric Lighting Co. (1900) 17 App. D. C. 356; Sheckells v. Sheckells (1914) 42 App. D. C. 131.

Florida.—White v. Walker (1854) 5 Fla. 478; Pierce v. J. M. Brunswick & B. Co. (1887) 23 Fla. 283, 2 So. 366; Kellogg v. Singer Mfg. Co. (1895) 35 Fla. 99, 17 So. 68; Ropes v. Jenerson (1903) 45 Fla. 556, 110 Am. St. Rep. 79, 34 So. 955; Braxton v. Liddon (1905) 49 Fla. 280, 38 So. 717; Ocala Foundry & Mach. Works v. Lester (1905) 49 Fla. 347, 38 So. 56; Mayo v. Hughes (1906) 51 Fla. 495, 40 So. 499; Southern Lumber & Supply Co. v. Verdier (1906) 51 Fla. 570, 40 So. 676; Griffith v. Henderson (1908) 55 Fla. 625, 45 So. 1003; Nobles v. L'Engle (1909) 58 Fla. 480, 5 So. 405; Russell v. Stickney (1911) 62 Fla. 569, 56 So. 691; Barnes & J. Co. v. Williams (1913) 64 Fla. 190, 60 So. 787; Mitchell v. Mason (1913) 65 Fla. 208, 61 So. 579; Johns v. Bowder (1916) — Fla. —, 73 So. 603.

Georgia.—Harris v. Collins (1885) 75 Ga. 97; Fite v. Black (1893) 92 Ga. 363, 17 S. E. 349; Heard v. Nix (1895) 96 Ga. 51, 23 S. E. 122.

the verification, standing alone, is not the reason for the rule. This is shown

Illinois.—Reece v. Darby (1842) 5 Ill. 159; Duncan v. Wickliffe (1843) 5 Ill. 452; Kimball v. Cook (1844) 6 Ill. 423; Garrett v. Stevenson (1846) 8 Ill. 261; Stouffer v. Machen (1855) 16 Ill. 553; Phelps v. White (1856) 18 Ill. 41; Trenchard v. Warner (1856) 18 Ill. 142; Morrison v. Stewart (1860) 24 Ill. 24; Gregg v. Renfrews (1860) 24 Ill. 621; James v. Bushnell (1862) 28 Ill. 158; Cassell v. Ross (1864) 33 Ill. 244, 85 Am. Dec. 270; Taintor v. Keys (1867) 43 Ill. 332; Blow v. Gage (1867) 44 Ill. 208; Bressler v. McCune (1870) 56 Ill. 475; Fish v. Stubbings (1872) 65 Ill. 492; Stevenson v. Mathers (1873) 67 Ill. 123; Tracy v. Rogers (1873) 69 Ill. 662; Lake Shore & M. S. R. Co. v. McMillan (1876) 84 Ill. 208; Bragg v. Geddes (1879) 93 Ill. 39, 5 Mor. Min. Rep. 624; Cissna v. Walters (1881) 100 Ill. 623; Mey v. Gulliman (1882) 105 Ill. 272; Patterson v. Scott (1892) 142 Ill. 138, 31 N. E. 433, affirming (1891) 37 Ill. App. 520; North & South Rolling Stock Co. v. People (1893) 147 Ill. 234, 24 L.R.A. 466, 35 N. E. 608; Merchants' Nat. Bank v. Lyon (1900) 185 Ill. 343, 56 N. E. 1083, affirming (1899) 82 Ill. App. 598; Fish v. Fish (1908) 235 Ill. 396, 85 N. E. 662.

Indiana.—Achey v. Stephens (1856) 8 Ind. 411; Pugh v. Pugh (1857) 9 Ind. 132.

Iowa—Garretson v. Vanloon (1851) 3 G. Greene, 128, 54 Am. Dec. 492; Cheuvete v. Mason (1854) 4 G. Greene, 231; State ex rel. Atty. Gen. v. Tilghman (1858) 6 Iowa, 496; White v. Hampton (1859) 10 Iowa, 238; Fifield v. Gaston (1861) 12 Iowa, 218; Culbertson v. Luckey (1862) 13 Iowa, 12; Beem v. Farrell (1906) — Iowa, —, 108 N. W. 1044.

Kentucky.—Price v. Boswell (1842) 3 B. Mon. 13.

Maine.—Bradley v. Chase (1843) 22 Me. 511; Hartshorn v. Eames (1849) 31 Me. 93; Alfred v. McNarrin (1857) 44 Me. 90.

Maryland.—Salmon v. Clagett (1828) 3 Bland, Ch. 125; Hagthrop v. Hook (1826) 1 Gill & J. 270; Thompson v. Diffendorfer (1849) 1 Md. Ch. 489; Rider v. Riely (1849) 2 Md. Ch. 16; Hopkins v. Stump (1808) 2 Harr. & J. 301; Ringgold v. Ringgold (1826) 1 Harr. & G. 11, 18 Am. Dec. 250; Pennington v. Gittings (1830) 2 Gill & J. 208; Stewart v. Duvall (1835) 7 Gill & J. 179; Rich v. Levy (1860) 16 Md. 74; Kent v. Carcaud (1861) 17 Md. 291; Hubbard v. Mobray (1863) 20 Md. 165; Turner v. Knell (1865) 24 Md. 55.

Michigan. — Schwarz v. Wendell (1843) Walk. Ch. 267; Hart v. Carpenter (1877) 36 Mich. 402; Whitfield v. Stiles (1885) 57 Mich. 410, 24 N. W. 119 (obiter); Newlove v. Callaghan (1891) 86 Mich. 301, 49 N. W. 214, denying rehearing of (1891) 86 Mich. 297, 24 Am. St. Rep. 123, 48 N. W. 1096.

Mississippi.—Everett v. Winn (1843) Smedes & M. Ch. 67; Berryman v. Sullivan (1849) 13 Smedes & M. 65; M'Gehee v. White (1856) 31 Miss. 41; Shackelford v. Brown (1894) 72 Miss. 380, 17 So. 896 (obiter).

Missouri. — Laberge v. Chauvin (1829) 2 Mo. 179; Prior v. Matthews (1845) 9 Mo. 267; Hewes v. Musick (1850) 13 Mo. 395.

New Hampshire.—Dodge v. Griswold (1842) 12 N. H. 573; Bellows v. Stone (1846) 18 N. H. 465; Miles v. Miles (1855) 32 N. H. 147, 64 Am. Dec. 362; Busby v. Littlefield (1856) 33 N. H. 76; Dodge v. Dodge (1856) 33 N. H. 487; Johnson v. Richardson (1859) 38 N. H. 353.

New Jersey. — Neville v. Demeritt (1840) 2 N. J. Eq. 321; Kinna v. Smith (1834) 3 N. J. Eq. 14; Allen v. Cole (1853) 9 N. J. Eq. 286, 59 Am. Dec. 416; Fisher v. Porch (1854) 10 N. J. Eq. 243; Stevens v. Post (1858) 12 N. J. Eq. 408; Brown v. Bulkley (1862) 14 N. J. Eq. 294; Graham v. Berryman (1868) 19 N. J. Eq. 29; Wilson v. Cobb (1877) 28 N. J. Eq. 177; Ingersoll v. Stiger (1890) 46 N. J. Eq. 511, 19 Atl. 842; Evans v. Evans (1904) — N. J. Eq. —, 59 Atl. 564.

New York.—Green v. Hart (1806) 1 Johns. 580; Swift v. Dean (1810) 6 Johns. 523; Murray v. Blatchford (1828) 1 Wend. 583, 19 Am. Dec. 537; Stafford v. Bryan (1829) 3 Wend. 532, affirming (1828) 1 Paige, 239; Forsyth v. Clark (1829) 3 Wend. 637; Harris v. Knickerbocker (1830) 5 Wend. 638, reversing (1828) 1 Paige, 209; Webb v. Pell (1832) 3 Paige, 368; Jackson v. Hart (1833) 11 Wend. 343; Becker v. Ten Eyck (1836) 6 Paige, 68; Dunham v. Gates (1839) Hoffm. Ch. 185; Jacks v. Nichols (1851) 5 N. Y. 178.

North Carolina.—Scott v. McDonald (1799) 3 N. C. (2 Hayw.) 98 (per Moore, J.; Haywood, J. contra); Felts v. Foster, 1 N. C. pt. 2, p. 72 (Taylor, 121); Moore v. Hylton (1830) 16 N. C. (1 Dev. Eq.) 429; McDonald v. McLeod

distinctly in those cases in which an answer, although verified, is held in-

(1840) 36 N. C. (1 Ired. Eq.) 221; Lewis v. Owen (1840) 36 N. C. (1 Ired. Eq.) 290; Lyerly v. Wheeler (1845) 38 N. C. (3 Ired. Eq.) 599; Morrison v. Meacham (1846) 39 N. C. (4 Ired. Eq.) 381; Jackson v. Spivey (1869) 63 N. C. 261; Longmire v. Herndon (1875) 72 N. C. 629.

Ohio.—Wilson v. Delarack (1827) 3 Ohio, 290; Nevitt v. McAroy (1833) Wright, 289.

Pennsylvania. — Maclay v. Work (1823) 10 Serg. & R. 194 (obiter); Com. ex rel. Claghorn v. Cullen (1850) 13 Pa. 133, 53 Am. Dec. 450 (obiter); Eberly v. Groff (1853) 21 Pa. 251; Paul v. Carver (1855) 24 Pa. 207, 64 Am. Dec. 649; Peacock v. Chambers (1863) 3 Grant, Cas. 398; Russell's Appeal (1864) 1 Walk. (Pa.) 131; Barclay's Appeal (1879) 3 Walk. (Pa.) 230; Cremer's Estate (1879) 7 W. N. C. 544; Burke's Appeal (1882) 99 Pa. 350; Bergner & E. Brewing Co. v. Commercial Exch. (1882) 12 W. N. C. 460; Gleghorne v. Gleghorne (1888) 118 Pa. 383, 11 Atl. 797; Bell v. Farmers Deposit Nat. Bank (1890) 131 Pa. 318, 18 Atl. 1079; Bussier v. Weekey (1899) 11 Pa. Super. Ct. 463; Columbia Ave. Sav. Fund. S. D. T. & T. Co. v. Lewis (1899) 190 Pa. 558, 42 Atl. 1094; Galbraith v. Galbraith (1899) 190 Pa. 225, 42 Atl. 683; Goggins v. Risley (1900) 13 Pa. Super. Ct. 316; Mason v. Smith (1901) 200 Pa. 270, 49 Atl. 642; Hopkins v. Stoneroad (1902) 21 Pa. Super. Ct. 168; McCoy v. Kane (1902) 19 Pa. Super. Ct. 187; Petry v. Clark (1903) 12 Pa. Dist. R. 249; Peck v. Cochran (1906) 9 Del. Co. Rep. 91; Real Estate & Mortg. Co. v. Cook (1909) 223 Pa. 158, 72 Atl. 345; Bollman v. Stork (1909) 36 Pa. Co. Ct. 273; Adrian v. Fink (1910) 226 Pa. 448, 75 Atl. 676; Berger v. Berger (1910) 44 Pa. Super. Ct. 305; Alcania Co. v. Avonmore Land & Improv. Co. (1914) 23 Pa. Dist. R. 990.

South Carolina.—Columbia Branch Bank v. Black (1827) 2 McCord, Eq. 344; Magwood v. Lubbock (1831) Bail. Eq. 382.

Tennessee.—Humphries v. Blevins (1805) 1 Overt. 178; McConnell v. Madisonville (1840) 2 Humph. 53; Walter v. McNabb (1870) 1 Heisk. 703; Pearce v. Suggs (1887) 85 Tenn. 724, 4 S. W. 526; Wilson v. Morris (1845) 94 Tenn. 547, 29 S. W. 966; Meek v. McCormick (1897) — Tenn. —, 42 S. W. 458.

Vermont. — Grafton Bank v. Doe (1847) 19 Vt. 463, 47 Am. Dec. 697; Mann v. Betterly (1849) 21 Vt. 326; Blaisdell v. Bowers (1868) 40 Vt. 126; Rich v. Austin (1867) 40 Vt. 416; Veile v. Blodgett (1877) 49 Vt. 270; McLane v. Johnson (1886) 59 Vt. 237, 9 Atl. 837; Phelps v. Root (1906) 78 Vt. 493, 63 Atl. 941.

Virginia. — Pendleton v. Stewart (1804) 5 Call, 1, 2 Am. Dec. 583; Blanton v. Brackett (1804) 5 Call, 232; Auditor v. Johnson (1807) 1 Hen. & M. 537; Purcell v. Purcell (1810) 4 Hen. & M. 507; Shumate v. Dunbar (1819) 6 Munf. 430; Taylor v. Moore (1824) 2 Rand. 563; Thornton v. Gordon (1844) 2 Rob. 719; Lyons v. Miller (1849) 6 Gratt. 427, 52 Am. Dec. 129; Sneed v. Smith (1855) 1 Patton & H. 46; Fant v. Miller (1867) 17 Gratt. 187; Mayo v. Carrington (1869) 19 Gratt. 74; Morrison v. Grubb (1873) 23 Gratt. 342; Shurtz v. Johnson (1877) 28 Gratt. 657; Frank v. Lilienfeld (1880) 33 Gratt. 377; Jones v. Abraham (1881) 75 Va. 466; Bell v. Moon (1885) 79 Va. 341; Keagy v. Trout (1888) 85 Va. 390, 7 S. E. 329; Major v. Ficklin (1889) 85 Va. 732, 8 S. E. 715; Ward v. Cornett (1895) 91 Va. 676, 49 L.R.A. 550, 22 S. E. 494; Coldiron v. Ashville Shoe Co. (1896) 93 Va. 364, 25 S. E. 238; Corbin v. Patton (1896) 2 Va. Dec. 452, 26 S. E. 410; Becker v. Johnson (1910) 111 Va. 245, 68 S. E. 986.

Wisconsin.—Gear v. Parish (1842) Burnett, 99; Walton v. Cody (1853) 1 Wis. 420; Farmers' & M. Bank v. Griffith (1853) 2 Wis. 443; Smith v. Potter (1854) 3 Wis. 432 (obiter); Coulson v. Coulson (1856) 5 Wis. 79; Cooper v. Tappan (1859) 9 Wis. 361; Remington v. Willard (1862) 15 Wis. 584.

United States.—Harper v. Dougherty (1822) 2 Cranch, C. C. 284, Fed. Cas. No. 6,087; Gould v. Gould (1844) 3 Story, 516, Fed. Cas. No. 5,637; Morgan v. Tipton (1844) 3 McLean, 339, Fed. Cas. No. 9,809; Pomeroy v. Manin (1832) 2 Paine, 476, Fed. Cas. No. 11,260; Hough v. Richardson (1845) 3 Story, 659, Fed. Cas. No. 6,722; Delano v. Windsor (1860) 1 Cliff. 501, Fed. Cas. No. 3,754; Tobey v. Leonard (1861) 2 Cliff. 40, Fed. Cas. No. 14,067, reversed on other points (1864) 2 Wall. 423, 17 L. ed. 842; Badger v. Badger (1862) 2 Cliff. 137, Fed. Cas. No. 718, affirmed in (1864) 2 Wall. 87, 17 L. ed. 836; Lonegran v. Fenlon (1866) 2 Pittsb. 115, Fed. Cas. No. 8,475; Scammon v. Cole (1871) 3 Cliff. 472, Fed. Cas. No. 12,432; Hayward v. Eliot Nat. Bank

admissible because verification has been waived by the complainant.[18] Although the verification of the answer is a necessary element, without which

(1874) 4 Cliff. 294, Fed. Cas. No. 6,273, affirmed in (1877) 96 U. S. 611, 24 L. ed. 855; Gilman v. Libby (1878) 4 Cliff. 447, Fed. Cas. No. 5,445; Wren v. Spencer Optical Mfg. Co. (1879) 5 Bann. & Ard. 61, Fed. Cas. No. 18,062; Slessinger v. Buckingham (1883) 8 Sawy. 469, 17 Fed. 454; Berry v. Sawyer (1882) 19 Fed. 286; Satterfield v. Malone (1888) 1 L.R.A. 35, 35 Fed. 445; Reid v. McCallister (1885) 49 Fed. 16; Childs v. N. B. Carlstein Co. (1896) 76 Fed. 86; Conrod v. Kelly (1902) 56 C. C. A. 353, 119 Fed. 841; Ford v. Taylor (1905) 137 Fed. 149; Northern P. R. Co. v. Boyd (1910) 101 C. C. A. 18, 177 Fed. 804, affirmed in (1913) 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554; Pioneer Min. Co. v. Delamotte (1911) 108 C. C. A. 90, 185 Fed. 752; Field v. Holland (1810) 6 Cranch, 8, 3 L ed. 136; Russell v. Clark (1812) 7 Cranch, 69, 3 L. ed. 271; Leeds v. Marine Ins. Co. (1817) 2 Wheat. 380, 4 L. ed. 266; Lenox v. Prout (1818) 3 Wheat. 520, 4 L. ed. 449; Eyre v. Patton (1853) 15 How. 42, 14 L. ed. 592; Seitz v. Mitchell (1876) 94 U. S. 580, 24 L. ed. 179 (obiter); Godden v. Kimmell (1878) 99 U. S. 201, 25 L. ed. 431; American File Co. v. Garrett (1884) 110 U. S. 288, 28 L. ed. 149, 4 Sup. Ct. Rep. 90; Hitz v. National Metropolitan Bank (1884) 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613; Union R. Co. v. Dull (1888) 124 U. S. 173, 31 L. ed. 417, 8 Sup. Ct. Rep. 433; Southern Development Co. v. Silva (1888) 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Dravo v. Fabel (1889) 132 U S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170; Beals v. Illinois, M. & T. R. Co. (1889) 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314; Monroe Cattle Co. v. Becker (1893) 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217.

England.—Atkins v. Farr (1738) 2 Eq. Cas. Abr. 247, 22 Eng. Reprint, 210; Parteriche v. Powlet (1742) 2 Atk. 383, 26 Eng. Reprint, 632; Ridgeway v. Darwin (1802) 7 Ves. Jr. 404, 32 Eng. Reprint, 164, 6 Revised Rep. 227; Thompson v. Lambe (1802) 7 Ves. Jr. 587, 32 Eng. Reprint, 236; Robinson v. Scotney (1816) 19 Ves. Jr. 582, 34 Eng. Reprint, 632.

In Bacon v. Lee (1857) 4 **Iowa**, 490, it is said: "When the answer or replication of a party is required to be made upon oath, as to any matter stated in the previous pleadings, and responsive to it, such answer or replication is evidence conclusive in favor of the party making the same, as to the matters of fact about which the opposite party seeks a disclosure from him, unless it is overcome by the satisfactory testimony of two opposing witnesses; or by one witness corroborated by other circumstances and facts, which give to such testimony a greater weight than the opposite pleading, or which are equivalent in weight to a second witness."

So, in Haynor v. Haynor (1911) 112 Va. 123, 70 S. E. 531, involving an answer under oath to a bill for divorce, it is said that, the verification not having been waived, the answer will constitute evidence for the defendant.

It is held in Hopkins v. M'Laren (1825) 4 Cow. (N. Y.) 667, that, where an assignee of a mortgage is brought in by supplemental bill, after the bringing of a suit for cancelation, and he answers not only the supplemental bill, but also the original, and the complainant neither excepts thereto nor introduces evidence to overcome the denials of the allegations of the original bill, such answer must be taken as true.

Where, in Ragsdale v. Buford (1817) 3 Hayw. (**Tenn.**)192, defendants denied allegations in complainant's bill, it is said that "in no case is an answer, replied to, evidence against the plaintiff." It is added, however, obiter, that "the answer which cannot be replied to is evidence for the defendant," as in the case of an answer to a bill of discovery. In a footnote to this case, the editor, after quoting the language above set out, says: "The court could scarcely have intended what their words seem, literally, to import. For, only a month or two previously, at Rogersville, in a case reported in this volume, Blair v. Brabson (1816) 3 Hayw. (**Tenn.**) 15, they held that 'a fact deposed to by one witness, in direct contradiction of a positive averment in the answer, and not corroborated by any circumstances, cannot, by the rules, which govern courts of equity, be considered as proved.' The rules thus alluded to are that, where an answer is responsive to the bill, it is evidence for the defendant."

[18] See infra, III. b, 4, (d), (1).

it will not be evidence,[19] the chief ground upon which such a pleading is admitted is the fact that the complainant, by filing his bill and requiring a verified answer to it, and to the interrogatories contained in it, makes the defendant his witness. His hope is, of course, to cause the defendant to give testimony harmful to himself, which, under the old practice, in which parties were not permitted to be witnesses, could not be extracted from the defendant in any other manner. It not infrequently happens, however, that the defendant makes answers which favor himself, and which are harmful to the case of the complainant. In their endeavor to be fair in the matter, the courts adopted the rule that the defendant, having been made a witness by the complainant, would be considered as a witness, not only in respect of answers returned favorable to the complainant, but also in respect of answers favorable to the pleader himself.[20] This is the ground upon which the rule, that verified answers in equity are admissible as evidence, rests. This rule has been held not to apply to the verified answer to the petition of an intervener.[21]

As pointed out above,[22] a careful distinction should be made between the use of pleadings as evidence of the facts stated therein, upon an issue of fact, and the "taking as true" of facts set out in an answer in equity, the truth of which is admitted, as by a demurrer in an action at law, by the setting down of the case for hearing upon bill and answer. In the latter situation there is involved merely a matter of pleading, and the facts stated in the answer, or a portion of them, are admitted to be true only for the purpose of examining into the sufficiency of the pleading. The setting down of a case upon bill and answer in the old equity practice or, in some jurisdictions, the failure to file a replication within the required time, amounted to the admission of the truth of the facts set out in the answer, responsive to the complaint, in the same manner in which a demurrer at law admits the truth of the facts set forth in the pleading demurred to. In a few states, however, the mere failure to

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[19] Infra, III. b, 2.

[20] In Bellows v. Stone (1846) 18 N. H. 465, where an attempt is made to distinguish between responsive matters of affirmance and matters of denial in an answer, it is said: "There is no sound foundation for a distinction, in this respect, between matter of denial and matter of affirmance, if the latter be in relation to a particular upon which the bill requires the defendant to make an answer. The true distinction is between allegations upon those subjects upon which the bill requires some answer, and allegations of new matter, not stated or inquired of in the bill, but introduced by the defendant in his defense. The reason why the answer of the defendant is evidence in any particular, and stands until it is overcome by evidence, is not because it is a direct denial of the plaintiff's statement, but because the plaintiff, by calling for a response or statement by the defendant, under oath, upon a particular subject, has, in effect, thus far made the defendant a witness, and cannot be heard to say that no dependence is to be placed upon the answer he has given. Whether he call upon him to make an answer which must directly affirm or deny some statement or whether he require him to make a statement of the facts upon a particular subject-matter, the principle is the same."

And see also Field v. Pope (1843) 5 Ark. 66, infra, note 244; Pennington v. Gittings (1830) 2 Gill & J. (Md.) 208, infra, note 298; M'Gehee v. White (1856) 31 Miss. 41, infra, note 300; Brown v. Bulkley (1862) 14 N. J. Eq. 294, infra, note 244; Brown v. Brown (1836) 10 Yerg. (Tenn.) 84, infra, note 272; Murray v. Johnson (1858) 1 Head (Tenn.) 353, infra, note 244.

[21] It is held in Irvine v. Dean (1893) 93 Tenn. 346, 27 S. W. 666, that the answer, upon oath, of a complainant in chancery, to the petition of an intervener setting up an adverse claim, is not evidence, within the rule governing answers to bills in chancery. The rule that a verified answer in equity is evidence, the court says, "is only applicable to bill and answer, and has never been applied to a simple petition."

[22] Supra, I.

file a replication was held to amount to a denial of the facts set out in the answer, and not to an admission thereof for the purposes of demurrer. In many of the cases involving mere questions of practice, the language used seems, unless carefully considered, to indicate a question of evidence, and, while the court has the proper distinction in mind, it is likely to prove confusing to the reader.

(b) *Under Code.*

In many of the states the common-law methods of pleading in equity cases have been abolished. With the abolition of the rule permitting complainants to put defendants upon discovery, by allegations and interrogatories framed with that intent, the rule making defendants' answers evidence in their own behalf has also gone out of existence. In the Code states and states in which the common-law methods of pleading have been modified by statute, answers in equity are no longer considered evidence.[23] From this it must not be taken, however, that the old rule is obsolete and unworthy of notice. It is still the rule in almost

[23] **Arkansas.** — Conger v. Cotton (1881) 37 Ark. 286.

California.—Goodwin v. Hammond (1859) 13 Cal. 168, 73 Am. Dec. 574; Blankman v. Vallejo (1860) 15 Cal. 638; Bostic v. Love (1860) 16 Cal. 69.

Colorado.—Shapleigh v. Hull (1895) 21 Colo. 419, 41 Pac. 1108.

Iowa.—Graves v. Alden (1862) 13 Iowa, 573.

New York.—Voris v. McCredy (1856) 16 How. Pr. 87; Ames v. Hurlbut (1859) 17 How. Pr. 185; Stilwell v. Carpenter (1875) 62 N. Y. 639, 2 Abb. N. C. 238, reversing on rehearing (1875) 59 N. Y. 414.

South Dakota. — Smith v. Tosini (1891) 1 S. D. 632, 48 N. W. 299.

Texas.—Autrey v. Cannon (1853) 11 Tex. 110; Clow v. Merritt (1855) 15 Tex. 134; Oliver v. Chapman (1855) 15 Tex. 400.

West Virginia.—Lowry v. Buffington (1873) 6 W. Va. 249; Brown v. Knapp (1874) 7 W. Va. 678; Nichols v. Nichols (1875) 8 W. Va. 174; Jarrett v. Jarrett (1877) 11 W. Va. 584; Rogers v. Verlander (1888) 30 W. Va. 619, 5 S. E. 847; Knight v. Nease (1903) 53 W. Va. 50, 44 S. E. 414; Glade Coal Min. Co. v. Harris (1909) 65 W. Va. 152, 63 S. E. 873.

In Johnson v. Riley (1895) 41 W. Va. 140, 23 S. E. 698, it is said that "when the plaintiff requires the defendant to file his answer under oath, the answer will be taken as true, unless contradicted by competent evidence." In criticizing this decision, Brannon, J., points out, in his dissenting opinion, that it is a departure from the settled rule in that state. In the later case of Knight v. Nease (1903) 53 W. Va. 50, 44 S. E. 414, this dissenting opinion is referred to with approval, and followed. The West Virginia statute provides that "when a defendant in equity shall, in his answer, deny any material allegation of the bill, the effect of such denial shall only be to put the plaintiff on satisfactory proof of the truth of such allegation."

"There is a vast difference between a verified answer according to the provisions of the Code of Procedure, and an answer under oath according to the practice which formerly prevailed in courts of equity, in respect to their effect as evidence in the action. The latter was evidence, but the former is not. Under the former system the bill could be so framed, with proper charges and interrogations, as to operate, not only as a statement of the complainant's cause of action, but also as a complete and searching examination of the defendant as to all facts within his knowledge, or upon which he had any information or belief which would tend to make out or sustain the same. The object was to search his conscience, and, in many instances, to lay the foundation for and establish the complainant's claim for relief, upon facts of which he alone was cognizant. The necessity for such a proceeding arose from the fact that in no other way could his testimony be obtained. He was incompetent, and could not be called upon to give evidence in the manner in which disinterested persons were. Hence, the complainant was allowed to so draw his bill as not only to concisely state his claim or demand, but likewise to embrace in it various collateral matters of fact, which, though not strictly pertinent as matters of pleading, were deemed necessary as evidence going to support such claim or demand, and to put questions to the defendant concerning them, to which

one fourth of the states, besides the District of Columbia and the Federal courts generally.

(2) Answers as affidavits.

Upon a motion to dissolve an injunction granted pendente lite, the answer has been held to be admissible as an affidavit. This is true in Code[24] as well as in common-law[25] jurisdictions. In a few cases, the answer has been said to be evidence on behalf of defendant, on his motion to dissolve an injunction granted pendente lite.[26] This is, however, probably nothing more than a loose statement, the court intending to say no more than that, upon the filing of the answer, the injunction must be dissolved. This is in keeping with the general rule, which is to the effect that, upon the filing of an answer denying the equity of a bill seeking injunction,

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he was bound, under oath, to respond. But the machinery of complaining and answering fixed by the Code is quite different, and renders these things impossible. The distinction between actions at law and actions in equity, and the forms of pleading in the same, is abolished, and the complaint, in all cases, must be 'a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.' " Staak v. Sigelkow (1860) 12 Wis. 235.

In Conger v. Cotton (1881) 37 Ark. 286, it is said, with respect to the admissibility of answers in equity on behalf of the defendants; under Code pleading: "Formerly the complainant, without any oath of his own . . . drew the defendant before the chancellor to probe his conscience. He made his adversary his own witness, and being allowed to do so, contrary to the course of common law, he was held bound by the answer, unless he could disprove it by still stronger countervailing evidence. This was reasonable. The new system proceeds on different principles. All parties are allowed to testify, and bills of discovery are almost wholly abolished. They are no longer necessary, where either party may testify for himself, and make his adversary a witness. All pleadings are required to be verified on both sides. The probing of conscience has been applied to both with equal severity before issues are made. The pleadings only make the issue, leaving the preponderance of testimony only necessary for him who has the onus of showing the fact from which the equity arises."

Under a statute providing that "neither a sworn bill nor a sworn answer shall have the force of evidence, except as to admissions," it is held, in Helmer v. Van Wormer (1915) 187 Mich. 1, 153 N. W. 1, that a sworn answer is not evidence for the defendant.

[24] **California.**—Falkinburg v. Lucy (1868) 35 Cal. 52, 95 Am. Dec. 76; Delger v. Johnson (1872) 44 Cal. 182; Hiller v. Collins (1883) 63 Cal. 235.

New York.—Roome v. Webb (1848) 3 How. Pr. 327, 1 N. Y. Code Rep. 114; Schoonmaker v. Reformed Protestant Dutch Church (1850) 5 How. Pr. 265; Florence v. Bates (1850) 2 Sandf. 675; Krom v. Hogan (1850) 4 How. Pr. 225; McEncroe v. Decker (1879) 58 How. Pr. 250; Rome, W. & O. R. Co. v. Rochester (1887) 46 Hun, 149.

North Carolina.—Blackwell Durham Tobacco Co. v. McElwee (1886) 94 N. C. 425; Howerton v. Sprague (1870) 64 N. C. 451.

[25] **Delaware.** — Marvel v. Ortlip (1866) 3 Del. Ch. 9; Ambursen Hydraulic Constr. Co. v. Eastern Cement Gun Co. (1913) 10 Del. Ch. 207, 88 Atl. 559; Whitmer v. William Whitmer & Sons (1916) — Del. Ch. —, 98 Atl. 940.

Montana.—Wetzstein v. Boston & M. Consol. Copper & S. Min. Co. (1901) 26 Mont. 193, 66 Pac. 943.

New Jersey.—Hardenburgh v. Farmers' & M. Bank (1834) 3 N. J. Eq. 68; Shreve v. Black (1842) 4 N. J. Eq. 177.

Pennsylvania. — Waring v. Cram (1850) 1 Pars. Sel. Eq. Cas. 516, 12 Mor. Min. Rep. 280; Dechamps v. Second & T. Street Pass. R. Co. (1858) 3 Phila. 279; Warren & F. R. Co. v. Clarion Land & Improv. Co. (1867) 54 Pa. 28; Dreydoppel v. Young (1880) 14 Phila. 226; Brobst v. Weidmer (1908) 18 Pa. Dist. R. 284.

Rhode Island.—Bradford v. Peckham (1869) 9 R. I. 250.

Virginia.—Thomas v. Rowe (1895) 2 Va. Dec. 113, 22 S. E. 157.

England.—Morphett v. Jones (1815) 19 Ves. Jur. 350, 34 Eng. Reprint, 548.

[26] Blundon v. Crosier (1901) 93 Md. 355, 49 Atl. 1; Robinson v. Cathcart (1825) 2 Cranch, C. C. 590, Fed. Cas. No. 11,946; United States v. Parrott (1858) 1 McAll. 271, Fed. Cas. No. 15,998.

the preliminary injunction will be dissolved. That being a rule of practice and not of evidence, it is not a part of this discussion.

In this connection, note should be taken of the distinction made between the use of pleadings as evidence of the facts stated therein, upon an issue of fact, and the "taking as true" of facts set out in an answer in equity, the truth of which is admitted, as by a demurrer in an action at law, by the setting down of the case for hearing upon bill and answer.[27] When the question of granting a preliminary injunction is tried upon bill and answer, the question involved with respect to the use of the facts stated in the answer is one of pleading, and not one of evidence, and cases holding that an answer to a bill seeking injunction must be taken as true, upon a hearing on bill and answer, do not come within the scope of this discussion.

In somewhat the same manner as a verified answer is made use of as an affidavit, on a motion to dissolve a preliminary injunction, an answer under oath has been held to be admissible as an affidavit, on a motion to vacate an order appointing a receiver.[28]

(b) Answers to interrogatories in equitable bill for relief.

As in the case of answers to allegations in bills in equity under the common-law,[29] answers to interrogatories contained in equitable bills for relief are admissible as evidence on behalf of the respondent.[30] This is on the theory that the respondent is made a witness by the proposal of the interrogatories, and that, having become a witness, he is capable of testifying on behalf of himself, as well as for the

[27] See the text accompanying note 22, supra.

[28] In Ford v. Taylor (1905) 137 Fed. 149, it is held that an answer under oath may be used as an affidavit, on a motion to vacate an order appointing a receiver.

[29] Supra, III. b, 1, (a), (1), (*a*).

[30] Petrie v. Wright (1846) 6 Smedes & M. (Miss.) 647; Money v. Dorsey (1846) 7 Smedes & M. (Miss.) 15; Fulton v. Woodman (1876) 54 Miss. 158; Hawralty v. Warren (1866) 18 N. J. Eq. 124, 90 Am. Dec. 613; Evans v. Evans (1904) — N. J. Eq. —, 59 Atl. 564; Woodcock v. Bennet (1823) 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; Hughes v. Blackwell (1860) 59 N. C. (6 Jones Eq.) 73; Peacock v. Chambers (1863) 3 Grant, Cas. (Pa.) 398; Jones v. Perry (1836) 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; Alexander v. Wallace (1836) 10 Yerg. (Tenn.) 105; Cherry v. Clements (1850) 10 Humph. (Tenn.) 552; Walter v. McNabb (1870) 1 Heisk. (Tenn.) 703; Fant v. Miller (1867) 17 Gratt. (Va.) 187; Shultz v. Hansbrough (1880) 33 Gratt. (Va.) 567; Thompson v. Clark (1886) 81 Va. 422; Anderson v. Union Bank (1915) 117 Va. 1, 83 S. E. 1080; Jones v. Cunningham (1874) 7 W. Va. 707; Snow v. Hazlewood (1908) 85 C. C. A. 226, 157 Fed. 898, writ of certiorari denied in (1908) 210 U. S. 434, 52 L. ed. 1136, 28 Sup. Ct. Rep. 762; Baldwin v. Ely (1850) 9 How. (U. S.) 580, 13 L. ed. 266.

The answer to an interrogatory filed in a bill for relief is held, in Oakey v. Rabb (1844) 1 Freem. Ch. (Miss.) 546, to be evidence on behalf of defendant, in a submission of the case for final hearing on the bill and answer.

In Vandall v. Vandall (1862) 13 Iowa, 247, a bill to cancel a conveyance, the answers of the defendant to interrogatories in the bill are held admissible on his behalf.

Under a statute providing that "if the plaintiff in his bill shall not require an answer under oath or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor," it is held, in Davis v. Crockett (1898) 88 Md. 249, 41 Atl. 66, that the answers to interrogatories, required to be under oath, and responsive thereto, are evidence for respondent.

It is held in Chaffin v. Chaffin (1839) 22 N. C. (2 Dev. & B. Eq.) 255, that, in a suit for an account, if the plaintiff examines the defendant before the master, and reads his examination on the hearing, the answers will be evidence for the defendant, upon the same principle that an answer to a bill in equity is evidence for the defendant.

The preceding case is cited and fol-

benefit of the complainant. In one or two jurisdictions, the rule applying to answers to interrogatories in pure bills of discovery[31] has erroneously been applied to answers to interrogatories contained in bills praying relief, and it has been held that such answers are not admissible on behalf of the respondent unless the proponent first makes use thereof as evidence in his own behalf.[32] This rule, however, has no proper application to answers to interrogatories contained in bills seeking relief.

Under a Code provision against the use of answers in equity as evidence, answers to interrogatories filed in bills in equity are not evidence,[33] it has been held. But, under a statute making answers on oath to interrogatories filed in an equitable action, depositions, such answers are admissible on behalf of the respondent.[34]

(c) Answers to interrogatories in pure bill of discovery.

A pure bill of discovery is filed in equity for the purpose of obtaining information desired by the complainant for use in a pending or a proposed action at law. No equitable relief is sought therein other than the compelling of the answers to the interrogatories contained therein. The sole purpose of the proceeding is to enable the complainant to acquire information which might otherwise be inaccessible to him, and to make a witness out of the respondent, who, under former rules of practice, was not competent as a witness in the legal action. Having thus made a witness out of the respondent, the respondent becomes, as in the case of answers to allegations[35] and to interrogatories[36] in equitable bills for relief, a witness on his own account, as well as on that of the complainant, and his answers are evidence in his own behalf.[37] There is one feature, however, which distinguishes the use of answers to bills of discovery from answers to bills for relief.[38] Answers to bills of discovery are, by the great weight of authority, admissible, in the first instance, only by the complainant therein.[39] That is, the

lowed in Fleming v. Murph (1860) 59 N. C. (6 Jones, Eq.) 59.

[31] See infra, note 39.

[32] It is held in Kidder v. Barr (1857) 35 N. H. 235, that an answer made by plaintiff to interrogatories filed in defendant's cross bill are admissible on behalf of the defendant, but not on behalf of plaintiff, unless the defendant, "having taken that answer as his evidence, shall first use it."

And see Greenleaf v. Highland (1830) Walk. (Miss.) 375, where the same opinion is expressed obiter.

[33] A Code provision to the effect that answers in equity shall not be evidence for defendants applies to answers to interrogatories, filed in bills in equity. Knight v. Nease (1903) 53 W. Va. 50, 44 S. E. 414.

[34] Under a statute providing that answers on oath to interrogatories, filed by a party in an equitable action, "may be read by either party as a deposition," such answers are admissible on behalf of the respondent. Short v. Tinsley (1858) 1 Met. (Ky.) 397, 71 Am. Dec. 482; Ecklar v. Galbreath (1869) 5 Bush (Ky.) 617.

[35] Supra, III. b, 1, (a), (1), (*a*).

[36] Supra, III. b, 1, (b).

[37] Clason v. Morris (1812) 10 Johns. (N. Y.) 524; Methodist Episcopal Church v. Wood (1831) 5 Ohio, 283.

[38] See, however, supra, note 32.

[39] Branch Bank v. Parker (1843) 5 Ala. 731 (obiter); Saltmarsh v. Bower (1853) 22 Ala. 221; Strawn v. Norris (1861) 23 Ark. 542; Chambers v. Warren (1851) 13 Ill. 319; Nourse v. Gregory (1823) 3 Litt. (Ky.) 378; Greenleaf v. Highland (1830) Walk. (Miss.) 375; Carson v. Flowers (1846) 7 Smedes & M. (Miss.) 99; Phillips v. Thompson (1814) 1 Johns. Ch. (N. Y.) 131; Clark v. Depew (1855) 25 Pa. 509, 64 Am. Dec. 717; Henken v. Gramann (1846) 2 Rich. L. (S. C.) 365 (obiter); Thompson v. French (1837) 10 Yerg. (Tenn.) 452; Jones v. Davidson (1854) 2 Sneed (Tenn.) 447; Hays v. Crawford (1870) 1 Heisk. (Tenn.) 86; M'Farland v. Hunter (1836) 8 Leigh (Va.) 489.

In Beem v. Farrell (1906) — Iowa, —, 108 N. W. 1044, in discussing the admissibility of answers to interrogatories on behalf of the party making the answers, it is said: "It is true that a sworn answer to a bill in equity is evidence in behalf of the party answering. . . . But this rule of equity pleading is not applicable to answers given in response to a bill

complainant may or may not, as he chooses, introduce the answers into the legal action; and, if he chooses not to introduce them, the defendant cannot make use of any of them on his own behalf. But, if the complainant offers the answers, they become evidence on behalf of the respondent as well.

In some jurisdictions it has been the practice, after granting discovery, for equity to retain jurisdiction of the cause, and to grant relief. When this is done, the answer of the respondent, so far as it is responsive to the allegations of the bill as to which no discovery is sought, is treated the same as if it were filed in answer to a bill for relief.[40]

(d) Answers to interrogatories authorized by statute.

In a number of jurisdictions, the former proceeding by bill of discovery to obtain discovery of facts within the knowledge of the respondent has been replaced by the filing of interrogatories in the legal action. Under statutes setting up such a substitute for a bill of discovery,[41] particularly where it is provided that the answers to the interrogatories shall be evidence on the trial in the same manner as if procured upon a bill in chancery for discovery,[42] the answers in conformance to the rules pertaining to answers to

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for discovery pure and simple, that is, where no other equitable relief than the securing of the answers under oath is sought."

And see Grimes v. Hilliary (1893) 51 Ill. App. 641.

It is said obiter in Barry v. Galvin (1867) 37 How. Pr. (N. Y.) 310, that, upon the filing of a bill for discovery, "the defendant was entitled to use such answer in his own behalf, if the plaintiff refused to offer it as adverse to his case. There are certain exceptions to the right of the defendant to use such answer; but, subject to such exceptions, the right of the defendant to use his own evidence, given in answer to such bill of discovery, was absolute." This is adverse to the decision in Phillips v. Thompson (1814) 1 Johns. Ch. (N. Y.) 131, rendered in the same jurisdiction.

And see infra, notes 41–43, and the accompanying text.

[40] Where equity court retains jurisdiction for the purpose of granting relief, after granting discovery, the answer of the defendant, "in so far as it is responsive to the other allegations of the bill, as to which no discovery is asked," it is held in Smith v. Smith (1896) 92 Va. 696, 24 S. E. 280, "is entitled to the same weight, as evidence in his favor, as if the bill had been filed for relief as well as discovery."

[41] In accordance with the rule that answers to bills of discovery are not evidence on behalf of the defendant, where no other equitable relief than the securing of the answers under oath is sought, it is held in Beem v. Farrell (1906) — Iowa, —, 108 N. W. 1044, 113 N. W. 509, an action at law, that answers to interrogatories, filed under statutes setting up a substitute for the proceeding by bill of discovery, are not admissible on behalf of the party making the answers.

On the ground that a proceeding to obtain answers to interrogatories, filed as authorized by statute, is analogous to a bill in equity for discovery, it is held in Page v. Page (1834) 15 Pick. (Mass.) 368, that the plaintiff in such proceeding is at liberty to use the answers, if he wishes, but that the defendant cannot have the like privilege.

[42] Conway v. Turner (1847) 8 Ark. 356; Strawn v. Morris (1861) 23 Ark. 542; McFarland v. Hunter (1836) 8 Leigh. (Va.) 489; Vaughn v. Garland (1840) 11 Leigh. (Va.) 251.

Under a statute providing for interrogatories in actions at law the answers to which are to be "evidence at the trial of the cause, in the same manner and to the same purpose and extent, and upon the same condition, in all respects, as if they had been procured upon a bill in chancery for discovery," the rule against a party introducing his answer to bill of discovery, in evidence where it is not introduced by his adversary, applies to answers to interrogatories. Branch Bank v. Parker (1843) 5 Ala. 731; Saltmarsh v. Bower (1853) 22 Ala. 221; Wells v. Branford (1856) 28 Ala. 200; Birmingham R. Light & P. Co. v. Morris (1909) 163 Ala. 190, 50 So. 198; Calvert v. Calvert (1912) 180 Ala. 105, 60 So. 261; Southern R. Co. v. Hayes (1913) 183 Ala. 465, 62 So. 874.

bills of discovery,[43] are not admissible on behalf of the respondents, unless first introduced by the proponents. On the theory that disclosures made in answer to interrogatories filed in pursuance of the statute in that jurisdiction are not pleadings, it is held, in Washington, that such disclosures are not evidence for the respondent, unless first offered by the proponent.[44] In Texas,[45] however, and in two other jurisdictions, under special statutes,[46] answers to interrogatories are held admissible on behalf of the respondent, regardless of the proponent's failure to make use thereof. But nowhere does it seem to be the theory that answers to interrogatories, filed under statute, must be introduced into evidence by the proponent.[47]

In cases dealing with answers of garnishees the troublous question seems to be, not whether the answers are admissible on behalf of the respondent, when not offered by the proponent, but whether such answers are admissible at all. Apparently in analogy to the rules governing answers to interrogatories filed in equity suits, some courts hold such answers admissible on behalf of the garnishee,[48] and in occasional jurisdictions such ad-

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And under a statute providing that either party to a suit shall be entitled to a discovery from the other, "in all cases when the same party would, by the rules of equity, be entitled to the same discovery in a court of equity, in aid of such suit," and that "the answer . . . shall be evidence on the trial of the suit, in the same manner and with the like effect as an answer to a bill in equity for a discovery," it is held in Fugate v. Carter (1840) 6 Mo. 267, that, where the proponent declines to introduce respondent's answers into evidence, respondent cannot himself introduce them.

[43] Supra, note 39.

[44] Under a statute in Washington, authorizing the parties to an action to obtain from their opponents disclosures of facts material to the support or defense of the action, it is held that such answers do not constitute a part of the pleadings, and that they are not evidence for the party answering, unless offered by the proponent. Moore v. Palmer (1896) 14 Wash. 134, 44 Pac. 142.

[45] Handley v. Leigh (1852) 8 Tex. 129; Hadley v. Upshaw (1864) 27 Tex. 547, 86 Am. Dec. 654.

[46] Under statutes directing that, whenever any fact is denied by the answer to an interrogatory, such answer shall, with certain exceptions, be received as true, it is held that such answer is admissible on behalf of the respondent as well as on that of the party filing the interrogatories. Scull v. Mowry (1812) 2 Mart. (La.) 275; Berthole v. Mace (1818) 5 Mart. (La.) 576; Hunter v. Smith (1826) 5 Mart. N. S. (La.) 178.

Answers to interrogatories, filed in pursuance of a statute authorizing such in the case of a nonresident adversary, are held in Standard Life & Acci. Ins. Co. v. Tinney (1896) 73 Miss. 726, 19 So. 662, to constitute an informal deposition, admissible on behalf of respondent in case the proponent does not introduce it into evidence.

[47] Under a rule of court authorizing the parties to a summary process at law to examine each other on interrogatories, it is held in Henken v. Gramann (1846) 2 Rich. L. (S. C.) 365, that a plaintiff, after filing interrogatories, may refuse to offer the answers in evidence, and may rely on other evidence to prove his case.

Under a statute providing that, upon disclosure made by a trustee, the plaintiff may have the liability of the trustee tried by jury, and that "on such trial the disclosure so made . . . may be offered," it is held in Smith v. Brown (1861) 43 N. H. 44, that it is not incumbent upon the plaintiff to introduce the trustee's disclosure.

[48] Davis v. Knapp (1844) 8 Mo. 657; McEvoy v. McCabe (1845) 9 Mo. 48; Stevens v. Gwathmey (1845) 9 Mo. 636; Black v. Paul (1846) 10 Mo. 103, 45 Am. Dec. 353; Perea v. Colorado Nat. Bank (1891) 6 N. M. 1, 27 Pac. 322.

Under a statute raising a presumption of truth on behalf of the answers to interrogatories contained in a garnishment proceeding, it is held in Kergin v. Dawson (1844) 6 Ill. 86, that such answers are to be considered evidence on behalf of defendant garnishee. The court says: "When the garnishee has made a full and explicit answer to the interrogatories,

missibility is specifically provided for by statute.[49] In other jurisdictions, however, the admissibility is denied.[50] And this has been held to be the proper rule under Code pleading,[51] even in one jurisdiction, which adhered to the contrary rule under the common-law practice.[52] In this last jurisdiction, answers to interrogatories filed in pursuance of a statute authorizing such, in a proceeding against a person alleged to be withholding assets belonging to the estate of a decedent, are likewise held inadmissible on behalf of the respondent.[53]

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and it fails to show, either that he is indebted to the defendant in the attachment, or that he has any of his property in his possession, the presumption arises that the answer is true, and the burden of disproving it is thrown on the plaintiff. He is bound to satisfy the jury, by competent testimony, that the material allegations of the answer are untrue, or the garnishee is entitled to be discharged. In our opinion, the answer of the garnishee is not to have the same effect as the answer of a defendant to a bill in chancery, requiring the testimony of two witnesses, or what may be equivalent, to overthrow it; but we are disposed to consider it as presenting prima facie defense, liable to be rebutted by preponderating testimony."

So, it is held in Schwab v. Gingerick (1852) 13 Ill. 697, that a garnishee, being called upon to make a true discovery under oath, has a right to have his answer go before the jury.

An answer to an interrogatory propounded to a garnishee, in which the garnishee admits a former indebtedness, but alleges payment, is held in Britt v. Bradshaw (1857) 18 Ark. 530, to be admissible in evidence on behalf of the garnishee.

The answer of a garnishee is held in Bassett v. Garthwaite (1858) 22 Tex. 230, 73 Am. Dec. 257, to be evidence against the plaintiffs, when contested by them.

And see Devries v. Buchanan (1856) 10 Md. 210, infra, note 122.

[49] Under a statute specifically so providing, the answer of a garnishee is competent evidence on his behalf. Drake v. Buck (1872) 35 Iowa, 472; Fairfield v. McNany (1873) 37 Iowa, 75.

And see Smith v. Brown (1861) 43 N. H. 44, supra, note 47.

[50] It is held in Lasley v. Sisloff (1843) 7 How. (Miss.) 157, that, where the plaintiffs in garnishment allege that the garnishee has not made a true discovery, and submit the issue to the jury, the garnishee's answer is not admissible in his behalf on the trial. "This inquiry," the court says, "arises only on the allegation that the garnishee has not discovered the true amount. It then becomes a question between the judgment creditor and the garnishee, the one being bound to make good his allegation, and the other being at liberty to resist, by such competent proof as he would be at liberty to use in other cases. But, to exonerate himself he could not testify; and, for the same reason, his answer cannot be used. If the statute had not given the power to dispute its truth, then the rule applicable to answers on discovery sought might also apply here; but the plaintiff has the privilege of showing it to be untrue, which he cannot do in ordinary cases of discovery."

In Myatt v. Lockhart (1846) 9 Ala. 91, involving the answer of a garnishee to interrogatories, it is said that "it never can be introduced as evidence by the garnishee, for the same reason that excludes all admissions as evidence for the party making them."

And following the preceding case, it is held in Price v. Mazange (1858) 31 Ala. 701, and Sevier v. Throckmorton (1859) 33 Ala. 512, that the answer of a garnishee may not be introduced into evidence on his behalf.

On the trial of a suggestion contesting the verified return of a garnishee, it is held in Dawkins v. Gault (1851) 5 Rich. L. (S. C.) 151, that the return is not evidence on behalf of the garnishee.

[51] The answer of a garnishee, denying liability, is not admissible in his favor, on a trial of the issue, under Code practice. Keep v. Sanderson (1860) 12 Wis. 353.

[52] Under the Code, the answer of a garnishee is not evidence in his behalf. Smith v. Heidecker (1866) 39 Mo. 157.

See supra, note 48, for the cases in the same jurisdiction under the common-law pleading.

[53] In Carmody v. Carmody (1916) 266 Mo. 556, 181 S. W. 1148, verified answers to interrogatories, filed in pursuance of a statute authorizing

2. Failure of verification.

(a) In general.

While the verification of answers making discovery is only one of the elements [54] contributing to their admissibility in derogation of the general rule of evidence against self-serving declarations, it is, nevertheless, a necessary element, in the absence of which there is no admissibility.[55] Viewing the pleader as witness, the reason for the requirement of verification is evident. As a witness, his testimony, to constitute evidence, must be sworn. Unsworn, it is merely hearsay.

(b) Answers of corporations.

The unsworn answers of corporations are subject to the same rules that apply to the unsworn answers of individuals. In absence of verification, they are not admissible on behalf of the corporation,[56] although it is not doubted that they are sufficient as

such, in a proceeding against a person alleged to be withholding assets from a decedent's estate, are held, on the ground that they constitute one of the pleadings in the case, not to be admissible on behalf of the respondent.

[54] See the text accompanying notes 19 and 20 supra.

[55] In Wilson v. Towle (1858) 36 N. H. 129, a suit in equity, it is said: "The answers of the defendants being without oath, their effect is merely that of a pleading, and to simply put the complainant to the necessity of proving the facts alleged in the bill."

And where a bill to quiet title calls on defendant for a discovery of the muniments of his alleged title, an unsworn answer setting up title under a tax sale constitutes no evidence of such matter. National Bank v. Louisville, N. O. & T. R. Co. (1894) 72 Miss. 447.

Answers to interrogatories, required by statute to be under oath, are not evidence on behalf of the party making them, where the requirement of the statute is not observed. Empire Car-Roofing Co. v. Macey (1885) 115 Ill. 390, 3 N. E. 417.

See also Poston v. Adams (1817) 5 Mart. (La.) 272.

[56] Where, in Maryland & N. Y. Coal & I. Co. v. Wingert (1849) 8 Gill (Md.) 170, the answers of the defendant corporation were under the corporate seal, attested by the signature of the president, the court considers "the answer and amended answer of this corporation as having the same force and effect, as evidence, as the answer of an individual, not under oath, would have in like cases, and no other or greater."

So, in Miami Exporting Co. v. Bank of United States (1833) Wright (Ohio) 249, involving the unsworn answer of a bank, it is said that "an answer without oath is a mere denial of the allegation in the bill, analogous to the general issue at law, which requires of the complainant only common proof of the allegations denied."

And Van Wyck v. Norvell (1840) 2 Humph. (Tenn.) 192, it is said: "The defendant here is a corporation. It answers by its corporate seal. It cannot swear to the answer, so as to oppose the oath of the defendant to the oath of one witness, and thereby create the reason for two witnesses. Its answer does no more, therefore, than to create an issue in pleading between the parties."

In Woodford v. Union Bank (1866) 3 Coldw. (Tenn.) 488, after stating the rule with respect to the evidence required to overcome an answer in equity, the court continues: "This rule, however, applies, if at all, with less stringency in cases of denial by a corporation, than of an individual. In the former case, the answer is under the seal of the corporation, and oath is not opposed to oath as in the latter, and thereby creating the reason for two witnesses to support the matter of the bill."

It is said in Baltimore & O. R. Co. v. Wheeling (1855) 13 Gratt. (Va.) 40, that "the answer of a corporation, not being verified by affidavit, is no evidence for the defendant, though responsive to the bill."

Where, in State Bank v. Edwards (1852) 20 Ala. 512, a bank corporation, defendant in the suit, had not verified its answer, it is held that "the answer of the bank not being sworn to, the same amount of evidence is not required to disprove its denials as in other cases."

In Lovett v. Steam Saw Mill Asso. (1836) 6 Paige (N. Y.) 54, it is said that "the answer of a corporation, without oath, where the complainant does not require it to be sworn to or supported by the sworn answer of the officers of the corporation, cannot be

pleadings upon which to base the issues of the case. And it has been held that they are of no effect as affidavits on motions to dissolve preliminary injunctions.[57] All of the difficulty that has arisen in this connection is due to the fact that a corporation, not being a person, cannot swear to its pleadings. In the cases here discussed, no question of verification by the officers of the corporation is raised, that question being taken up in a subsequent section.[58]

3. Sufficiency of verification.

(a) In general.

It is to be presumed that only such manner of verification as is sufficient in general is sufficient to satisfy the requirements with respect to pleadings making discovery. And the failure of sufficient verification, it would seem, would have the same effect as the failure of verification altogether.[59] The oath being one of the elements upon which the admissibility of answers making discovery is based,[60] it is

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said to answer the double purpose of a pleading to put the material matters of the bill in issue, and of an examination of the defendant for the purpose of obtaining his evidence in support of complainant's allegations."

In Union Bank v. Geary (1831) 5 Pet. (U. S.) 99, 8 L. ed. 60, affirming (1827) 3 Crouch, C. C. 233, **Fed.** Cas. No. 5,241a, involving the unsworn answer of a corporation, it is said: "Although the reason of the rule, which requires two witnesses, or circumstances to corroborate the testimony of one, to outweigh the answer, may be founded in a great measure upon the consideration that the complainant makes the answer evidence by calling for it, yet this is in reference to the ordinary practice of the court, requiring the answer to be on oath. But the weight of such answer is very much lessened, if not entirely destroyed, as matter of evidence, when unaccompanied by an oath; and indeed we are inclined to adopt it as a general rule, that an answer, not under oath is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations. But it is not necessary in the present case to go thus far."

So, in McDowell v. Bank of Wilmington & Brandywine (1834) 1 Harr. (**Del.**) 369, involving the conclusiveness of the unverified answer, in equity, of a corporation, there were held to be corroborating circumstances in connection with the evidence of the one witness whose testimony was offered to overcome the denials of the answer, and the court was not compelled to decide the question as to the necessity of more than one witness to overcome such denials. It says, however, obiter: "The reason of the rule that has obtained is that you have oath against oath, and that, in such case, further proof or corroborating circumstances are called for, or the answer will neutralize the oath of a single witness. This reason does not exist in the case of a corporation, and we confess we entertain strong doubts whether the testimony of one witness should be annulled by an answer wanting the sanction of an oath."

And see Smith v. St. Louis Mut. L. Ins. Co. (1876) 2 **Tenn.** Ch. 599; Lindsley v. James (1866) 3 Coldw. (**Tenn.**) 477.

It is said obiter in Salmon v. Clagett (1828) 3 Bland, Ch. (**Md.**) 125, that an answer in equity is, so far as responsive, evidence on behalf of defendant, although it is made "by a corporation aggregate under its seal, without oath." But in a later case directly involving the point, the court in the same jurisdiction arrived at the opposite conclusion. See Maryland & N. Y. Coal & I. Co. v. Wingert (1849) 8 Gill (**Md.**) 170, supra.

[57] It is said in Citizens' Coach Co. v. Camden Horse R. Co. (1878) 29 **N. J.** Eq. 299, that the answer of a corporation, under seal, is of no consequence on a motion to dissolve a preliminary injunction granted.

See supra, note 25.

[58] Infra, III. b, 3, (b).

[59] See supra, note 55.

In Freytag v. Hoeland (1872) 23 **N. J.** Eq. 36, an answer, sworn to before a justice of the peace of another state, not authorized to take an oath to an answer in the state in which the action was brought, is held to have no weight as evidence.

[60] See the text accompanying notes 19 and 20, supra.

necessary that it be made in proper form.

(b) Verification by corporate officer.

A corporation being incapable of performing any act except by means of its officers and agents, it has become the practice for corporate officers to verify the pleadings of the corporation. The rule in the greater number of states is, that verification of an answer making discovery, by a proper corporate officer having knowledge of the facts set out in the pleading, is sufficient.[61] Personal knowledge of the facts pleaded, by the officer, is an essential element of admissibility under this rule.[62] And the United States Supreme Court has taken the view that the evidentiary value of such an answer on behalf of the corporation is dependent upon the degree of knowledge possessed by the verifying officer.[63]

The Delaware court, however, goes to the extent of holding an answer verified by a corporate officer admissible as an affidavit on a motion to dissolve a restraining order, although the officer has not personal knowledge of all the facts set out in the pleading.[64] This is on the ground of the "volume and

[61] "The answer of a corporation, sworn to by the proper officer, having personal knowledge of the facts, is within the equity rule as to the weight of a responsive answer as evidence." Gantt v. Cox & Sons Co. (1901) 199 Pa. 208, 48 Atl. 992.

So, in Kane v. Schuylkill F. Ins. Co. (1901) 199 Pa. 198, 48 Atl. 989, the court says: "It is said that a corporation cannot answer under oath, but only under seal. This is conceded, but it is purely technical. A corporation can only act through the persons of its officers, or other agents. Its corporate seal is not action, but only evidence of action by the proper officers. When, therefore, to the answer under seal there is added the oath of an officer on his own knowledge, the whole becomes a corporate act, with all the advantages to the plaintiff of compulsory disclosure of the truth, which he would have had in a suit against an individual."

And it is said in Hayward v. Eliot Nat. Bank (1874) 4 Cliff. 294, Fed. Cas. No. 6,273, affirmed in (1877) 96 U. S. 611, 24 L. ed. 855, that if an "answer be duly sworn to, even though the suit be against a corporation, and the oath be by one of its principal officers, the answer will have that effect [the effect of evidence], if it be responsive to the bill, and be clear and positive in its terms."

Where, in Porter v. Bank of Rutland (1847) 19 Vt. 410, the defendant bank answered by its cashier, it is said that, "if it was necessary for the corporation to answer at all upon this point, it cannot be questioned but that the answer must be received as evidence."

[62] Where the cashier of a bank, who verifies the corporation's answer, is shown by his testimony to have no personal knowledge of the matters set out in his answer, the answer will not be evidence of those matters. Savings & L. Soc. v. Davidson (1899) 38 C. C. A. 365, 97 Fed. 696, affirming (1893) 80 Fed. 54.

And see, in this connection, infra, X. c, 2, (b).

[63] It is held in Carpenter v. Providence Washington Ins. Co. (1846) 4 How. (U. S.) 185, 11 L. ed. 931, that an answer by a corporation, under its seal and sworn to by its president, who has some means of knowledge on the subject, should impose upon the complainant an obligation to prove the fact denied, by more than one witness. The amount of testimony required in addition to that of the one witness seems, according to the view of the court, to be dependent upon the degree of knowledge of the officer verifying the answer. In the instant case, he had not been president of the company at the time the letter in question was alleged to have been sent, but, since becoming an officer he had had access to all of the records and files, and therefore had means of acquiring knowledge as to whether such letter had been received. The denial by him is held to "impose upon the complainant the proof of his allegation by something more than the testimony of one witness, though not so much more, it is conceded, as the 'pregnant circumstances' before alluded to," as required usually in addition to the testimony of one witness.

[64] On the hearing of a motion to dissolve a restraining order, it is held in Whitmer v. William Whitmer & Sons (1916) — Del. Ch. —, 98 Atl. 940,

complexity of modern business corporations, as to whose transactions, in most cases, no one person is competent to make averments, based on his own knowledge, in such way as to give credence to his statement." In one jurisdiction only has the answer of a corporation, verified by a corporate officer, been held insufficient, on the ground that the officer is not a party to the suit;[65] and, in that state, the party seeking the discovery is permitted to make such officer a codefendant, and thus to obtain the verified answers sought.[66]

4. Waiver of verification.

(a) Right to waive in general.

Under the common-law practice, there was no such thing as waiver by complainants in equity, of oath to the answers of the defendants. Bills required sworn answers, and complainants could not deprive the defendants,[67] in the absence of statute[68] or rule of

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that the answer of defendant corporation is admissible as an affidavit on behalf of such corporation, although verified by the president, who does not have personal knowledge of all the facts alleged. This is on the ground that is is impracticable to require the affidavit of a person with personal knowledge of the facts, "in view of the volume and complexity of modern business corporations, as to whose transactions, in most cases, no one person is competent to make averments, based on his own knowledge, in such way as to give credence to his statement." It is said, however, that such an answer, verified by an officer without personal knowledge, is entitled to less weight than if it were verified by one having personal knowledge of all the facts.

[65] It is held in Van Wyck v. Norvell (1840) 2 Humph. (Tenn.) 192, that the answer of a bank corporation, sworn to by the cashier, is not evidence. "The cashier is no party to this suit," the court says, "He is an entire stranger to the proceeding; as much so as he would be to a suit between two of his neighbors, the facts in relation to which he might happen to know. His affidavit in such a case would have just as much efficacy as it can have in this case."

[66] In Lindsley v. James (1886) 3 Coldw. (Tenn.) 477, it is said: "The bank, as a corporation, cannot answer, except under its corporation seal; and a disclosure under the common seal of the corporation, however false, would subject the corporation to no punishment; and it would, therefore, of course, answer nothing to its prejudice. To avoid this difficulty, when it is necessary to obtain a disclosure from a corporation, it seems to be allowable to make a principal officer or agent of the corporation, a party, so far as the bill seeks for discovery; and that may be done, although such officer or agent has no individual interest in the suit, and no relief can be had against him. . . . This practice is founded upon authority, and sustained by sound reason. It at once gives the court jurisdiction of the party of whom the disclosure is sought, and confers the power to punish for contempt; and, at the same time, furnishes to the complainant the benefit of a disclosure, under oath."

[67] Where, in Clements v. Moore (1867) 6 Wall. (U. S.) 299, 18 L. ed. 786, the complainants waived an answer under oath, and defendant nevertheless verified her answer, the court says: "This was proper. It was her right so to answer, and the complainants could not deprive her of it."

So, in Amory v. Lawrence (1872) 3 Cliff. 523, Fed. Cas. No. 336, it is said: "It is also objected that the complainant attempted to deprive the respondents of their right to an answer under oath; but the controlling answer to the objection is that it can have no such effect, as the waiver amounts to nothing, unless the respondents accept it."

It is said in Heath v. Erie R. Co. (1871) 8 Blatchf. 347, Fed. Cas. No. 6,306, involving a demurrer to a bill on the ground that it waived an answer under oath, that "there is no doubt that the defendants have a right to answer an oath notwithstanding such waiver, and that the plaintiffs cannot, by tendering such waiver in their bill, deprive the defendants of the right to answer on oath."

[68] In absence of statute, complainant cannot, by expressly waiving discovery, deprive defendant of effect of answer as evidence. Thornton v. Gordon (1849) 2 Rob. (Va.) 719; Faut v. Miller (1867) 17 Gratt. (Va.) 187; Jones v. Abraham (1881) 75 Va. 466.

And a similar rule has been laid

court,[69] of their right to make evidence for themselves by answering the allegations and interrogatories of the complainants, under oath. But defendants might, by acquiescing in the waiver by filing answers without oath, deprive their answers of any weight as evidence.[70] The common-law rule has been changed in most jurisdictions, either by statute or by rule of court, as may be seen from the number of cases involving the rights of the parties under pleadings, the verification of which has been waived.[71] In Iowa, a statutory provision authorizing plaintiffs to require answers under oath at their option was, for a while, held to apply only to actions at law,[72] but at length the court came to the conclusion that it was intended to apply to answers in chancery as well.[73]

(b) Failure either to waive or to require verification.

The right of defendants in equity to make evidence for themselves existed prior to any statute or rule of court on the subject. Accordingly, those statutes and rules of court granting complainants the right of waiver are derogatory, and are to be construed strictly. Where they merely grant a right of waiver, they provide complainants with a means of avoiding the effect of having the answers taken as evidence; but, in order to take advantage of it, the complainants must bring themselves within the terms of the rule or statute, i. e., they must specifically waive the verification.[74] Mere failure to require answers under oath is not sufficient. A somewhat different situation, however, arises, where veri-

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down in Georgia. Vanderzer v. McMillan (1859) 28 Ga. 339.

In absence of statute, it is held in Armstrong v. Scott (1852) 3 G. Greene (Iowa) 433, that a complainant cannot waive answer under oath, and so deprive the defendant of the benefit of his answer as evidence.

[69] Where there is no provision in the rules of court with respect to the waiver by complainant of an answer under oath, it is held in FARRELL v. FOREST INVEST. Co. (reported herewith) ante, 25, that a complainant cannot deprive the defendant of the benefit of his answer under oath, by expressly waiving it in the bill.

And see Baker v. Cummings (1894) 4 App. D. C. 230, infra, note 80.

[70] In absence of authority to waive answer under oath, the waiver of verification and the acceptance of it by the filing of an unsworn answer deprive the answer of its weight as evidence. Patterson v. Gaines (1848) 6 How. (U. S.) 550, 12 L. ed. 553.

[71] See infra, III. b, 4, (c), and III. b, 4, (d).

[72] See White v. Hampton (1859) 9 Iowa, 181, s. c. subsequent appeal (1859) 10 Iowa, 238, in which a statutory provision authorizing plaintiff, at his option, to require an answer under oath, is held to apply to actions at law alone.

[73] In Shepard v. Ford (1860) 10 Iowa, 502, the court comes to the conclusion that the statute does apply to chancery, and that answer under oath may properly be waived.

[74] Under a statute providing that, if the complainant shall "waive an answer under oath, . . . the answer of the defendant, though under oath, . . . shall not be evidence in his favor," it is said in Throckmorton v. Throckmorton (1890) 86 Va. 768, 11 S. E. 289, that "when the bill neither demands nor expressly waives an answer under oath, and the defendant answers under oath, the answer, responsive to the bill, is evidence in his behalf."

In Conley v. Nailor (1886) 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001, involving a rule of court similarly worded, it is said: "The answer, though not called for under oath, is evidence in behalf of the defendant. For, if a plaintiff in equity is unwilling that the answer should be evidence against him, he must expressly waive the oath of the defendant in his bill. . . . If he fails to do this, the answer must be given under oath, and is evidence."

The preceding case is cited and followed in Calivada Colonization Co. v. Hays (1902) 119 Fed. 202; Jacobs v. Van Sickle (1903) 61 C. C. A. 598, 127 Fed. 62, affirming (1903) 123 Fed. 340; Dravo v. Fabel (1889) 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170.

Where, in Delta & P. Land Co. v. Adams (1909) 93 Miss. 340, 48 So. 190, the answer was unsworn, and contained at its end a statement, "answer under oath waived," signed by complainant's counsel, such statement, in absence of any showing to the con-

fication is specifically waived in each of the paragraphs of a bill, and the only failure to waive with which the complainant is chargeable is with respect to amendments consisting of mere interlineations of a brief character, introducing no new matter, but inserted merely to render clearer averments already contained therein.[75] In such a situation, the answer has been held not to be evidence on behalf of the defendant.

(c) Effect of failure to verify.

Where complainant takes advantage of statute or rule of court, and waives an answer under oath, and defendant accordingly does not verify his answer, the answer is neither evidence in the defendant's behalf,[76] nor an affi-

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trary, was deemed to be equivalent to a waiver of answer under oath in the bill, and not an agreement by complainant's counsel that such answer should be received the same as if sworn.

[75] Where an original bill is divided into several short sections, and the oath of defendant is waived as to each, amendments consisting of mere interlineations of a brief character, introducing no new matter, but making clearer averments already contained in the bill, do not give the defendants the right to file new answers containing the same defensive matter as the answers to the original bill, and, having verified them, claim the privilege of evidence for them because of complainant's failure to waive oath to the amendments in footnotes thereto; especially where the defensive matter so set up is not responsive and, under the rules of pleading not admissible in any case. Ladd v. Smith (1894) 107 Ala. 506, 18 So. 195.

[76] **Alabama.**—Pearce v. Nix (1859) 34 Ala. 183; Rainey v. Rainey (1859) 35 Ala. 282; Guthrie v. Quinn (1869) 43 Ala. 561; Latham v. Staples (1871) 46 Ala. 462; Taunton v. McInnish (1871) 46 Ala. 619; Blum v. Mitchell (1877) 59 Ala. 535; Buchanan v. Buchanan (1882) 72 Ala. 55; Zelnicher v. Brigham (1883) 74 Ala. 598; Watts v. Eufaula Nat. Bank (1884) 76 Ala. 474; Goodloe v. Dean (1886) 81 Ala. 479, 8 So. 197; Scott v. Brassell (1902) 132 Ala. 660, 32 So. 694.

District of Columbia.—Mankey v. Willoughby (1903) 21 App. D. C. 314.

Florida.—Parken v. Safford (1904) 48 Fla. 290, 37 So. 567; Lykes v. Beauchamp (1905) 49 Fla. 333, 38 So. 603; Indian River Mfg. Co. v. Wooten (1908) 55 Fla. 745, 46 So. 185; Russell v. Stickney (1911) 62 Fla. 569, 56 So. 691; Barnes & J. Co. v. Williams (1913) 64 Fla. 190, 60 So. 787; Johns v. Bowden (1916) — Fla. —, 73 So. 603.

Georgia.—Imboden v. Etowah & B. B. Hydraulic Hose Min. Co. (1883) 70 Ga. 86; Toomer v. Warren (1905) 123 Ga. 477, 51 S. E. 393.

Illinois.—Willis v. Henderson (1842) 5 Ill. 13, 38 Am. Dec. 120; Harris v. Reece (1848) 10 Ill. 212; Chambers v. Rowe (1864) 36 Ill. 171; Hopkins v. Granger (1869) 52 Ill. 504; Jones v. Neely (1874) 72 Ill. 449; Goodwin v. Bishop (1893) 145 Ill. 421, 34 N. E. 47, affirming (1892) 50 Ill. App. 145; Millard v. Millard (1905) 123 Ill. App. 264.

Indiana.—Larsh v. Brown (1851) 3 Ind. 234; Moore v. McClintock (1855) 6 Ind. 209; Peck v. Hunter (1855) 7 Ind. 295.

Iowa.—Smith v. Phelps (1871) 32 Iowa, 537.

Maryland.—Taggart v. Boldin (1856) 10 Md. 104.

Michigan. — Durfee v. McClurg (1859) 6 Mich. 223; Mandeville v. Comstock (1862) 9 Mich. 536; Morris v. Hoyt (1862) 11 Mich. 9.

New Jersey.—Walker v. Hill (1871) 22 N. J. Eq. 513; Symmes v. Strong (1877) 28 N. J. Eq. 131; Craft v. Schlag (1901) 61 N. J. Eq. 567, 49 Atl. 431.

New York.—Bartlett v. Gale (1834) 4 Paige, 503.

Porto Rico.—Fajardo de Salazar v. Costa (1904) 1 Porto Rico Fed. Rep. 119.

Rhode Island.—Harrington v. Harrington (1887) 15 R. I. 341, 5 Atl. 502.

Tennessee. — Lindsley v. James (1866) 3 Coldw. 477.

Virginia. — Hampton v. Hampton (1890) 87 Va. 148, 12 S. E. 340.

Wisconsin.—Smith v. Potter (1854) 3 Wis. 432.

United States.—Treadwell v. Lennig (1892) 50 Fed. 872; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (1897) 83 Fed. 26.

And see Patterson v. Gaines (1848) 6 How. (U. S.) 550, 12 L. ed. 553, supra, note 70, where the waiver was without

davit which he may offer to sustain his position, on a motion to dissolve a preliminary injunction.[77] Under such circumstances, both of the elements[78] which go to render an answer admissible on behalf of the pleader are lacking. In the first place, the complainant, by his waiver, has robbed the defendant of all claim to being a witness. So far from calling upon him to testify, the complainant has specifically disavowed any desire to hear his testimony. And in the second place, defendant, by failing to swear to his answer, has deprived it of all claim to consideration as evidence. It is merely hearsay.

(d) Effect of verification.

(1) In general.

Where complainant waives answer under oath, he deprives the answer of the defendant of the more important of the elements which constitute answers making discovery evidence on behalf of the pleader.[79] It cannot be said that a complainant who waives answer under oath calls upon the defendant as a witness. Hence, although the defendant disregard the waiver, and verify his pleading in spite thereof, it will not constitute evidence in his behalf.[80] Being verified, it will constitute an affidavit on a motion to dis-

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authority, either of statute or of rule of court.

See also Dowden v. Wilson (1874) 71 Ill. 485, infra, note 91.

[77] Charlotte Harbor & N. R. Co. v. Lancaster (1915) 70 Fla. 200, 69 So. 720.

[78] See the text accompanying notes 19 and 20, supra.

[79] See the text accompanying note 78 supra.

[80] **Delaware.**—Cummins v. Jerman (1887) 6 Del. Ch. 122, 33 Atl. 622.

District of Columbia. — Baker v. Cummings (1894) 4 App. D. C. 230.

Florida.—Kahn v. Weinlander (1897) 39 Fla. 210, 22 So. 653.

Illinois.—Moore v. Hunter (1844) 6 Ill. 317; Willenborg v. Murphy (1865) 36 Ill. 344; Wallwork v. Derby (1866) 40 Ill. 527; Hopkins v. Granger (1869) 52 Ill. 504; Adlard v. Adlard (1872) 65 Ill. 212; Andrews v. Knox County (1873) 70 Ill. 65; Bickerdike v. Allen (1895) 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740; Koebel v. Doyle (1912) 256 Ill. 610, 100 N. E. 154.

Indiana.—Peter v. Wright (1855) 6 Ind. 183.

Iowa.—Gilbert v. Mosier (1861) 11 Iowa, 498; Wilson v. Holcomb (1862) 13 Iowa, 110; Connelly v. Carlin (1862) 13 Iowa, 383; Morton v. Chase (1862) 13 Iowa, 597; Mitchell v. Moore (1868) 24 Iowa, 394.

Maine.—Clay v. Towle (1886) 78 Me. 86, 2 Atl. 852; Peaks v. McAvey (1886) — Me. —, 7 Atl. 270; Dascomb v. Marston (1888) 80 Me. 223, 13 Atl. 888 (obiter); Leathers v. Stewart (1911) 108 Me. 96, 79 Atl. 16, Ann. Cas. 1913B, 366.

Maryland.—Winchester v. Baltimore & S. R. Co. (1853) 4 Md. 231; Coan v. Consolidated Gas, E. L. & P. Co. (1916) 128 Md. 530, 97 Atl. 921.

Michigan. — Van Dyke v. Davis (1851) 2 Mich. 144.

Mississippi.—Snell v. Fewell (1887) 64 Miss. 655, 1 So. 908 (obiter); Holmes v. Lemon (1894) — Miss. —, 15 So. 141; Morrison v. Hardin (1902) 81 Miss. 583, 33 So. 80.

New Hampshire.—Ayer v. Messer (1879) 59 N. H. 279.

New Jersey.—Hyer v. Little (1870) 20 N. J. Eq. 443; Walker v. Hill (1870) 21 N. J. Eq. 191; Sweet v. Parker (1871) 22 N. J. Eq. 453.

New York.—Case v. Case (1848) 3 How. Pr. 207; Miller v. Avery (1848) 2 Barb. Ch. 582.

Porto Rico.—Sixto v. Maldonado (1907) 2 Porto Rico Fed. Rep. 454.

Tennessee.—Banks Grocery Co. v. Wheatley (1915) 5 Tenn. C. C. A. 250.

Under a rule of court declaring that, after waiver of oath on the part of complainant, the answer shall not be evidence in the defendant's favor, it is held in Baker v. Cummings (1894) 4 App. D. C. 230, that, where oath is waived by complainant, the answer will not be evidence, although defendant declines to avail himself of the waiver, and verifies his answer. And it is held further that defendant cannot complain, on the ground of being deprived by a mere rule of court of his pre-existing right.

In Wallwork v. Derby (1866) 40 Ill. 527, it is said: "It is, as we have had occasion heretofore to remark, bad practice to put in sworn answers to a bill, wherein the oath of the defendant is expressly waived. . . . But they derive no advantage from it, and can derive none, for the court will cer-

solve a temporary injunction,[81] but it will not be evidence on the pleader's behalf, on the final hearing of an injunction suit.[82] And the filing by the complainant of a replication to the verified answer, although in general a waiver of the insufficiencies of the answer, does not have the effect of giving the defendant the benefit of the oath which has been waived.[83]

(2) Where verification comes before waiver.

Statutes providing for the waiver by complainants of answers under oath are intended to excuse the complainants from the operation of what, not infrequently, proves to be a harsh rule. But they are not intended to assist complainants to take advantage of defendants. The waiver of oath, to entitle complainant to the benefit intended, must be a bona fide waiver, made for the single purpose of preventing the operation of the rule making answers required under oath evidence on behalf of the pleader, and not for the purpose of depriving a defendant of the benefit of his oath, after he has been tricked into making it by a bill requiring a sworn answer. After complainant has demanded an answer under oath, and has received it, he cannot, because dissatisfied therewith, deprive the defendant of the benefit thereof as evidence, by filing an amended bill, setting up substantially the same facts as those contained in the original bill, and waiving therein an answer under

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tainly find out the true nature of the pleadings, and never suffer what is but pleading,—the mere declarations of a party,—to assume the character of evidence, to be overcome by countervailing testimony."

And in Marvel v. Fralinger (1904) 67 N. J. Eq. 622, 63 Atl. 166, reversing (1903) 65 N. J. Eq. 161, 55 Atl. 818, it is held that where a complainant asks for an answer without oath and, in the body of his bill, addresses certain interrogatories to the defendant, the answers to such interrogatories are not evidence on behalf of the defendant, although sworn.

Under a statute giving plaintiff in all actions right to waive answer under oath, it is held in Gilbert v. Mosier (1861) 11 **Iowa**, 498, that an instruction to the effect that an answer, being under oath as required by the petition, is evidence for the defendant, is properly refused as inapplicable, where the petition does not require an answer under oath.

So, where defendant, in his answer in a chancery suit, does not require a replication under oath, under a statutory provision providing for the waiver of pleadings under oath, such replication, although verified, has no effect as evidence. Arms v. Stockton (1861) 12 **Iowa**, 327.

Where, in Kibby v. Kibby (1834) Wright (**Ohio**) 607, the bill charged the defendant with forgery, and the complainant could not, because his bill charged a crime, require an answer, and he did call for an answer, the answer of the defendant, volunteered under oath, is held not to be evidence in his behalf.

[81] Andrews v. Knox County (1873) 70 **Ill.** 65; Gelston v. Rullman (1859) 15 **Md.** 260; Walker v. Hill (1870) 21 N. J. Eq. 191; Ashby v. Ashby (1898) — N. J. Eq. —, 40 Atl. 118 (statute specifically so providing in New Jersey); United States v. Workingmen's Amalgamated Council (1893) 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 **Fed.** 994, affirmed in (1893) 6 C. C. A. 258, 13 U. S. App. 426, 57 Fed. 85; Pere Marquette R. Co. v. Bradford (1906) 149 **Fed.** 492.

[82] Where a bill asking an injunction does not call for answer under oath, and the answer is not read by the complainant, such answer, although verified, is not admissible on the final hearing on behalf of defendant. Dorn v. Bayer (1860) 16 **Md.** 144.

[83] Under a rule in chancery that, when the complainant waives answer under oath, "the answer *may* be without oath, and *shall* have no other or greater force as evidence than the bill," the filing of a replication to an answer under oath does not make such answer evidence notwithstanding the complainant's express waiver of answer under oath. Gerrish v. Towne (1854) 3 Gray (**Mass.**) 82. The ground of defendant's contention in this case was that a general replication waives all insufficiencies and defects in the answer, it being his belief that an answer under oath was improper when oath was waived.

oath.[84] This is especially true where the amendment containing the waiver is not filed until after the expiration of the time for the taking of testimony, and the defendant is deprived of all evidence other than that contained in his answer.[85] The answer continues to be evidence on behalf of the defendant, despite the waiver,[86] although an answer not under oath is filed in answer to the supplemental bill containing the waiver.[87] And where the amended bill sets up new matter in addition to that set up in the original bill, the waiver therein applies merely to the answer to such new matter, without affecting the admissibility of the answer under oath, filed to the original bill.[88] The only proper remedy of a complainant, who wishes to get rid of a sworn answer filed in pursuance of his demand therefor, is to dismiss the suit and to bring another.[89] In the new suit he may waive answer under

[84] It is said in Stevenson v. Mathers (1873) 67 Ill. 123: "A party cannot file a bill, call for and receive an answer under oath, and evade the effect of the answer by filing what is called an amended bill, substantially the same as the original, dispensing with a sworn answer, and receive a copy of the previous answer without the jurat. To do so would violate a maxim of the law that that which cannot be done directly is prohibited from being done by indirection. It would be a sheer evasion to permit it to be done."

So, it is held in Walker v. Campbell (1880) 5 Lee (Tenn.) 354, that after a defendant has put in his answer, on oath, to an original bill, the complainant cannot amend, and include in the amendment a waiver of answer under oath, so as to deprive defendant of the benefit of his amended answer to the amendment, so far as it is responsive to the original bill.

In Throckmorton v. Throckmorton (1890) 86 Va. 768, 11 S. E. 289, it is said: "It can hardly be seriously contended that a complainant in equity may deprive the defendant of the benefit of his answer to the bill in which an answer under oath is not waived, simply by filing an amended bill after the answer is filed, stating the same case in different language, and waiving an answer under oath."

Where a complainant, after the coming in of sworn answers, dismissed his bill, and then files another, setting up substantially the same ground for relief, but waiving answers under oath, it is held in Mey v. Gulliman (1882) 105 Ill. 272, that the sworn answers filed to the prior bill will be evidence against him, to be overcome by a preponderance of proof.

And see Burras v. Looker (1833) 4 Paige (N. Y.) 227, infra, note 89.

[85] Where a bill in equity does not waive an answer under oath, and the defendant verifies his answer and permits the time for the taking of testimony to pass without the taking of testimony, and the case to be set for final hearing upon bill and answer, the complainant cannot then amend his bill so as to waive answer under oath. Creegan v. Hyman (1908) 93 Miss. 481, 46 So. 952.

[86] Where, in Bingham v. Yeomans (1852) 10 Cush. (Mass.) 58, the complainant waived answer under oath, after answer was in, the answer was held still to be evidence on behalf of defendant. "If it were otherwise," the court says, "the effect would be that, after a sworn answer filed, the complainant might speculate on the relative advantage or disadvantage, on the one hand, of benefit to himself of the discoveries, and on the other of benefit to the defendant of his answer, as evidence, and admit or reject it accordingly, at his own election. This would be an unfair advantage, and inequitable."

[87] After an answer under oath to a bill calling for an answer under oath, the filing of a supplemental bill waiving answer under oath, and an answer thereto not under oath, do not deprive defendant of the right to use his original verified answer as evidence. Wylder v. Crane (1870) 53 Ill. 490.

[88] Where the original bill requires an answer under oath, which is filed, and the complainant subsequently files an amended bill setting up new matter and dispensing with a sworn answer, such waiver does not affect the answer under oath already filed, but applies merely to the answer to the new matter set up in the amended bill. Jefferson v. Kennard (1875) 77 Ill. 246.

[89] In Burras v. Looker (N. Y.) supra, it is said: "After the defendant has put in an answer on oath as to the whole or any part of the bill, it is too late for the complainant to get rid of

oath, but the sworn answer filed to the prior bill will nevertheless be admissible against him.[90] The only circumstance which will release a complainant entirely from the use of the verified pleading requested by him is the stipulation of the defendant, authorizing an amendment of the bill and a waiver therein of verification, followed by the filing of the amended bill and an answer thereto, not under oath.[91] It is even held that where the complainant fails, in his original bill, to waive verification, his amended bill waiving oath, put in before the filing of the answer, but after the contents of the intended answer are discovered, will not deprive the defendant of the right to make use of his allegations and denials as evidence.[92] And the effect of this rule cannot be avoided by filing a second amended bill, also waiving oath.[93]

5. Exceptions to the general rule relating to answers making discovery.

(a) Irresponsive statements.

(1) In answers to allegations in bill in equity.

The chief element[94] which goes to render an answer making discovery evidence for the pleader, in derogation of the general rule of evidence against the admissibility of self-serving declarations, is the fact that the complainant by requiring answers to his allegations and interrogatories, makes the respondent a witness with respect thereto. With respect to matter not inquired into by the complainant, this element is lacking, and, accordingly, what may be said with reference thereto by the respondent cannot be looked upon as coming within the rule. "The right of a defendant to have his answer taken as evidence is coextensive with

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the consequences of a denial, upon oath, of all or any of the matters of the bill. An amendment, in that stage of the suit, waiving an answer on oath, is irregular and cannot be allowed. If the complainant can establish his case without a discovery from the defendant, and he is unwilling to rely upon the answer, as made upon oath, his only remedy is to dismiss his bill, and commence a new suit; in which suit he will have the right to waive the necessity of an answer on oath."

[90] Where a complainant, after the coming in of sworn answers, dismisses his bill, and then files another, setting up substantially the same grounds for relief, but waiving answers under oath, it is held in Mey v. Gulliman (1882) 105 Ill. 272, that the sworn answers filed to the prior bill will be evidence against him, to be overcome by a preponderance of proof.

[91] Where defendant in chancery suit, after the filing of his answer under oath, stipulates that the complainant may amend his bill and waive an answer under oath, and complainant makes the amendment under such stipulation, and the defendant files an answer not sworn to, it is held, in Dowden v. Wilson (1874) 71 Ill. 485, that the sworn answer is not evidence on behalf of the defendant.

[92] It is held in Stanford v. Murphy (1879) 63 Ga. 410, that where a bill containing no waiver of oath is amended so as to waive answer under oath, after the complainant has ascertained what defendant's answer will be, the answer will nevertheless be evidence. The court says that "where one searches the conscience of another and makes him swear, and discovers what, or parts of what, he does swear, whether rightfully or wrongfully, he may not then say, 'That will do me no good,' and in effect repudiate the search and reject the discovery."

[93] And it is held in Stanford v. Murphy (Ga.) supra, that, where the complainant has not waived an answer under oath until he has learned what the answer will be, the rule, estopping him from cutting off defendant's right to use such answer as evidence by the filing of an amended bill waiving answer under oath applies to an answer to an amended bill, filed after the amendment making waiver of oath. The court says that if the rule were otherwise, "then a complainant might amend to suit the case made by the answer already in, and, having got all the information he desired to shape his case, then, taking advantage of so much forced out of the respondent, waive all the rest, so as in effect to utilize part of what his adversary had to say, and not permit him to tell the remainder of the transaction with the same advantage."

[94] See the text accompanying notes, 19 and 20 supra.

his obligation to answer." [95] No question has ever been raised as to the propriety of this rule. It is agreed by all the courts that statements in an answer in equity, not responsive to the allegations of the bill, do not constitute evidence on behalf of the defendant.[96] Such statements must be proved by

[95] Pierson v. Clayes (1843) 15 Vt. 93.

[96] **Alabama.**—Lucas v. Bank of Darien (1830) 2 Stew. 280; M'Gowen v. Young (1832) 2 Stew. & P. 160; Forrest v. Robinson (1841) 2 Ala. 215, former appeal not involving this point in (1837) 4 Port. 44; Branch Bank v. Marshall (1842) 4 Ala. 60; Manning v. Manning (1845) 8 Ala. 138; Dunn v. Dunn (1845) 8 Ala. 784; Walker v. Miller (1847) 11 Ala. 1067; Hanson v. Patterson (1850) 17 Ala. 738; Royall v. McKenzie (1854) 25 Ala. 363; Webb v. Webb (1857) 29 Ala. 588; Keiffer v. Barney (1857) 31 Ala. 192; Gordon v. Bell (1874) 50 Ala. 213; Marks v. Cowles (1878) 61 Ala. 299; Wynn v. Rosette (1880) 66 Ala. 517; Craft v. Russell (1880) 67 Ala. 9; Green v. Casey (1881) 70 Ala. 417; Buchanan v. Buchanan (1882) 72 Ala. 55; Barton v. Barton (1883) 75 Ala. 400; Goodloe v. Dean (1886) 81 Ala. 479, 8 So. 197; Holmes v. State (1893) 100 Ala. 291, 14 So. 51; Ladd v. Smith (1894) 107 Ala. 506, 18 So. 195.

Arkansas. — Cummins v. Harrell (1845) 6 Ark. 308; Patton v. Ashley (1848) 8 Ark. 290; Pelham v. Moreland (1850) 11 Ark. 442; Scott v. Henry (1852) 13 Ark. 112; Walker v. Scott (1853) 13 Ark. 644; Wheat v. Moss (1855) 16 Ark. 243; Shields v. Trammell (1857) 19 Ark. 51; Stilwell v. Bodgett (1860) 22 Ark. 164; Marshall v. Green (1866) 24 Ark. 410; Magness v. Arnold (1876) 31 Ark. 103.

Delaware.—Robinson v. Jefferson (1823) 1 Del. Ch. 244; Merriken v. Godwin (1860) 2 Del. Ch. 236.

District of Columbia.—Dexter v. Gordon (1897) 11 App. D. C. 60; Marmion v. McClellan (1897) 11 App. D. C. 467.

Florida.—Orman v. Barnard (1854) 5 Fla. 528; La Trobe v. Hayward (1870) 13 Fla. 190; Maxwell v. Jacksonville Loan & Improv. Co. (1903) 45 Fla. 425, 34 So. 255; Pinney v. Pinney (1903) 46 Fla. 559, 35 So. 95; Mayo v. Hughes (1906) 51 Fla. 495, 40 So. 499; Tyler v. Toph (1906) 51 Fla. 597, 40 So. 624; Parsons v. Ramsey (1907) 53 Fla. 1055, 43 So. 503; Griffith v. Henderson (1908) 55 Fla. 625, 45 So. 1003; Davis v. Horne (1909) 57 Fla. 396, 49 So. 505; Russell v. Stickney (1911) 62 Fla. 569, 56 So. 691; Barnes & J. Co. v. Williams (1913) 64 Fla. 190, 60 So. 787; Mitchell v. Mason (1913) 65 Fla. 208, 61 So. 579; AMERICAN SECURITIES CO. v. GOLDSBERRY (reported herewith) ante, 15; Pittman v. Milton (1915) 69 Fla. 304, 68 So. 658; FARRELL v. FOREST INVEST. CO. (reported herewith) ante, 25.

Georgia. — Eastman v. McAlpin (1846) 1 Ga. 157; Lee v. Baldwin (1851) 10 Ga. 208; Laughlin v. Greene (1853) 13 Ga. 359; Cartledge v. Cutliff (1860) 29 Ga. 758; Neal v. Patten (1869) 40 Ga. 363; Stanford v. Murphy (1879) 63 Ga. 410; Harris v. Collins (1885) 75 Ga. 97; Parker v. Lanier (1888) 82 Ga. 216, 8 S. E. 57; Toomer v. Warren (1905) 123 Ga. 477, 51 S. E. 393.

Illinois. — Garrett v. Stevenson (1846) 8 Ill. 261; Lynn v. Lynn (1849) 10 Ill. 602; Cummins v. Cummins (1853) 15 Ill. 33; Stouffer v. Machen (1855) 16 Ill. 553; Stark v. Hillibert (1857) 19 Ill. 344; Gregg v. Renfrews (1860) 24 Ill. 621; Cassell v. Ross (1864) 33 Ill. 244, 85 Am. Dec. 270; Marple v. Scott (1866) 41 Ill. 50; Taintor v. Keys (1867) 43 Ill. 332; Blow v. Gage (1867) 44 Ill. 208; Cooper v. Tyler (1868) 46 Ill. 462, 95 Am. Dec. 442; Mahoney v. Mahoney (1872) 61 Ill. 406; Fish v. Stubbings (1872) 65 Ill. 492; Stevenson v. Mathers (1873) 67 Ill. 123; Tracy v. Rogers (1873) 69 Ill. 662; Walton v. Walton (1873) 70 Ill. 142; Roberts v. Stigleman (1875) 78 Ill. 120; O'Brian v. Fry (1876) 82 Ill. 274; Lake Shore & M. S. R. Co. v. McMillan (1876) 84 Ill. 208; Home Ins. & Bkg. Co. v. Myer (1879) 93 Ill. 271; Cissna v. Walters (1881) 100 Ill. 623; Atkinson v. Foster (1890) 134 Ill. 472, 25 N. E. 528; Cushman v. Bonfield (1891) 139 Ill. 219, 28 N. E. 937; Harding v. Hawkins (1892) 141 Ill. 572, 33 Am. St. Rep. 347, 31 N. E. 307; Salsbury v. Ware (1900) 183 Ill. 505, 56 N. E. 149, reversing (1899) 80 Ill. App. 485; Fish v. Fish (1908) 235 Ill. 396, 85 N. E. 662; Richeson v. Richeson (1881) 8 Ill. App. 204; Cole v. Shetterly (1883) 13 Ill. App. 420; Brown v. Bear (1901) 97 Ill. App. 342; Barlow v. McDowell (1905) 118 Ill. App. 506; Miller v. Armstrong (1912) 169 Ill. App. 185.

Indiana.—Green v. Vardinan (1830) 2 Blackf. 324; Wasson v. Gould (1832) 3 Blackf. 18; West v. Thornburgh (1843) 6 Blackf. 542; Clark v. Spears (1844) 7 Blackf. 96; Pierce v. Gates

evidence aliunde. In the whole subject of the use of pleading as evidence, there is no rule more firmly fixed, and none supported by such an array of

(1844) 7 Blackf. 162; Baker v. Leathers (1852) 3 Ind. 558; Nash v. Hall (1853) 4 Ind. 444.

Iowa.—Bacon v. Lee (1857) 4 Iowa, 490; Schaffner v. Grutzmacher (1858) 6 Iowa, 137; State ex rel. Atty. Gen. v. Tilghman (1858) 6 Iowa, 496; White v. Hampton (1859) 10 Iowa, 238; Thrift v. Redman (1862) 13 Iowa, 25.

Kentucky.—Tunstall v. M'Clelland (1808) Hardin, 519; Bright v. Haggin (1808) Hardin, 536; Ballinger v. Worley (1808) 1 Bibb. 195; Harrison v. Edwards (1823) 3 Litt. 340; Mitchell v. Maupin (1826) 3 T. B. Mon. 185; Lampton v. Lampton (1828) 6 T. B. Mon. 616; Taylor v. Morton (1830) 5 J. J. Marsh. 65; Atwood v. Harrison (1831) 5 J. J. Marsh. 329; Todd v. Sterrett (1831) 6 J. J. Marsh. 425.

Maine.—O'Brien v. Elliott (1838) 15 Me. 125, 32 Am. Dec. 137; Buck v. Swazey (1852) 35 Me. 41, 56 Am. Dec. 681; Gilmore v. Patterson (1853) 36 Me. 544; Bradley v. Webb (1866) 53 Me. 462; Peaks v. McAvoy (1886) — Me. —, 7 Atl. 270.

Maryland.—Lingan v. Henderson (1826) 1 Bland, Ch. 236; Hagthorp v. Hook (1826) 1 Gill & J. 270; Salmon v. Claggett (1828) 3 Bland, Ch. 125; Glenn v. Baker (1847) 1 Md. Ch. 73; Thompson v. Diffenderfer (1849) 1 Md. Ch. 489; Jones v. Slubey (1822) 5 Harr. & J. 372; Ringgold v. Ringgold (1826) 1 Harr. & G. 11, 18 Am. Dec. 250; Dilly v. Barnard (1836) 8 Gill & J. 170; Jones v. Belt (1844) 2 Gill, 106; Fitzhugh v. McPherson (1845) 3 Gill, 408; McNeal v. Glenn (1853) 4 Md. 87; Feigley v. Feigley (1855) 7 Md. 537, 61 Am. Dec. 375; Kent v. Carcaud (1861) 17 Md. 291; Cecil v. Cecil (1862) 19 Md. 72, 81 Am. Dec. 626; Smoot v. Rea (1863) 19 Md. 398; Hubbard v. Mobray (1863) 20 Md. 165; Turner v. Knell (1865) 24 Md. 55.

Massachusetts. — Mills v. Gore (1838) 20 Pick. 28; Clark v. Flint (1839) 22 Pick. 231, 33 Am. Dec. 734; Leach v. Fobes (1858) 11 Gray, 506, 71 Am. Dec. 732.

Michigan. — Millard v. Ramsdell (1842) Harr. Ch. 373; Schwarz v. Wendell (1843) Walk. Ch. 267; Van Dyke v. Davis (1851) 2 Mich. 144; Hunt v. Thorn (1851) 2 Mich. 213; Hart v. Carpenter (1877) 36 Mich. 402; Whitfield v. Stiles (1885) 57 Mich. 410, 24 N. W. 119 (obiter).

Mississippi. — Russell v. Moffitt (1842) 6 How. 303; Fitch v. Stamps (1842) 6 How. 487; Planters' Bank v. Stockman (1843) Freem. Ch. 502; Planters' Bank v. Courtney (1843) Smedes & M. 40; Jack v. State (1846) 6 Smedes & M. 494; Dease v. Moody (1856) 31 Miss. 617; Miller v. Lamar (1871) 43 Miss. 383; Wofford v. Ashcraft (1873) 47 Miss. 641; Park v. Bamberger (1876) 52 Miss. 565; Rodd v. Durbridge (1876) 53 Miss. 694; Osborne v. Crump (1880) 57 Miss. 622; Dyer v. Williams (1884) 62 Miss. 302; Shackelford v. Brown (1894) 72 Miss. 330, 17 So. 896 (obiter); Applewhite v. Foxworth (1901) 79 Miss. 773, 31 So. 533; AUSTIN CLOTHING CO. v. POSEY (reported herewith) ante, 13.

Missouri. — Rountree v. Gordon (1843) 8 Mo. 19; Prior v. Matthews (1845) 9 Mo. 267; (obiter); Walton v. Walton (1852) 17 Mo. 376.

New Hampshire.—Moors v. Moors (1845) 17 N. H. 481; Bellows v. Stone (1846) 19 N. H. 465; Miles v. Miles (1855) 32 N. H. 147, 64 Am. Dec. 362; Busby v. Littlefield (1856) 33 N. H. 76.

New Jersey.—Miller v. Wack (1831) 1 N. J. Eq. 204; Neville v. Demeritt (1840) 2 N. J. Eq. 321; Kinna v. Smith (1834) 3 N. J. Eq. 14; Hutchinson v. Tindall (1835) 3 N. J. Eq. 357; Bray v. Hartough (1837) 4 N. J. Eq. 46; Lovett v. Demarest (1845) 5 N. J. Eq. 113; Vanderhoof v. Clayton (1847) 6 N. J. Eq. 192; Allen v. Cole (1853) 9 N. J. Eq. 286, 59 Am. Dec. 416; Fisler v. Porch (1854) 10 N. J. Eq. 243; Stevens v. Post (1858) 12 N. J. Eq. 408; Gaskill v. Sine (1861) 13 N. J. Eq. 400, 78 Am. Dec. 105; Brown v. Bulkley (1862) 14 N. J. Eq. 294; Vanderveer v. Holcomb (1866) 17 N. J. Eq. 547; Voorhees v. Voorhees (1867) 18 N. J. Eq. 223; Winans v. Winans (1868) 19 N. J. Eq. 220; Roberts v. Birgess (1869) 20 N. J. Eq. 139; Stearns v. Stearns (1872) 23 N. J. Eq. 167 (obiter); Van Dyke v. Van Dyke (1875) 26 N. J. Eq. 180; Fey v. Fey (1876) 27 N. J. Eq. 213; Brown v. Kahnweiler (1877) 28 N. J. Eq. 311; Frink v. Adams (1883) 36 N. J. Eq. 485 (obiter); Wilkinson v. Bauerle (1886) 41 N. J. Eq. 635, 7 Atl. 514; Ingersoll v. Stiger (1890) 46 N. J. Eq. 511, 19 Atl. 842; Evans v. Evans (1904) — N. J. Eq. —, 59 Atl. 564.

New York. — James v. M'Kernon (1810) 6 Johns. 559; Hart v. Ten Eyck (1816) 2 Johns. Ch. 62; Simson v. Hart

authority. But, in the application of the general rule, all kinds of confusion and disagreement have arisen. What is responsive and what irresponsive to

(1816) 14 Johns. 63; Briggs v. Penniman (1826) 8 Cow. 387, 18 Am. Dec. 454; Atwater v. Fowler (1832) 1 Edw. Ch. 417; Town v. Needham (1832) 3 Paige, 545, 24 Am. Dec. 246; Wakeman v. Grover (1832) 4 Paige, 23; Valentine v. Farrington (1833) 2 Edw. Ch. 53; Dunham v. Gates (1839) Hoffm. Ch. 185.

North Carolina.—Salter v. Spier (1802) 1 N. C. pt. 2, p. 142 (Taylor, p. 318); Moore v. Hylton (1830) 16 N. C. (1 Dev. Eq.) 429; Johnson v. Person (1830) 16 N. C. (1 Dev. Eq.) 364; Ellis v. Amason (1832) 17 N. C. (2 Dev. Eq.) 276; Gillis v. Martin (1833) 17 N. C. (2 Dev. Eq.) 470, 25 Am. Dec. 729; Speight v. Speight (1839) 22 N. C. (2 Dev. & B. Eq.) 280; McDonald v. McLeod (1840) 36 N. C. (1 Ired. Eq.) 221; Lewis v. Owen (1840) 36 N. C. (1 Ired. Eq.) 290; Jones v. Jones (1841) 36 N. C. (1 Ired. Eq.) 332; Lyerly v. Wheeler (1845) 38 N. C. (3 Ired. Eq.) 599; Woodall v. Prevatt (1853) 45 N. C. (Busbee, Eq.) 199; Fleming v. Murph (1860) 59 N. C. (6 Jones, Eq.) 59 (obiter); Jackson v. Spivey (1869) 63 N. C. 261; Longmire v. Herndon (1875) 72 N. C. 629.

Ohio.—Paine v. French (1831) 4 Ohio, 318; Harris v. Carlisle (1836) 7 Ohio, pt. 2, 144; Brown v. Cutler (1837) 8 Ohio, 142.

Pennsylvania.—Com. ex rel. Claghorn v. Cullen (1850) 13 Pa. 133, 53 Am. Dec. 450 (obiter); Eberly v. Groff (1853) 21 Pa. 251; Pusey v. Wright (1858) 31 Pa. 387; Larkin's Appeal (1861) 38 Pa. 457; Coleman v. Ross (1863) 46 Pa. 180; Slemmer's Appeal (1868) 58 Pa. 155; Vollmer's Appeal (1868) 61 Pa. 118; Eaton's Appeal (1870) 66 Pa. 483; Audenreid v. Walker (1876) 11 Phila. 183, affirmed without opinion (1879) 89 Pa. 120, 33 Am. Rep. 731; Kenney's Appeal (1888) 9 Sadler (Pa.) 437, 12 Atl. 589; Luburg's Appeal (1889) 1 Monaghan, 329, 17 Atl. 245; Bussier v. Weekey (1899) 11 Pa. Super. Ct. 463; Galbraith v. Galbraith (1899) 190 Pa. 225, 42 Atl. 683; Goggins v. Risley (1900) 13 Pa. Super. Ct. 316; Berger v. Berger (1910) 44 Pa. Super. Ct. 305; Thompson v. Fitz Gerald (1911) 233 Pa. 242, 82 Atl. 212.

Rhode Island.—Parkes v. Gorton (1854) 3 R. I. 27; Ives v. Hazard (1855) 4 R. I. 14, 67 Am. Dec. 500.

South Carolina.—Barton v. Rushton (1813) 4 Desauss. Eq. 373; Branch Bank v. Black (1827) 2 M'Cord, Eq. 344; Duncan v. Dent (1852) 5 Rich. Eq. 7; Ison v. Ison (1852) 5 Rich. Eq. 15, overruling M'Caw v. Blewit (1827) 2 M'Cord, Eq. 90; Ellis v. Woods (1856) 9 Rich. Eq. 19; Barr v. Haseldon (1858) 10 Rich. Eq. 53; Cloud v. Calhoun (1858) 10 Rich. Eq. 358; Belcher v. McKelvey (1859) 11 Rich. Eq. 9.

Tennessee.—Napier v. Elam (1834) 6 Yerg. 108; Wolfe v. Cawood (1870) 1 Heisk. 597; State use of Baker v. McAuley (1871) 4 Heisk. 424; Gass v. Arnold (1873) 6 Baxt. 329; Beech v. Haynes (1874) 1 Tenn. Ch. 569; De Berry v. Hurt (1874) 7 Baxt. 390; Meek v. McCormick (1897) — Tenn. —, 42 S. W. 458.

Texas.—Thouvenin v. Helzle (1848) 3 Tex. 57; Jouett v. Jouett (1848) 3 Tex. 150.

Vermont. — Mott v. Harrington (1840) 12 Vt. 199; Cannon v. Norton (1842) 14 Vt. 178; Lane v. Marshall (1843) 15 Vt. 85; Pierson v. Clayes (1843) 15 Vt. 93; McDonald v. McDonald (1844) 16 Vt. 630; Allen v. Mower (1843) 17 Vt. 61; Sanborn v. Kittredge (1847) 20 Vt. 632, 50 Am. Dec. 58; Adams v. Adams (1849) 22 Vt. 50; Spaulding v. Holmes (1853) 25 Vt. 491; Wells v. Houston (1864) 37 Vt. 245; Blaisdell v. Bowers (1868) 40 Vt. 126; Veile v. Blodgett (1877) 49 Vt. 270.

Virginia.—Beckwith v. Butler (1793) 1 Wash. 224; Pendleton v. Stewart (1804) 5 Call, 1, 2 Am. Dec. 583; Purcell v. Purcell (1810) 4 Hen. & M. 507; Paynes v. Coles (1810) 1 Munf. 373; Taylor v. Moore (1824) 2 Rand. 563; Crenshaw v. Clark (1834) 5 Leigh, 65; Vather v. Zane (1849) 6 Gratt. 246; Lyons v. Miller (1849) 6 Gratt. 427, 5 Am. Dec. 129; Shurtz v. Johnson (1877) 28 Gratt. 659; Frank v. Lilienfeld (1880) 33 Gratt. 377; Fink v. Denny (1881) 75 Va. 663; Lewis v. Mason (1885) 84 Va. 731, 10 S. E. 529; Pixey v. Deitrick (1888) 85 Va. 42, 6 S. E. 615; Keagy v. Trout (1888) 85 Va. 390, 7 S. E. 329; Yates v. Law (1889) 86 Va. 117, 9 S. E. 508; Vashon v. Barrett (1906) 105 Va. 490, 54 S. E. 705; Wingfield v. McGhee (1911) 112 Va. 644, 72 S. E. 154.

Wisconsin.—Gear v. Parish (1842) Burnett, 99; Walton v. Cody (1853) 1 Wis. 420; Farmers' & M. Bank v. Griffith (1853) 2 Wis. 443; Smith v. Potter (1853) 3 Wis. 432 (obiter); Sheldon

the allegations contained in a bill is a matter not easily made the subject of legal principle. It is usually a matter of fact in each particular case; and a principle which applies with precision in one case, or one class of cases, will frequently not do at all when applied to other cases, or other kinds of cases.[96a] Accordingly, the courts have blundered through principle after principle, in their search for a rule suitable to all cases, and have, in the end, accomplished little but the complication of confusion. The greatest difficulty which the courts have experienced has been in answers containing confession and avoidance. For instance, the complainant will file a bill for the foreclosure of a mortgage, given as security for a note, and the defendant will admit the execution of the mortgage and the note, but allege payment, or that the note was secured by fraud, or that there was a mistake in the execution of the instruments. In such a case, the matter in avoidance is in respect of a phase of the transaction not mentioned and not, in so many words, inquired in-

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v. Sheldon (1854) 3 Wis. 699; Garlick v. M'Arthur (1857) 6 Wis. 450; Cooper v. Tappan (1859) 9 Wis. 361; Remington v. Willard (1862) 15 Wis. 584.

United States. — Gernon v. Boccaline (1808) 2 Wash. C. C. 199, Fed. Cas. No. 5,366; Randall v. Phillips (1824) 3 Mason, 378, Fed. Cas. No. 11,555; Robinson v. Cathcart (1825) 2 Cranch, C. C. 590, Fed. Cas. No. 11,946; Robinson v. Cathcart (1828) 3 Cranch, C. C. 377, Fed. Cas. No. 11,947; Tilghman v. Tilghman (1832) 1 Baldw. 464, Fed. Cas. No. 14,045; Flagg v. Mann (1837) 2 Sumn. 486, Fed. Cas. No. 4,847; Morgan v. Tipton (1844) 3 McLean, 339, Fed. Cas. No. 9,809; Tobey v. Leonard (1861) 2 Cliff. 40, Fed. Cas. No. 14,067; Hayward v. Eliot Nat. Bank (1874) 4 Cliff. 294, Fed. Cas. No. 6,273, affirmed (1878) 96 U. S. 611, 24 L. ed. 855; Allen v. O'Donald (1886) 28 Fed. 17, affirmed in Cross v. Allen (1891) 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; Reid v. McCallister (1885) 49 Fed. 16; Earle v. Art Library Pub. Co. (1899) 95 Fed. 544; Lake Shore & M. S. R. Co. v. Felton (1900) 43 C. C. A. 189, 103 Fed. 227; Pennsylvania County v. Cole (1904) 132 Fed. 668; Coca Cola Co. v. Gay-Ola Co. (1912) 119 C. C. A. 164, 200 Fed. 720; Kirkpatrick v. McBride (1912) 120 C. C. A. 322, 202 Fed. 144, modified on rehearing (1913) 120 C. C. A. 328, 203 Fed. 449; Clarke v. White (1838) 12 Pet. 178, 9 L. ed. 1046; Bank of United States v. Beverly (1843) 1 How. 134, 11 L. ed. 75; Randel v. Brown (1844) 2 How. 406, 11 L. ed. 318; McCoy v. Rhodes (1850) 11 How. 131, 13 L. ed. 634; Gunnell v. Bird (1870) 10 Wall. 304, 19 L. ed. 913; Roach v. Summers (1873) 20 Wall. 165, 22 L. ed. 252; Seitz v. Mitchell (1876) 94 U. S. 580, 24 L. ed. 179.

England.—Atkins v. Farr (1738) 2 Eq. Cas. Abr. 247, 22 Eng. Reprint, 210; Parteriche v. Powlet (1742) 2 Atk. 383, 26 Eng. Reprint, 632; Ridgeway v. Darwin (1802) 7 Ves. Jr. 404, 32 Eng. Reprint, 164; Thompson v. Lambe (1802) 7 Ves. Jr. 587, 32 Eng. Reprint, 236; Robinson v. Scotney (1816) 19 Ves. Jr. 582, 34 Eng. Reprint, 632.

Although the time granted by the rules of court for the production of evidence has not expired, where the defendant acquiesces in the setting down of the cause for hearing on bill, answer, and replication, he cannot claim the benefit of the rule with respect to new matter alleged in his answer, and the allegations of the answer with respect thereto are not to be taken as evidence. Maxwell v. Jacksonville Loan & Improv. Co. (1903) 45 Fla. 425, 34 So. 255.

It is said in McDaniels v. Barnum (1833) 5 Vt. 279, that "when usury is set up as a defense in a court of equity, and the object of a party is to avoid a contract entirely, and appropriate to his own use the money of another, and avoid payment by force of the statute, it must be fully and substantially proved; and the evidence to prove it is not aided by the answer of a defendant, unless he is particularly called on to disclose in the bill."

In Daniel v. Johnson (1859) 29 Ga. 207, an action of assumpsit, the answer of plaintiff in a prior chancery suit between the same parties was held inadmissible, it not being made to appear that the answer had been responsive to the bill.

[96a] See PICTURE PLAYS THEATER CO. v. WILLIAMS (reported herewith) ante, 1.

to by the complainant. Still, it is a part of the transaction in question, and properly belongs in an answer to the bill making defendant a witness with respect thereto. In cases of this kind, all manner of rules have been laid down, many of them wrong. Many of them, also, have ceased to be operative in the jurisdictions in which adopted, by reason of the abolition of common-law pleading.[97] A discussion of these particular rules, in so far as they apply to answers to allegations and interrogatories in bills seeking relief, is not included in this note.

Here, as in other parts of this note, careful distinction should be made between irresponsive matter in pleadings sought to be made use of as evidence of the facts stated therein, upon an issue of fact arising under the pleadings, and the "taking as true" of facts set out in an answer in equity, the truth of which is admitted, as by a demurrer in an action at law, by the setting down of the case for hearing upon bill and answer. In the latter situation, there is no question of evidence involved, the sole question being whether irresponsive matter contained in an answer is admitted to be true in the same manner as responsive matter, by the setting down of the case for hearing on the pleadings. This distinction should be noted, also, in cases involving motions to dissolve preliminary injunctions on the averments of the answer, the question being, where nothing other than the terms of pleadings are considered, one merely of practice. In such a case the answer is, by the general rule of practice, to be "taken as true," and is not viewed as evidence, properly speaking.

The rule with respect to irresponsive matter applies to answers used as affidavits, on motions to dissolve temporary injunctions.[98] But where the equity rule with respect to the use of answers as evidence has been abrogated by the Code, the exception with respect to irresponsive matter is also destroyed, and the whole of an answer used as an affidavit is admissible on behalf of the defendant.[99]

Under the common-law method of pleading, the complainant sometimes undertook to anticipate the defense, and to make answer thereto in the bill. The portion of the bill setting forth the probable claims of the defendant is designated the charging part. As to whether or not matter in the answer regarding this part of the bill is responsive, the courts are not in agreement.[100] Difficulty has also arisen with respect to the admissibility of allegations of positive fact made in answers, in response to allegations of negative fact made in the bill. In some instan-

[97] See supra, III. b, 1, (a), (1), (*b*).

[98] Hardy v. Summers (1838) 10 Gill & J. (Md.) 316, 32 Am. Dec. 167; Pere Marquette R. Co. v. Bradford (1906) 149 Fed. 492.

[99] Florence v. Bates (1850) 2 Sandf. (N. Y.) 675.

[100] In holding, in Leas v. Eidson (1852) 9 Gratt. (Va.) 277, that the defendant's statements, with respect to matter set out in the charging part of a bill, are not evidence, it is said: "These words of the bill were not intended as part of the statement of the plaintiff's case, nor to charge that the defendant was, in fact, entitled according to his pretension; nor was the defendant interrogated in any way in regard to such pretension. They were merely intended, as is very common in bills, to suggest the pretension on which the defendant sought to evade his obligation, and not to admit the truth of the pretension, nor to afford the defendant an opportunity to make it evidence against the plaintiff by affirming it."

In Smith v. Clark (1834) 4 Paige (N. Y.) 368, a suit for an injunction to restrain a judicial sale, complainant, in the charging part of his bill, alleges that the defendant will claim to be a bona fide assignee of the bond in question, and sets out that he is not. The court says: "The error into which the plaintiff's counsel appears to have fallen is in supposing that an answer responsive to the charging part of the bill is not evidence in favor of the defendants. The charging part of a bill is as necessary to be answered as the stating part. So far as the charges are material to anticipate and defeat a defense which may be set up by the defendant, they may be considered in the nature of a special replication. But, the complainant has the same right to the defend-

ces, the allegations in the answer are held inadmissible, on the ground that the complainant is not bound to prove a negative fact, but that the defendant is bound to prove the positive fact, and that the denials in his answer are not responsive, being in avoidance.[101] In one jurisdiction, cases are found holding both ways on this question.[102]

(2) In answers to interrogatories in equitable bill for relief.

The rule that irresponsive matter contained in answers in equity is inadmissible on behalf of the pleader applies to answers to interrogatories contained in bills in equity, praying relief, in the same manner and to the same extent as in the case of answers to allegations and charges contained in such a bill.[103] The same confusion exists with respect to what really constitutes irresponsive matter, and the same difficulties are encountered. Without going into the various rules laid down by the courts, in their efforts to reduce this question to one of exact principle, it may be said that, without exception, it is everywhere agreed that matter once adjudged to be irresponsive is inadmissible on behalf of the respondent.[104] Where the answer is responsive

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ant's answer to the charging part of the bill, to prove the truth of his special replication, as he had to an answer to the stating part, to prove the truth of that."

[101] In Carpenter v. Devon (1844) 6 Ala. 718, surety, in his bill to enjoin creditor from levying execution against his property on his principal's debts, alleged that defendant had indulged the principal without complainant's consent. The defendant answered that the indulgence had been given with complainant's consent. On the ground that, although the negative averment was proper and necessary in complainant's bill, it was incumbent upon defendant to prove the positive, and not upon complainant to prove the negative, of the proposition, it is held that the defendant need not have answered the negative averment of the bill, and that his answer, accordingly, was not receivable in evidence.

And it is held in Walker v. Palmer (1854) 24 Ala. 358, that where a bill alleges that defendant became the purchaser of certain property without complainant's consent, defendant is bound to prove his allegation that the purchase was made with complainant's consent. The court says: "The averment of the bill is the averment of a negative. . . . To prove this description of a negative averment involves a moral impossibility, and is, therefore, not required, no matter from which party it comes. But if Walker defends on the ground that Palmer *did* consent, that is readily susceptible of proof, and Walker must accordingly prove it. Palmer makes an averment which he is not bound to prove; but it was material to his case, and Walker was bound either to admit or deny it; and, if he denies it, to verify that denial in the only way in which such a denial can be verified, by proving directly and positively the existence of a fact or facts incompatible with its claim to truth. All this Walker cannot get over by simply averring, as if in response, that which he is bound on his part to prove, namely, that Palmer *did* consent. This was strictly a part of his defense, matter in avoidance, which he must prove."

[102] Where, in Sims v. Sims (1844) 5 Humph. (Tenn.) 370, the complainant charges that no genuine and valid deed, conveying the equity of redemption in the premises in question ever existed, and the answer states that such a deed did exist, and was lost, it is held that the answer does not exempt defendants from the necessity of proving the existence and validity of the instrument. But, although complainant charges a negative in his bill, and defendant denies in the affirmative, it is held in Humphreys v. Blevins (1805) 1 Overt. (Tenn.) 178, that the answer is evidence. In this case, complainant was seeking relief against a judgment obtained by the defendant at law, alleging the contract sued upon to be unfair.

[103] Supra, III. b, 5, (a), (1).

[104] Hogan v. Smith (1849) 16 Ala. 600; Walthall v. Rives (1859) 34 Ala. 91; Roberts v. Totten (1853) 13 Ark. 609; Tenny v. Porter (1895) 61 Ark. 329, 33 S. W. 211; Laughlin v. Greene (1853) 13 Ga. 359; Shiels v. Stark (1854) 14 Ga. 429; Cournan v. Hall (1831) 3 Gill & J. (Md.) 398; Gardiner v. Hardey (1842) 12 Gill & J. (Md.) 365; Davis v. Crockett (1898)

to the interrogatory, but irresponsive to the allegations of the bill, because the complainant has not laid a proper foundation for his interrogatory in the stating part of his bill, a more complicated question arises. In two jurisdictions, an answer to such an interrogatory is held to be evidence on behalf of the defendant, if pertinent to the matter in question.[105] Another state, however, while admitting that an answer to an interrogatory, having no foundation in the stating part of the bill, will put the matter contained in the interrogatory in issue, denies that it will constitute evidence on behalf of the respondent.[106]

(3) In answers to interrogatories in pure bill of discovery.

Although bills of discovery are pleadings in equity, there is a difference

88 **Md.** 249, 41 Atl. 66; New England Bank v. Lewis (1829) 28 Pick. (**Mass.**) 113; Nichols v. Daniels (1826) Walk. (**Miss.**) 224; Woodcode v. Bennett (1823) 1 Cow. (**N. Y.**) 711, 13 Am. Dec. 568; Gillis v. Martin (1833) 17 **N. C.** (2 Dev. Eq.) 470, 25 Am. Dec. 729; Gordon v. Saunders (1827) 2 M'Cord, Eq. (**S. C.**) 151; Alexander v. Wallace (1836) 10 Yerg. (**Tenn.**) 105; Cocke v. Trotter (1836) 10 Yerg. (**Tenn.**) 213; Davis v. Clayton (1844) 5 Humph. (**Tenn.**) 446; Jones v. Cunningham (1874) 7 **W. Va.** 707; Wren v. Spencer Optical Mfg. Co. (1879) 5 Bann. & Ard. 61, **Fed.** Cas. No. 18,062; Kirkpatrick v. Love (1748) 2 Ambl. 589, 27 **Eng.** Reprint, 384; Ormond v. Hutchinson (1806) 13 Ves. Jr. 47, 33 **Eng.** Reprint, 212.

In Fleming v. Murph (1860) 59 **N. C.** (6 Jones, Eq.) 59, involving the admissibility of answers made by defendant in an action for an accounting, upon examination before the master, it is said: "It appears, then, that the answers made by a defendant, to interrogatories upon his examination before the master, are evidence for him, upon the same principle, and to the same extent only, as is his answer to the bill. It follows that, if he be examined as to the items of the plaintiff's account, his reply will be evidence for him, upon the ground that, as to them, the plaintiff has made him a witness in the cause; and the same rule would apply as to any other matters, about which the plaintiff might think proper to interrogate him; but he cannot be allowed to become a witness for himself to prove charges which he may have made against the plaintiff, and as to which no interrogatories have been put to him."

And see, generally, the cases cited supra, in note 96, in many of which the decision of the court undoubtedly embraced answers to interrogatories, without a specific statement to that effect.

[105] In Smith v. Atwood (1854) 14 **Ga.** 402, involving interrogatories in a bill for relief, it is said: "It is true that, if a complainant does not lay the foundation for an interrogatory which he addresses to the defendant in the stating or charging portions of the bill, such defendant is not required to answer the interrogatory. But if a complainant do insert such interrogatory without such foundation, he does so at his peril, if the same relate to the matter in issue; and he must be bound by a pertinent answer. A different rule would encourage an unscrupulous pleader to take the chances of a favorable answer to a fishing interrogatory, and, if the answer was such as was not wanted, then to object."

In Fenno v. Sayre (1842) 3 Ala. 458, a suit to foreclose a mortgage, in which complainant included certain interrogatories in his bill, it is said: "It is well settled that the interrogating part of the bill must be founded on what precedes it, and that, if there is nothing in the prior part of the bill to warrant a particular interrogatory, the defendant is not compellable to answer it. But although the defendant is not bound to answer an interrogatory which does not grow out of the antecedent matter stated or charged in the bill, yet, if he does answer it, and the answer is replied to, the matter of the interrogatory is deemed to be put in issue, and the informality is cured."

[106] In Roberts v. Totten (1853) 13 **Ark.** 609, affirmative matter set up by defendant by way of confession and avoidance, in an answer to an interrogatory in a bill for account, is held inadmissible as evidence on defendant's behalf, although made in answer to the interrogating part of the bill. The court says: "The interrogatory part of the bill must be founded on the matters contained in the bill. Therefore, . . . if there is nothing

between the use of the answers filed thereto, and the answers filed by defendants to allegations and interrogatories contained in equitable bills, praying relief. In the case of bills seeking relief, the answers are made use of in the equitable proceeding in which filed, and the rules governing the admissibility of answers in equity apply. Answers to pure bills of discovery, however, are made use of, not in the equitable proceeding itself, but in the legal action in aid of which the bill for discovery is filed. Accordingly, they are to be considered as evidence merely, and not as pleadings.[107] And the rules of pleading, one of which has to do with irresponsive matter in answers to allegations [108] and interrogatories [109] in bills for relief, have no application to them. They are admissible as a whole,[110] and are unaffected therein by any rules except the rules of evidence. Accordingly, it is the rule that matter contained in answers to bills of discovery is admissible, in connection with the other contents thereof, although irresponsive to the call in the bill.[111] And when equity, having obtained jurisdiction of a cause for the purposes of discovery, retains jurisdiction for the purpose of granting relief, matter in

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in the prior part of the bill to warrant a particular interrogatory, the defendant is not compellable to answer it. . . . But to this general rule there is an exception that, in some instances, even though the defendant might not be compelled to answer the interrogatory, yet, if he choose to do so, the matter of the interrogatory is deemed to be put in issue. Giving to the defendant the full benefit of this rule, and it would only extend to the formation of the issue upon the fact so set up in his answer; but certainly it would not, for that reason, be the less affirmative matter, and the burden of proof would still rest on him who set it up. So much, then, of the answer as is responsive to interrogatories propounded as to facts not charged in the bill, and which cannot come in and of the complainant's equity, must be sustained by evidence independent of such answer."

[107] See Lyons v. Millar (1849) 6 Gratt. (Va.) 427, 52 Am. Dec. 129, infra, note 178.

[108] See supra, III. b, 5, (a), (1).

[109] See supra, III. b, 5, (a), (2).

[110] See infra, VI. b.

[111] Strawn v. Norris (1861) 23 Ark. 342; Ormond v. Hutchinson (1806) 13 Ves. Jr. 47, 33 Eng. Reprint, 212.

In rendering a decision with respect to answers to interrogatories, under a statute making such answers evidence, the same as answers to bills of discovery in chancery, it is said in Saltmarsh v. Bower (1853) 22 Ala. 221, that the plaintiff in a bill of discovery "must set forth in particular the matters in relation to which discovery is sought. The bill thus opens up the whole case. . . . There is no difference in the manner of answering such bill and a bill for relief; for, if the defendant submits to answer, he must answer fully, and his answer may embrace everything which goes to the merits of the controversy, and which would enable the court, in which the answer is to be used as evidence, to determine advisedly upon the matters in issue. The defendant in such answer may set up any matter showing that the plaintiff has no right of action. . . . He has no right to introduce impertinent matter, but may answer to any and every matter going to the true merits of the issue, or issues, involved in the litigation; and whether his answer contain affirmative irresponsive allegations in avoidance of the demand, or is purely responsive, is no more the subject-matter of exception than in an answer to a bill for discovery and relief."

So in Price v. Tyson (1831) 3 Bland. Ch. (Md.) 392, 22 Am. Dec. 279, involving a bill for discovery, it is said: "If a plaintiff has a right to relief in this court, he has a right to an answer from the defendant to every allegation of his bill, the admission of the truth of which, or the proof of the truth of which, is necessary to entitle him to relief. . . . And after having given, in all respects, such an answer as the bill requires, the defendant may and, indeed, always should go on, by way of further answer, to state all matters in bar, or by way of avoidance, which he may make available as a defense against the plaintiff's claim."

In rendering, in Pritchett v. Munroe (1853) 22 Ala. 501, a decision with respect to answers to interroga-

avoidance is held admissible, as it would have been had the cause been turned over to the law court to grant the relief.[112] A few of the states, while not going to the extent of adopting the rule admitting irresponsive matter generally, seem to be inclined to permit the respondent, in a suit for discovery, a broader latitude in his answers than is commonly the custom with respect to answers to bills for relief. In these courts, matter contained in the answer to a bill of discovery, responsive to the call in the bill for discovery, or connected necessarily with the responsive matter, or explanatory of it, is held admissible on behalf of the respondent.[113] In one of these states, however, this same rule is applied to answers to interrogatories contained in bills seeking relief,[114] and it is possible that in the others, likewise, there is no intended distinction between answers to bills for discovery and answers to interrogatories in bills for relief. In one jurisdiction, it is held that, although the

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tories, under a statute making such answers evidence the same as answers to bills of discovery in chancery, it is held that answers to bills of discovery in chancery are admissible, although they go beyond the pure requirements of the question, where they state facts necessarily a part of the answer sought, without which such answer would be inaccurate and incomplete.

In Stilwell v. Badgett (1860) 22 Ark. 164, it is said that the rule denying admission to answers on the ground of irresponsiveness "does not apply to answers to bills of discovery, but to answers to bills for relief, wherein the grounds of relief set forth in the bill are admitted, but are avoided by independent and affirmative matters, showing that the relief prayed for ought not to be granted."

In Glascock v. Hays (1836) 4 Dana (Ky.) 58, involving answers to a bill of discovery filed in aid of an action at law, it is said obiter: "One party has no right to extort from another a partial discovery, if a full or more extended disclosure respecting the matter sought to be discovered may be useful to the party appealed to as a witness against himself, and if he desire to tell the whole truth."

And see Vance v. Vance (1827) 5 T. B. Mon. (Ky.) 521.

[112] It is held in Lyons v. Miller (1849) 6 Gratt. (Va.) 427, 5 Am. Dec. 129, that, the effect of defendant's discovery being the same when the action is retained in equity for the purpose of granting relief as when the parties are turned over to a court of law to obtain their relief, matter in avoidance set out in the discovery is admissible on behalf of defendant.

[113] In Methodist Episcopal Church v. Wood (1831) 5 Ohio, 283, involving answers to a bill of discovery, it is said: "The answer of the defendant is evidence for him, so far as it is responsive to the call in the bill for discovery, or connected necessarily with the responsive matter, or explanatory of it. So far as the answer in such a case sets up matter not responsive to the call of the bill, or is not necessarily connected with or explanatory of it, it cannot be used in evidence by the party making it."

"An answer to a bill in chancery, for discovery, is evidence for the defendant, so far as it is responsive to the call in the bill for discovery, or connected necessarily with the responsive matter, or explanatory of it." Clayton v. Brown (1860) 30 Ga. 490.

So, it is said in Chambers v. Warren (1851) 13 Ill. 319, involving a pure bill of discovery: "In bills for relief, the answer is evidence for the defendant, only so far as it is responsive to the bill; and there is some confusion in the authorities as to how far an affirmative fact in the answer shall be received as evidence to discharge a defendant from a liability which he has admitted, in response to the bill, but, whatever the rule may be in reference to answers to bills praying relief as well as discovery, we apprehend that the rule, in reference to an answer to a bill of discovery merely, is that all which it contains responsive to the call for discovery, or connected with or explanatory of it, should be received as evidence, the court or jury being at liberty to give credit to so much of the answer only as, from all the circumstances of the case, they believe to be true."

[114] See Shiels v. Stark (1854) 14 Ga. 429, where it is held that an answer to an interrogatory in a bill for relief is admissible on behalf of the defendant, as responsive, if it is "connected with or explanatory of . . . responsive matter."

rule is that the whole of an answer to a bill of discovery is admissible, when a portion of it is offered, that rule does not apply to irresponsive matter, which is inadmissible on behalf of the respondent.[115]

(4) In answers to interrogatories authorized by statute.

Under statutes providing for interrogatories in actions at law, and the use of the answers thereto as evidence, in the same manner and with like effect as if they had been procured upon a bill in chancery for discovery, the rule governing answers to bills for discovery is applied to answers obtained to interrogatories filed thereunder;[116] and such answers constitute evidence on behalf of the respondent, irrespective of any question of responsiveness.[117] In jurisdictions, however, in which irresponsive matter in answers to bills of discovery is held inadmissible,[118] the

[115] Massingill v. Carraway (1850) 13 Smedes & M. (Miss.) 324; Greenleaf v. Highland (1830) Walk. (Miss.) 375.

[116] Supra, III. b, 5, (a), (3).

[117] Under a statute providing for interrogatories in actions at law, and the use of the answers thereto as evidence, "in the same manner, and to the same purpose and extent and upon the same condition in all respects, as if it had been procured upon a bill in chancery for discovery," the rules with respect to the admission of answers to bills for discovery in chancery are controlling, and an answer is admissible, whether it is purely responsive to the interrogatory propounded, or contains affirmative allegations irresponsive thereto, provided they are in avoidance of the demand. Saltmarsh v. Bower (1853) 22 Ala. 221.

The preceding case is reaffirmed and followed in Sullivan Timber Co. v. Louisville & N. R. Co. (1909) 163 Ala. 125, 50 So. 941, which expressly overrules several cases arising in the meanwhile, holding that irresponsive matter in answers to interrogatories, under the statute, may be stricken out on motion of the proponent.

In Southern R. Co. v. Hayes (1913) 183 Ala. 465, 62 So. 874, involving the answers to interrogatories filed under authority of statute in actions at law, it is said: "If the party demanding the answer introduce it in evidence, he must introduce it as a whole; he cannot introduce a party only, or, having introduced the whole, have parts of the answer stricken because not responsive."

On the ground that such answers to interrogatories filed in actions at law are made, by statute, admissible in the same manner as answers to bills of discovery, it is held, in Stillwell v. Badgett (1860) 22 Ark. 164, that an answer to an interrogatory, admitting liability, but setting up payment by way of avoidance, is not inadmissible, under the rule barring irresponsive answers. Such an answer, it is held, is responsive in reply to an interrogatory in a bill of discovery.

And where, in Strawn v. Norris (1861) 23 Ark. 542, the proponent of interrogatories objected to the admission of answers made thereto, as not being responsive, the court says: "Where the bill is for discovery merely, the rule is that, if the plaintiff makes use of the defendant's answer, the whole of it must be read and weighed together as evidence, . . . and the statute expressly provides that the answer to a petition for discovery shall be evidence in the same manner and with like effect as an answer to a bill in equity for discovery."

It is held in Lake v. Gilchrist (1845) 7 Ala. 955, that although a witness, in answering an interrogatory filed in pursuance of statute, may state anything which relates to the immediate subject with respect to which he is called on to answer, and his response must be taken as entire or not at all, yet a portion of his answer which refers to a distinct matter from that inquired of is not evidence on his behalf. In this case, "the question propounded called upon the defendant to state whether the debt had been paid in any other way than by the transfer of Campbell's note, in answer to which the defendant goes on to speak of the contract by which Campbell's note was received." This case is expressly overruled, however, in Saltmarsh v. Bower, supra, note 111. But see Pritchett v. Munroe, (1853) 22 Ala. 501, where the court seems to relapse, momentarily, into the old rule.

[118] See supra, notes 113–115.

same rule would be expected to apply to answers to interrogatories filed under such statute, authorizing interrogatories in actions at law, and providing that the answers shall be evidence, "in all respects as if the same had been procured upon a bill in chancery for discovery, but no further or otherwise." [119] Matter in avoidance in answers to interrogatories, under a statute requiring the answers to be taken as a whole, is held, in the state in which that statute stands, to be admissible on behalf of the pleader.[120] In those jurisdictions holding answers of garnishees, admissible on behalf of the garnishee,[121] it is the rule that the portion of the answer containing irresponsive matter, as well as that containing responsive matter, is to be taken as evidence.[122] And under a statute providing that "the party interrogated may introduce into his answer any matter relevant to the issue to which the interrogatory relates," all relevant matter is held admissible, even though not responsive.[122a] Under a statute [123] or

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[119] Under a statute providing that the answers to interrogatories shall be evidence " 'to the same extent and in all respects as if the same had been procured upon a bill in chancery for discovery,' . . . but no further or otherwise," a portion of an answer not elicited by the question propounded is not admissible. Zeigler v. Scott (1851) 10 Ga. 389, 54 Am. Dec. 395. And, following the rule governing answers to bills of discovery in chancery, in pursuance of the terms of the statute authorizing interrogatories in actions at law, it is held in Clayton v. Brown (1860) 30 Ga. 490, that answers to such interrogatories, to be admissible, must, at least, be connected with or explanatory of matter responsive to the interrogatories.

[120] Taylor v. Morgan (1811) 1 Mart. (La.) 204; Read v. Bailey (1811) 2 Mart. (La.) 60; Berthole v. Mace (1818) 5 Mart. (La.) 576; Bradford v. Brown (1822) 11 Mart. (La.) 217; Hunter v. Smith (1824) 3 Mart. N. S. (La.) 109; Conrey v. Harrison (1849) 4 La. Ann. 349; Gusman v. Hearsay (1874) 26 La. Ann. 251.

[121] See supra, note 48, and the accompanying text.

[122] Answers to interrogatories, filed by virtue of a statute authorizing such in garnishment proceedings, are held in Devries v. Buchanan (1856) 10 Md. 210, to be subject to the rule governing answers to bills of discovery used in actions at law and to be admissible as a whole, irrespective of irresponsive matter.

And in Holton v. South Pacific R. Co. (1872) 50 Mo. 151, it is said that "the answer of a garnishee must stand, whether it be a denial or an affirmation of new matter, until evidence is produced conducing to overthrow it." But in James Bonar & Co. v. South Penn Oil Co. (1911) 47 Pa. Super. Ct. 315, where plaintiff introduced into evidence admissions made by garnishee, in answers to interrogatories, with respect to a sum of money due from it to the principal debtor under a contract, declarations therein with respect to damages claimed by it against the principal debtor, for breach of warranty, are held not, for that reason, admissible on behalf of the defendant.

[122a] Under a statute providing that "the party interrogated may introduce into his answer any matter relevant to the issue to which the interrogatory relates," it is held in Baxter v. Massasoit Ins. Co. (1866) 13 Allen (Mass.) 320, that the respondent is not limited, in his answer to an interrogatory, to the mere giving of the information demanded, but that he may set out all the facts bearing upon the issue to which the interrogatory relates, even though it be irresponsive. This was an action on an insurance policy, which was defended on the ground that no such contract was made. The interrogatory in question related to the filling out of a policy in behalf of plaintiff by defendant's agents, and in the answer defendant admitted the filling out of the policy, but denied that it was filled out in pursuance of any contract with said plaintiff, or in accordance with any agreement with any person on behalf of plaintiff.

[123] In Marion v. Faxon (1850) 20 Conn. 486, an action of assumpsit to recover for goods delivered by plaintiff to defendant for safe-keeping, an answer to a motion for disclosure, inquiring only into the question of the plaintiff's demand, is held to be irresponsive and inadmissible on behalf of respondent, so far as it states that

rule of court,[123a] however, providing for discovery under particular circumstances, and making no statement as to the use of the answers in any manner corresponding with that of answers to bills in chancery for discovery, the disclosing party is permitted to make use of his disclosure on his own behalf, only so far as it is responsive.

(b) Answers denying fraud.

It has several times been urged upon the courts that answers of persons charged with fraud are not admissible on behalf of the pleaders as evidence. The ground of the distinction thus sought to be made is not apparent, unless it is the lack of honesty and veracity imputed by the charges of the bill. But, if that is the ground, it should be remembered that the imputation of fraud is vastly different from the proof of fraud. At any rate, the courts have found no reason to make the exception.[124]

(c) Answers not within pleader's knowledge.

When it appears from the pleader's direct admission in his pleading, or, indirectly, from the facts set out therein, or from his inability to make the allegations of his answer, except upon information and belief, that facts set out in his pleading are not within his personal knowledge, the pleading is, according to some authorities, held not to constitute evidence, at all, of the facts in question, and, according to others, not to constitute evidence worthy of the usual degree of credit. Between these sets of cases there is no practical difference, and the difference in statement is largely due to carelessness, rather than any inclination to make a distinction. These cases are all treated together, under the question of weight.[124a] In the case of verified petitions and answers offered on behalf of the pleaders, on motions to grant injunctions pendente lite or to dissolve such injunctions, it is everywhere held

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the receipt given for the goods, introduced into evidence by plaintiff in support of his allegation of a promise to return the same, was merely nominal, and given for no valuable consideration. "The principle is well settled" says the court, "that the disclosing party can use the discovery so far only as it is responsive to the petition."

[123a] Under a rule of court authorizing the parties to a summary process at law to examine each other on interrogatories, an irresponsive answer admitting a debt and setting up payment must, as in the case of an irresponsive answer to a bill in equity, be proved. Clark v. Meek (1831) 2 Bail. L. (S. C.) 391; Walker v. Berry (1854) 8 Rich. L. (S. C.) 33.

[124] The operation of defendant's answer is the same, although the equity of the plaintiff's bill is grounded on fraud. Nulton's Appeal (1883) 103 Pa. 286; Audenreid v. Walker (1876) 11 Phila. (Pa.) 183, affirmed without opinion in (1850) 89 Pa. 120, 33 Am. Rep. 731.

So it is held in Wharton v. Clements (1868) 3 Del. Ch. 209, that an answer, responsive to a bill in which fraud is charged, is admissible as evidence, as in other cases; and, in the absence of countervailing proof, may establish the defense without other evidence.

And in Dilly v. Barnard (1836) 8 Gill & J. (Md.) 170, it is said that the answer, "being responsive to the bill, and not rebutted or disproved by testimony, is evidence . . . for the defendant, and that, too, even where the equity of the complainant is grounded, as in this case, upon the allegation of fraud."

In Wright v. Wheeler (1862) 14 Iowa, 8, an action to set aside conveyances on the ground that they were made to hinder and delay the complainants as creditors of defendants, it is held that, the answer denying the fraud not having been overcome by the requisite proof, the decree should be in favor of the defendants.

After holding, in Southern Development Co. v. Silva (1888) 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435, that the answer must be disproved by a greater weight of testimony than that of one witness, it is said that "this effect of the defendant's answer is not weakened by the fact that the equity of complainant's bill is the allegation of fraud."

[124a] Infra, X. c, 2, (b).

that such pleadings do not constitute affidavits, where they are verified only upon information and belief.[124b] This is because the statements necessary to constitute such affidavits must be statements made upon the personal knowledge of the affiants.

(d) Answers containing conclusions instead of facts.

According to the generally accepted rule, answers containing conclusions instead of facts do not constitute evidence on behalf of the pleader. In some instances, it is said that such answers do not constitute evidence worthy of the usual degree of credit. Between the two kinds of cases there is no practical difference, the difference in statement being due largely to inadvertence and lack of care. Both kinds of cases are treated together, under the question of weight.[124c] But where petitions for injunction contain mere conclusions of law instead of facts, it is held, without exception, that they are incompetent as affidavits on the procurement of injunction pendente lite.[124d]

(e) Effect of general rules of evidence.

To be admissible in evidence, it is true, as a general rule, that the allegations of an answer making discovery must "relate to such facts as other testimony could be received to establish." [125] The general rules of evidence apply to answers which come within the category of evidence by fulfilling the requirements relative to answers making discovery, in the same manner in which they apply to other evidence. And, where other evidence would be rendered inadmissible by these general rules, answers making discovery, al-

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[124b] In Rome, W. & O. T. R. Co. v. Rochester (1887) 46 Hun (N. Y.) 149, it is held that an answer verified on information and belief, to a bill for injunction does not prove anything upon a motion for an injunction pendente lite.

It is held in Wetzstein v. Boston & M. Consol. Copper & S. Min. Co. (1901) 26 Mont. 193, 66 Pac. 903, that an answer, verified only upon information and belief, is not admissible as an affidavit on behalf of defendant, on the hearing of an application for an injunction pendente lite. "A witness sworn to testify orally would not be permitted to depose to mere hearsay statements," the court says, "neither may an affidavit embodying only hearsay statements be considered of any evidentiary value."

In Roome v. Webb (1848) 3 How. Pr. 327, 1 N. Y. Code Rep. 114, it is held that neither a bill nor an answer verified upon information and belief is sufficient as an affidavit, upon a motion to dissolve an injunction. This case came under the Code.

A petition, verified upon information and belief, is held, in Atchison v. Bartholow (1866) 4 Kan. 124, not to be sufficient to come within the rule that a petition, properly verified, may be read as an affidavit, in an application for injunction. This case came under the Code.

Under a statute providing for the issuance of injunction upon the affidavit of the complainant, a complaint verified upon information and belief is not, it is held in Hecker v. New York (1865) 28 How. Pr. (N. Y.) 211, 18 Abb. Pr. 369, an affidavit within the meaning of the statute, it being "only when the verification of the complaint is positive that it will suffice as the affidavit."

[124c] Infra, X. c, 2, (d).

[124d] In Center Twp. v. Hunt, (1876) 16 Kan. 430, involving the use of the petition in an injunction suit as an affidavit, it is said: "If the affidavit is to be used as evidence, as in this case, and it should state the facts in such general and comprehensive terms as to be styled conclusions of fact or conclusions of law, the affidavit would not be sufficient."

It is held in Olmstead v. Koester (1875) 14 Kan. 463, that allegations in a petition for injunction, which state conclusions of law, whether sufficient or not as a matter of pleading, are incompetent as testimony upon using the petition as an affidavit for the procurement of injunction.

And the preceding case is cited and followed in Howard v. Eddy (1896) 56 Kan. 498, 43 Pac. 1133, in which it is said that, "measured by this rule, many of the averments of the petition were insufficient to sustain the application."

[125] FARRELL v. FOREST INVEST. CO. (reported herewith) ante, 25.

though satisfying all of the principles particularly relating to answers of that kind, are likewise inadmissible. Both the best evidence [126] and the parol evidence [127] rules have been held to apply to answers making discovery. And where, by the terms of a statute denying the defendant, in an action brought by a person in a representative capacity, the right to testify, a defendant may not become a witness in his own behalf, his answer will not be evidence for him, it has been held.[128] In another jurisdiction, however, the opposite view is taken of this matter, and the pleading admitted into evidence.[129]

It has been held that the Statute of Frauds is not violated by the admission of an answer explaining the terms of a deed.[130]

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[126] In Neale v. Hagthrop (1826) 3 Bland. Ch. (Md.) 557, it is said: "An answer is only so far responsive as it answers to a material statement or charge in the bill, as to which a disclosure is sought, and which is the subject of parol proof; but no further. Where a deed or instrument of writing is necessary to establish any right, and the bill requires the evidence of such right, the answer, unaccompanied and unsupported by such deed or writing, will be no evidence, although it should directly respond to the bill; because the answer is only in the nature of parol evidence; and, in such case, evidence of a higher grade is required by law."

And it is held in Lafarge v. Ripley (1825) 4 Mart. N. S. (La.) 303, that a party interrogated with respect to his possession of a paper cannot, by his answer, make a copy of the instrument evidence, without accounting for the loss of the original.

[127] Where defendant admits the genuineness of a writing purporting to set forth the terms of a contract, it is held, in Jones v. Belt (1844) 2 Gill (Md.) 106, that his denial of the terms, as set out in the writing, need not be overcome by two witnesses, or by one with pregnant circumstances. The court says that the cases to which the rule requiring such overcoming proof "was intended to apply must be those in which the facts denied depended on oral only, or oral and circumstantial, evidence; not where they were conclusively proved by the production of the written contract of the parties."

And the preceding case is cited and followed in Trump v. Baltzell (1852) 3 Md. 295, where the defendant admits the authenticity of articles of partnership, but claims a certain credit to be legitimate, in opposition to the terms thereof. The court says: "The answer . . . , it is true, claims the credit as legitimate and just, but this cannot avail against the written evidence of which this claim is predicated."

In Kent v. Carcaud (1861) 17 Md. 291, an agreement to sell a definitely stated number of acres of land is held not to be varied or qualified by an allegation in defendant's answer that the contract included the words "more or less," the answer having no effect as evidence on that point.

It is held, in Clark v. Flint (1839) 22 Pick. (Mass.) 231, 33 Am. Dec. 734, that, aside from the matter of responsiveness, an answer admitting the acceptance of a bill in writing cannot be admitted as evidence of oral terms of the contract not set out in the bill, such being excluded by the rule with respect to varying written contracts by oral evidence.

On motion to dissolve an injunction, the answer is evidence only of facts as to which other testimony could be received, and it will not be admitted to contradict the terms of a written instrument. Carter v. Bennett (1855) 6 Fla. 214.

[128] In Hunter v. Harris (1890) 131 Ill. 482, 23 N. E. 626, a sworn answer in an action of assumpsit is held not to be evidence on behalf of the defendant, on the ground that the plaintiff, who is an administrator, is suing in a representative capacity, and that the defendant accordingly may not testify.

[129] Where, in Saffold v. Horne (1894) 71 Miss. 762, 15 So. 639, it is urged that the defendant's pleading is not evidence in his behalf because, by the terms of statute, he is not a competent witness against the estate of a deceased person, it is held that the admissibility of the pleading is not affected by the incompetency of the pleader as a witness.

[130] Wainwright v. Read (1797) 1 Desauss. Eq. (S. C.) 573.

IV. Parties for whom admissible.

a. In proceedings in which pleadings are filed.

1. Admissibility on behalf of pleader against opponent.

The most common situation involving the admissibility of pleadings containing self-serving declarations is where the pleader himself is seeking to make use of his declarations in his own behalf, against his opponent, in the action or suit in which the pleading is filed. The cases of this kind have already been taken up under other sections, and discussed.[131] If a pleading containing self-serving declarations is admissible at all, it would seem that such ought to be the case where the parties and the issue are the ones in respect of which the pleading is filed.

2. Admissibility on behalf of pleader against his codefendant.

It is the general rule that answers containing self-serving declarations are not admissible on behalf of the pleader, as against his codefendant in the proceeding.[132] This is the rule which one would expect to find, in view of the fact, that the only answers [133] which are admissible at all, on behalf of the pleader, are those making discovery,[134] and that the chief element of admissibility in such answers making discovery is the call therefor by the persons against whom they are admitted.[135] In the case of a codefendant this element is lacking. The codefendant has not called upon the pleader for an answer, and he has not made him a witness in respect of himself.

3. Admissibility on behalf of pleader's codefendant against opponent.

With respect to the admissibility of a pleading containing self-serving declarations, on behalf of the pleader's codefendant, against the complainant, there is a difference of opinion, the courts being about equally divided. The theory of a majority of the courts holding in favor of admissibility [136] seems to be that, the answer being admissible

[131] See supra, II., III. a, and III. b, 1, most of the cases in which involve the admissibility of pleadings on behalf of the pleader, against his opponent, in the proceeding in which filed.

[132] One defendant cannot offer his answer against his codefendant for the purpose of charging her with costs, by proving his willingness to pay the debt sued for. Cherret v. Jones (1822) 6 Madd. Ch. 267, 56 Eng. Reprint, 1093.

Webb v. Pell (1832) 3 Paige (N. Y.) 368, was an action to foreclose a mortgage, brought against the purchasers and holders of other mortgages, from the complainant's mortgagors. On the question of the admissibility of the answers of one of such defendants, in evidence on his behalf, against a codefendant, the court says: "As the admission of one defendant in equity cannot prejudice the rights of another, having a separate and distinct interest, it seems to be equally reasonable that the answer of one defendant asserting a right in himself should not be used in his favor to the prejudice of a codefendant. It is true, the answer of a defendant, responsive to the bill, is evidence against the complainant; but it does not follow that it is to have the same effect as against a codefendant who has not asked for that answer."

In Calwell v. Boyer (1836) 8 Gill & J. (Md.) 136, an action for the sale of land belonging to a decedent's estate, in holding certain defendants not to have been prejudiced by the lack of opportunity to file answers, it is said that, if they had filed such answers, they could not have made use of them as against their codefendants.

Campbell v. Campbell (1848) 1 Ind. 220, was a suit to foreclose a mortgage, brought against the mortgagor's heirs, and defended on the ground that the instrument was fraudulent. A guardian ad litem was appointed for the infant heirs. Creditors of mortgagor intervened, also claiming fraud, and filed cross bills. In answer thereto, complainant set out the consideration of the mortgage note. Such answer was held inadmissible against the infant defendants, on behalf of the complainant.

[133] See supra, II., and III. a.

[134] See supra, III. b, 1.

[135] See the text accompanying notes 19 and 20 supra.

[136] It is held, in Mills v. Gore (1838) 20 Pick. (Mass.) 28, that the reason for the rule against using the answer of one codefendant on behalf of plain-

against the complainant on behalf of the pleader, it ought to be admissible against him for all purposes and in behalf of all parties. The courts holding

tiff, against another codefendant, does not apply to the case of the admissibility of the answer of one codefendant on behalf of another, as against plaintiff. "An answer of one defendant is not evidence against a codefendant," it is said, "for the plaintiff may so frame his bill and interrogatories as to elicit evidence from one defendant to charge another, and to exclude such matters as might discharge him. To admit the answer of the one to be evidence against the other, under such circumstances, and when cross interrogatories could not be admitted, would give to the plaintiff an undue advantage, against the manifest principles of impartial justice. But where the answer is unfavorable to the plaintiff, and consequently operates favorably for a codefendant, this reason is not applicable. Where the plaintiffs call upon a defendant for a discovery, requiring him to answer, under oath, fully to all the matters charged in the bill, they cannot be allowed to say that his answer is not testimony."

And in Powles v. Dilley (1850) 9 Gill (Md.) 222, an action by creditors against a debtor and his assignee to set aside a conveyance as fraudulent, the answer of the debtor to an interrogatory, denying insolvency at the time of the assignment, is held admissible on behalf of the assignee. The court says: "The proposition is best tested by the sound and just rule of evidence, that neither party shall be charged by evidence without an opportunity to examine the witness; but that a party who cites the witness, and examines him, shall not be at liberty to reject his testimony afterwards. Here, the evidence offered is the result of the complainant's own examination. The complainant may so shape his bill as to make such use of the defendant as he pleases, in eliciting his evidence. Interrogatories are not a necessary part of his bill. He may call upon the defendant to answer generally the matters charged in his bill. But if he proceeds by interrogatories, so far as they are responsive, he makes the answers evidence. . . . Where his [defendant's] answer is responsive, and he denies the complainant's averments, it is pleading coupled with evidence. And when a complainant, as here, seeks a discovery, and requires full answers to interrogatories from all the defendants, he cannot be allowed to say that each answer is not evidence against him, whatever may be the incidental operation of the evidence upon the other defendants."

Where, in Ligon v. Rogers (1852) 12 Ga. 281, complainant charged fraud and collusion in the purchase of property, the answer of one defendant, who was the vendor in the sale, is held to be evidence on behalf of his codefendant, the vendee.

In Glenn v. Baker (1847) 1 Md. Ch. 73, an action by a trustee in insolvency against an insolvent and a trustee to whom the insolvent had transferred a portion of his property, prior to insolvency, to have such transfer declared void as in anticipation of insolvency, the answer of the insolvent is held admissible on behalf of his codefendant. The question here, the court says, "is simply which of two trustees shall administer the fund, the rights of the insolvent being identically the same, let the result be what it may. Under such circumstances, I think, there is such an equilibrium of interest that the insolvent would be a competent witness for either party, and, so thinking, am of opinion that the complainant, having thought fit to make him a defendant and examine him in that form, must be content to take his answer as evidence against him, so far as it is responsive to the allegations of the bill."

In Pleasant v. Raughley (1867) 3 Del. Ch. 124, a suit for specific performance of a contract to sell land, brought against the vendor and a subsequent purchaser from the vendor, declarations in the vendor's answer, with respect to the amount of consideration paid by complainant on the contract, are held to be admissible on behalf of his codefendant.

In Salmon v. Smith (1880) 58 Miss. 399, involving the admissibility of the answer of a husband, in a suit against him and his wife to subject to execution against the husband certain property conveyed by him to his brother, and by the brother to the wife, the answer of the husband denying fraud in the transfer is held admissible on behalf of the wife.

It is held, in Miles v. Miles (1855) 32 N. H. 147, 64 Am. Dec. 362, that the answer of a defendant, responsive to

pleadings inadmissible on behalf of the pleader's codefendant,[137] on the other hand, adhere more strictly to the underlying principles, upon which the admissibility of pleadings on behalf of the pleader is based. The decisions in two jurisdictions are indicative of a disposition to make an exception to the general rule existing against admissibility, in the case of defendants sued

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the bill, is evidence on behalf of his codefendant.

The rule admitting the answer of one defendant on behalf of his codefendant, against the plaintiff, is held in Mills v. Gore (1838) 20 Pick. (Mass.) 28, to be especially true in that case, inasmuch as the party claiming the benefit of his codefendant's pleading is merely the depositary of the papers involved in the suit, and has no interest therein, but is bound to deliver them to the party having the title.

Where, in Lenox v. Notrebe (1834) Hempst. 251, Fed. Cas. No. 8,246c, an action to cancel a mortgage, the answer of the original mortgagee was deemed incomplete by his codefendants, who were claiming under him, and they asked in their cross bill for a full disclosure of the facts, it is held that his answer thereto may be considered an amended answer to the complainant's original bill, and may be used as evidence against the complainant on behalf of the pleader's codefendants.

In Bennet v. Walker (1747) 1 Dick. 130, 21 Eng. Reprint, 217, the answer of one defendant was admitted on behalf of his codefendant, in support of a plea filed by him.

[137] In Blodgett v. Hobart (1846) 18 Vt. 414, the answer of the purchaser of lands is held inadmissible on behalf of his codefendants, who were his vendors, and who had obtained possession of the land under a mortgage deed, as against the right of the cross complainant, who was the mortgagor, to redeem. The court says: "The general rule is that the answer of one defendant is not evidence for or against his codefendants. There may be exceptions, as in cases where the matter in controversy arises from a *joint contract*. But here, Hobart's right to redeem is a matter solely between him and his mortgagees, though Burrage [the purchaser] has become interested as to the existence of such right."

So, in Larkin's Appeal (1861) 38 Pa. 457, an action by the owner of stock against her agent, who had sold it, and the purchaser, the answer of the agent is held not admissible against the plaintiff, on behalf of the codefendant, to establish an alleged parol transfer of the stock by the plaintiff to the agent.

In Carr v. Weld (1868) 19 N. J. Eq. 319, a suit against various assignees of a judgment, it is held that the answer of one defendant is not admissible as evidence on behalf of his codefendants.

On the ground that the answers of one defendant cannot be evidence for his codefendant, it is held in Hardin v. Baird (1821) Litt. Sel. Cas. (Ky.) 340, that, in an action by one claiming to be the owner of land, against the purchaser thereof from a third person, and the third person who made the sale, the answers filed by the third person to the other defendant's cross bill are not admissible against the complainant, to show that the transaction by which such respondent obtained the conveyance to the land was arranged between him and the complainant, for the purpose of defrauding complainant's creditors.

In Robinson v. Cathcart (1825) 2 Cranch, C. C. 590, Fed. Cas. No. 11,946, the answer of one defendant is held not to be evidence for another, who has failed to answer, on a motion to dissolve a preliminary injunction.

It is held in Boring v. Williams (1850) 17 Ala. 510, that the admissions and declarations of a tax collector, in his answers to a bill of discovery filed against him and the county treasurer by his securities, are not admissible on their behalf, in an action against him and them, as securities, by the county treasurer.

Where, in Jackson v. Spivey, (1869) 63 N. C. 261, a suit in equity, after an appeal of the case, issues were sent down to be tried by a jury, it is held that the answer of one of the defendants is inadmissible on the trial, on behalf of the other defendants. The court says: "One reason for excluding the answer is that stated by the judge, that the plaintiff has had no opportunity for cross-examination. Another is that the answer is not anywhere evidence of affirmative matter, and, the affirmant in the issues having on him the onus probandi, there can be

jointly.[138] This is, to a certain extent, analogous to the rules governing the admission of pleadings containing admissions against interest, on behalf of the pleader's opponent, against the pleader's codefendant,[139] and may ultimately prove to indicate the proper rule to be applied to these cases. Where an answer is, by reference and adoption, made the pleading of the pleader's codefendants, it is properly evidence in their behalf; [140] but where the pleading referred to is not yet filed at the time when the answer assuming to adopt it is sworn to, and there is nothing to identify an answer subsequently filed with the answer so referred to, the lack of identification is fatal to any use of the answer so filed, as evidence.[141] With reference to the admissibility of answers filed by a husband, made a defendant with his wife on account of coverture, on behalf of the wife, see a subsequent section of this note.[142]

4. Admissibility in miscellaneous cases.

The answer of a garnishee has been held inadmissible on behalf of the garnishee, as against interveners who come into the action, asserting a claim to the assets in the garnishee's hands.[143] And, in a similar case, the answer of a defendant is held to be inadmissible on behalf of an intervener, on an issue between it and the plaintiff.[144] In another case, however, a garnishee's answer is admitted on behalf of the assignee of the assets in question for the purpose of proving the assign-

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no necessity for using the answer simply as a denial, and the issue is tried like any other issue of fact joined at law."

Ellis v. Amason (1832) 17 N. C. (2 Dev. Eq.) 276, was an action by a surety against his principal, against the defendant in an action brought by plaintiff upon a claim assigned to him by the principal as security, and against a third person, who set up a right to the claim sued upon under an assignment from plaintiff's principal. Certain unresponsive statements in the answers of defendants being unsupported by evidence, it is said that "their answers are not evidence for any more than against each other."

And see Dunn v. Graham (1856) 17 Ark. 60, where the question is discussed, but no decision reached.

[138] Where the conveyance upon which two persons are charged as garnishees is made to them jointly, and the statement of the case against them, the summons, the entries of court, and the entire record of the court show that they were sued jointly, it is held, in Pollock v. Jones (1893) 96 Ala. 492, 11 So. 529, that the answer of one of such garnishees is admissible as evidence on behalf of the other.

And see Blodgett v. Hobart (1846) 18 Vt. 414, supra, note 137.

[139] See section III. a, 2, of the note to Craig v. United R. Co. — A.L.R. —, on the admissibility as evidence of pleadings, as containing admissions against interest.

[140] Where, in Coldiron v. Asheville Shoe Co. (1896) 93 Va. 364, 25 S. E. 238, the answer of one defendant, by reference and adoption, is made the answer of other defendants, it is held to be evidence for them.

[141] The statement by one defendant, in his answer, that he has seen the answer of a codefendant and that it is true, cannot avail to make such answer evidence on behalf of himself, where the answer so referred to is not filed when the answer admitting its truth was sworn to, and there is nothing to identify the answer subsequently filed by the codefendant with the answer referred to. Carr v. Weld (1868) 19 N. J. Eq. 319.

[142] Infra, IX.

[143] Where, in Bassett v. Garthwaite (1858) 22 Tex. 230, 73 Am. Dec. 257, a judgment creditor was proceeding by a writ of garnishment against the maker of a promissory note alleged to belong to the judgment debtor, and third persons, claiming to be owners of the note, intervened and prayed judgment against the defendant, the defendant's answer with respect to the ownership, of the note is held not to be evidence in his own behalf, as against the interveners. This is on the ground that if the interveners had not intervened, but had waited and brought an action on the note against the garnishee, the latter could not have offered in evidence on his own behalf his own declarations.

[144] In J. E. Latham Co. v. Rogers, ante, 11, an action to recover damages for fraudulent representations of the grades of a lot of cotton covered by invoices attached to drafts, the an-

ment.[145] In another jurisdiction, the converse is the rule.[146] The answer of a garnishee is admissible, it has been held, on behalf of the principal defendant against the plaintiff.[147]

b. In other proceedings.

1. Admissibility on behalf of pleader against his opponent in preceeding in which filed.

Although there is little authority on the subject, there is enough to show that the courts do not favor the use of pleadings containing self-serving declarations, by the pleader, in a proceeding other than the one in which the pleadings are filed, even though the pleader's adversary be the same in both proceedings.[148] This is entirely harmonious with the principles underlying the general subject of the use of self-serving declarations in pleadings, as evidence. In the first place, it has been seen[149] that, as a general rule, pleadings at law and bills in equity are inadmissible on behalf of the pleader; and it is not to be expected, therefore, that there would be any exception made in the case of such pleadings, made use of in proceedings subsequent to those in which the pleadings are filed.[150] With respect to pleadings making discovery and, therefore, admissible, as a general rule, on behalf of the pleader,[151] there are not the same grounds for holding them admissible on behalf of the pleader, in a subsequent proceeding, as there are in the proceeding in which filed, although the parties, and even the issue, be the same. The principal ground of the admissibility of such pleadings is the call for discovery by the pleader's opponent, and the consequent making of the pleader into a witness.[152] This making of the pleader into a witness, however, is for the purposes of the case in which discovery is

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swer of the defendant, that the bank which had purchased the drafts from the defendant was a bona fide purchaser, is held inadmissible on behalf of the bank, on an issue between it, as intervener, and the plaintiff.

[145] In Morrell v. Rogers (1821) 1 Me. 328, an action for foreign attachment, the disclosure of an assignment of his principal's effects to a third person, made by the trustee of the debtor in his answers, is held to be admissible in evidence on behalf of the assignee.

[146] It is held, in Scott v. Stallsworth (1847) 12 Ala. 25, that the admissions contained in the answer of a garnishee are not admissible on behalf of the persons claiming to be the transferees of the debtor in the action. In this case, the admissions concerned the validity of the transfer of the property in the garnishee's hands, to the claimants.

[147] It is held, in Whitfield v. Stiles (1885) 57 Mich. 410, 24 N. W. 119, that the answers of garnishees to interrogatories, under oath, are admissible on behalf of the principal defendant against plaintiff.

[148] The answer of defendant in an equity suit involving certain slaves is held, in Newell v. Newell (1857) 34 Miss. 385, not to be admissible in his behalf, in a subsequent action of replevin brought by him against the complainant in the equity suit, for the recovery of the slaves.

In Daniel v. Johnson (1859) 29 Ga. 207, an action of assumpsit, the answer of plaintiff in a prior chancery suit between the same parties was held inadmissible, it not being made to appear that the answer had been responsive to the bill.

It is held, in Bien v. Weatherspoon (1834) 1 How. (Miss.) 28, that, where defendant in an action at law brings suit in equity to enjoin the proceeding at law, the answer filed by defendant in the chancery proceedings is not admissible in his own favor, in the action at law.

See Moore v. Leftwitch (1832) 1 Stew. & P. (Ala.) 254.

However, the answer of respondent to an interrogatory, filed under statute, is held, in Hunter v. Smith (1826) 5 Mart. N. S. (La.) 178, to be admissible in his behalf, in a subsequent action between the same parties, based on the same grounds of action, and brought by the proponent of the interrogatories, after he had dismissed the first action.

[149] Supra, II.

[150] For cases involving the use of pleadings at law and bills in equity as evidence on behalf of the pleader, in proceedings other than those in which filed, see supra, notes 6–9.

[151] See supra, III. b, 1.

[152] See the text accompanying notes 19 and 20 supra.

sought, alone, and not in respect of all proceedings and actions which may subsequently arise between the parties. Accordingly, to permit the use of the pleading in other proceedings would seem to amount to an unwarrantable stretching of the rule.[153]

2. Admissibility on behalf of pleader against stranger to proceeding in which filed.

There is no ground for exception to the general rule that pleadings, other than those making discovery, are inadmissible on behalf of the pleader,[154] where the person against whom the pleading is offered is a stranger to the proceeding in which it is filed. Accordingly, under such circumstances, such pleadings are held inadmissible.[155] And even in the case of pleadings making discovery, the rule is the same,[156] it being contrary to the underlying principles governing such pleadings, to use them against a stranger.[157]

3. Admissibility on behalf of stranger to proceeding in which filed, against stranger thereto.

As a general rule, self-serving declarations in pleadings other than those making discovery are inadmissible on behalf of strangers to the action in which filed, against other strangers thereto.[158] This is in accordance with the rule that such pleadings are inadmissible.[159] An exception has been made in the case of pleadings offered to show pedigree,[160] but there is authority seemingly the other way.[161]

4. Admissibility on behalf of person claiming under pleader.

On the question of the admissibility of pleadings containing self-serving declarations, on behalf of persons claiming under the pleader, the courts are helplessly confused. In cases involving pleadings making discovery,

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[153] See, in connection with this section, supra, note 90.

[154] Supra, notes 6–8.

[155] In Mead v. Randall (1896) 111 **Mich.** 268, 69 N. W. 506, where plaintiff in action for alienation of his wife's affections sought to introduce in his own behalf his bill for divorce, it is said that such "bill of complaint, which was an ex parte statement of the plaintiff, not himself a competent witness, should not have been read in evidence."

In an action between attaching creditors and the debtor's vendee, involving the right to property, a petition filed by the vendee against the debtor is not admissible for the purpose of showing a consideration for the transfer, and of disproving fraud and collusion therein, especially where such petition is filed after the levy of the attachment. Howard v. Parks (1892) 1 **Tex.** Civ. App. 603, 21 S. W. 209.

[156] In an action on a note by the payee thereof against the maker, the answer of the latter as garnishee in a prior action, in which he admits that the debt for which the note was given was, in reality, owing to the debtor in that action, and not to the payee of the note, is not admissible. McClellan v. Young (1850) 17 **Ala.** 498. This is put upon the ground that the payee of the note was not made a party to the garnishment proceeding.

[157] See the text accompanying notes 19 and 20 supra.

[158] In Macdonnell v. Fuentes (1894) 7 **Tex.** Civ. App. 136, 26 S. W. 792, a petition in a prior action between strangers is held inadmissible as evidence of the facts stated therein.

[159] See supra, II.

[160] A bill in chancery by an ancestor is said, in Taylor v. Cole (1879) 7 T. R. 3, note, 100 **Eng.** Reprint, 582, note, 1 Revised, Rep. 706, 1 H. Bl. 555, 126 Eng. Reprint, 318, to be admissible to prove a family pedigree, stated therein.

In an action of trespass to try title, in which the defendants deny that plaintiff's remote grantor was the son of the original patentee of the land, and that such grantor's mother was the wife of the patentee, a petition by the grantor's mother for divorce from the patentee, and a petition for the guardianship of her minor son, are admissible in evidence. Wren v. Howland (1903) 33 **Tex.** Civ. App. 87, 75 S. W. 894.

[161] A petition is inadmissible, in a subsequent action involving different parties and different subject-matter, for the purpose of proving the heirship of the person offering it. House v. Stephens (1917) — **Tex.** Civ. App. —, 198 S. W. 384.

In Freeman v. Hawkins (1890) 77

both positive[162] and negative[163] answers have been given. And, irrespective of the general rule against the admissibility of pleadings other than those making discovery, such a pleading is held admissible on behalf of a person claiming under the pleader.[164] In one such case, however, the general rule is taken notice of, and admissibility denied.[165]

c. On later appeals of proceedings in which pleadings are filed.

Authority on the question of the admissibility of pleadings on subsequent appeals of the proceedings in which the pleadings are filed is practically nonexistent. This is due, of course, to the fact that, in most cases, the pleadings on the subsequent hearing are the same as on the original hearing. In one case, the answers to interrogatories filed on the first appeal are held admissible on behalf of the respondent on the second appeal of the case.[166]

V. Admissibility of withdrawn or superseded pleadings.

A pleading, inadmissible because of the general rule against the self-serving declarations contained therein,[167] will not gain admissibility by being withdrawn or superseded.[168] And where an answer, otherwise admissible, drops out of a case because the cross bill, in answer to which it is filed, is dismissed, the answer ceases to be evidence on behalf of the pleader.[168a] So, an answer making discovery, it has been held, will not be admissible against the complainant, where the pleader dies after the filing of an amended bill, but prior to the filing of an amended answer.[169] As has been pointed out above, a complainant will not be permitted to deprive a defendant of the use of his original answer as evidence, after having required a sworn answer and obtained the benefit

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Tex. 498, 19 Am. St. Rep. 769, 14 S. W. 369, the petition in a prior action, brought by the person under whom plaintiff in the later action claims, is held inadmissible in his behalf, to show the pedigree of the petitioners in that action, the defendant in the present action not having been a party thereto, and the same property not being involved in the two actions.

[162] In Ricketts v. Garrett (1847) 11 Ala. 806, it is held that an answer in a suit in chancery is admissible on behalf of the administrator of one of the defendants therein, in a subsequent action of debt brought by him against the party who was the other defendant in the injunction suit.

And see Culbertson v. Matson (1848) 11 Mo. 493, infra, note 220.

[163] It is held in Drury v. Conner (1824) 6 Harr. & J. (Md.) 288, that an answer filed by the owner of an estate in land, to a bill in chancery, is not admissible on behalf of his heirs in a subsequent suit against them, involving the same interest in the land.

[164] In an issue between a judgment creditor and a claimant claiming the land levied upon, the petition of the judgment debtor for a trustee, in which he claims title to the land in question is admissible. Trice v. Rose (1887) 79 Ga. 75, 3 S. E. 701.

[165] A complaint of intervention, not being admissible on behalf of the intervener, is held in Sutton v. Whitstone (1907) 21 S. D. 341, 112 N. W. 850, not to be admissible on behalf of a person claiming under him, in an action between such person and a person who was party to the prior action.

And see Freeman v. Hawkins (1890) 77 Tex. 498, 19 Am. St. Rep. 769, 14 S. W. 369, supra, note 161.

[166] Bachemin v. Scheixnaydre (1861) 16 La. Ann. 32.

[167] See supra, II.

[168] See Sweetzer v. Claflin (1889) 74 Tex. 667, 12 S. W. 395, supra, note 10; Gamble v. Martin (1912) — Tex. Civ. App. —, 151 S. W. 327; Buhrmaster v. New York, C. & H. R. R. Co. (1916) 173 App. Div. 62, 158 N. Y. Supp. 712; infra, note 209.

[168a] Where the cross bill filed by defendant is dismissed, the answer of the respondent thereto is of no avail for the pleader, to assist him in sustaining his bill. Saffold v. Horne (1894) 71 Miss. 762, 15 So. 639.

[169] Where, in Moore v. Harper (1866) 14 L. T. N. S. (Eng.) 14, 14 Week. Rep. 306, the defendant, after filing an answer to the original bill, and after the amendment of the bill by the plaintiff, but before the filing of an amended answer thereto, died, his original answer is held not to be evidence against the plaintiff therein.

thereof, by filing a supplemental bill, calling for an amended answer, and waiving verification thereto.[170]

VI. Admissibility of whole of pleadings containing admissions.

a. Answers to bills in equity for relief.

While it is not necessary for a person making use of an admission contained in an answer to a bill in equity for relief, to offer the whole of the pleading,[171] and he is never bound to offer portions thereof, which are irresponsive to the call for discovery,[172] such a person, wishing to take advantage of admissions in an answer to a bill in equity, must, with the exception just stated, relating to irresponsive allegations, introduce the whole of the answer, so far as it explains or qualifies the admission.[173] And where verification is waived, the rule is the same, responsive matter relating to the admission being necessarily offered in

[170] See supra, III. b, 4, d, (2).

[171] In Talbot v. Rutledge (1747; Eng.) set out in Blount v. Burrow (1792) 4 Bro. Ch. 72, 29 Eng. Reprint, 784, 1 Ves. Jr. 546, 30 Eng. Reprint, 481, it is said that, in equity, the whole of an answer need not be offered by the plaintiff who introduces admissions contained therein, but that in law the rule is different.

It is said obiter, in Boardman v. Jackson (1813) 2 Ball & B. (Ir.) 382, however, that, where the answer of a party in another cause is resorted to as evidence, the whole of it is admissible, both at law and in equity.

[172] Complainant may read portions of answer in equity, without making part thereof which is irresponsive to bill, evidence for defendant. McDonald v. McDonald (1844) 16 Vt. 630.

In Stickney v. Tylee (1867) 13 Grant, Ch. (U. C.) 193, a suit for specific performance, where defendant's admission of his trusteeship of certain property was followed by a statement that the estate was insolvent, and that it was administered by the court of chancery, it is held that the plaintiff may put in evidence the admission, without being called upon to offer the statement following, it not being explanatory of the admission.

See also Ormond v. Hutchinson (1806) 13 Ves. Jr. 47, 33 Eng. Reprint, 212, infra, note 173, and Freeman v. Tatham (1846) 5 Hare, 329, 67 Eng. Reprint, 939, infra, note 173.

And see, generally, supra, III. b, 5, (a), (1), and III. b, 5, (a), (2).

[173] It is said in Ormond v. Hutchinson (1806) 13 Ves. Jr. 47, 33 Eng. Reprint, 212, that "when relief is prayed, and the plaintiff replies to the answer, putting the whole in issue, he cannot . . . stop at the end of a sentence, but must proceed to the completion of the immediate subject to which the defendant is answering; as, at law, a witness cannot be stopped where the party wishing to elicit from him particular facts finds it convenient to stop him, but must be allowed to finish the particular subject, and to proceed to state anything with reference to it. Otherwise, the party might obtain an advantage, stopping the evidence just at the qualification. But that does not apply to distinct matter."

Where the trustee in her answer admits the existence of a trust and sets out the particulars thereof, it is held in Freeman v. Tatham (1846) 5 Hare, 329, 67 Eng. Reprint, 939, that the plaintiff, if she offers the admission, must also offer the portion setting out the particulars. This is on the ground that the paragraph containing the particulars is explanatory of the admissions, and responsive to the bill.

In Glenn v. Randall (1847) 2 Md. Ch. 220, it is said: "The rule, as established, appears to be this: That though a complainant in equity may read a portion of an answer, and is not bound, as he would be at law, to read the whole answer, yet he will not be allowed to read a passage from the answer for the purpose of fixing the defendant with an admission, without reading the explanations and qualifications by which the admission may be accompanied."

And in Barber v. McKay (1889) 17 Ont. Rep. 562, an action for the recovery of land, plaintiffs, who claimed title, in common with defendant, under the executor of a decedent, offered a portion of defendant's answer to prove title in the executor. The plaintiffs cannot take that part of this pleading which suits their purpose, and reject the rest," the court holds.

In Nurse v. Bunn (1832) 5 Sim. 225; 58 Eng. Reprint, 321, an action in equi-

connection therewith;[174] and irresponsive matter, although connected with the admission, being inadmissible.[175] But where verification is waived, and the matter contained in the admission is proved extrinsically, the explanatory matter is unavailable to the pleader.[176] And where the explanatory matter is merely hearsay on the part of the pleader, it is also inadmissible.[177]

b. Answers to bills of discovery.

In the case of answers to bills of discovery, made use of against the pleaders in actions at law, the rule is that the whole of the answers must be offered into evidence, and not merely, as in the case of answers in equity suits for relief, the portions thereof relating to the admissions desired to be taken advantage of by the complainants. The

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ty, "the vice chancellor ruled that, if a plaintiff reads a passage from the answer as evidence, he is compellable to read all other passages in the answer which are explanatory of the passage read, whether such other passages are connected in point of grammatical construction, or separated by passages relating to distinct subjects."

And if a plaintiff in equity reads a passage in an answer which does not refer to, but is qualified by, a subsequent passage, it is held, in Rude v. Whitchurch (1830) 2 Sim. 562, 57 **Eng.** Reprint, 1109, that the defendant may read the latter.

In Bartlett v. Gillard (1826) 3 Russ. Ch. 149, 38 **Eng.** Reprint, 532, involving an answer in equity, it is said: "Where a plaintiff chooses to read a passage from the defendant's answer, he reads all the circumstances stated in the passage. If the passage so read contains a reference to any other passage, or to a fact stated in any other passage, that other passage must be read also; but it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read. . . . If, in the passage thus referred to, new facts and circumstances are introduced, in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read."

An admission, in an answer in equity, that defendant was removing property out of the state, when connected in the pleading with an explanation that such shipments were made in the due and regular course of business, it is held in Clinch River Min. Co. v. Harrison (1895) 91 **Va.** 122, 21 S. E. 660, must be taken as a whole.

In Morrison v. Grubb (1873) 23 Gratt. (**Va.**) 342, an admission in an answer that the bonds in question belonged to a decedent several days before his death is held not properly "taken to be an admission of the allegation of the bill that they were the property of the decedent at his death, because it is accompanied with the declaration of the defendant that they were afterwards, in the lifetime of the decedent, delivered to him as a gift."

See also Crawford v. Kirksey (1874) 50 **Ala.** 590; Bath v. Battersea (1794) 5 Mod. 9, 87 **Eng.** Reprint, 487.

[174] Where, in Durfee v. McClurg (1859) 6 **Mich.** 223, complainant, who had waived an answer under oath, introduced portions of defendant's answer as admissions, it is held that he cannot "use a part of the answer and exclude other parts relating to the same subject, that would be responsive to the bill had the answer been under oath."

[175] Where, in Fajardo De Salazar v. Costa (1904) 1 **Porto Rico** Fed. Rep. 119, the answer admitted the receipt of certain payments, and alleged that they were made on account of a debt owing by another person, on the ground that such allegation was not responsive, it was held that it was not necessary for the complainant to offer it into evidence in connection with the admission. In this case, answer under oath had been waived, and the answer was not sworn.

[176] In Reager v. Chappelear (1905) 104 **Va.** 14, 51 S. E. 170, it is held that although the whole of an answer would be admissible in explanation of an admission made therein, yet where the oath thereto is waived, and the matter contained in the admission proved extrinsically, the explanatory matter in the answer is unavailable to the pleader.

[177] Where the defendant in ejectment introduces a portion of the answer of the plaintiff's lessor in a suit in chancery, the rule making the whole of such answer admissible on behalf of plaintiff is subject to an

complainant in the bill of discovery, if he introduces into the legal action, in aid of which the bill is filed, any portion of the defendant's answer thereto, is bound to introduce the whole of it into evidence.[178] And, the rules of pleading no longer governing,[179] no exception is made in the case of matter irresponsive to the bill,[180] although, of course, impertinent matter is inadmissible.[181] The rule with respect to the admissibility of irresponsive matter, however, is not universal,[182] although the weight of authority is in its favor. The rule with respect to the admissibility of the whole of the answer to a bill of discovery applies, it has been held, where equity, having obtained jurisdiction of the cause for the purpose of discovery,

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exception, with respect to the portion thereof that is stated only by way of hearsay. Roe ex dem. Pellatt v. Ferras (1801) 2 Bos. & P. 542, 126 Eng. Reprint, 1429.

[178] Massingill v. Carraway (1850) 13 Smedes & M. (Miss.) 324; Allen v. McNew (1847) 8 Humph. (Tenn.) 46; Ormond v. Hutchinson (1806) 13 Ves. Jr. 47, 33 Eng. Reprint, 212; Butterworth v. Bailey (1883) 15 Ves. Jr. 358, 33 Eng. Reprint, 789.

On the ground that an answer to a bill of discovery, when used in an action at law, is to be considered as evidence, as distinguished from a pleading, it is held, in Lyons v. Miller (1849) 6 Gratt. (Va.) 427, 5 Am. Dec. 129, that all matter contained in it, pertinent to the discovery is to be admitted, and that no part is to be refused because affirmative, or in avoidance of what is admitted to be true. In that case, the equity court, having gained jurisdiction of the cause for discovery, retained jurisdiction for the purpose of granting relief; but the same rule is applied to the answers to the discovery as if the action were at law. The court says: "The answer gains no artificial force by being responsive to the bill; nor is any part of it, pertinent to the discovery, to be rejected because affirmative matter in avoidance of that which is admitted to be true. These are rules of pleading, and not of evidence, and the answer to such a bill does not make up issues to be tried in the cause, but furnishes evidence to be used collaterally on the trial of the common-law action, or on that which is substituted for it, when the court of equity, to prevent circuity, expense, and delay, undertakes itself to give or refuse redress, after the discovery has been made."

Where plaintiff reads a portion of defendant's answer to bill of discovery, it is error to refuse, on defendant's application, to have the whole answer read. McNutt v. Dare (1846) 8 Blackf. (Ind.) 35.

And see Jones v. Davidson (1854) 2 Sneed (Tenn.) 447, infra, note 182.

[179] See Lyons v. Miller (Va.) supra.

[180] See supra, III. b, 5, (a), (3).

Also Lyons v. Miller (Va.) supra.

[181] In holding the refusal of the court to admit the whole of an answer to a bill of discovery, offered in evidence against the respondent in the action at law in aid of which it was filed, not to be error, in Glascock v. Hays (1836) 4 Dana (Ky.) 58, it is said: "Although it is a reasonable and well-established rule that, when one party attempts to prove what another party had said, or to use as evidence anything contained in his answer to a bill of discovery, he should prove all that the party said at the same time and on the same subject, or should read the entire answer to the bill, nevertheless matter altogether impertinent may be omitted, and there may be cases in which a part only may, without error or prejudice, be used as evidence, and, therefore, as the record does not state what was pretermitted, or show that the plaintiff in error was or could have been prejudiced by the discrimination, and as this court should presume, in the absence of evidence to the contrary, that the court below acted correctly, we cannot decide that there was any illegality or injustice in permitting a part only of the answer to be read to the jury."

See also Lyons v. Miller (Va.) supra.

[182] See supra, note 115.

And see Jones v. Davidson (1854) 2 Sneed (Tenn.) 447, where it is said that, when the answer to a bill of discovery is offered in evidence against the respondent in a trial at law, the rule is that the whole of the answer responsive to the bill must be read; for it is considered in the light of admissions, which must be taken all together, or not at all."

retains jurisdiction for the purpose of granting relief.[183]

c. Answers to interrogatories authorized by statute.

Under statutes providing for the filing of interrogatories in actions at law, and the use of the answers as evidence in the same manner as if procured upon bills in chancery for discovery, the answers to such interrogatories are, in analogy to the answers to bills of discovery,[184] to be offered as a whole by the proponent, if he makes use of any part thereof.[185] And it has been pointed out supra [186] that no exception to this rule exists, on the ground of the irresponsiveness of any portion of the answers so made in reply to interrogatories. In one jurisdiction, it has been provided by statute that answers to the interrogatories filed thereunder shall be read in their entirety. Under such a statute, the answers filed are not only admissible as a whole,[187] but they are admissible as a whole, regardless of any consideration with respect to irresponsive matter.[188]

Where the statute authorizing interrogatories does not specifically make the use of the answers thereto analogous to the use of answers to bills of discovery, it has been held that no such analogy exists, and that it is not incumbent upon the proponent of the interrogatories, in order to make use of an admission contained in the answers thereto, to introduce into evidence all of the answers.[189] He must, however, introduce all matter in the answers ex-

[183] See Lyons v. Miller (Va.) supra.

[184] Supra, note 178.

[185] Southern R. Co. v. Hubbard (1896) 116 Ala. 387, 22 So. 541; Calvert v. Calvert (1912) 180 Ala. 105, 60 So. 261; Southern R. Co. v. Hayes (1913) 183 Ala. 465, 62 So. 874; Strawn v. Norris (1861) 23 Ark. 542; Maxwell v. Guthrie (1861) 23 Ark. 702; M'Farland v. Hunter (1836) 8 Leigh (Va.) 489.

Under the rule entitling a defendant to a bill for discovery in chancery to have the whole of his answer read, if any part thereof is read, it is held in Saltmarsh v. Bower (1853) 22 Ala. 221, that it is error for a court to exclude from evidence one portion of an answer made by defendant to an interrogatory, filed in pursuance of statute, while permitting the remainder to stand. Although the action here is one at law, the equity rule applies, by reason of the provision of the statute that answers to interrogatories shall be evidence, "in the same manner, and to the same purpose and extent, and upon the same condition in all respects, as if they had been procured upon a bill in chancery for discovery."

And it is said in Pritchett v. Munroe (1853) 22 Ala. 501, with respect to an answer to an interrogatory that "a party is not allowed to garble an admission or to call for a part of a transaction only. If a statement or admission is required in relation to, the qualification under which it was made thereby becomes evidence, and the whole must be taken together. If a party calls only for that portion which makes in his favor, he cannot thereby exclude the other portion, which may operate against him."

So, it is held in Birmingham R. Light & R. Co. v. Oden (1909) 164 Ala. 1, 51 So. 240, that the party submitting interrogatories, under statute, cannot offer in evidence a part of the answers, on the suggestion of laying a predicate for impeachment, without introducing all of the answers.

[186] Supra, note 117, and the accompanying text.

[187] Under a statute providing that the answers to interrogatories are to be read in their entirety, it is held, in Godfrey v. Hall (1832) 4 La. 158, that the proponent of interrogatories cannot offer in evidence a portion of the answers secured to them, unless he reads the answers to all of the interrogatories.

[188] See supra, note 120.

[189] On the ground that the practice of filing interrogatories by the parties in actions, as authorized by statute, is not analogous to the practice of equity with respect to bills of discovery in aid of actions at law, it is held, in Allend v. Spokane Falls & N. R. Co. (1899) 21 Wash. 324, 58 Pac. 244, that the proponent of interrogatories is not bound to offer all of the answers in evidence, merely because he offers a part. "The party answering is, of course, entitled to have read all of the matter that he gives in answer to an interrogatory that is pertinent thereto," the court says: "This

plaining or limiting the admission.[190] Under a statute providing that "the party interrogated may introduce into his answer any matter relevant to the issue to which the interrogatory relates," and "may require that the whole of the answers upon any one subject-matter inquired of shall be read," the respondent may require the proponent, who puts into evidence a portion of his answers relating to a particular issue, to put into evidence all he has said with respect to that issue, in his answers to the interrogatories.[191] This rule may not be evaded by the introduction by the proponent of the substance of one of the respondent's answers, without repeating his exact words.[192] But if the respondent, in such a case, does not assert his right to have the whole of his answers, and not the mere substance, introduced into evidence, he cannot complain thereof.[193] And when the proponent has read all of the answers dealing with the issue in relation to which the admission is offered, the respondent cannot compel him to read other answers not relating thereto.[194] Under this statute, the admissibility of relevant matter is not affected by the fact that it may be irresponsive.[195]

In one jurisdiction, the whole of the answer of a garnishee has been held admissible, where a portion thereof has been offered in evidence against him.[196] And, in another, the whole of the gar-

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would include not only the answer directly given, but also all matter in explanation thereof, and if the interrogatories and answers are interwoven, or are so prepared that an understanding of one cannot be had without the reading of another, or others, the party offering them would be compelled to read all that pertained to the particular matter inquired of. But where, as in this instance, the interrogatories read are complete in themselves, and the answers thereto have no connection with other answers, no error is committed by refusing to compel the party offering them to read them all."

[190] See Allend v. Spokane Falls & N. R. Co. (Wash.) supra.

[191] Under a statute providing that "the party interrogated may introduce into his answer any matter relevant to the issue to which the interrogatory relates," and "may require that the whole of the answers upon any one subject-matter inquired of shall be read, if a part of them is read," it is held in Churchill v. Ricker (1872) 109 Mass. 209, that the terms "issue" and "subject-matter" refer, not to "the particular fact covered by any one or more interrogatories, but the matter put in issue by the pleadings and thus inquired of." Accordingly, in that case, the plaintiff having read some of the answers to interrogatories relating to the issue of the defendant's negligence, the defendant was permitted to read other answers bearing on the same issue.

[192] Under the statute providing that "the party interrogated may require that the whole of the answers upon any one subject-matter inquired of shall be read, if a part of them is read," it is held in Freeman v. United Fruit Co. (1916) 223 Mass. 300, 111 N. E. 789, that, where plaintiff introduces into evidence the substance of defendant's answer to one interrogatory, the defendant may introduce his entire answer to that interrogatory, and his answers to all interrogatories bearing upon that issue.

[193] If the defendant, having the right, under the statute providing that a party interrogated may require that the whole of his answers upon the subject-matter inquired of, shall be read, if a part of them is read, does not take advantage thereof, so as to offer the whole of an answer introduced by plaintiff, in substance, into the evidence, he cannot complain of the use of such substantial statement as evidence, or the reference thereto in argument by plaintiff's counsel. Freeman v. United Fruit Co. (Mass.) supra.

[194] It was held in Demelman v. Burton (1900) 176 Mass. 363, 57 N. E. 665, that where plaintiff reads all the answers to interrogatories dealing with a certain issue, the respondent cannot compel him to read answers to other interrogatories, under the statute providing that "the party interrogated may require that the whole of the answers upon any one subject-matter inquired of shall be read, if a part of them is read."

[195] See Baxter v. Massasoit Ins. Co. (1866) 13 Allen (Mass.) 320, supra, note 122a.

[196] Where portions of the answer of a garnishee are read in evidence, it

nishee's answer to a particular interrogatory is considered admissible, where a portion of it is made use of as an admission.[197] With respect to the effect of the rule relating to irresponsive matter on the answers of garnishees, reference is made to the section of this note where that particular matter is treated.[198]

d. Pleadings not making discovery.

In the case of pleadings making discovery,[199] the self-serving declarations therein being admissible on behalf of the pleaders,[200] irrespective of any offer by the complainants of portions thereof as admissions, there is nothing exceptional in the rule requiring the complainants, when they offer portions of the pleadings as containing admissions, to introduce all of the pleadings explaining or qualifying the admissions. But, in the case of pleadings not making discovery, self-serving declarations are not admissible on behalf of the pleader. This rule comprehends not only bills in chancery,[201] but petitions[202] and answers[203] at law. And, under the Code, it includes, in addition to the pleadings stated, answers to bills in equity for relief.[204] All of these pleadings, then, fall in the same category, and are subject to the same rules with respect to the question of the admissibility of self-serving declarations therein, when admissions therein are introduced into evidence by the pleader's adversary. The general rule is that, when admissions in such pleadings, not making discovery, are offered by the pleader's adversary, he must offer in connection therewith all that is contained in the pleading, serving to explain,[205] or to limit and

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is held, in Godden v. Pierson (1868) 42 Ala. 370, that the garnishee is entitled to read his entire answer to the jury.

[197] On the ground that a draft and acceptance, mentioned by a garnishee in one of his answers to interrogatories, is a part of such answer, it is held in Erskine v. Sangston (1838) 7 Watts (Pa.) 150, that, the plaintiff having read in evidence the garnishee's answers to the interrogatories, the garnishee may offer such draft and acceptance in evidence, it being his right "to insist upon the whole of his answer to any interrogatory being read, when practicable, instead of a part."

[198] Supra, III. b, 5, (a), (4).

[199] Supra, VI. a–c.

[200] See supra, III. b, 1.

[201] See supra, note 6.

[202] See supra, note 7.

[203] See supra, note 8.

[204] See supra, III. b, 1, (a), (1), (b).

[205] It is proper to refuse to admit in evidence a part of a paragraph of defendant's answer, containing an admission, unless the whole paragraph is offered, where the parts of the paragraph are "so connected that the part not offered in evidence was necessary to explain that which was offered." Rushing v. Seaboard Air Line R. Co. (1908) 149 N. C. 158, 62 S. E. 890.

In Hewlett v. Hyden (1904) 4 Ind. Terr. 176, 69 S. W. 839, where defendant had read in evidence, in his action of forcible entry and detainer, parts of the complaint filed by plaintiff in an action of unlawful detainer subsequently brought against him, the remainder of the complaint was held admissible on behalf of the plaintiff, apparently on the theory that it was necessary to a proper understanding of the parts read by defendant.

And it is said in Davis v. Spurling (1829) 1 Russ. & M. 64, 39 Eng. Reprint, 25, that, "if the plaintiff read a passage in the defendant's answer as evidence of a particular fact, the defendant had no right to read, as evidence, any subsequent matter, although it might be connected with the passage which the plaintiff had read, by such words as 'but' and 'and,' unless the subsequent matter was explanatory of the passage read by the plaintiff."

An instruction to the effect that, upon the consideration of the whole of an answer as explaining defendant's admissions therein, such parts of the answer "as are against the plaintiff, if any, are to be considered by the jury equally with such other parts," containing admissions, is held in Chamlee v. Planters' Hotel Co. (1911) 155 Mo. App. 144, 134 S. W. 123, to be improper. This was an action at law for damages. "While it was for the jury to consider the whole answer and all of its parts," the court says, "it is not true that the portions

qualify,[206] the admissions offered by him. This rule, however, is limited

thereof which" made certain charges against plaintiff "were to be considered of equal probative force against plaintiff's interest, as were the admissions therein made by defendant pertaining to the negligence charged."

And see Gossler v. Wood (1897) 120 N. C. 69, 27 S. E. 33, infra, note 209; Gunn v. Todd (1855) 21 Mo. 303, 64 Am. Dec. 231, infra, note 209; Watkins v. Fontaine (1914) 14 Ga. App. 321, 80 S. E. 694.

[206] In Gildersleeve v. Landon (1878) 73 N. Y. 609, an action to recover personal property which plaintiff claimed to have purchased, in good faith, from his son, defendant admitted the purchase, but alleged that it was made with knowledge of defendant's prior mortgage. It is held that "the statements must be taken and construed together; and, if relied on to establish the purchase, it must also be held as establishing that it was made by plaintiff with knowledge of the mortgage; but that plaintiff, if he relied on the admission, could, and it is incumbent upon him to disprove the allegation of knowledge."

So, where, in McCord v. Southern R. Co. (1902) 130 N. C. 491, 41 S. E. 886, defendant put in evidence a paragraph of the complaint as an admission against plaintiff, it was held proper to admit, on behalf of plaintiff, the other paragraphs of the complaint which referred to the same matter, it being elementary, according to the court, "that, when part of a declaration or admission is put in evidence, the party making it has a right to have the whole of the declaration brought out."

And in Spencer v. Fortescue (1893) 112 N. C. 268, 16 S. E. 989, the plaintiff having offered one article of defendant's answer in evidence as an admission of a sum of money due on a note, it is held that the second article, which is a qualification of the first, is admissible on behalf of defendant. This is on the ground that "the whole admission is to be taken together."

In Stuart v. Kissam (1848) 2 Barb. (N. Y.) 493, an action to enforce a mortgage, defendant relied upon a statement in the bill that the mortgage had been discharged. In holding that he could not rely thereon without introducing the part of the bill stating that the discharge had been upon a false certificate of satisfaction, without any actual payment or satisfaction of the mortgage debt, the court says: "Where a defendant relies upon an admission in a bill to establish his defense, he must, as a general rule, take the whole of such admission. He cannot avail himself of such part of the admission as makes in his favor, and reject the residue."

Steinhardt v. Baker (1898) 25 App. Div. 197, 49 N. Y. Supp. 357, affirmed in (1900) 163 N. Y. 410, 57 N. E. 629, was an action by a vendee against a vendor of land, based upon the lack of marketability of the title. In the answer the defendant admitted that, at the time of the sale, a third person was lawfully in possession of the premises, but such statement was connected with the further statement that the possession of such person was merely that of a tenant at will, and that she offered to surrender the premises. It was held that "the admissions of the answer must be taken in their entirety."

In Goodyear v. De La Vergue (1877) 10 Hun (N. Y.) 537, an action at law charging defendants with the receipt and sale of butter of plaintiff's and their refusal to pay for the same, the admission of the receipt and sale in the answer is held admissible, only in connection with averments therein with respect to payment made to plaintiff therefor, the answer being admissible only as an entirety.

In Thompson-Houston Electric v. Berg (1895) 10 Tex. Civ. App. 200, 30 S. W. 464, where the admissions of plaintiff's petition are offered in evidence, it is held that the admissions must be taken and construed with all the limitations and qualifications accompanying them.

Where, in Lawyers' Title Ins. & T. Co. v. Kelly (1912) 132 N. Y. Supp. 721, plaintiff offered in evidence an admission contained in the special plea of the defendant, it is held that "where part of a special plea is relied upon as an admission, to prove the plaintiff's affirmative case, the admission must be read in connection with the statements contained in the same plea, limiting the admission."

So, an admission in the answer of the defendant who is being sued upon his guaranty of a mortgage bond,

to matter included in the pleading containing the admission, and does not extend to matter contained in an amended pleading, superseding the

that he executed the bond, is held in Vanderbilt v. Schréyer (1880) 21 Hun (N. Y.) 537, reversed on other grounds in (1883) 91 N. Y. 392, not to be admissible on behalf of plaintiff, without admitting also his allegations, contained in the same sentence, tending to show such guaranty to be inoperative. The court says that "the rule is well settled that the paragraph in which the admission and the allegation are blended cannot be severed."

Where defendant in an action for personal injuries reads in evidence a portion of plaintiff's petition, which, unexplained, would be misleading, it is proper for the plaintiff to introduce the whole of the paragraph containing such admission. Galveston, H. & S. A. R. Co. v. Fitzpatrick (1906) — Tex. Civ. App. —, 91 S. W. 355.

In Chamlee v. Planters Hotel Co. (1911) 155 Mo. App. 144, 134 S. W. 123, an action for damages in which plaintiff introduced into evidence certain admissions in the defendant's answer, it is held that the answer is to be considered as a whole, and that the admissions are "binding on the defendant only as made, and no further."

In Sims v. Ferrill (1872) 45 Ga. 585, in holding the admissions contained in the answer admissible on behalf of complainant, it is said that such admissions are "subject to such qualifications as may be gathered from other parts of the answer, but the jury are not bound to believe the qualifications."

And the preceding case is cited and followed in Hickson v. Bryan (1885) 75 Ga. 392.

Where, in Woodward v. Gates (1868) 38 Ga. 205, complainant sought to make use of statements in defendant's answer as admissions, it is said that if "the complainant insists on the answer as an admission of record, he must take it as a whole; and he will not be permitted to insist on the admitted fact, to the exclusion of any qualifications or explanations accompanying it."

And, where the plaintiff introduces into evidence a portion of a bill filed by defendant as complainant in a former suit, defendant is entitled to introduce other portions thereof, relating to the same issue, to show the true situation as alleged in such bill. Davies v. Flewellen (1859) 29 Ga. 49.

In McCaskill v. Walker (1908) 147 N. C. 195, 61 S. E. 46, an action to obtain possession of land held by defendants, plaintiffs offered a portion of the answer as an admission on their behalf, to show that a certain John Walker had been for many years in possession of the land. The court explains the situation as follows: "In their answer the defendants said, in a connected narrative, that John Walker, their ancestor, and themselves after his death, had been for a long time prior to 22 June, 1869, the date of an alleged deed, in the adverse possession of the land in controversy. This admission, as made, plaintiffs were entitled to put in evidence. His Honor offered to permit them to do so, or to put in such parts thereof as 'would make sense.' Certainly, the plaintiffs could not do otherwise. His Honor further asked them to indicate what portion of the paragraph they offered—what words they wished to introduce. This they declined to do. We concur with his Honor that they could not, in a general way, without designating the language which they proposed to introduce, put in evidence a portion of the paragraph. We think that the paragraph, correctly read, states one proposition, which cannot be separated and 'cut up' into different and distinct propositions. While it is not always easy to draw the line by which portions of a pleading may be separated from other portions and introduced, we think it clear that, where there is but one proposition stated, it should not be separated so that the pleader is made to say something which he never intended, and which, by reasonable construction he has not said."

It is said obiter in Gunn v. Todd (1855) 21 Mo. 303, 64 Am. Dec. 231, involving an answer to a petition under the Code, that if any "portions of the answer, not read by the plaintiff, affected the sense, or explained in any way the portions read, he [defendant] would have a right to read them."

In Shrady v. Shrady (1899) 42 App. Div. 9, 58 N. Y. Supp. 546, an action by an heir at law against his coheirs to partition property belonging to the

pleading in which the admission appears.[207] And the rule does not mean that the whole of the pleading is to be made evidence, where the whole of it does not limit or qualify the admissions.[208] On the contrary, por-

estate of their deceased ancestor, an allegation in the answer of the defendants, to the effect that the ancestor has made advancements to all of the heirs, is held not to be admissible, on behalf of plaintiff, to establish the fact of the receipt advancements by the defendants, without admitting it also to establish advancements made to the plaintiff. "Where the plaintiff desires to avail himself of an admission or allegation contained in an answer as a pleading," it is said, "he must accept the admission or allegation as an entirety; he cannot accept such portion of it as may be favorable to him, and reject the remainder."

And where, in Baker v. Duff (1909) 136 App. Div. 13, 120 N. Y. Supp. 184, affirmed without opinion in (1911) 202 N. Y. 570, 96 N. E. 1109, reargument denied in (1914) 213 N. Y. 649, 107 N. E. 1073, the plaintiff in ejectment offered a portion of the verified answer of defendants' grantors in an action brought against them by a third person, it is said that such evidence is in the case for all purposes, and inures to the benefit of the defendants as well as to that of the plaintiff.

And see Granite Gold Min. Co. v. Maginness (1897) 118 Cal. 131, 50 Pac. 269, infra, note 208.

[207] In holding, in Roberts v. Tennell (1826) 3 T. B. Mon. (Ky.) 247, that the rule with respect to the admission of the whole of an allegation on behalf of a pleader, when a part of it is offered in evidence against him, does not apply so as to render an answer filed to an amended bill admissible on behalf of defendant, when the answer to the original bill is offered against him in a subsequent action at law, it is said: "It is true that, wherever the declaration of a party is used as evidence against him, the whole of it must be taken together, as well that which operates in his favor as that which makes against him, and hence it is an established rule that, if an answer of a party is used against him, he has a right to insist upon the whole of it being read; but, regularly, it is only the whole statement which he makes at the same time, which he has a right to insist upon being read in his favor, when a part of it is used against him, and, therefore, if the statement made at one time is used against a party, it does not make a statement made by him at a different time evidence in his favor."

[208] In Granite Gold Min. Co. v. Maginness (1897) 118 Cal. 131, 50 Pac. 269, an action of ejectment, plaintiff offered in evidence certain admissions contained in defendant's answer with respect to plaintiff's title, and the court thereupon admitted the whole of the answer into evidence on defendant's behalf. The court, in holding this improper, says: "When the plaintiff offered in evidence so much of the answer of defendant as averred the execution of certain deeds of conveyance, it entitled the defendant to read as evidence in the case every fact averred in his answer, going to explain, modify, or qualify the averments made evidence by the plaintiff, and, as the cause was tried by the court, it may have been proper to permit the whole answer to be read, to the end of determining whether or not any such explanations or qualifications were contained therein; but this did not have the effect of making the whole answer conclusive evidence in the case." The term "conclusive" is used here because there was no other evidence in the case, and the pleading was necessarily conclusive evidence, if evidence at all. What the other court holds is that, the hearing being to the judge, the whole of the pleading may be read; but that the portions thereof not containing qualifying matter are not to be considered evidence.

In Blankman v. Vallejo (1860) 15 Cal. 639, involving an answer under the Code, it is said: "It is true the answer does deny the delivery of the bond; but its possession by the plaintiff was evidence of delivery. There is nothing in the point that an admission in an answer cannot be availed of by the plaintiff, without entitling the defendant to the benefit of the whole as proof. An answer is no proof for the defendant, under our statute; but his admission of a fact stated in the bill is conclusive evidence against him."

In Masterson v. Heitmann (1905) 38 Tex. Civ. App. 476, 87 S. W. 227, where plaintiffs introduced into evi-

tions of the pleading not connected with the admission, nor qualifying nor limiting it, need not be offered in evidence certain admissions contained in defendant's answer and cross bill, an instruction to the jury that, by so doing the plaintiffs made the whole of these pleadings their evidence, is held improper.

And see Pittsburgh v. Pittsburgh R. Co. (1912) 234 Pa. 223, 83 Atl. 273, Ann. Cas. 1913C, 933, infra, note 209.

[209] It is said in Gunn v. Todd (1855) 21 Mo. 303, 64 Am. Dec. 231, involving an answer to a petition under the Code, that "the reading of a portion of the defendant's answer by the plaintiff as evidence, the answer being a pleading in the cause, and read as such, gave the defendant no right to use any other parts of the answer as evidence for himself. If a defendant admits one fact, and it is used by his adversary as evidence, surely that can be no warrant to him to take all the facts stated in the answer as evidence against the plaintiff. If any other portions of the answer, not read by the plaintiff, affected the sense, or explained in any way the portions read, he would have a right to read them; but as to the portions which related to other facts, he would have no right to do so."

After holding admissions in an affidavit of defense in an action of assumpsit admissible on behalf of the plaintiff, it is said, in Pittsburgh v. Pittsburgh R. Co. (Pa.) supra: "He [plaintiff] is not required to offer the whole affidavit, and is not bound by any part of the affidavit which he does not specially offer; nor can the defendant use the other parts of the affidavit to relieve himself from supporting those averments by proof. Such parts only of the affidavits as are offered for the specific purpose are in evidence, and to be considered by the jury."

And where, in Wauhop v. Sauvage (1913) — Tex. Civ. App. —, 159 S. W. 185, the plaintiff was permitted, on an issue of accounting, to offer in evidence admissions in defendant's answer with respect to the receipt of a sum of money as rent, the declarations of defendant as to the disposition of the sum received as rent were refused, as self-serving.

In Buhrmaster v. New York C. & H. R. R. Co. (1916) 173 App. Div. 62, 158 N. Y. Supp. 712, it is held that plaintiff may not make use, as evidence on his behalf, of a complaint, superseded by an amended complaint, and introduced into evidence by the defendant.

In Gossler v. Wood (1897) 120 N. C. 69, 27 S. E. 33, while admitting that explanatory matter in an answer, necessary to the proper understanding of an admission therein, should be admitted therewith, it is held that, under the Code procedure, it is not necessary to admit the whole of the answer on behalf of defendant, when an admission therein is admitted on behalf of plaintiff.

Where one portion of a paragraph in an answer admits plaintiff's allegation as to the place where the injury complained of occurred, by introducing such admission into evidence the court is not bound to offer the remainder of defendant's paragraph, which has nothing to do with the place of the injury, but contains a denial of the commission of the injury by defendant. Lewis v. Norfolk & W. R. Co. (1903) 132 N. C. 382, 43 S. E. 919.

So, in an action against a railroad for the death of a brakeman by being struck, while riding on top of defendant's cars, by a bridge, under which the train passed, a part of the answer admitting the manner of decedent's death is held, in Hedrick v. Southern R. Co. (1904) 136 N. C. 510, 48 S. E. 830, to be competent, without the introduction of the remainder of the paragraph, which denies the negligence of the defendant. The court says: "It is true that the part of the paragraph offered in evidence was only the half of the paragraph, and a half of the sentence, but it was a complete admission that the intestate had been killed, and that his death was caused by contact with the bridge. That part of the sentence not offered in evidence did not, in the least, retract that admission. It only had reference to whether he was killed through the negligence of the defendant. It was not averred in the latter part of the sentence that the intestate was not killed by being stricken on the head by the timbers of the bridge, but it contained a matter of defense on the part of the defendant against its obliged negligence."

And in Stewart v. North Carolina

not be made evidence by the offering of a portion of such pleading by the opposite party, as an admission.[210] Later decisions, however, show that the rule with respect to the admissibility of allegations explaining and limiting the effect of admissions applies, nevertheless, in that jurisdiction.[211]

Where, by the terms of statute, each paragraph of an answer must be complete within itself, a party offering one paragraph containing an admission is not bound to offer, in connection therewith, the whole of the answer.[212] It is held, however, that the defendant may offer in his own behalf whatever statements are contained in the other paragraphs of the answer, tending to destroy the admission offered. And where a pleader is given the right, by statute, to offer in evidence any portion of his pleading necessary to the understanding of a portion already in evidence, it is held that his adversary offering an admission in his pleading, is not bound to offer more than the admission.[213]

R. Co. (1904) 136 N. C. 385, 48 S. E. 793, an action against a railroad for the wrongful death of plaintiff's decedent on its track, it was held proper to admit a portion of a paragraph in defendant's answer, admitting that defendant's train did the killing, without offering the remainder of the paragraph, which denied the negligence of the defendant.

Where, in Hockfield v. Southern R. Co. (1909) 150 N. C. 419, 134 Am. St. Rep. 945, 64 S. E. 181, the plaintiff offered two paragraphs of defendant's answer in evidence as admissions, and defendant thereupon offered the other two paragraphs, the court says: "Here the paragraphs of the answer put in evidence by the plaintiff were complete in themselves, and it was not error to exclude the distinct averments in its own interest, made by the defendant."

In Modlin v. Atlantic F. Ins. Co. (1909) 151 N. C. 35, 65 S. E. 605, an action on a fire insurance policy, the defendant, in one paragraph of his answer, said: "Defendant admits the loss of the said property by fire, but denies liability therefor." It is held that the denial of liability need not be introduced into evidence by the plaintiff in order to take advantage of the part of the sentence containing the admission.

In Sawyer v. Roanoke R. & Lumber Co. (1907) 145 N. C. 24, 22 L.R.A. (N. S.) 200, 58 S. E. 598, an admission in defendant's answer with respect to the manner in which the injury complained of was sustained is held admissible, without offering "qualifying or explanatory matter inserted by way of defense" in the same paragraph.

And the preceding case is quoted from and followed in Wade v. McLean Contracting Co. (1908) 149 N. C. 177, 62 S. E. 919.

[210] The fact that an answer contains an admission does not render new matter in avoidance admissible on behalf of defendant, even under the Code; but the burden of proving such allegations in avoidance rests upon the defendant. Cook v. Guirkin (1896) 119 N. C. 13, 25 S. E. 715.

[211] See Spencer v. Fortescue (1893) 112 N. C. 268, 16 S. E. 898, supra, note 206; Gossler v. Wood (1897) 120 N. C. 69, 27 S. E. 33, supra, note 209; McCord v. Southern R. Co. (1902) 130 N. C. 491, 41 S. E. 886, supra, note 206; McCaskill v. Walker (1908) 147 N. C. 195, 61 S. E. 46, supra, note 206.

[212] Under a Code, providing that each paragraph of an answer must be sufficient within itself, it is held in Kentucky & I. Cement Co. v. Cleveland (1891) 4 Ind. App. 171, 30 N. E. 802, that it is not improper to admit a single paragraph of a pleading containing several, against a pleader. "If any other paragraph of the answer contained statements tending to destroy the effect of the admissions contained in the one introduced, it would have been competent evidence on behalf of appellant [defendant], had it been offered," says the court.

[213] It is held, in Johnson v. Butte & S. Copper Co. (1910) 41 Mont. 158, 48 L.R.A.(N.S.) 938, 108 Pac. 1057, that a plaintiff offering an admission contained in defendant's answer is not bound to introduce the whole of the answer, defendant having a right, under a statute providing that, where a portion of a writing is given in evidence, any other portion necessary to its understanding is admissible, to offer such portions thereof as are necessary to explain the admissions.

VII. Admissibility of pleading on ground of prior admission of opposite pleading.

A pleading is always admissible to explain admissions against interest set out in the opposite pleading, both on behalf of the party making the admissions, and on behalf of the party offering them in evidence.[214] Pleadings offered, however, not merely to explain statements in opposite pleadings already offered in evidence, but for the purpose of proving the statements set out therein, and thus disproving the statements of the opposite pleadings, are properly inadmissible, both on behalf of the author of the pleading offered,[215] and on behalf of the author of the opposite pleading.[216] In a doubtful case, it is held that, where a bill in another proceeding is offered in evidence against the defendant in that proceeding, to show that a certain fact was there put in issue, the defendant in the former proceeding may offer in evidence his answer filed therein, for the purpose of showing what account he there gave of the fact in question.[217] It is improbable that any court to-day would make a similar holding.

VIII. Admissibility of pleadings never filed.

The elements of admissibility of pleadings containing self-serving declarations, as evidence, are verification and the making of the pleader, by the call for discovery, into a witness for the party making the call.[218] Where a pleading is not filed, although answering a call for discovery, it is difficult to see how the pleader is to be considered, with respect to the unused pleading, as a witness either for his opponent or himself. This question may be complicated by the amendment by the complainant of his bill, before answer thereto is filed, but after the contents of the unfiled answer are learned, for the purpose of waiving verification, and depriving the respondent of the benefit of his pleading.[219] But, as a general rule, dealing with the question in the abstract, pleadings containing self-serving declarations, unfiled and unused, so far as the complainant's call for discovery goes, seem properly to be inadmissible on behalf of the pleader. The only case found involving this question holds to the contrary, but, as is there said, the ruling of the court applies only to the particular facts involved, and not to the general question.[220]

IX. Admissibility of the declarations of parties suing or defending in representative capacity.

It is the undisputed rule that the pleadings of persons suing or defend-

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[214] See notes 116 and 117 of the note, on the admissibility as evidence of pleadings, as containing admissions against interest, appended to Craig v. United R. Co., — A.L.R. —.

[215] Where, in Clarke v. Robinson (1844) 5 B. Mon. (Ky.) 55, plaintiff, in an action at law, had introduced the answer of the defendant in a prior suit in equity between the same parties, it is held that plaintiff's bill in the prior suit "could not be made evidence to disprove the answer read by him, and much less to prove his own statements."

[216] When not necessary for purposes of identification, it is held, in Randall v. Parramore (1847) 1 Fla. 409, that the bill in a suit in equity is not admissible in a subsequent legal action brought by two of the defendants in the equity suit against their codefendant, who filed the answer in question in that suit, merely because such answer is read on behalf of the petitioners in the subsequent action. It would be otherwise, the court says, were the reading of the bill necessary to explain the meaning of the answer.

[217] Where, in Dolphin v. Dolphin (1826) 2 Molloy (Ir.) 540, plaintiff read the bill in a cause in exchequer between another plaintiff and the defendant, to prove that a certain fact was in issue in that cause, it is held that defendant's answer is admissible, in his behalf, to show what account he there gave of the fact in question.

[218] See the text accompanying notes 19 and 20 supra.

[219] See supra, note 92.

[220] In Culbertson v. Matson (1848) 11 Mo. 493, complainants filed a bill to enforce a trust in land against the trustee, and the trustee prepared an answer, made oath to it, and was about to file it, when the bill was dismissed. Subsequently, after the trustee's death, the complainants filed an-

ing in representative capacities do not constitute evidence for the real parties in interest, even though the pleadings make discovery,[221] and conform in all respects to the qualifications specified for pleadings admitted on behalf of the pleader. This rule has been applied, both to the pleadings of guardians ad litem, acting on behalf of infants,[222] and to the pleadings of husbands joined with their wives, on account of the disability of coverture.[223]

X. Weight and conclusiveness.

a. Conclusiveness in general.

As a general rule, self-serving declarations contained in pleadings are not conclusive evidence on behalf of the pleader. This is true with respect to answers to bills for relief;[224] and answers to interrogatories filed under the authority of statute, whether specifically so provided by the statute,[225] or

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other bill for the same purpose against the trustee's heirs and representatives, and the defendants sought to introduce as evidence in their behalf the unfiled answer of their father in the former proceeding. "There may be no legal principle which would make the answer of Richard Matson [trustee] evidence in the cause," the court says, "but we are satisfied that, under the circumstances of this case, no chancellor ought to entertain the bill upon any other terms than the admission of the answer. This bill is brought to enforce a trust, after a lapse of many years, and after the death of the two principal parties to the transaction. At the time the first suit was instituted, R. Matson was perhaps the only individual living who was fully competent to explain and unravel the transaction, and if his account of it, verified by the solemnity of his oath, shall be excluded, it cannot operate otherwise than as injurious to his representatives, who are measurably ignorant on the subject."

[221] Supra, III. b.

[222] "The answer of an infant, also, by his guardian ad litem, though it be responsive to the bill, and sworn to by the guardian, is not evidence in his favor; for it is regarded as a mere pleading, and not as an examination for the purpose of discovery." Bussier v. Weekey (1899) 11 **Pa.** Super. Ct. 463, quoting from Greenleaf on Evidence.

So, in Bulkley v. Van Wyck (1836) 5 Paige (**N. Y.**) 536, it is said: "If, as suggested, the new defendants are infants, their answer on oath, by their guardian, would not be evidence in their own favor. . . . He [infant] is not allowed to answer personally; and his answer by his guardian is a pleading merely, and not an examination for the purposes of discovery, although an answer on oath is not waived by the complainant."

And it is said in Stephenson v. Stephenson (1837) 6 Paige (**N. Y.**) 353, that at the time the bill in that case was filed, "and when this defendant was an infant, it would have been useless to waive an answer from him on oath, as his guardian ad litem could not put in an answer which could be used as evidence, either for or against the infant."

It is said obiter in Riegel v. American L. Ins. Co. (1893) 153 **Pa.** 134, 19 L.R.A. 166, 25 Atl. 1070, that "the answer of an infant by his guardian ad litem, though it be responsive to the bill, and sworn to by the guardian, is not evidence in his favor."

[223] Where, in an action against a wife, the husband is made a party for the mere sake of conformity, he having no legal interest in the cause, and no discovery from him nor relief against him being asked, his answer is not evidence on behalf of his wife. Frank v. Lilienfeld (1880) 33 Gratt. (**Va.**) 377.

[224] Newlove v. Callaghan (1891) 86 **Mich.** 301, 49 N. W. 214, denying rehearing of (1891) 86 Mich. 297, 24 Am. St. Rep. 123, 48 N. W. 1096; Barron v. Meyers (1905) 140 **Mich.** 431, 103 N. W. 842; Jackson v. Hart (1833) 11 Wend. (**N. Y.**) 343; Scott v. M'Donald (1799) 3 **N. C.** (2 Hayw.) 98 (per Moore, J., Haywood, J., contra); Mayo v. Carrington (1869) 19 Gratt. (Va.) 74; PICTURE PLAYS THEATER CO. v. WILLIAMS (reported herewith), ante 1.

It is held in Miller v. Tollison (1824) Harp. Eq. (**S. C.**) 145, 14 Am. Dec. 712, that, where the bill is for relief, the answer thereto is not conclusive upon the complainant.

[225] Wilson v. Maria (1852) 21 **Ala.** 359; Southern R. Co. v. Hubbard (1896) 116 **Ala.** 387, 22 So. 541; Louisville & N. R. Co. v. Wynn (1910) 166

not.[226] With respect to answers to bills of discovery in chancery, introduced by the complainants therein in the actions at law, in aid of which the bills are filed, there is a division of authority. It should be noted that answers to bills of discovery, when used as evidence, are introduced by the complainant in the bill,[227] and that he must offer in evidence the whole of the respondent's answers,[228] including not only admissions against interest, but also self-serving declarations. In the case of answers to bills in equity for relief, this is not true; and it has, at times, been urged that, because the declarations in answers to bills of discovery favoring the defendant are offered in evidence by the complainant therein, he should be estopped to offer proof to overcome them.[229] No court has sustained this view, and the general rule is that answers to bills of discovery are not conclusive on behalf of the pleader.[230] In several jurisdictions, however, it is held that the complainant, to entitle himself to a bill of discovery, must allege that the facts respecting which he prays discovery rest solely in the knowledge of the respond-

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Ala. 413, 51 So. 976; McDougal v. Alston (1914) 190 Ala. 78, 66 So. 683; Stevens v. Gwtahmey (1845) 9 Mo. 636; Sawdey v. Spokane Falls & N. R. Co. (1902) 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972.

It is held in Wilson v. Maria (1852) 21 Ala. 359, that the answer of a party to interrogatories, filed under the statute expressly providing that the answers shall not be conclusive, is not conclusive evidence, but that "it is to be treated like the testimony of any other witness, and is to prevail, when it is not outweighed by other testimony, in whole or in part."

Under a statute providing expressly that answers to interrogatories filed thereunder may be contradicted, it is held in Le Bleu v. Savoie (1903) 109 La. 680, 33 So. 729, that such answers may be contradicted by the proponent, notwithstanding the fact that he has called them forth, and that such contradiction may be by parol, where parol is otherwise admissible.

[226] Goodman v. Lehigh Valley R. Co. (1911) 82 N. J. L. 527, 81 Atl. 851; Mays v. Lehigh Valley R. Co. (1911) 82 N. J. L. 450, 81 Atl. 848; Murray v. Johnson (1858) 1 Head (Tenn.) 353; M'Farland v. Hunter (1836) 8 Leigh (Va.) 489.

The answers of a garnishee to interrogatories filed in the garnishment proceedings, denying indebtedness to the principal defendant, are not conclusive evidence in his behalf. Lansdale Trust & S. D. Co. v. Smith (1902) 19 Pa. Super. Ct. 235.

And see Prentiss v. Danaher (1866) 20 Wis. 312, infra, note 237; Wilson v. Maria (1852) 21 Ala. 359, infra, note 244.

[227] See supra, note 39.

[228] See supra, note 178.

[229] See Nourse v. Gregory (1823) 3 Litt. (Ky.) 378, infra, note 230.

[230] Chambers v. Warren (1851) 13 Ill. 318; Williams v. Jayne (1870) 55 Ill. 81; Williams v. Wann (1847) 8 Blackf. (Ind.) 477; Carson v. Flowers (1846) 7 Smedes & M. (Miss.) 99; Lyons v. Miller (1849) 6 Gratt. (Va.) 427, 5 Am. Dec. 129.

In holding improper a prayer for an instruction, directing the jury, in an action at law, that answers filed to a bill of discovery in aid thereof are conclusive on the complainant, the court, in District of Columbia v. Robinson (1901) 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283, affirming (1899) 14 App. D. C. 512, says: "The greatest strength of proof attributable to an answer under oath, in a suit in equity, is that it cannot be overcome by a single witness, unaccompanied by some corroborating circumstance. That it has even that strength in a common-law court we are not called upon to decide. It certainly has not conclusive strength."

So, in Nourse v. Gregory (1823) 3 Litt. (Ky.) 378, it is said: "An answer to a bill of discovery is entitled to no higher consideration than an answer to any other description of bill, when given in evidence on the trial of an issue at law; and of answers in general, it is said that although 'the party producing an answer makes the whole evidence for the defendant, of the facts stated in it, yet it is not conclusive evidence of those facts, but the plaintiff may contradict it by other evidence.'"

It is said in Fant v. Miller (1867) 17 Gratt. (Va.) 187, that "if a witness state facts against the interest of the party that called him, another witness may be called by the same party

ent thereto; and that he is accordingly estopped from stultifying himself by subsequently introducing other evidence with respect thereto.[231] But where the complainant, in a bill of discovery, must allege merely that the facts as to which a discovery is sought are material to his case, there is nothing to prevent him from offering evidence to overcome the self-serving declarations contained in the answer.[232] Where a party to a legal action seeks the aid of the court of equity, on the ground that the facts respecting which he prays discovery rest solely in the knowledge of the respondent to the bill, and the equity court, having obtained jurisdiction of the cause for the purposes of the discovery, retains jurisdiction for the purpose of granting relief, it is held that the complainant cannot contradict the answer made to his bill, inasmuch as to do so would prove him to be without any right to equity, and would put him out of court.[233]

It has been seen that, in certain instances, parties offering into evidence portions of the pleadings of their adversaries, as containing admissions against interest, are

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to disprove those facts; for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential."

And see Williams v. Wann (1847) 8 Blackf. (**Ind.**) 477, infra, note 232.

[231] It is said in Barton v. Rushton (1813) 4 Desauss. Eq. (**S. C.**) 373: "Where a case originates at law, and the complainant comes here for a discovery, after a verdict against him, and states that a particular fact of which he seeks discovery is in the knowledge of defendant alone; that if the defendant, answering, deny all knowledge of such fact, then the complainant is precluded from going into evidence to contradict the answer. Because, to permit him to do so, after stating that the fact was known to defendant alone, would be to entrap him, by holding out an untruth."

So, in Pollard v. Lyman (1803) 1 Day (**Conn.**) 156, 2 Am. Dec. 63, it is said: "A plaintiff, therefore, to entitle himself to a discovery, avers in his bill that the facts respecting which he prays a disclosure rest solely in the knowledge of the defendant, or of the defendant and himself; and to permit him, after disclosure is obtained, to produce other evidence in proof of those facts, is to permit him to falsify himself, and to trifle with the court and the conscience of his adversary."

In Robinson v. Francis (1843) 7 How. (**Miss.**) 458, it is said: "The party who files a bill of discovery always admits that he cannot prove the facts, except by the answer of his adversary; and that answer is conclusive upon him. He is not permitted to contradict it."

[232] In Williams v. Wann (1847) 8 Blackf. (**Ind.**) 477, it is said: "Where a party goes in his bill for discovery merely, with the view of using the answer obtained as evidence on a trial at law, it is necessary for him to show in his bill only that the facts as to which a discovery is sought are material to his defense, and not that he cannot establish it without them; and the answer to such a bill, when obtained, may be used on the trial at law, or not, as the party obtaining it chooses; and, if used, it does not preclude the admission of other evidence."

[233] In Henken v. Gramann (1846) 2 Rich. L. (**S. C.**) 365, an action at law, in which defendant filed interrogatories, it is said obiter: "Where a plaintiff resorts to a court of equity for the establishment of a claim purely legal, upon the ground that facts essential to his case are exclusively within the knowledge of the defendant, and expects that the court, having possession of the case for discovery, will proceed to grant relief, he must rely upon the answer of the defendant, because his adduction of other evidence would remove the only ground for the jurisdiction of the court. . . . But in all cases where bills are filed for discovery and relief in matters within the equity jurisdiction, the answer may be contradicted."

And it is said in Smith v. Smith (1896) 92 Va. 696, 24 S. E. 280, that where a court of equity, having obtained jurisdiction in a cause by reason of the demand for discovery, retains jurisdiction for the purpose of granting relief, "the complainant cannot contradict the answer, as to the matter discovered by it in response

compelled to offer, in connection therewith, allegations explaining or limiting the effect of the admissions.[234] Here, as in the case of answers to bills of discovery,[235] the self-serving declarations are introduced into evidence not by the pleader himself, but by his adversary; and it has been urged that, having introduced the statements into evidence, the adversary is estopped to offer evidence to overcome them.[236] The courts, however, have not adopted this view, it being unanimously held that such self-serving declarations are not conclusive as against the pleader's adversary, offering them into evidence in connection with admissions against interest contained in the same pleading.[237]

In Louisiana, there is a rule that a

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to the prayer of the bill, by other evidence, as he would thereby prove himself out of court."

It is said obiter in Fant v. Miller (1867) 17 Gratt. (Va.) 187, with respect to answers to bills of discovery: "Where the court of equity retains the cause and proceeds to give the proper relief, it acts as a substitute for the court of law, and gives the same effect to the answer that would be given to it in that court. It would seem, however, with this difference, that, in the court of equity, the only ground of jurisdiction being the necessity for a discovery, the plaintiff cannot contradict the answer by other evidence, as he would thereby prove himself out of court."

It is said obiter in Thompson v. Clark (1886) 81 Va. 422, an action not depending upon discovery for the jurisdiction of equity, that, in a case where the equitable jurisdiction depends solely upon the discovery, if "the plaintiff were permitted to contradict the answer and to prove his case by other evidence, he would thereby prove himself out of court."

[234] Supra, VI.

[235] See supra, note 230 and the accompanying text.

[236] See Cromwell v. Hughes (1895) 12 Misc. 372, 33 N. Y. Supp. 643, infra, note 237; Prentiss v. Danaher (1866) 20 Wis. 311, infra, note 237; and the cases in note 237, generally.

[237] Where, in Gildersleeve v. Landon (1878) 73 N. Y. 609, the portion of defendant's answer admitting plaintiff's purchase of the property sued for contained an allegation that plaintiff had purchased with knowledge of defendant's prior mortgage, it is held that, although the declaration must be received together with the admission, plaintiff may introduce evidence to disprove it.

So, in Whitney v. Ticonderoga (1889) 53 Hun, 214, 6 N. Y. Supp. 844, defendant admitted that the road scraper which caused plaintiff's injuries had been left standing in the highway, but also stated that due diligence had been used in placing it there. In holding the refusal of a nonsuit proper, the court points out that the jury is not bound to believe the allegation with respect to diligence. "The jury must determine the issues of fact upon a fair consideration of all the testimony," the court says: "Their convictions or inferences cannot be coerced by the court, and they may, upon all the evidence, reach the conclusion that the confession of the party is true, and the avoidance false."

And it is held in Warne v. Johnston (1911) 48 Pa. Super. Ct. 98, that, when plaintiff in assumpsit offers in evidence the defendant's affidavit of defense, he is not concluded by the statements made therein by defendant in his own behalf.

In Cromwell v. Hughes (1895) 12 Misc. 372, 33 N. Y. Supp. 643, it is said: "A party is not bound by the admission of his adversary in a pleading, but is at liberty to use it so far as it makes in his favor, and to disprove the residue; that is, he is not estopped by it."

If the answer of a garnishee contains admissions beneficial to the plaintiff, "he may read and rely upon such admissions," it is said in Prentiss v. Danaher (1866) 20 Wis. 311, "and that will not preclude him from disproving the answer in other respects, the same being controverted by a reply, or by operation of statute, where no reply is required."

It is held in Johnson v. Butte & S. Copper Co. (1910) 41 Mont. 158, 48 L.R.A.(N.S.) 938, 108 Pac. 1057, that a plaintiff who introduces portions of defendant's answer in an action at law is not bound by the allegations contained therein, favorable to the defendant.

So, a plaintiff may offer in evidence the whole of defendant's affidavit of defense, take advantage of such por-

party to a suit cannot avoid the rule of evidence with respect to the contradiction of the terms of a written contract by parol evidence, by the expedient of proposing interrogatories, with respect to the contract, to his opponent, and then introducing parol evidence to overcome the answers made in response thereto.[238] Exceptions to this rule, however, exist in the case of strangers to the contract,[239] and in the case of evidence offered to explain an ambiguity in the writing.[240]

As shown above,[241] it is doubtful

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tions as are in his favor, and contradict the rest. McAvoy v. Consolidated Title, Ins. & T. Co. (1905) 27 Pa. Super. Ct. 271.

A plaintiff offering in evidence the answer of defendant, which has been superseded by an amended answer, is not bound by all the statements therein contained, but may introduce evidence to rebut the portion of them contrary to his view of the case. Cleveland, C. C. & St. L. R. Co. v. Gray (1897) 148 **Ind.** 266, 46 N. E. 675, 2 Am. Neg. Rep. 116.

And see Sims v. Ferrill (1872) 45 **Ga.** 585, supra, note 206; Chamlee v. Planters' Hotel Co. (1911) 155 **Mo.** App. 144, 134 S. W. 123, supra, note 205.

[238] Godwin v. Neustadtl (1890) 42 **La.** Ann. 735, 7 So. 744; Wright-Blodgett Co. v. Elms (1902) 106 **La.** 150, 30 So. 311; Rester v. Powell (1907) 120 **La.** 406, 45 So. 372; Larido v. Perkins (1913) 132 **La.** 660, 61 S. E. 728.

In Semere v. Semere (1855) 10 **La.** Ann. 704, involving the right of a proponent of interrogatories to offer parol evidence to overcome the answers to them, under the statute which provides that such answers may be overcome by two witnesses, or by one witness and strong circumstantial evidence, or by written proof, it is said: "It does not follow . . . that a party would, by probing the conscience of his adversary, be enabled to introduce parol proof to contradict his answers in relation to a notarial act, or the oral sale of an immovable. This article of the Code of Practice must be construed with reference to the other provisions of law, and cannot be held to authorize the introduction of the testimony of witnesses, only where such a mode of proof is admitted. But where the answers of the party supply the place of written proof (in those cases where written proof is required by law), no parol evidence can be received to contradict them." In that case a sale of a slave was involved in the interrogatories and answers.

[239] But the rule against impeachment, by parol, of title made out by answers, under oath, to interrogatories, is held in Rush v. Landers (1902) 107 **La.** 549, 57 L.R.A. 353, 32 So. 95, to apply only to parties to the instrument attacked, and not as against a judgment creditor, on behalf of an intervenant laying claim to the land levied upon under the judgment; and it is held that "the answers of the intervener to the interrogatories on facts and articles are entitled to no greater effect than her oral testimony, given in her own behalf."

[240] It is said in Rester v. Powell (1907) 120 **La.** 406, 45 So. 372: "The rule is well established that where, in a litigation between parties to an authentic act, purporting to convey title to real estate, one of the litigants attempts, by means of interrogatories on facts and articles propounded to his opponent, to prove a contract at variance with that expressed in the act, he must stand upon the answers made to such interrogatories, unless he then chooses to rely upon the act itself. We do not, however, understand that if, in such a case, the litigant elects to stand upon the act, he is precluded, by the answers to the interrogatories, from proving, by parol testimony or otherwise, anything that he might have proved if no interrogatories had been propounded." In that case, the proponent of the interrogatories was standing upon the contract, but it contained ambiguities, and the questions put to the defendant were with respect to its interpretation. The court says: "Ordinarily, the meaning of such an act would be ascertained from the face of the instrument, but in this instance, by reason of the language and of the conditions agreed on, the meaning is ambiguous, and cannot be ascertained in that way; hence, the door is opened to parol and other evidence, not to vary the terms of the instrument, but to render it intelligible."

[241] As to the admissibility of answers on behalf of the pleaders, in actions other than those in which filed, see supra, IV. b, 1.

whether an answer in one proceeding is admissible on behalf of the pleader in another. But even granting admissibility in such a case, it is held that, in the later proceeding, the answer is not conclusive evidence.[242]

b. Impeachment of pleader.

While a pleader's opponent is, in nearly all cases, free to offer testimony to overcome the self-serving declarations set out by the pleader in his pleading,[243] it is the unamimous rule of the courts that the opponent may not introduce testimony for the purpose of impeaching the pleader, by proving his want of truth and veracity.[244] This is on the ground that the opponent has

[242] Granting that the answer of defendant in one action is admissible on his behalf in another, it is held in Martin v. Campbell (1860) 11 Rich. Eq. (S. C.) 205, that it is not conclusive evidence on his behalf.

[243] See supra, X. a.

[244] In Chambers v. Warren (1851) 13 Ill. 318, involving an answer to a bill of discovery, it is said: "It is true that, after reading the answer to the jury, the appellants were not at liberty to discredit it by impeaching the general reputation of the appellee for truth; for the reason that a party is not permitted to show that his own witness is unworthy of belief; but he may always controvert the correctness of the statements made by his own witness, by the introduction of other evidence, and in that way discredit his testimony. An answer to a bill of discovery is entitled to no higher consideration than the answers of a party's own witness upon the stand, and may be controverted in the same way."

So, in Field v. Pope (1843) 5 Ark. 66, the proponent of a petition of discovery, provided by statute to take the place in, actions at law, of bills of discovery, is held to be estopped, after having introduced the answers thereto in evidence, from impeaching the party making such answers. The court says: "The discovery is generally granted upon the principle that the party cannot prove the discovery sought without resorting to the conscience of the opposite party. This is of the essence of the right. He here makes him his witness, reads the answer in evidence, and then attempts to show, by circumstantial documentary evidence, that his own witness is not to be credited."

Answers to interrogatories, filed under a statute making them evidence "upon the same condition, in all respects, as if they had been procured upon a bill in chancery for discovery," are held, in Wilson v. Maria (1852) 21 Ala. 359, to be subject to the rule with respect to impeachment, applied to answers to bills for discovery, and it is held, accordingly, that the party so introducing such answers admits that the respondent is worthy of credit, and is estopped to impeach him. "But using the answer of the party does not make that conclusive evidence," the court adds "It is to be treated like the testimony of any other witness, and is to prevail, when it is not outweighed by other testimony."

And where, in Miller v. Tollison (1824) Harp. Eq. (S. C.) 145, 14 Am. Dec. 712, involving defendant's answer to the bill the court received evidence to show that the defendant was not entitled to credit, it is said: "It was objected, however, that it was not proper to receive any evidence to prove the want of credibility of the defendant Tollison, because the complainant, by putting him to his oath, gave him credit, which he was not at liberty to attack or deny. This objection, by going too far, defeats itself. It would be absurd and mischievous to admit it, and it is not the rule of the court."

In Murray v. Johnson (1858) 1 Head (Tenn.) 353, it is said that the complainant having forced the defendant "into the position he occupies, and compelled him to answer on oath to the limited extent he chooses to prescribe, it is but reasonable that he should be bound by the responses he has extracted, unless he can disprove them. He may weaken them by circumstances intrinsic or extrinsic, but he cannot be allowed to discredit by attacking the general character."

And in Brown v. Bulkley (1862) 14 N. J. Eq. 294, it is said: "The party in whose favor the witness is examined is never permitted, either at law or in equity, to impeach or overthrow his testimony by assailing his character for truth and veracity. So far as the answer operates as evidence, its averments are regarded as the testimony of a witness called by the plaintiff. This is the foundation of the principle. The plaintiff calls upon the defendant to answer an allegation of fact which

made the pleader his witness by his call for discovery,[245] and that he is, therefore, bound by the rule against impeaching one's own witness with respect to him, in the same manner as if he had put him on the stand and questioned him there. But it has been held that the proponent of interrogatories, under a statute substituting such for a bill of discovery, not being bound to offer the answers thereto on the trial,[246] may, where he does not make use of them, inpeach the pleader when he offers himself as a witness on his own behalf at the trial.[247] Not having made use of the answers, he has not made the respondent his witness. And where the pleader offers himself as a witness, and his credibility is sucessfully impeached, it has been held that the effect of his pleading, as testimony, is weakened.[248]

c. Evidence necessary to overcome declaration.

1. In general.

(a) In answers to bills in equity for relief.

By calling upon the defendant to a suit in equity to answer, the complainant makes him a witness, it has been seen,[249] and bestows upon his answer

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he makes, and thereby admits the answer to be evidence of that fact. If testimony, it is equal to the testimony of any other witness."

In Salmon v. Clagett (1830) 3 Bland, Ch. (Md.) 125, involving defendant's answer to the bill, it is said: "It is no objection to the validity and efficacy of an answer in this respect that the defendant is infamous or a negro, and, as such, an incompetent witness in ordinary cases; his answer must, notwithstanding, have full credit allowed to it; since the plaintiff, by calling him into court, has given him a competency to this extent, for the purpose of defending himself and protecting his property."

It is said obiter, in Shackleford v. Brown (1894) 72 Miss. 380, 17 So. 896, that "the complainant by calling upon the defendant to answer, undoubtedly gives to his answer, in so far as it was responsive to the bill, the character of evidence, and precludes himself from attacking the general credibility of the defendant as a witness."

In Clark v. Bailey (1848) 2 Strobh. Eq. (S. C.) 143, where it was proposed to impeach the general character of the defendant as a means of shaking the credit of his answer to complainant's bill, the chancellor, in excluding the evidence, says: "If the most successful assault had been made on his veracity, I must still say that the case would have been left in too great doubt to allow of my interfering."

It is held in Price v. Mazange (1858) 31 Ala. 701, that, where the answer of a garnishee is adduced in evidence by the plaintiff, he cannot discredit it in a request for instructions.

And see Fant v. Miller (1867) 17 Gratt. (Va.) 187, infra, note 305.

[245] See the text accompanying notes 19 and 20 supra.

[246] See supra, notes 42 and 43, and the accompanying text.

[247] In Shober v. Wheeler (1893) 113 N. C. 370, 18 S. E. 328, the plaintiff examined defendant before the trial, under a statute substituting such a proceeding in place of a bill of discovery. Upon the trial, the plaintiff did not introduce his answers into evidence, but, when defendant testified in his own behalf, asked him, on cross-examination, questions alleged by his counsel to be impeaching. Such questions were objected to on the ground that plaintiff had made defendant his witness by the examination, and that he could not, therefore, impeach him. The court says that the examination "did not compel the plaintiff to use that testimony on the trial, nor did it make that defendant, in any sense, the plaintiff's witness."

[248] In Bixler v. Heilman (1910) 44 Pa. Super. Ct. 603, it is said: "Where the defendant goes upon the witness stand, and his credibility is successfully impeached by evidence of his general reputation for truth and veracity, the force of his answer is weakened, and the rule in equity will be satisfied by the positive and satisfactory testimony of one witness to the facts essential to a decree of the relief prayed for, corroborated by other facts and circumstances which give it greater weight than the answer, even though the circumstantial evidence, standing alone, would not be sufficient to make out every essential to a decree for the plaintiff."

And see infra, note 274.

[249] See the text accompanying notes 19 and 20 supra.

the qualifications of evidence. In considering the weight of the answer as evidence, it is to be viewed as the testimony of the defendant, that is, the testimony of one witness;[250] and whatever is necessary to overcome the testimony of a witness is necessary to overcome it.[251] The complainant has made the defendant his witness, and he can with poor grace urge that his testimony is not of equal weight with that of any other witness whom he happens to call. Much of the difficulty that arises in connection with the question of the weight of answers in equity can be avoided by the application of the simple rule set out above, viz., that whatever is required to overcome the testimony of one witness, and neither more nor less, is necessary to overcome the answer of a defendant in equity. This question as to the weight of an answer arises most frequently in cases where the answer is the only evidence which the defendant has. Inasmuch as the burden of proof is on the complainant, he must, at the very least, offer enough evidence to overcome the answer. And upon his ability to produce evidence sufficient to overcome the weight of the answer rests his right to a decree. While the courts have not agreed absolutely as to the wording of the rules laid down by them as measures of the weight of answers, these rules may be, at least partially, harmonized by the fact that they are all adopted as corollary to the same rule, —the rule that whatever is required to overcome the answer of one witness is necessary to overcome an answer in equity,—and that no fundamental difference in theory exists.

The simplest of the rules governing the weight of answers in equity is that the testimony of one witness is not sufficient to overcome such an answer.[252] Of course, this amounts to nothing more than saying that, when the testimony of one witness is opposed by the testimony of another witness, a balance is struck; and that the com-

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[250] Culbertson v. Luckey (1862) 13 Iowa, 12; Appleton v. Horton (1845) 25 Me. 23.

[251] In Veile v. Blodgett (1877) 49 Vt. 270, it is said: "In short, the answer, when used as evidence, is subject to the same proper criticism, and the same legal infirmities, that attach to all evidence, in whatsoever form it is introduced in court. All that the orator is bound to do is to meet and overcome the answer by competent proof. This proof may require one or twenty witnesses; it may be made without any." And it is said, further, that "the answer, considered as evidence, is to be weighed precisely as it would be if it appeared in a deposition disconnected from the defendant's pleading; and the fact that the defendant is interested in the event of the suit has the same effect, in discrediting his story, that it does in an ordinary case at law."

And in McLane v. Johnson (1886) 59 Vt. 237, 9 Atl. 837, it is said that an answer in equity gains no factitious weight because it happens also to be one of the pleadings. As evidence, it is subject to the infirmities of evidence.

[252] **Illinois.**—Dunlap v. Wilson (1863) 32 Ill. 517.

Iowa.—Davis v. Stevens (1856) 3 Iowa, 158; Clark v. Langworthy (1856) 3 Iowa, 563.

Kentucky.—Littell v. M'Iver (1808) 1 Bibb, 203; Hardwick v. Forbes (1808) 1 Bibb, 212; Sullivan v. Bates (1822) 1 Litt. 41; Patterson v. Hobbs (1822) 1 Litt. 275; Hawkins v. Embry (1821) 3 T. B. Mon. 225; Young v. Hopkins (1827) 6 T. B. Mon. 18 (obiter); Hudson v. Cheatham (1830) 5 J. J. Marsh. 50; McCrum v. Preston (1831) 5 J. J. Marsh. 332; Patrick v. Langston (1831) 5 J. J. Marsh. 653; Mason v. Peck (1832) 7 J. J. Marsh. 300; Bibb v. Smith (1833) 1 Dana. 580.

Maryland.—Salmon v. Clagett (1828) 3 Bland, Ch. 125; Methodist Protestant Church v. Baltimore (1848) 6 Gill, 391, 48 Am. Dec. 540; Gelston v. Pullman (1859) 15 Md. 260.

Massachusetts.—Parkman v. Welch (1837) 19 Pick. 231.

New Hampshire.—Page v. Page (1836) 8 N. H. 187; Hollister v. Barkley (1841) 11 N. H. 501; Bellows v. Stone (1846) 18 N. H. 465; Lawton v. Kittredge (1855) 30 N. H. 500; Warren v. Swett (1855) 31 N. H. 332.

New Jersey.—Commercial Bank v. Reckless (1846) 5 N. J. Eq. 430, reversed on another point but affirmed on this point in (1847) 5 N. J. Eq. 650; Brown v. Bulkley (1862) 14 N. J. Eq. 294; De Hart v. Baird (1869) 19 N. J.

plainant, having the burden of proof, must fail. This is a rule that has never been refuted. It is so close to the basic principle that there is no opportunity to go wrong with respect to it. In the old chancery practice, where

Eq. 423; Bent v. Smith (1869) 20 N. J. Eq. 199; Zane v. Cawley (1870) 21 N. J. Eq. 130; Calkins v. Landis (1870) 21 N. J. Eq. 133; Bent v. Smith (1871) 22 N. J. Eq. 560; Frink v. Adams (1883) 36 N. J. Eq. 485.

New York.—Swift v. Dean (1810) 6 Johns. 523; Hart v. Ten Eyck (1816) 2 Johns. Ch. 62; Stafford v. Bryan (1829) 3 Wend. 352, affirming (1828) 1 Paige, 239; Dunham v. Jackson (1830) 6 Wend. 22; Jackson v. Hart (1833) 11 Wend. 343; Cushman v. Shepard (1848) 4 Barb. 113.

North Carolina.—Martin v. Browning (1823) 9 N. C. (2 Hawks) 644; Bruce v. Child (1826) 11 N. C. (4 Hawks) 372; Allen v. Ledbetter (1830) 16 N. C. (1 Dev. Eq.) 449; Armsworthy v. Cheshire (1833) 17 N. C. (2 Dev. Eq.) 456; Speight v. Speight (1839) 22 N. C. (2 Dev. & B. Eq.) 280; Averitt v. Foy (1842) 37 N. C. (3 Ired. Eq.) 224.

Ohio.—Miami Exporting Co. v. United States Bank (1833) Wright, 249 (obiter).

Pennsylvania.—Campbell v. Patterson (1880) 95 Pa. 447; Burke's Appeal (1882) 99 Pa. 350; Hodges v. Laurel (1880) 2 Kulp, 372; Nulton's Appeal (1883) 103 Pa. 286; Gleghorne's Appeal (1888) 118 Pa. 383, 11 Atl. 797; Goggins v. Risley (1900) 13 Pa. Super. Ct. 316.

Porto Rico.—Fajardo de Salezar v. Costa (1904) 1 Porto Rico Fed. Rep. 119.

South Carolina.—Johnson v. Slawson (1831) Bail. Eq. 463; Clark v. Bailey (1848) 2 Strobh. Eq. 143; Counts v. Clark (1851) 3 Rich. Eq. 418.

Tennessee. — Searcy v. Pinnell (1812) 3 Tenn. 110 (obiter); Blair v. Brabson (1816) 3 Hayw. 15; Baker v. Barfield (1844) 4 Humph. 514; Woodfork v. Union Bank (1866) 3 Coldw. 488; Alexander v. Mluse (1903) 112 Tenn. 233, 79 S. W. 117.

Vermont.—Pierson v. Catlin (1830) 3 Vt. 272; Porter v. Bank of Rutland (1847) 19 Vt. 410; Shattuck v. Gay (1872) 45 Vt. 87; Field v. Wilbur (1876) 49 Vt. 157.

Virginia.—Hoomes v. Smock (1794) 1 Wash. 389; Love v. Braxton (1805) 5 Call. 537; Beatty v. Smith (1808) 2 Hen. & M. 395; Heffner v. Miller (1811) 2 Munf. 43; Thornton v. Gordon (1844) 2 Rob. 719.

United States.—Smith v. Shane (1829) 1 McLean, 22, Fed. Cas. No. 13,105; Piatt v. Vattier (1831) 1 McLean, 146, Fed. Cas. No. 11,117; Pomeroy v. Manin (1832) 2 Paine, 476, Fed. Cas. No. 11,260; Towne v. Smith (1846) 1 Woodb. & M. 115, Fed. Cas. No. 14,115; Delano v. Windsor (1860) 1 Cliff. 501, Fed. Cas. No. 3,754; Tobey v. Leonard (1861) 2 Cliff. 40, Fed. Cas. No. 14,067 reversed on other grounds (1864) 2 Wall. 423, 17 L. ed. 842; Scammon v. Cole (1871) 3 Cliff. 472, Fed. Cas. No. 12,432; Powden v. Johnson (1878) 2 N. J. L. J. 48, Fed. Cas. No. 11,353; Slessinger v. Buckingham (1883) 8 Sawy. 469, 17 Fed. 454; Union Bank v. Geary (1831) 5 Pet. 99, 8 L. ed. 60, affirming (1827) 3 Cranch, C. C. 233, Fed. Cas. No. 5,241a; Voorhees v. Bonesteel (1872) 16 Wall. 16, 21 L. ed. 268; Seitz v. Mitchell (1876) 94 U. S. 580, 24 L. ed. 179 (obiter); Vigel v. Hopp (1881) 104 U. S. 441, 26 L. ed. 765; Southern Development Co. v. Silva (1888) 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Campbell v. Northwestern Eckington Improv. Co. (1913) 229 U. S. 561, 57 L. ed. 1330, 33 Sup. Ct. Rep. 796, reversing (1910) 36 App. D. C. 149.

England.—Alam v. Jourdan (1683) 1 Vern. 161, 23 Eng. Reprint, 387; Janson v. Rany (1740) 2 Atk. 140, 26 Eng. Reprint, 488; Le Neve v. Le Neve (1747) 1 Ves. Sr. 66, 27 Eng. Reprint, 895; Glynn v. Bank of England (1750) 2 Ves. Sr. 58, 28 Eng. Reprint, 26; Mortimer v. Orchard (1793) 2 Ves. Jr. 243, 30 Eng. Reprint, 615; Evans v. Bicknell (1801) 6 Ves. Jr. 174, 31 Eng. Reprint, 998; East India Co. v. Donald (1804) 9 Ves. Jr. 275, 32 Eng. Reprint, 608; Cooke v. Clayworth (1811) 18 Ves. Jr. 12, 34 Eng. Reprint, 222, 11 Revised Rep. 137; Reeks v. Postlethwaite (1815) G. Coop. 161, 35 Eng. Reprint, 515; Harris v. Gardner (1817) 2 Madd. Ch. 198, 56 Eng. Reprint, 308.

In Garrow v. Carpenter (1834) 1 Port. (Ala.) 359, it is said, with respect to this rule requiring two witnesses to overcome the allegation of an answer: "The rule is not inexorable, but yields to such reasonable considerations as show the impropriety of its application. It is founded on the equitable principle that evidence should be weighed, and the preponderance given, not to number merely,

issues of fact arising in equity were sometimes submitted to juries for decision, a court of chancery would not submit an issue to a jury when the testimony thereupon consisted merely of the defendant's answer and of one witness opposing it.[253]

Although the testimony of one witness will not overcome the testimony of the defendant, as set out in his answer, the testimony of two witnesses will unquestionably be sufficient to accomplish that end.[254] One witness will balance the answer, and two will turn

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but to the greatest weight of the testimony. The answer of a defendant, who is made a competent witness by the complainant, is equal to another competent witness; and, without more, the cause is in equilibrio, and the maxim applies, 'Melior est conditio defendentis.'"

So, it is held in Marshall v. Howell (1871) 46 Ala. 318, that the answer of a defendant to a bill in chancery is not overcome by the testimony of the complainant as a witness.

"It is well settled," it is said in Powell v. Manson (1872) 22 Gratt. (Va.) 177, "that where the defendant denies, in express terms, the allegations of the bill, and the plaintiff produces only one witness in support of them, the court will neither make a decree nor send the case to be tried at law, but simply dismiss bill."

In Pember v. Mathers (1779) 1 Bro. Ch. 52, 28 Eng. Reprint, 979, it is said by the Lord Chancellor: "I take the rule to be that, where the defendant, in express terms, negatives the allegations of the bill, and the evidence is only one person, affirming what has been so negatived, there the court will neither make a decree, nor send it to a trial at law."

Where, in Tansel v. Pepin (1830) 5 Yerg. (Tenn.) 452, involving a bill charging defendants as securities, defendants denied the charge positively, the proof of one witness as to his understanding of the contract between the parties was held insufficient to overcome the answer. "If one witness would, in such a case, be sufficient," the court says, "his proof should be positive and direct of fact."

But see infra, note 276.

[253] See Powell v. Manson (Va.) and Pember v. Mathers (Eng.) supra.

In Keagy v. Trout (1888) 85 Va. 390, 7 S. E. 329, it was held that "when the allegations of the bill are positively denied by the answer, and the plaintiff had failed to furnish two witnesses, or one witness and strong corroborating circumstances in support of the bill, it is error in the chancellor to order an issue; that no issue should be ordered until the plaintiff has thrown the burden of proof on the defendant; and that, until the onus is shifted, and the case rendered doubtful by the conflicting evidence of the opposing parties, the defendant cannot be deprived, by an order for an issue, of his right to a decision by the court on the case as made by the pleadings and proofs."

But see Ibbotson v. Rhodes (1706) 1 Eq. Cas. Abr. 229, 21 Eng. Reprint, 1010, 2 Vern. 554, 23 Eng Reprint, 958, where an issue denied by the answer and supported by only one witness was submitted to the jury.

[254] **Alabama.**—Smith v. Rogers (1832) 1 Stew. & P. 317; Garrow v. Carpenter (1835) 1 Port. 359; Branch Bank v. Marshall (1842) 4 Ala. 60; McMekin v. Bobo (1847) 12 Ala. 268; Edmondson v. Montague (1848) 14 Ala. 370; May v. Barnard (1852) 20 Ala. 200; Bryan v. Cowart (1852) 21 Ala. 92; Garrett v. Garrett (1856) 29 Ala. 439; Camp v. Simon (1859) 34 Ala. 126; Bryan v. Bryan (1859) 34 Ala. 516; Easterwood v. Linton (1860) 36 Ala. 175; Marshall v. Cromm (1875) 52 Ala. 554; Turner v. Flinn (1880) 67 Ala. 529; Birmingham Nat. Bank v. Steele (1892) 98 Ala. 85, 12 So. 783.

Arkansas. — Watson v. Palmer (1844) 5 Ark. 501; Cummins v. Harrell (1845) 6 Ark. 308; Menifee v. Menifee (1847) 8 Ark. 9; Aiken v. Harrington (1851) 12 Ark. 391; Jordan v. Fenno (1853) 13 Ark. 593; Dyer v. Bean (1855) 15 Ark. 519; Wheat v. Moss (1855) 16 Ark. 243; Burr v. Burton (1856) 18 Ark. 214; Byrd v. Belding (1856) 18 Ark. 118; Shields v. Trammell (1857) 19 Ark. 51; Spence v. Dodd (1857) 19 Ark. 166; Hill v. Bush (1858) 19 Ark. 522; Marshall v. Green (1866) 24 Ark. 410; Barclay v. Dawson (1871) 26 Ark. 417.

Delaware.—Pickering v. Day (1866) 2 Del. Ch. 333; Pickering v. Day (1867) 3 Houst. 474, 95 Am. Dec. 291; Davidson v. Wilson (1869) 3 Del. Ch. 307; Brooks v. Silver (1874) 5 Del. Ch. 7; Small v. Collins (1880) 6 Houst. 273; Cummins v. Jerman (1887) 6 Del. Ch. 122, 33 Atl. 622.

the scale in the complainant's favor. But this rule should not be taken to mean that nothing less than two witnesses will overcome a sworn answer in equity. One agency which a complainant may employ to overcome the

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District of Columbia.—Burr v. Meyers (1876) 2 MacArth. 524; Rick v. Neitzy (1881) 1 Mackey, 21; Wheeler v. Ryon (1893) 1 App. D. C. 142; McCartney v. Fletcher (1897) 10 App. D. C. 572; Sheckells v. Sheckells (1914) 42 App. D. C. 131.

Florida.—White v. Walker (1854) 5 Fla. 478; Stephens v. Orman (1862) 10 Fla. 9; Carr v. Thomas (1882) 18 Fla. 736; Foster v. Ambler (1888) 24 Fla. 519, 5 So. 203; Day v. Jones (1898) 40 Fla. 443, 25 So. 275; Pinney v. Pinney (1903) 46 Fla. 559, 35 So. 95; Ocala Foundry & Mach. Works v. Lester (1905) 49 Fla. 347, 38 So. 56; Mayo v. Hughes (1906) 51 Fla. 495, 40 So. 499; Nobles v. L'Engle (1909) 58 Fla. 480, 51 So. 405; Russell v. Stickney (1911) 62 Fla. 569, 56 So. 691; Barnes & J. Co. v. Williams (1913) 64 Fla. 190, 60 So. 787; Mitchell v. Mason (1913) 65 Fla. 208, 61 So. 579; Pittman v. Milton (1915) 69 Fla. 304, 68 So. 658; Johns v. Bowden (1916) 72 Fla. 530, 73 So. 603; FARRELL v. FOREST INVEST. Co. (reported herewith) ante, 25.

Georgia.—Galt v. Jackson (1850) 9 Ga. 151; White v. Crew (1854) 16 Ga. 416; Williams v. Philpot (1856) 19 Ga. 567; Low v. Argrove (1860) 30 Ga. 129; Stanford v. Murphy (1879) 63 Ga. 410; Harris v. Collins (1885) 75 Ga. 97; Heard v. Nix (1895) 96 Ga. 51, 23 S. E. 122; Toomer v. Warren (1905) 123 Ga. 477, 51 S. E. 393.

Illinois.—Martin v. Dryden (1844) 6 Ill. 187; Swift v. School Trustees (1853) 14 Ill. 493; Stouffer v. Machen (1855) 16 Ill. 553; Pauton v. Tefft (1859) 22 Ill. 367; Morrison v. Stewart (1860) 24 Ill. 24; Myers v. Kinzie (1861) 26 Ill. 36; Barton v. Moss (1863) 32 Ill. 50; Power v. McCord (1864) 36 Ill. 214; Martin v. Eversal (1864) 36 Ill. 222; Wightman v. Hart (1865) 37 Ill. 123; Willdey v. Webster (1866) 42 Ill. 108; Blow v. Gage (1867) 44 Ill. 208; Fish v. Stubbings (1872) 65 Ill. 492; Stevenson v. Mathers (1873) 67 Ill. 123; O'Brian v. Fry (1876) 82 Ill. 274; Deimel v. Brown (1891) 136 Ill. 586, 27 N. E. 44, affirming (1889) 35 Ill. App. 303; Salsbury v. Ware, 183 Ill. 505, 56 N. E. 149, reversing (1899) 80 Ill. App. 485; Merchant's Nat. Bank v. Lyon (1900) 185 Ill. 343, 56 N. E. 1083, affirming (1849) 82 Ill. App. 598; Richeson v. Richeson (1881) 8 Ill. App. 204; Heeren v. Kitson (1888) 28 Ill. App. 259; Hutchinson v. Croarkin (1900) 87 Ill. App. 557, reversed on another point in (1900) 187 Ill. 633, 58 N. E. 678; Teich v. Midland Mach. Co. (1913) 177 Ill. App. 354.

Indiana.—Green v. Vardiman (1830) 2 Blackf. 324; Jenison v. Graves (1831) 2 Blackf. 440; Coles v. Raymond (1840) 5 Blackf. 435; Pierce v. Gates (1844) 7 Blackf. 162; Kinsey v. Grimes (1844) 7 Blackf. 290; Nash v. Hall (1853) 4 Ind. 444; Kittering v. Parker (1856) 8 Ind. 44; Achey v. Stephens (1856) 8 Ind. 411; Hiatt v. Brooks (1859) 11 Ind. 508.

Iowa.—Pierce v. Wilson (1855) 2 Iowa, 20; Bacon v. Lee (1857) 4 Iowa, 490; White v. Hampton (1859) 10 Iowa, 238.

Kentucky.—Bright v. Haggin (1808) Hardin, 536; Myers v. Baker (1808) Hardin, 544; Lee v. Vaughn (1808) 1 Bibb, 235; Vance v. Vance (1827) 5 T. B. Mon. 521; Petty v. Taylor (1837) 5 Dana, 599.

Maryland.—Hagthorp v. Hook (1826) 1 Gill & J. 270; Thompson v. Diffenderfer (1849) 1 Md. Ch. 489; Rider v. Riely (1849) 2 Md. Ch. 16, s. c. on Appeal (1865) 22 Md. 540; Ing v. Brown (1850) 3 Md. Ch. 521; Hopkins v. Stump (1808) 2 Harr. & J. 301; Roberts v. Salisbury (1831) 3 Gill & J. 425; Beatty v. Davis (1850) 9 Gill, 211; Glenn v. Grover (1852) 3 Md. 212; West v. Flannagan (1853) 4 Md. 36; Feigley v. Feigley (1855) 7 Md. 537, 61 Am. Dec. 375; Brooks v. Thomas (1855) 8 Md. 367; Turner v. Knell (1865) 24 Md. 55.

Massachusetts.—Farnam v. Brooks (1830) 9 Pick. 212; Mills v. Gore (1838) 20 Pick. 28.

Mississippi.—Lee v. Montgomery (1822) Walk. 109; Nichols v. Daniels (1826) Walk. 224; M'Gehee v. White (1856) 31 Miss. 41; Waller v. Shannon (1876) 53 Miss. 500; Snell v. Fewell (1887) 64 Miss. 655, 1 So. 908 (obiter).

Missouri.—Bartlett v. Glasscock (1835) 4 Mo. 62; Roundtree v. Gordon (1843) 8 Mo. 19; Gamble v. Johnson (1845) 9 Mo. 605; French v. Campbell (1850) 13 Mo. 485.

New Hampshire.—Dodge v. Griswold (1842) 12 N. H. 573; Miles v. Miles (1855) 32 N. H. 147, 64 Am. Dec. 362; Busby v. Littlefield (1856) 33 N. H. 76; Johnson v. Richardson (1859) 38 N. H. 353.

defendant's answer is the introduction of the testimony of two witnesses; but he may employ any means which will produce a weight of evidence in his

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New Jersey.—Kinna v. Smith (1834) 3 N. J. Eq. 14; Brown v. Bulkley (1862) 14 N. J. Eq. 294; Marlatt v. Warwick (1866) 18 N. J. Eq. 108, affirmed in (1867) 19 N. J. Eq. 439; Bird v. Styles (1869) 18 N. J. Eq. 297; Force v. Dutcher (1867) 18 N. J. Eq. 401; Vandergrift v. Herbert (1867) 18 N. J. Eq. 466; Bent v. Smith (1871) 22 N. J. Eq. 560; Stearns v. Stearns (1872) 23 N. J. Eq. 167; Wilson v. Cobb (1877) 28 N. J. Eq. 177; Morris v. White (1882) 36 N. J. Eq. 324; Frink v. Adams (1883) 36 N. J. Eq. 485, affirmed in (1884) 38 N. J. Eq. 287, for reasons given below; Evans v. Evans (1904) — N. J. Eq. —, 59 Atl. 564; Marvel v. Fralinger (1903) 65 N. J. Eq. 161, 55 Atl. 818, reversed on another point in (1904) 67 N. J. Eq. 622, 63 Atl. 166.

New York.—Smith v. Brush (1815) 1 Johns. Ch. 459; Atkinson v. Manks (1823) 1 Cow. 691; Dunham v. Jackson (1830) 6 Wend. 22.

North Carolina.—Cartwright v. Godfrey (1810) 5 N. C. (11 Murph.) 422; Lewis v. Owen (1841) 36 N. C. (1 Ired. Eq.) 290; Hill v. Williams (1861) 59 N. C. (6 Jones Eq.) 242.

Pennsylvania.—Horton's Appeal (1850) 13 Pa. 67; Eberly v. Groff (1853) 21 Pa. 251; Pusey v. Wright (1858) 31 Pa. 387; Painter v. Harding (1859) 3 Phila. 449; Ressler v. Whitmer (1860) 1 Pearson, 174; Eaton's Appeal (1870) 66 Pa. 483; Audenreid v. Walker (1876) 11 Phila. 183, affirmed without opinion in (1879) 89 Pa. 120, 33 Am. Rep. 731; Barclay's Appeal (1879) 3 Walk. 230; Cresson's Appeal (1879) 91 Pa. 168 (obiter); Campbell v. Patterson (1880) 95 Pa. 447; Burke's Appeal (1882) 99 Pa. 350; Nulton's Appeal (1883) 103 Pa. 286; Reed v. Staib (1886) 4 Sadler, 410, 7 Atl. 174; Sylvius v. Kosek (1887) 117 Pa. 67, 2 Am. St. Rep. 654, 11 Atl. 392; Gleghorne v. Gleghorne (1888) 118 Pa. 383, 11 Atl. 797; Hand v. Weidner (1892) 151 Pa. 362, 25 Atl. 38; Huston v. Harrison (1895) 168 Pa. 136, 31 Atl. 97; Bussier v. Weekey (1899) 11 Pa. Super. Ct. 463; Columbia Ave. Sav. Fund, S. D. T. & T. Co. v. Lewis (1899) 190 Pa. 558, 42 Atl. 1094; Galbreath v. Galbreath (1899) 190 Pa. 225, 42 Atl. 683; Waller v. Kingston Coal Co. (1899) 191 Pa. 193, 43 Atl. 235; Goggins v. Risley (1900) 13 Pa. Super. Ct. 316; Kane v. Schuylkill F. Ins. Co. (1901) 199 Pa. 198, 48 Atl. 989; Mason v. Smith (1901) 250 Pa. 270, 49 Atl. 642; Eley v. Eley (1901) 10 Kulp, 545; Hopkins v. Stoneroad (1902) 21 Pa. Super. Ct. 168; Petry v. Clark (1903) 12 Pa. Dist. R. 249, 28 Pa. Co. Ct. 534; Boyle v. Boyle (1904) 34 Pa. Co. Ct. 581; McGary v. McDermott (1904) 207 Pa. 620, 57 Atl. 46; Real Estate & Mortg. Co. v. Cook (1909) 223 Pa. 158, 72 Atl. 345; Adrian v. Fink (1910) 226 Pa. 448, 75 Atl. 676; Berger v. Berger (1910) 44 Pa. Super. Ct. 305; Shingle v. Smyth (1915) 248 Pa. 359, 94 Atl. 67; Schwebel v. Wohlsen (1916) 254 Pa. 281, 98 Atl. 864.

Porto Rico.—Fajardo de Salazar v. Costa (1904) 1 Porto Rico Fed. Rep. 119 (obiter).

South Carolina.—Miller v. Tollison (1824) Harp. Eq. 145, 14 Am. Dec. 712 (obiter); Moffatt v. McDowall (1826) 1 M'Cord Eq. 434; Reeves v. Tucker (1852) 5 Rich. Eq. 150; Belcher v. McKelvey (1859) 11 Rich. Eq. 9.

Tennessee.—Meek v. McCormick (1897) — Tenn. —, 42 S. W. 458; Humphries v. Blevins (1805) 1 Overt. 178; Gray v. Faris (1834) 7 Yerg. 155; Brown v. Brown (1836) 10 Yerg. 84; Raines v. Jones (1844) 4 Humph. 490 (obiter); Smith v. Kincaid (1849) 10 Humph. 73 (obiter); McLard v. Linnville (1849) 10 Humph. 163; Trabue v. Turner (1872) 10 Heisk. 447; English v. King (1873) 10 Heisk. 666; Bogart v. McClung (1872) 11 Heisk. 105, 27 Am. Rep. 737.

Texas.—Autrey v. Cannon (1853) 11 Tex. 110 (obiter.)

Vermont.—Pierson v. Catlin (1830) 3 Vt. 272; Veile v. Blodgett (1877) 49 Vt. 270.

Virginia.—Pryor v. Adams (1798) 1 Call. 382; Pendleton v. Stewart (1804) 5 Call. 1, 2 Am. Dec. 583; Lyons v. Miller (1849) 6 Gratt. 427, 5 Am. Dec. 129; Roberts v. Kelly (1857) 2 Patton & H. 396; Fant v. Miller (1867) 17 Gratt. 187; Beverley v. Walden (1870) 20 Gratt. 147; Powell v. Manson (1872) 22 Gratt. 177; Morrison v. Grubb (1873) 23 Gratt. 342; Shurtz v. Johnson (1877) 28 Gratt. 659; Jones v. Abraham (1881) 75 Va. 466; Thompson v. Clark (1886) 81 Va. 422; Smith v. Smith (1896) 92 Va. 696, 24 S. E. 280; Coldiron v. Asheville Shoe Co. (1896) 93 Va. 364, 25 S. E. 238; Becker v. Johnson (1910) 111 Va. 245, 68 S. E. 986; Haynor v. Haynor (1911) 112 Va. 123, 70 S. E. 531.

West Virginia.—Arnold v. Welton

favor, greater than the weight of the testimony of one witness. It has been held that the equivalent of two witnesses is necessary to overcome the defendant's answer.[255] On the face of it, such a rule is unsound, and it is

(1872) 5 W. Va. 436; Leachman v. Adamson (1872) 5 W. Va. 443.

Wisconsin.—Gear v. Parish (1842) Burnett, 99; Smith v. Potter (1854) 3 Wis. 432 (obiter).

United States.—Gernon v. Boccaline (1808) 2 Wash. C. C. 199, Fed. Cas. No. 5,366; Searcy v. Pannell (1812) Brunner, Col. Cas. 172, Cooke, 110, Fed. Cas. No. 12,584; Hughes v. Blake (1818) 1 Mason, 515, Fed. Cas. No. 6,845, affirmed in (1821) 6 Wheat. 453, 5 L. ed. 303; Harper v. Dougherty (1822) 2 Cranch, C. C. 284, Fed. Cas. No. 6,087; Flagg v. Mann (1837) 2 Sumn. 486, Fed. Cas. No. 4,847; Daniel v. Mitchell (1840) 1 Story, 172, Fed. Cas. No. 3,562; Langdon v. Goddard (1842) 2 Story, 267, Fed. Cas. No. 8,060; Cushing v. Smith (1844) 3 Story, 556, Fed. Cas. No. 3,511; Gould v. Gould (1844) 3 Story, 516, Fed. Cas. No. 5,637; Morgan v. Tipton (1844) 3 McLean, 339, Fed. Cas. No. 9,809; Delano v. Windsor (1860) 1 Cliff. 501, Fed. Cas. No. 3,754; Tobey v. Leonard (1861) 2 Cliff. 40, Fed. Cas. No. 14,067, reversed on other grounds in (1864) 2 Wall. 423, 17 L. ed. 842; Badger v. Badger (1862) 2 Cliff. 137, Fed. Cas. No. 718, affirmed in (1864) 2 Wall. 87, 17 L. ed. 836; Lonergan v. Fenton (1866) 2 Pittsb. 115, Fed. Cas. No. 8,475; Walker v. Derby (1870) 5 Biss. 134, Fed. Cas. No. 17,068; Hayward v. Eliot Nat. Bank (1874) 4 Cliff. 294, Fed. Cas. No. 6,273, affirmed in (1877) 96 U. S. 611, 24 L. ed. 855; Gilman v. Libby (1878) 4 Cliff. 447, Fed. Cas. No. 5,445; Slessinger v. Buckingham (1883) 8 Sawy. 469, 17 Fed. 454; Berry v. Sawyer (1882) 19 Fed. 286; Satterfield v. Malone (1888) 1 L.R.A. 35, 35 Fed. 445; Peeler v. Lathrop (1892) 1 C. C. A. 93, 2 U. S. App. 40, 48 Fed. 780; Walcott v. Watson (1892) 53 Fed. 429; Carle v. Art Library Pub. Co. (1899) 95 Fed. 544; Jacobs v. Van Sickle (1903) 61 C. C. A. 598, 127 Fed. 62, affirming (1903) 123 Fed. 340; Ford v. Taylor (1905) 137 Fed. 149; Kennedy v. Custer (1909) 98 C. C. A. 584, 174 Fed. 972; Clark v. Van Riemsdyk (1815) 9 Cranch, 153, 3 L. ed. 688; Vorhees v. Bonesteel (1872) 16 Wall. 16, 21 L. ed. 268; Seitz v. Mitchell (1876) 94 U. S. 580, 24 L. ed. 179 (obiter); Godden v. Kimmell (1878) 99 U. S. 201, 25 L. ed. 431; Vigel v. Hopp (1881) 104 U. S. 441, 26 L. ed. 765; Morrison v. Durr (1887) 122 U. S. 518, 30 L. ed. 1225, 9 Sup. St. Rep. 1215; Latta v. Kilbourn (1893) 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; Campbell v. Northwest Eckington Improv. Co. (1913) 229 U. S. 561, 57 L. ed. 1330, 33 Sup. Ct. Rep. 796, reversing (1910) 36 App. D. C. 149.

Where, in Bogart v. McClung (1872) 11 Heisk. (**Tenn.**) 105, 27 Am. Rep. 737, the complainant introduced two witnesses to prove a promise by defendant to pay a debt denied by the defendant, it is held not essential that the two witnesses should testify to the same conversation. "It is enough to satisfy the rule of chancery . . . ," it is said, "that two witnesses should testify to a fact or facts to be established, whether their knowledge of such fact or facts be acquired at the same time or at different times."

[255] **Illinois.**—Pauton v. Tefft (1859) 22 Ill. 367; Trout v. Emmons (1862) 29 Ill. 433, 81 Am. Dec. 326; Barton v. Moss (1863) 32 Ill. 50; Marple v. Scott (1866) 41 Ill. 50; Russell v. Russell (1870) 54 Ill. 250; Walton v. Walton (1873) 70 Ill. 142; Deimel v. Brown (1891) 136 Ill. 586, 27 N. E. 44, affirming (1889) 35 Ill. App. 303; Fish v. Fish (1908) 235 Ill. 396, 85 N. E. 662; Heeren v. Kitson (1888) 28 Ill. App. 259; Boyd v. Brown (1897) 74 Ill. App. 205; Brown v. Bear (1901) 97 Ill. App. 342.

Iowa.—Pierce v. Wilson (1855) 2 Iowa, 20; State ex rel. Atty. Gen. v. Tilghman (1858) 6 Iowa, 496.

Maine.—Gould v. Williamson (1842) 21 Me. 273; Farley v. Bryant (1851) 32 Me. 474.

New Jersey.—Bird v. Styles (1867) 18 N. J. Eq. 297; Vandergrift v. Herbert (1867) 18 N. J. Eq. 466; Wilson v. Cobb (1877) 28 N. J. Eq. 177; Frink v. Adams (1883) 36 N. J. Eq. 485.

North Carolina.—Lewis v. Owen (1840) 36 N. C. (1 Ired. Eq.) 290; Hill v. Williams (1861) 59 N. C. (6 Jones, Eq.) 242.

Pennsylvania.—Painter v. Harding (1859) 3 Phila. 449.

South Carolina.—Cloud v. Calhoun (1858) 10 Rich. Eq. 358.

Vermont.—Shattuck v. Gay (1872) 45 Vt. 87; Field v. Wilbur (1876) 49 Vt. 157; Veile v. Blodgett (1877) 49 Vt. 270; Phelps v. Root (1906) 78 Vt. 493, 63 Atl. 941.

probably the outgrowth of carelessness in stating the rule with respect to the countervailing effect of the testimony of two witnesses. At any rate, it is absurd to say that the only evidence which will overcome an answer is a weight twice that of the answer. There is no such rule in law or equity. It is frequently said that one witness and corroborating circumstances will be sufficient to overcome the answer.[256] This is a proper rule, and one very

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Wisconsin.—Sheldon v. Sheldon (1854) 3 Wis. 699 (obiter).

But in Hollister v. Barkley (1841) 11 N. H. 501, it is said: "The plaintiff, to make out his case . . . , must overcome the answer by the evidence of two witnesses, or something more than the testimony of a single witness. It is not necessary that there should be two witnesses, or matter equivalent to two. The answer being made under oath, upon the call of the plaintiff, he cannot control and defeat it by the evidence of one witness, contradicting it."

[256] **Alabama.**—Smith v. Rogers (1832) 1 Stew. & P. 317; Garrow v. Carpenter (1834) 1 Port. 359; May v. Barnard (1852) 20 Ala. 200; Bryan v. Cowart (1852) 21 Ala. 92; Beene v. Randall (1853) 23 Ala. 514; Garrett v. Garrett (1856) 29 Ala. 439; Camp v. Simon (1859) 34 Ala. 126; Bryan v. Bryan (1859) 34 Ala. 516; Starke v. Blackwell (1860) 36 Ala. 154; Easterwood v. Linton (1860) 36 Ala. 175; Marshall v. Croon (1875) 52 Ala. 554; Turner v. Flinn (1880) 67 Ala. 529; Birmingham Nat. Bank v. Steele (1892) 98 Ala. 85, 12 So. 783.

Arkansas.—Watson v. Palmer (1844) 5 Ark. 501; Cummens v. Harrell (1845) 6 Ark. 308; Menifee v. Menifee (1847) 8 Ark. 9; Aiken v. Harrington (1851) 12 Ark. 391; Jordan v. Fenno (1853) 13 Ark. 593; Dyer v. Bean (1855) 15 Ark. 519; Wheat v. Moss (1855) 16 Ark. 243; Burr v. Burton (1856) 18 Ark. 214; Byrd v. Belding (1856) 18 Ark. 118; Shields v. Trammell (1857) 19 Ark. 51; Spence v. Dodd (1857) 19 Ark. 166; Hill v. Bush (1858) 19 Ark. 522; Brittin v. Crabtree (1859) 20 Ark. 309; Brittin v. Handy (1859) 20 Ark. 381, 73 Am. Dec. 497; Marshall v. Green (1866) 24 Ark. 410; Barclay v. Dawson (1871) 26 Ark. 417.

Delaware.—Pickering v. Day (1866) 2 Del. Ch. 333; Pickering v. Day (1867) 3 Houst. 474, 95 Am. Dec. 291; Davidson v. Wilson (1869) 3 Del. Ch. 307; Brooks v. Silver (1874) 5 Del. Ch. 7; Small v. Collins (1880) 6 Houst. 273; Cummins v. Jerman (1887) 6 Del. Ch. 122, 33 Atl. 622.

District of Columbia.—Burr v. Meyers (1876) 2 MacArth. 524; Rick v. Neitzy (1881) 1 Mackey, 21; Kilbourn v. Latta (1886) 5 Mackey, 304, 60 Am. Rep. 373; Wheeler v. Ryon (1893) 1 App. D. C. 142; McCartney v. Fletcher (1897) 10 App. D. C. 572; Sheckells v. Sheckells (1914) 42 App. D. C. 131.

Florida.—White v. Walker (1854) 5 Fla. 478; Stephens v. Orman (1862) 10 Fla. 9; Carr v. Thomas (1882) 18 Fla. 736; Foster v. Ambler (1888) 24 Fla. 519, 5 So. 263; Day v. Jones (1898) 40 Fla. 443, 25 So. 275; Pinney v. Pinney (1903) 46 Fla. 559, 35 So. 95; Ocala Foundry Mach. Works v. Lester (1905) 49 Fla. 347, 38 So. 56; Mayo v. Hughes (1906) 51 Fla. 495, 40 So. 499; Nobles v. L'Engle (1909) 58 Fla. 480, 51 So. 405; Russell v. Stickney (1911) 62 Fla. 569, 56 So. 691; Barnes & J. Co. v. Williams (1913) 64 Fla. 190, 60 So. 787; Mitchell v. Mason (1913) 65 Fla. 208, 61 So. 579; Pittman v. Milton (1915) 69 Fla. 304, 68 So. 658; Johns v. Bowden (1916) — Fla. —, 73 So. 603; FARRELL v. FOREST INVEST. CO. (reported herewith) ante, 25.

Georgia.—Galt v. Jackson (1850) 9 Ga. 151; White v. Crew (1854) 16 Ga. 416; Williams v. Philpot (1856) 19 Ga. 567; Low v. Argrove (1860) 30 Ga. 129; Stanford v. Murphy (1879) 63 Ga. 410; Harris v. Collins (1885) 75 Ga. 97; Heard v. Nix (1895) 96 Ga. 51, 23 S. E. 122; Toomer v. Warren (1905) 123 Ga. 477, 51 S. E. 393.

Indiana.—Green v. Vardiman (1830) 2 Blackf. 324; Jenison v. Graves (1831) 2 Blackf. 440; Coles v. Raymond (1840) 5 Blackf. 435; M'Cormick v. Malin (1841) 5 Blackf. 509; Pierce v. Gates (1844) 7 Blackf. 162; Kinsey v. Grimes (1844) 7 Blackf. 290; Nash v. Hall (1853) 4 Ind. 444; Kittering v. Parker (1856) 8 Ind. 44; Achey v. Stephens (1856) 8 Ind. 411.

Iowa.—Bacon v. Lee (1857) 4 Iowa, 490.

Kentucky.—Myers v. Baker (1808) Hardin, 544; Vance v. Vance (1827) 5 T. B. Mon. 521; Petty v. Taylor (1837) 5 Dana, 598.

Maryland.—Hagthorp v. Hook (1826) 1 Gill & J. 270; Thompson v. Diffenderfer (1849) 1 Md. Ch. 489; Rider v. Riley (1849) 2 Md. Ch. 16; Ing

frequently applied: But it should be noted that it neither defines what is meant by corroborating circumstances, nor attempts to establish a measure

v. Brown (1850) 3 Md. Ch. 521; Hopkins v. Stump (1808) 2 Harr. & J. 301; Roberts v. Salisbury (1831) 3 Gill & J. 425; Beatty v. Davis (1850) 9 Gill, 211; Glenn v. Grover (1852) 3 Md. 212; West v. Flannagan (1853) 4 Md. 36; Feigley v. Feigley (1855) 7 Md. 537, 61 Am. Dec. 375; Brooks v. Thomas (1855) 8 Md. 367; Rider v. Riely (1865) 22 Md. 540; Turner v. Knell (1865) 24 Md. 55.

Massachusetts.—Mills v. Gore (1838) 20 Pick. 28.

Mississippi.—Lee v. Montgomery (1822) Walk. 109; Nichols v. Daniels (1826) Walk. 224; M'Gehee v. White (1856) 31 Miss. 41; Waller v. Shannon (1876) 53 Miss. 500; Johnson v. Crippens (1885) 62 Miss. 597; Snell v. Fewell (1887) 64 Miss. 655, 1 So. 908 (obiter).

Missouri.—Bartlett v. Glasscock (1835) 4 Mo. 62; Roundtree v. Gordon (1843) 8 Mo. 19; Gamble v. Johnson (1845) 9 Mo. 605; French v. Campbell (1850) 13 Mo. 485; Johnson v. McGruder (1852) 15 Mo. 365.

New Hampshire.—Page v. Page (1836) 8 N. H. 187; Dodge v. Griswold (1842) 12 N. H. 573; Warren v. Swett (1855) 31 N. H. 332; Miles v. Miles (1855) 32 N. H. 147, 64 Am. Dec. 362; Busby v. Littlefield (1856) 33 N. H. 76; Johnson v. Richardson (1859) 38 N. H. 353, — N. J. —; Chance v. Teeple (1842) 4 N. J. Eq. 173; Commercial Bank v. Reckless (1849) 5 N. J. Eq. 650, reversing on other points (1846) 5 N. J. Eq. 430; Brown v. Bulkley (1862) 14 N. J. Eq. 294; Bent v. Smith (1871) 22 N. J. Eq. 560; Wilson v. Cobb (1877) 28 N. J. Eq. 177; Frink v. Adams (1883) 36 N. J. Eq. 485; Marvel v. Fralinger (1903) 65 N. J. Eq. 161, 55 Atl. 801, 1 Ann. Cas. 601, reversed in another point in (1904) 67 N. J. Eq. 622, 63 Atl. 166.

New Mexico.—Keeney v. Carillo (1883) 2 N. M. 480.

New York.—Smith v. Brush (1815) 1 Johns. Ch. 459; Hart v. Ten Eyck (1816) 2 Johns. Ch. 62; Atkinson v. Manks (1823) 1 Cow. 691; Dunham v. Jackson (1830) 6 Wend. 22.

North Carolina.—Marin v. Browning (1823) 9 N. C. (2 Hawks) 644; Alley v. Ledbetter (1830) 16 N. C. 1 (1 Dev. Eq.) 449; Armsworthy v. Cheshire (1833) 17 N. C. (2 Dev. Eq.) 456; Speight v. Speight (1839) 22 N. C. (2 Dev. & B. Eq.) 280.

Ohio.—Washburn v. Holmes (1832) Wright, 67.

Pennsylvania.—Baker v. Williamson (1846) 4 Pa. 456; Horton's Appeal (1850) 13 Pa. 67; Pusey v. Wright (1858) 31 Pa. 387; Ressler v. Witmer (1860) 1 Pearson, 174; Eaton's Appeal (1870) 66 Pa. 483; Audenreid v. Walker (1876) 11 Phila. 183, affirmed without opinion in (1879) 89 Pa. 120, 33 Am. Rep. 731; Cresson's Appeal (1879) 91 Pa. 168 (obiter); Barclay's Appeal (1879) 3 Walk. 230, 38 Phila. Leg. Int. 440; Campbell v. Patterson (1880) 95 Pa. 447; Burke's Appeal (1882) 99 Pa. 350; Nulton's Appeal (1883) 103 Pa. 286; Gleghorne v. Gleghorne (1888) 118 Pa. 383, 11 Atl. 797; Hand v. Weidner (1892) 150 Pa. 362, 25 Atl. 38; Columbia Ave. Sav. Fund S. D. Title & T. Co. v. Lewis (1899) 190 Pa. 558, 42 Atl. 1094; Galbraith v. Galbraith (1899) 190 Pa. 225, 42 Atl. 683; Kane v. Schuylkill F. Ins. Co. (1901) 199 Pa. 198, 48 Atl. 989; Petry v. Clark (1903) 12 Pa. Dist. R. 249; Boyle v. Boyle (1904) 34 Pa. Co. Ct. 581; Gundaker v. Ehrgott (1904) 209 Pa. 284, 58 Atl. 476; McGary v. McDermott (1904) 207 Pa. 620, 57 Atl. 46; Schwebel v. Wohlsen (1916) 254 Pa. 281, 98 Atl. 864.

Porto Rico.—Fajardo De Salazar v. Costa (1904) 1 Porto Rico Fed. Rep. 119 (obiter).

South Carolina.—Moffat v. M'Dowall (1826) 1 M'Cord, Eq. 434; Martin v. Sale (1830) Bail. Eq. 1; Reeves v. Tucker (1852) 5 Rich. Eq. 150.

Tennessee.—Humphries v. Blevins (1805) 1 Overt. 178; Gray v. Faris (1834) 7 Yerg. 155; Brown v. Brown (1836) 10 Yerg. 84; Raines v. Jones (1844) 4 Humph. 490 (obiter); Smith v. Kincaid (1849) 10 Humph. 73 (obiter); McLard v. Linnville (1849) 10 Humph. 163; English v. King (1873) 10 Heisk. 666.

Texas.—Autrey v. Cannon (1853) 11 Tex. 110 (obiter).

Vermont.—Pierson v. Catlin (1830) 3 Vt. 272.

Virginia.—Wilkins v. Woodfin (1816) 5 Munf. 183; Roberts v. Kelly (1857) 2 Patton & H. 396; Fant v. Miller (1867) 17 Gratt. 187; Beverley v. Walden (1870) 20 Gratt. 147; Powell v. Manson (1872) 22 Gratt. 177; Morrison v. Grubb (1873) 23 Gratt. 342; Shurtz v. Johnson (1877) 28 Gratt. 659; Jones v. Abraham (1881) 75 Va. 466; Thompson v. Clark (1886) 81 Va. 422; Smith v. Smith (1896) 92 Va. 696, 24 S. E. 280; Coldiron v. Asheville Shoe Co. (1896) 93 Va. 364, 25 S. E. 238; Becker

of the amount of corroborating circumstances necessary. In one jurisdiction, corroborating circumstances are defined as circumstances which,

v. Johnson (1910) 111 Va. 245, 68 S. E. 986; Haynor v. Haynor (1911) 112 Va. 123, 70 S. E. 531.

Wisconsin.—Gear v. Parish (1842) Burnett, 99.

United States.—Higbie v. Hopkins (1805) 1 Wash. C. C. 230, Fed. Cas. No. 6,466; Gernon v. Boccaline (1808) 2 Wash. C. C. 199, Fed. Cas. No. 5,366; Hughes v. Blake (1818) 1 Mason, 515, Fed. Cas. No. 6,845, affirmed in (1821) 6 Wheat. 453, 5 L. ed. 303; McNeil v. Magee (1829) 5 Mason, 244, Fed. Cas. No. 8,915; Daniel v. Mitchell (1840) 1 Story, 172, Fed. Cas. No. 3,562; Cushing v. Smith (1844) 3 Story, 556, Fed. Cas. No. 3,511; Delano v. Windsor (1860) 1 Cliff. 501, Fed. Cas. No. 3,754; Parker v. Phetteplace (1861) 2 Cliff. 70, Fed. Cas. No. 10,746, affirmed in (1863) 1 Wall. 684, 17 L. ed. 675; Tobey v. Leonard (1861) 2 Cliff. 40, Fed. Cas. No. 14,067, reversed on other grounds in (1864) 2 Wall. 423, 17 L. ed. 842; Powden v. Johnson (1878) 2 N. J. L. J. 48, Fed. Cas. No. 11,353; Earle v. Art Library Pub. Co. (1899) 95 Fed. 544; Calivada Colonization Co. v. Hays (1902) 119 Fed. 202; Jacobs v. Van Sickle (1903) 61 C. C. A. 598, 127 Fed. 62, affirming (1903) 123 Fed. 340; Clark v. Van Riemsdyk (1815) 9 Cranch, 153, 3 L. ed. 688; Union Bank v. Geary (1831) 5 Pet. 99, 8 L. ed. 60, affirming (1827) 3 Cranch, C. C. 233, Fed. Cas. No. 5,241a; Voorhees v. Bonesteel (1872) 16 Wall. 16, 21 L. ed. 268; Seitz v. Mitchell (1876) 94 U. S. 580, 24 L. ed. 179; (obiter); Godden v. Kimmell (1878) 99 U. S. 201, 25 L. ed. 431; Southern Development Co. v. Silva (1888) 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Latta v. Kilbourn (1893) 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; District of Columbia v. Robinson (1901) 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283, affirming (1899) 14 App. D. C. 512.

Canada.—Cowan v. Britton (1884) 3 Manitoba L. R. 175.

England.—Walton v. Hobbs (1739) 2 Atk. 19, 26 Eng. Reprint, 409; Janson v. Rany (1740) 2 Atk. 140, 26 Eng. Reprint, 488; Reech v. Kennegal (1748) 1 Ves. Sr. 125, 27 Eng. Reprint, 933; Pember v. Mathers (1779) 1 Bro. Ch. 52, 28 Eng. Reprint, 979, Dick. 550, 21 Eng. Reprint, 384; Cooth v. Jackson (1800) 6 Ves. Jr. 12, 31 Eng. Reprint, 913; Biddulph v. St. John (1805) 2 Sch. & Lef. 521; Pilling v. Armitage (1805) 12 Ves. Jr. 78, 33 Eng. Reprint, 31, 8 Revised Rep. 295; Savage v. Brocksopp (1811) 18 Ves. Jr. 335, 34 Eng. Reprint, 344.

"The reason upon which the rule stands is this. The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and, as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance." Clark v. Van Riensdyk (1815) 9 Cranch (U. S.) 153, 3 L. ed. 688.

It is held in Sharp v. Behr (1902) 117 Fed. 864, that the testimony of complainant's wife, supporting that of her husband, "should, at least, be accorded the weight of a corroborating circumstance, which is sufficient to satisfy the equitable requirement," appertaining to the weight of evidence necessary to overcome a verified answer.

In order to overcome a clear and positive denial in the answer by the testimony of one witness and corroborating circumstances, it is held in Pickering v. Day (1867) 3 Houst. (Del.) 474, 95 Am. Dec. 291, that "the witness must not only be competent, but his testimony must be credible, and the circumstances relied on as corroborative must be such as to materially support the witness and strengthen his testimony, so that, when both are considered together, they may be sufficient to satisfy the conscience of the court that the allegations and charges of the bill, in respect to the point in controversy, are true."

In Maddox v. Sullivan (1845) 2 Rich. Eq. (S. C.) 4, 44 Am. Dec. 234, a bill to set aside a judicial sale on the ground of a corrupt agreement between defendants not to bid against each other, the inadequacy of the price is held an insufficient corroborating circumstance to effect, in connection with the testimony of one of the defendants, an overthrow of the sworn answer of the other defendant, denying such agreement.

See, in this connection, the cases set out infra, note 271, in which the corroborating circumstances consist of documentary evidence. Also, the cases in note 273, infra, in which the cor-

disconnected from the evidence of the witness, tend to establish the charges made by the bill.[257] In the language of another rule, what is necessary as corroboration are facts which, combined with the testimony of the witness, give the complainant the greater weight of evidence.[258] In still another jurisdiction, it is said that, in addition to one witness, the complainant must produce a "preponderance of proofs sufficient to sustain the bill, if the oath to the answer had been waived."[259] In view of the fact that a complainant in equity is bound to establish his case by clear and convincing proof, the proper rule would seem to be that the corroborating facts must be such, and of such weight, that, in connection with the witness, the complainant's case is established over the evidence constituted by the answer, clearly and convincingly. In a number of instances, courts have lost sight of the principle underlying the question of weight, and have misconstrued the rule with respect to the countervailing effect of two witnesses, apparently viewing it as a statement, not of what will be abundantly sufficient to overcome an answer, but of what is the least evidence acceptable for that purpose. Under this error, courts have stated it as a rule that the testimony necessary to overcome the weight of an answer in equity must consist of one witness, and circumstances in addition thereto, equivalent to another witness.[260] Other courts have specifically

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roborating circumstances consist of statements made by defendant in his answer.

[257] In Beene v. Randall (1853) 23 Ala. 514, it is said: "When the law speaks of corroborating circumstances, which, with a single witness, may outweigh an answer, it means circumstances which, disconnected from the evidence of the witness, would tend to establish the charges made by the bill, which are denied by the answer. And if these circumstances would not, of themselves, be evidence for that purpose, or would be entitled to no weight in sustaining the bill, the answer must prevail."

And in Birmingham Nat. Bank v. Steele (1892) 98 Ala. 85, 12 So. 783, it is said that the answer "must prevail against the testimony of one witness, however full, clear, and explicit, unless supported by corroborating circumstances, which, disconnected from the evidence of the witness, will tend to establish the charges made by the bill, which are denied by the answer."

[258] **Pennsylvania.**—Galbraith v. Galbraith (1899) 190 Pa. 225, 42 Atl. 683; Waller v. Kingston Coal Co. (1899) 191 Pa. 193, 43 Atl. 235; Goggins v. Risley (1900) 13 Pa. Super. Ct. 316; Berger v. Berger (1910) 44 Pa. Super. Ct. 365.

United States.—Badger v. Badger (1862) 2 Cliff. 137, Fed. Cas. No. 718, affirmed in (1864) 2 Wall. 87, 17 L. ed. 836; Hayward v. Eliot Nat. Bank (1874) 4 Cliff. 294, Fed. Cas. No. 6,273, affirmed in (1878) 96 U. S. 611, 24 L. ed. 855; Lonergan v. Fenlon (1866) 2 Pittsb. 115, Fed. Cas. No. 8,475; Gilman v. Libbey (1878) 4 Cliff. 447, Fed. Cas. No. 5,445.

[259] A sworn answer is held in Mey v. Gulliman (1882) 105 **Ill.** 272, not to be overcome until "proven false by evidence equal to that of one witness, and, in addition thereto, a preponderance of proofs sufficient to sustain the bill, if the oath to the answer had been waived."

[260] **Illinois.**—Power v. McCord (1864) 36 Ill. 214; Wightman v. Hart (1865) 37 Ill. 123; Willdey v. Webster (1866) 42 Ill. 108; Blow v. Gage (1867) 44 Ill. 208; Stevenson v. Mathers (1873) 67 Ill. 123; Merchants' Nat. Bank v. Lyon (1900) 185 Ill. 343, 56 N. E. 1083, affirming (1899) 82 Ill. App. 598; Hutchinson v. Croarkin (1900) 87 Ill. App. 557, reversed on another point in (1900) 187 Ill. 633, 58 N. E. 678; Teich v. Midland Mach. Co. (1913) 177 Ill. App. 354.

Iowa.—White v. Hampton (1859) 10 Iowa, 238.

New Jersey.—Kinna v. Smith (1834) 3 N. J. Eq. 14; Marlatt v. Warwick (1866) 18 N. J. Eq. 108, affirmed in (1867) 19 N. J. Eq. 439; Stearns v. Stearns (1872) 23 N. J. Eq. 167; Morris v. White (1882) 36 N. J. Eq. 324; Evans v. Evans (1904) — N. J. Eq. —, 59 Atl. 564.

North Carolina.—Hill v. Williams (1861) 59 N. C. (6 Jones, Eq.) 242.

Pennsylvania.—Kennedy v. Wentz (1881) 1 Kulp, 428; Reed's Appeal (1886) 4 Sadler, 140, 7 Atl. 174; Sylvius v. Kosek (1887) 117 Pa. 67, 2 Am. St. Rep. 645, 11 Atl. 645; Bussier v. Weekly (1899) 11 Pa. Super. Ct. 463; Mason v. Smith (1901) 200 Pa. 270, 49 Atl. 642; Eley v. Eley (1901) 10 Kulp, 545; Hopkins v. Stoneroad (1902) 21 Pa. Super. Ct. 168; Real Estate &

refuted this rule.[261] In a number of jurisdictions, it is said that, in addition to one witness, the complainant must have *strong* corroborating circumstances, in order to overcome the answer of the defendant.[262] This

Mortg. Co. v. Cook (1909) 223 Pa. 158, 72 Atl. 345; Adrian v. Fink (1910) 226 Pa. 448, 75 Atl. 676; Thomas v. Herring (1914) 244 Pa. 550, 91 Atl. 501; Shingle v. Smyth (1915) 248 Pa. 359, 94 Atl. 67.

Porto Rico.—Fajardo De Salazar v. Costa (1904) 1 Porto Rico Fed. Rep. 119 (obiter).

West Virginia.—Leachman v. Adamson (1872) 5 W. Va. 443.

United States.—Langdon v. Goddard (1842) 2 Story, 267, Fed. Cas. No. 8,060; Gould v. Gould (1844) 3 Story, 516, Fed. Cas. No. 5,637; Slessinger v. Buckingham (1883) 8 Sawy. 469, 17 Fed. 454; Berry v. Sawyer (1882) 19 Fed. 286; Satterfield v. Malone (1888) 1 L.R.A. 35, 35 Fed. 445; Peeler v. Lathrop (1891) 1 C. C. A. 93, 2 U. S. App. 40, 48 Fed. 780; Walcott v. Watson (1892) 53 Fed. 429; Ford v. Taylor (1905) 137 Fed. 149; Kennedy v. Custer (1909) 98 C. C. A. 584, 174 Fed. 972; Vigel v. Hopp (1881) 104 U. S. 441, 26 L. ed. 765; Morrison v. Durr (1887) 122 U. S. 518, 30 L. ed. 1225, 7 Sup. Ct. Rep. 1215; Campbell v. Northwestern Eckington Improv. Co. (1913) 229 U. S. 561, 57 L. ed. 1330, 33 Sup. Ct. Rep. 796, reversing (1910) 36 App. D. C. 149.

After stating, in Field v. Wilbur (1876) 49 Vt. 157, that the equivalent of two witnesses is required to overcome the effect of a sworn answer in equity, the court continues: "This rule does not require that the denial in the answer shall be overcome by the testimony of two living witnesses, who were present and cognizant of the fact in controversy. Circumstantial evidence may, if of equal weight and credibility take the place of the testimony of one or both of such witnesses. The amount of testimony or evidence required to be produced by the orator in such cases, though expressed numerically, is not always the same. If the defendant, by his answer, or otherwise, is shown to be a very reliable and credible witness, it is manifest that more weighty testimony should be required to overcome the denial in the answer, and to establish the averment in the bill, than there should be if the defendant was shown to be unreliable and entitled to but little credence. So, too, the testimony of witnesses, when to the same facts, is not always doubled by doubling the number. The rule must be construed and applied with good sense and reason, to each case, having reference to other well-established rules and principles in regard to weighing testimony. It requires that the credence and weight to be given to the answer, remembering that the orator has called the defendant into the case as a witness, is to be fairly overcome, and the averment in the bill is to be reasonably established by a preponderance which the law has denominated the testimony of a second witness."

In Thomas v. Herring (1914) 244 Pa. 550, 91 Atl. 501, a suit in equity to cancel a deed on the ground that it had been intended to be but a temporary and revocable arrangement, effected for the purpose of enabling plaintiff to eject a troublesome tenant, the circumstances of plaintiff's receipt of the rent, and of defendant's application for permission to mortgage, after the delivery of such deed, are held sufficient, in connection with the testimony of the plaintiff, to satisfy the rule requiring the testimony of one witness and corroborating circumstances equivalent to the testimony of another witness, to overcome the denials of a sworn answer.

[261] The circumstances required, in connection with the testimony of one witness, to overcome the evidence of a sworn answer to a bill in equity, need not, of necessity, be equal in strength to the proof of another witness. White v. Crew (1854) 16 Ga. 416.

So, it is said in Morrison v. Stewart (1860) 24 Ill. 24, that "the rule is, the answer is evidence for the defendant, and can only be overcome by two witnesses, or one witness and strong corroborating circumstances. It is not, as in the language of the instruction, equal to two witnesses, and it was erroneous so to charge."

[262] **Illinois.**—Martin v. Dryden (1844) 6 Ill. 187; Swift v. Trustees of Schools (1853) 14 Ill. 493; Morrison v. Stewart (1860) 24 Ill. 24; Myers v. Kinzie (1861) 26 Ill. 36; Fish v. Stubbings (1872) 65 Ill. 492; Salsbury v. Ware (1900) 183 Ill. 505, 56 N. E. 149, reversing (1899) 80 Ill. App. 485.

Kentucky.—Bright v. Haggin (1808)

rule also has been held to be improper.[263]

It not infrequently happens that a complainant cannot produce a witness who can testify positively in contradiction of the allegations and denials made by the defendant in his answer. Under such circumstances, he is not to lose his case because of the evidence afforded by the answer, where he can prove it by other evidence. The answer of the defendant is properly to be accredited the weight of the testimony of a witness, and, where the complainant can produce sufficient evidence to overcome such a weight, he is not to be denied the benefit thereof, merely because the testimony of a positive witness does not happen to be a part of it. Being opposed by the testimony of one positive witness, it is incumbent upon him to produce an equivalent of more than the testimony of one witness;[264] but he is as unlimited as to the kind of evidence he may offer as if he were opposed by the testimony of any ordinary witness upon the stand. In pursuance of this principle, it has been held that circumstances, standing alone, may, if of sufficient force, overcome the sworn denials of the answer.[265] Authority is to be found con-

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Hardin (Ky.) 536; Lee v. Vaughn (1808) 1 Bibb, 235.

Pennsylvania.—Eberly v. Groff (1853) 21 Pa. 251; Kennedy v. Wentz (1881) 1 Kulp, 428; Delaney v. Thompson (1898) 187 Pa. 343, 40 Atl. 1023.

South Carolina.—Miller v. Tollison (1824) Harp. Eq. 145, 14 Am. Dec. 712 (obiter); Johnson v. Slawson (1831) Bail. Eq. 463; Maddox v. Sullivan (1845) 2 Rich. Eq. 4, 44 Am. Dec. 234; Belcher v. McKelvey (1859) 11 Rich. Eq. 9.

Tennessee.—Meek v. McCormick (1897) — Tenn. —, 42 S. W. 458; Searcy v. Pannell (1812) 3 Tenn. 110 (obiter); Trabue v. Turner (1872) 10 Heisk. 447.

Virginia.—Pryor v. Adams (1798) 1 Call. 382, 1 Am. Dec. 533; Bullock v. Goodall (1801) 3 Call, 44; Pendleton v. Stewart (1804) 5 Call, 1, 2 Am. Dec. 583; Lyons v. Miller (1849) 6 Gratt. 427, 5 Am. Dec. 129.

West Virginia.—Arnold v. Welton (1872) 5 W. Va. 436; Leachman v. Adamson (1872) 5 W. Va. 443.

Wisconsin.—Smith v. Potter (1854) 3 Wis. 432 (obiter).

United States.—Searcy v. Pannell (1812) Brunner, Col. Cas. 172, Cooke, 110, Fed. Cas. No. 12,584; Smith v. Shane (1829) 1 McLean, 22, Fed. Cas. No. 13,105; Flagg v. Mann (1837) 2 Sumn. 486, Fed. Cas. No. 4,847; Morgan v. Tipton (1844) 3 McLean, 339, Fed. Cas. No. 9,809; Walker v. Derby (1870) 5 Biss. 134, Fed. Cas. No. 17,068.

In Denton v. M'Kenzie (1792) 1 Desauss. Eq. (S. C.) 289, 1 Am. Dec. 664, it is said: "We do not consider the rules of evidence to go so great lengths as has been contended for; that is, that there must be two positive witnesses to contradict a fact denied by defendant in his answer. We think the rule is not so strict; but that if there is one positive witness and strong circumstantial evidence, amounting to violent presumption, . . . it is sufficient to destroy the testimony of defendant's answer."

[263] A charge stating that a sworn answer must be overcome by the testimony of one witness and "strong" corroborating circumstances is held, in Durham v. Taylor (1859) 29 Ga. 166, to be improper. "The rule, as laid down by the best elementary writers," the court says, "does not include the word 'strong.' If the circumstances are such as to give a clear preponderance against the answer, that, we think, is enough."

And it is said in Kinsey v. Grimes (1844) 7 Blackf. (**Ind.**) 290, that, when the answer is evidence, "it is going too far to say that, to weigh it down, the testimony of one witness and *strong* corroborating circumstances are, at least, necessary; slight corroboration is sometimes sufficient."

[264] Bradley v. Chase (1843) 22 Me. 511; Moors v. Moors (1845) 17 N. H. 481; Marlatt v. Warwick (1866) 18 N. J. Eq. 108, affirmed in (1867) 19 N. J. Eq. 439.

[265] Roberts v. Kelly (1857) 2 Patton & H. (Va.) 396; Norman v. Hall (1857) 2 Patton & H. (Va.) 676; Smith v. Smith (1896) 92 Va. 696, 24 S. E. 280.

Where in Clark v. Van Riemsdyk (1815) 9 Cranch (U. S.) 153, 3 L. ed. 688, it is urged that a sworn answer must prevail, unless contradicted by one witness, as well as by circumstances, the court, in refuting that argument, says: "The general rule that

either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and, as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But certainly, there may be evidence arising from circumstances, stronger than the testimony of any single witness."

And in Bowden v. Johnson (Adams v. Johnson) (1882) 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246, the court says that the case comes within the principle asserted in Clark v. VanRiemsdyk (U. S.) supra, "as a case where the evidence arising from circumstances is stronger than the testimony of any single witness."

It is held that in Kirkpatrick v. McBride (1913) 120 C. C. A. 322, 202 Fed. 144, modified on rehearing in (1913) 120 C. C. A. 328, 203 Fed. 449, that the evidence afforded by the sworn answer to a bill in equity may be overcome "by facts and circumstances alone, without the aid of the positive testimony of a single witness."

So, where, in Oliver v. Chapman (1855) 15 Tex. 400, the court below refused to charge that circumstances alone could not disprove any matter set out in defendant's answers to interrogatories, it is said: "The proposition here sought to be maintained is that it is absolutely essential that at least one witness should contradict the answer, by testifying directly to the fact. This is not correct. There may be circumstances of so conclusive a force and tendency as to disprove the answer, though no witness testifies directly to the fact. The meaning of the rule [requiring one witness and circumstances] is that the oath of one witness, if corroborated by 'strong circumstantial evidence,' shall be sufficient to disprove the answer; but not that no circumstances, however conclusive, shall have that effect, unless in corroboration of the oath of a witness, directly to the fact."

And it is said in Phelps v. Root (1906) 78 Vt. 493, 63 Atl. 941, that "circumstantial evidence may take the place of the testimony of one or both witnesses, if of equal weight and credibility."

In Commercial Bank v. Reckless (1849) 5 N. J. Eq. 650, reversing (1846) 5 N. J. Eq. 430, it is said: Circumstances alone, . . . without the testimony of a single witness, may overthrow an answer. In that case, the possession of the mortgage in question, by the mortgagee, is held to be sufficient, standing alone, to overcome the denial of the answer that such mortgage was delivered. The court argues as follows: "Must the mortgagee, to overcome the answer, be fortified with proof of the fact of delivery, beyond that afforded by the mortgage itself? I think not. It would render mortgage securities alarmingly insecure. Upon a bill of foreclosure the complainant has no option whether to trust the answer of the mortgagor. He is compelled to make him a defendant, and to receive his answer. He may be utterly without character, legally infamous, or even attainted of perjury—the mortgagee must still appeal to his conscience. His answer must be taken, and that answer has the same efficacy, so far as mere character is concerned, as the answer of the most pure and irreproached character in society."

And the preceding case is cited with approval in Long v. Kinkel (1883) 36 N. J. Eq. 359.

In Dodge v. Griswold (1842) 12 N. H. 573, it is said: In this case, the issue betwixt the parties is whether or not the sale of certain real estate was executed with a view to defeat, delay, or defraud creditors. In all such cases, the evidence almost uniformly consists of a variety of facts, derived from different witnesses, the aggregate of which tend to show a fraud; and where such evidence, as a whole, overbalances the answer, it is a good foundation for a verdict. Such was the testimony submitted in this case. Numerous witnesses testified to various transactions, each severally tending to disprove the answer of the defendant. It is not necessary that the answer should, in terms, negative the allegations of the answer. It is sufficient that destined facts are shown from two or more witnesses, conflicting with it. Facts thus derived from independent sources are fully competent to overrule the answer."

tradicting this rule,[266] but it can scarcely be said to be correct. Extrajudicial admissions against interest, made by the defendant, will, under proper cir-

In Snow v. Hazelwood (1908) 85 C. C. A. 226, 157 Fed. 898, writ of certiorari denied in (1908) 210 U. S. 434, 52 L. ed. 1136, 28 Sup. Ct. Rep. 762, the defendant's answers to interrogatories contained in the bill are said to be contradicted by so many facts and circumstances that they fall within the rule that circumstances alone, in the absence of a positive witness, will, if sufficiently strong, overcome a sworn answer in equity.

In Robinson v. Hardin (1858) 26 Ga. 344, a suit to reform a deed, the patent mistake in the terms thereof is held sufficient, unsupported by the testimony of any witness, to overcome the denial of the existence of such mistake, made in the answer.

In Gould v. Williamson (1842) 21 Me. 273, it is said: "It is said, and truly, that, to control the answer, the evidence against it must be equivalent to that of the testimony of two credible witnesses, testifying to the contrary. This evidence, however, may in this, as in other cases, be by way of inference from circumstances, which are sometimes more convincing than direct testimony. In the development of fraud, it furnishes almost the only source to be relied upon. It is not often the case that any but the participators in fraud are cognizant of it; and the perpetrators of it will deny it. If fraud, therefore, could not be established by circumstantial evidence, even in opposition to the denial of the defendant in equity, under oath, the remedy, under a process in equity, would be, in almost every case, illusory."

It is said obiter, in White v. Crew (1854) 16 Ga. 416, that 'circumstances alone, independent of any direct proof, might often justify and require a decree against the answer."

And in Long v. White (1830) 5 J. J. Marsh. (Ky.) 226, it is said: "When there is no positive witness, circumstances may, alone, be sufficient to overrule the denial in the answer, even of a person who answers on his own personal knowledge." In that case, however, sufficient circumstances were not put in evidence to overcome the sworn denial of the answer.

And see Field v. Wilbur (1876) 49 Vt. 157, supra, note 260.

[266]Circumstances, standing alone, it is said in Ing v. Brown (1850) 3 Md. Ch. 521, will not be sufficient to destroy the sworn answer to a bill in equity.

And it is said in Roberts v. Salisbury (1831) 3 Gill & J. (Md.) 425, that, if there were pregnant circumstances offered in opposition to the evidence of defendant's answer, "yet, standing alone, without the aid of the positive testimony of a single witness, they would be unavailing."

Where in Waters v. Ritchie (1894) 3 App. D. C. 379, complainant did not offer a single witness to overcome the positive denials of defendant's answers, but depended entirely upon circumstances deducible from the testimony of defendant's witnesses, in holding such circumstances to be insufficient to overcome the denials of the answers, it is said: "We find it rather difficult to appreciate the position assumed on behalf of the complainant in this regard, that 'corroborating circumstances' are sufficient to prove his case, without any witnesses. Facts and circumstances, as the basis of private right, do not prove themselves. They are required to be proved by witnesses. . . . It is difficult to see how an answer in equity can be overcome merely by circumstances, without the testimony of any witness."

In Hartley's Appeal (1883) 103 Pa. 23, it is said: "It is almost incredible that the appellee, who had purchased and occupied the land in question for over twenty years, and had paid nearly all the purchase money, would sell it for so much less than its admitted market value. In the absence of testimony tending to show any motive for such extraordinary conduct, it is difficult to conclude that any sane man would be guilty of such folly; but, without more, the inherent improbability of the transaction, as claimed by appellant, would be wholly insufficient to overcome the responsive denial of his answer." In this case, however, sufficient direct testimony was found against the answer to overcome it, and the case did not depend upon the determination of the question as to improbability.

So, in Carter v. Happel (1873) 49 Ala. 539, an action by creditors to set aside, as fraudulent, a conveyance of real estate by their debtor, it is held that the positive denial of

cumstances, be sufficient to overcome the denials of defendant in his sworn answer.[267] But a general statement, prescribing the limits of this rule is

fraud in the answer is not overcome by the evidence of certain facts calculated to cast suspicion on the good faith of the defendant. This evidence consisted of proof of the existence of a verbal agreement, contemporaneous with the sale, that the vendor was to occupy the house, free of rent, and to get wood from the land without charge; the sale of the premises by the vendee to the vendor's wife for a sum greatly less than that paid for it; and the admissions of both the grantor and the grantee that a judgment against the former was a lien on the property. Neither in this case nor in the next, however, is there any general rule laid down against the efficacy of circumstances, standing alone, if of sufficient force, to overcome an answer in equity.

And it is held, in Tompkins v. Nichols (1875) 53 Ala. 197, that the answers of vendor and vendee, denying all fraud or intention to defraud creditors, are not overcome by the testimony of two witnesses in that case, who testify only to suspicious circumstances surrounding the execution of the deed.

[267] It is said in Fish v. Fish (1908) 235 Ill. 396, 85 N. E. 662, that the answer of defendant in equity is "subject to impeachment, either by its own improbability, or the inconsistent conduct or declaration of the person swearing to it."

So, in Bradley v. Bufford (1801) Sneed (Ky.) 12, 2 Am. Dec. 703, a suit against a grantor and a grantee to annul a deed on the ground of fraud, it is held that the denials of fraud contained in the defendants' answers, in which it is claimed that the consideration for the deed was a debt, are overcome by evidence of oral admissions that there was no such debt, made by the grantor in the presence of the grantee, and uncontradicted by him.

And it is held in Gillett v. Robbins (1860) 12 Wis. 320, that the positive testimony of three witnesses to declarations made by defendant at different times, directly contradicting the averments of his answer, denying that the land in question had been purchased by him for the deceased, are sufficient, in connection with the circumstance that deceased and those claiming under him had occupied and received the rents of the land for years, to overcome the denials of the answer.

"A positive responsive averment, in a sworn answer, may be overcome by mere proof of verbal admissions," it is said in Garrett v. Garrett (1856) 29 Ala. 439; "but those admissions must appear to have been made deliberately and considerately, and must be established with reliable certainty, before an effect can be conceded to them equivalent to that of the testimony of two witnesses, or of one with corroborating circumstances." In this case, it is held that the testimony for complainant, when balanced against that of the defendant, is not equivalent to the positive testimony of two witnesses, or of one with corroborating circumstances.

In Petty v. Taylor (1837) 5 Dana (Ky.) 599, defendant denied in his verified answer a fact, the existence of which, two witnesses testified, he had admitted to them upon distinct occasions. The court says: "Neither of these witnesses proves directly the fact which is denied by the answer. Nor do the two concur in proving the same conversation; but each proves a separate admission to himself of the fact which is denied on oath. In the case of an ordinary witness, the oaths of two credible witnesses deposing to his separate statements, made deliberately and in direct contradiction of his own oath, would destroy the weight of his testimony; but such proof of his statements would not establish the fact denied by his oath, because his mere statements, not on oath, would themselves be incompetent to prove the fact stated. But, as the deliberate admissions of a party interested are evidence against himself of the fact admitted, we are inclined to the opinion that the proof of such admission, on two several occasions, by two credible witnesses, though deposing each to but one admission, should be deemed sufficient, in absence of all other evidence, not only to neutralize the denial of the answer, but to prove, in opposition to it, the truth of the fact denied. In such a case, the testimony of each witness, singly, is sufficient to establish the admission to which he swears; and, if it were not, each, by proving the same admission at differ-

impossible. It is rather for the court to decide, in each individual case, whether, upon the particular facts of that case, the admissions proved are of sufficient weight to overcome the answer made.[268] Among the kinds of evidence which, independent of any direct proof, may be sufficient to overcome the sworn statements of an answer in equity, documentary evidence also has a place.[269] But, with respect to such evidence, no ironclad rule to govern all cases can be laid down.[270] It may be said here, however, that documentary evidence not infrequently constitutes the corroborating circumstance necessary, when the complainant offers, in addition thereto, the testimony of one positive witness.[271]

It is the opinion of the greater num-

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ent times, corroborates the other. And the repetition by a party of an admission contrary to his interest adds to its weight as evidence against him. We are of opinion, however, that, in conceding to such testimony by two witnesses the effect of proving a fact denied by an answer on oath, the conditions of the concession must be strictly adhered to. The testimony must be such as to produce a conviction that the admission has been deliberately made and repeated; and if, upon the face of the testimony itself, or upon comparing it with other circumstances and proof in the cause, there be disbelief or serious doubt upon either of these points, or if, upon the whole case, the evidence in favor of the answer preponderates, the answer must prevail." Applying these principles to the case in question, the court was of the opinion that the denial of the answer was not overcome.

[268] The positive denials of a garnishee's answer in chancery are not overcome by declarations made by defendant, in an answer to a garnishment at law, brought by other persons. Holley v. Wilkinson (1857) 31 Ala. 196.

In Lieb v. Henderson (1878) 91 Ill. 282, it is held that the sworn denial of the defendant that he intended to perform a certain improper act, outweighed the testimony of four witnesses, who testified to statements made by him of his intention to perform such improper act.

That it is not meant, in the two preceding cases, to hold that admissions are never sufficient to overcome the defendant's answer, is evidenced by cases in the same jurisdictions, in which the admissions in question are held sufficient to overcome the answers. See note 267 supra.

[269] Smith v. Smith (1896) 92 Va. 696, 24 S. E. 280; Coldiron v. Asheville Shoe Co. (1896) 93 Va. 364, 25 S. E. 238; Becker v. Johnson (1910) 111 Va. 245, 68 S. E. 986; Haynor v. Haynor (1911) 112 Va. 123, 70 S. E. 531.

And see Robinson v. Hardin (1858) 26 Ga. 344, supra, note 265, and Pickering v. Day (1867) 3 Houst. (Del.) 474, 95 Am. Dec. 291, infra, note 272.

[270] The recital of a note, in a mortgage given to secure it, is held in O'Bannon v. Myers (1860) 36 Ala. 551, 76 Am. Dec. 335, not to be sufficient to overcome the denial of the mortgagor of its existence, in his sworn answer to a bill in equity.

[271] Where, in Eldridge v. Turner (1847) 11 Ala. 1049, the allegations of the bill, with respect to the terms of a note and the contract under which it was made are denied by the answer, it is held that the deposition of one witness, corroborated by the note, which expresses a contract in harmony with that proved, will overbalance the denial of the answer.

So, where, in Thomason v. Smithson (1838) 7 Port. (Ala.) 144, the defendant denied in his answer the making of an assignment of a judgment, the proof of the assignment by a single subscribing witness is held sufficient to countervail such denial. "The principle that an answer can only be overthrown by two witnesses does not apply," it is said, "to the case of the proof by one witness of the execution of a written instrument, which contradicts the answer."

And where an answer to a bill to compel defendant to admit plaintiff as a stockholder avers that the plaintiff's subscription was wholly for the use of another person, it is held, in Rowley's Appeal (1886) 115 Pa. 150, 9 Atl. 329, that the charter, with the requisite affidavit, stating plaintiff to be a shareholder, and the acknowledgment, afford corroboration to plaintiff's testimony equal to the testimony of another witness.

In Preschbaker v. Feaman (1863) 32 Ill. 475, a bill to redeem from an absolute deed alleged to be a mort-

ber of courts in which the question has arisen that the defendant's answer may be overcome by the unreasonableness, inconsistency, or contradiction of the statements made therein.[272] The justice of this rule is evident. In a number of cases, it has been held that inconsistent or unreasonable statements in an answer will constitute the corroborating circumstance necessary, when the complainant offers the testimony of one positive witness in his behalf.[273] And when, under a statute authorizing the defendant to appear as a witness in the case, he does testify, and his testimony is contradictory of the declarations he has made in his answer, such testimony will overcome

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gage, the denial of the sworn answer that such deed, and the bond to convey upon payment of a certain sum, constituted a mortgage, was held to be overcome by the evidence afforded by the papers themselves, together with the testimony of the scrivener that the instrument was intended as a mortgage. It is said that the papers would have been sufficient to raise a presumption of mortgage, in the absence of a sworn answer.

[272] It has been held that the credibility of the answer may be impeached by internal evidence, and that it may be, within itself, so inconsistent and contradictory as to deprive it of the character of a fair answer, and of the effect to which it would otherwise be entitled. Brown v. Bulkley (1862) 14 N. J. Eq. 294.

So, it is said in Brown v. Brown (1836) 10 Yerg. (Tenn.) 84, that it is true that the discovery which is sought from a defendant "makes her a witness, but it does not follow that everything she may state in her answer is necessarily to be believed. The credit due to her answer is no greater than that which is due to the deposition of a witness. If, then, she contradicts herself, if she state things which are unreasonable, or if she be contradicted as to material facts by other witnesses, so that her credit as a witness is wholly destroyed, it does not follow that the court must act upon her statement, although there may not be two witnesses contradicting her." In that case the defendant, charged by the bill with destroying a will, denied possession of it at any time, and then, admitting statements to others containing declarations of possession of the will, attempted to explain them by saying that the decedent had expressed his desires with respect to the disposition of his property to her, orally, and that the possession of that information was what she meant.

And it is said in Walter v. McNabb (1870) 1 Heisk. (Tenn.) 703, that the evidence of an answer "is subject to be rebutted and overturned, either by admissions and statements in the answer, or by witnesses." In that case, the admissions depended upon by the complainant are held insufficient to rebut the declarations contained therein.

It is said obiter, in Pickering v. Day (1867) 3 Houst. (Del.) 474, 95 Am. Dec. 291, that "the true meaning of the rule, however, is not that the testimony of a witness, with additional and corroborative circumstances, is indispensable in all cases because circumstances, alone, may sometimes be found in the answer itself, or in documentary evidence referred to in the answer, sufficient to more than countervail the denials of the answer. The rule properly applies to the case of an answer, opposed only by the testimony of a single witness."

And see Fish v. Fish (1908) 235 Ill. 396, 85 N. E. 662, supra, note 267; Jacks v. Nichols (1851) 5 N. Y. 178, infra, note 292; Gunn v. Brantley (1852) 21 Ala. 633, infra, note 304.

In Powell v. Manson (1872) 22 Gratt. (Va.) 177, however, an instruction to the effect that "an answer positively denying the allegations of the bill may be overthrown by the admissions, evasions, and contradictions, if any, which may be found therein," is held improper.

[273] It is said, in Gear v. Parish (1842) Burnett (Wis.) 99, that "if it appears from the answer of a defendant that he discredits his answer by contradictory, unreasonable, irreconcilable statements, or by statements contradicted by written instruments on the same point, . . . then the testimony of one disinterested witness would preponderate over the weight of testimony contained in his answer."

And in Pierson v. Catlin (1830) 3 Vt. 272, it is said obiter that "the an-

the answer,[274] the rule with respect to insufficiency of one witness to overcome the answer [275] notwithstanding.[276]

In addition to the above general rules, it has been held that the positive answer of a defendant cannot be overcome by the mere opinions of witnesses.[277] Also, that it is error to instruct a jury that an answer is to be looked upon with suspicion, if it ap-

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swer containing the denial may also, in itself, contain the circumstances giving to the testimony [of the complainant's one witness] sufficient credit to found a decree upon."

It is said in Hobbs v. Norton (1862) 1 Vern. 136, 23 **Eng.** Reprint, 370, 2 Ch. Cas. 128, 22 Eng. Reprint, 879, that, in the case of circumstances in the answer itself, corroborating, against the denial contained therein, one witness is sufficient to overcome it.

And it is said in Hart v. Ten Eyck (1816) 2 Johns. Ch. (N. Y.) 62, that "the answer containing the denial may also, *in itself*, contain the circumstances giving greater credit to the witness, sufficient to found a decree against the defendant."

[274] In Savings & L. Soc. v. Davidson (1899) 38 C. C. A. 365, 97 **Fed.** 696, it is said: "It is undoubtedly true that an answer may be overcome by the testimony of the witness who verified it, or by the testimony of the other defendants, testifying in their own behalf, or on behalf of the other defendants."

So it is said in Sherman v. Herr (1908) 220 **Pa.** 420, 69 Atl. 899, that "the defendant's own admissions, when on the witness stand, tend to contradict his answer filed to the plaintiff's bill." In that case, there was sufficient testimony, aside from that of the defendant's admissions, to overcome the answer.

And in Columbia Ave. Sav. Fund, S. D. T. & T. Co. v. Lewis (1899) 190 **Pa.** 558, 42 Atl. 1094, it is said that an answer responsive to the bill is not to be accepted as true, where "it is in conflict with the testimony of the respondent on the same point." In that case, the court says, the respondent's testimony "was, in a measure, contradictory of his answer; not sufficiently so, perhaps, to overcome its effect as evidence, but enough to weaken its force."

Where, by statute, complainant, can call defendant to the witness stand, it is held, in Roberts v. Miles (1864) 12 **Mich.** 297, that defendant's testimony as a witness on behalf of complainant may, alone, be sufficient to overcome the effect of his sworn answer. The court says: "If . . . defendant, on the stand, furnishes the means of destroying his own answer, and corroborating complainant's case, his testimony is preferable to his answer for the same reason which makes any oral examination and cross-examination more favorable for eliciting the truth, than a statement where affiant is not pressed to answer questions too rapidly to enable him to deliberate how he can best shape his response to secure his own ends."

So, where, in Spencer's Appeal (1876) 80 **Pa.** 317, defendant averred in his answer that he had received a written deed to the land in question, and had lost it, his testimony as a witness, in which he could not swear that he had ever had a deed, nor that he had ever seen one, nor that one was ever written, is held to be sufficient to overcome the answer. "When a party is permitted to testify, and does testify in conflict with his answer, it will not do," the court says, "to hold that his testimony shall be disregarded, and his answer stand wholly unimpeached. Precisely how far the rule should be modified, now that a party may be a witness in his own behalf, it is not necessary, at present, to indicate."

And see supra, note 248.

[275] See supra, note 252.

[276] Where, in Morris v. White (1882) 36 **N. J.** Eq. 324, defendant offered himself as a witness, and his testimony was in conflict with the allegations of his answer, the court says: "Where the defendant does not rely on his answer alone, but offers himself as a witness, the rule that one witness is not sufficient to overcome a responsive answer to a material fact, under oath, is hardly applicable. An answer may carry its own refutation within itself; . . . and the defendant may refute himself by his own evidence."

[277] It is held in Simpson v. Feltz (1826) 1 M'Cord, Eq. (S. C.) 213, 16 Am. Dec. 602, that where, in a suit for accounting between partners, the defendant has sworn in his answer to a maximum, which he declares unequivocally the cash receipts could

pears to them that it has been recklessly made.[278] On the other hand, one court has laid down the rule that an answer, verified by two defendants, does not require more evidence to overcome it than is required by an answer, verified by a single defendant.[279]

Where issues of fact arising in equity are submitted to a jury at law, the answer of the defendant is held not to be entitled to the weight which it receives in equity.[280] The jury may give to it whatever weight they believe it to be worth, and, in arriving at their opinion, they may take into consideration the fact that it is the statement of an interested witness.

(b) In answers to bills of discovery.

Answers to bills in chancery for discovery, like answers to bills for relief,[281] must be overcome, it is held, by two witnesses,[282] or by one witness together with corroborating circumstances.[283] But, as has been held with respect to answers to bills for relief,[284] such answers may be overcome, independently of any witnesses, by the statements contained within them.[285] This distinction, however, should be noted between answers to bills for relief and answers to bills for discovery only, viz., that, in the former case, the answers are used in courts of equity, and, in the latter, in courts of law. And whereas, in a court of equity, a complainant must

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not have exceeded, and in which he is sure he is not mistaken, the opinions of witnesses, however respectable they are, which are merely conjectural, cannot outweigh it.

[278] It is held in Fish v. Stubbings (1872) 65 Ill. 492, that the evidence of a sworn answer in chancery can be impeached only as oral testimony can be, and that it is error to instruct the jury to look with suspicion upon the answer, if they believed, from the evidence, that it was recklessly made.

[279] It is held in Marlatt v. Warwick (1866) 18 N. J. Eq. 108, affirmed in (1867) 19 N. J. Eq. 439, that the verification of an answer by two defendants does not require more evidence to overcome it than if only one defendant had sworn to it.

[280] Where, in Hunter v. Wallace (1807) 1 Overt. (Tenn.) 239, an issue at equity was submitted to a jury, and the answer read to them, Overton, J., is of the opinion that though two witnesses, or one witness with corroborating circumstances, are necessary to overcome an answer in equity, upon the consideration of the court, "who cannot, like a jury, weigh the credibility of testimony, it is not conclusive on the jury, and they may find one way or the other, as they may judge the weight of evidence lies."

In Kinsey v. Grimes (1844) 7 Blackf. (Ind.) 290, it is said: "The answer has not the same weight before a jury trying an issue at law that it has before the chancellor. The jury have the right to view it with the suspicion which attends the testimony of an interested witness, and to give it such credit as they may think it deserves." The direct question of admissibility is not raised. This was a case of an answer in equity, where an issue was raised which a jury was called to try.

Where the issues are submitted to a jury at law, on the issue raised by the oath of one witness, the answer is admissible, not as evidence in the sense in which it is evidence in equity, but so that the defendant may have the benefit of his oath, if it is considered of value by the jury. Ibbotson v. Rhodes (1706) 1 Eq. Cas. Abr. 229, 21 Eng. Reprint, 1010, 2 Vern. 554, 23 Eng. Reprint, 958, 18 Eng. Rul. Cas. 531.

But see Only v. Walker (1746) 3 Atk. 407, 26 Eng. Reprint, 1035, where it is held that where there are circumstances, in addition to one witness, opposing the answer, it may not be read at law.

[281] Supra, X. c. 1, (a).

[282] Buckner v. Armour (1825) 1 Mo. 534; M'Dowel v. Teasdale (1795) 1 Desauss. Eq. (S. C.) 459.

[283] Ibid.

It is said in Clason v. Morris (1812) 10 Johns. (N. Y.) 524, involving an answer to a bill of discovery, that to overcome it requires "one witness, and circumstances corroborating the testimony of that witness."

[284] See supra, note 272.

[285] Where, in Allen v. McNew (1847) 8 Humph. (Tenn.) 46, it is urged that the answers to a bill of discovery must be overcome by the evidence of two witnesses, or of one witness with strong corroborating circumstances, the court says that "its truth before the jury should be weighed, like other testimony, by its intrinsic character,

establish his case by clear and convincing proof, a plaintiff at law is bound merely to produce a preponderance of evidence.

(c) In answers to interrogatories authorized by statute.

Under statutes specifically making answers to interrogatories evidence, in the same manner as if produced in answer to bills of discovery in chancery, the rules governing the weight of answers to bills of discovery apply;[286] and the answers must be overcome by two witnesses, or by one witness together with corroborating circumstances,[287] or, where such is the rule with respect to the answers to bills of discovery, by one witness together with strong corroborating circumstances.[288] In one state, there is a statute making no reference to bills for discovery, but specifically providing that answers to interrogatories must be overcome by the oath of two witnesses, or of a single witness, corroborated by strong circumstantial evidence, or by written proof.[289] Answers to interrogatories made by a garnishee have been held to be entitled to the weight accorded to answers to bills of discovery,[290] but there is a difference of opinion on this point, one court holding that a garnishee's answers are entitled only to whatever weight the jury sees fit to give them.[291]

2. Exceptions to general rules.

(a) Evasive answer.

It is a general rule that an evasive

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subject to be set aside by what might be found in the answer itself, by the nature of the statement, or by other proof."

[286] See supra, X. c. 1, (b).

[287] Under a statute providing that answers to interrogatories shall be evidence, "to the same extent, in all respects, as if the same had been procured upon a bill in chancery for discovery," it is held, in Zeigler v. Scott (1851) 10 Ga. 389, 54 Am. Dec. 395, that answers to interrogatories are conclusive, unless contradicted by two witnesses, or one witness and circumstances.

And see Turner v. Miller (1846) 6 Ark. 463, infra, note 288.

[288] So, under a statute making answers to interrogatories, evidence in the trial of the suit, in the same manner, and with the like effect, as an answer to a bill in equity for discovery, it is held, in Turner v. Miller (1846) 6 Ark. 463, that such answers "must be taken as true, unless contradicted by two witnesses, or by one witness with strong corroborating circumstances."

[289] Under a statute so providing, answers to interrogatories must be overcome by the oath of two witnesses, or of a single witness corroborated by strong circumstantial evidence, or by written proof. Hynson v. Texada (1867) 19 La. Ann. 470.

So, under a statute so providing, answers to interrogatories must be overcome by the proof of "strong corroborating circumstances," in addition to the testimony of one witness. Stafford v. Stafford (1823) 1 Mart. N. S. (La.) 648; Fletcher v. Fletcher (1850) 5 La. Ann. 406.

In Bourgeois v. Bourg (1831) 2 La. 537, the testimony of two witnesses is held to overcome the answers made to interrogatories, filed in the case. The statute controlling interrogatories in that state provides that answers thereto may be destroyed by the oath of two witnesses, or of one witness corroborated by strong circumstantial evidence, or by written proof.

Under a statute requiring strong circumstantial evidence, in addition to the testimony of one witness, to overcome an answer to an interrogatory, it is held in Shiers v. Poole (1851) 6 La. Ann. 401, that, in a suit on notes, barred by prescription, the possession of the notes by the plaintiff is not sufficient circumstantial evidence of a waiver of the prescription by defendant, to satisfy the requirement of the statute.

[290] Where the plaintiff raises an issue on the garnishee's denial of indebtedness, and goes to trial thereon, the answers to the interrogatories, filed by the garnishee under the statute, are entitled to the weight accorded to answers to a bill of discovery. Quarles v. Porter (1848) 12 Mo. 76.

[291] In Schwab v. Gingerick (1852) 13 Ill. 697, it is said that the jury should give the sworn answer of a garnishee "such weight as they may believe it entitled to."

answer [292] is not entitled to the same weight, as evidence, as one that is positive and unequivocal. Such an answer, it is held, will put a complainant to proof, that is, it is sufficient as a pleading, the complainant not having excepted to its irregularities; but it will have little, if any, weight as evidence. To come within the rules set out above,[293] with respect to the weight of evidence, an answer must be direct, positive, and unequivocal.[294] And it must not be in

[292] **Alabama.**—Lyon v. Hunt (1847) 11 Ala. 295, 46 Am. Dec. 216; Savage v. Benham (1849) 17 Ala. 119; Russey v. Walker (1858) 32 Ala. 532; Bobe v. Stickney (1860) 36 Ala. 482; Hartwell v. Whitman (1860) 36 Ala. 712; Longmire v. Goode (1863) 38 Ala. 577.

Kentucky. — M'Campbell v. Gill (1830) 4 J. J. Marsh, 87; Crutcher v. Trabue (1837) 5 Dana, 80; Amos v. Heatherby (1838) 7 Dana, 46; Price v. Boswell (1842) 3 B. Mon. 13; Lewis v. Outton (1843) 3 B. Mon. 453.

Missouri. — Gamble v. Johnson (1845) 9 Mo. 605 (obiter); Martin v. Greene (1847) 10 Mo. 652.

Pennsylvania.—Moloney v. Davis (1865) 48 Pa. 512.

Tennessee. — Haywood v. Ensley (1847) 8 Humph. 460.

Vermont.—Veile v. Blodgett (1877) 49 Vt. 270.

Virginia.—Wilkins v. Woodfin (1816) 5 Munf. 183.

United States.—Slater v. Maxwell (1867) 6 Wall. 268, 18 L. ed. 796.

In Fairbairn v. Middlemiss (1882) 47 **Mich.** 372, 11 N. W. 203, the court says: "Whether complainants are now entitled to say that the paper filed by Mrs. McKinley as a sworn answer is not so authenticated as to be deemed verified is extremely doubtful, but not material. Admitting it to be a sworn answer, it is so grossly evasive that it cannot have the force of one bearing the semblance of good faith and integrity."

So, it is held in Raines v. Jones (1844) 4 Humph. (**Tenn.**) 490, that an answer denying the tender of redemption money, but admitting a statement by complainant's agent that he would redeem, or had the money to redeem, is evasive, and does not require the evidence of two witnesses to overcome it. In this case, the denial of tender was more directly made in the amended answer, but according to the court, "the admissions in the first answer are not and could not have been taken back. They stand as though the two answers were but one."

And it is said in Jacks v. Nichols (1851) 5 N. Y. 178: "The answer of the defendant, under oath, was asked for by the complainant, and is therefore, of itself, equal to the evidence of one witness in favor of the defendant. This answer, the defendant insists, has not been overthrown by the evidence of Young [witness for complainant]. . . . The defendant and Young stand before us as two witnesses called by the complainants and their evidence must, when in conflict with each other, balance, the one against the other, unless, from the circumstances of the case as detailed, the unreasonable or evasive statements of the one give a preponderance to those of the other."

Where defendants claim the benefit of a Statute of Nonclaim by way of plea, but do not positively deny in their answers the presentation of complainant's demand, proof of such presentation by one witness is held, in Pharis v. Leachman (1852) 20 **Ala.** 662, to be sufficient.

An answer denying that any contract, such as that charged in the bill, was ever legally made between the parties, is held in Everhart's Appeal (1884) 106 **Pa.** 349, to be evasive, inasmuch as it does not deny the fact of the contract, nor its equitable obligation, but only its legal effect. The rule making answers in equity evidence on behalf of the pleader is held not to apply.

It is said in Pilling v. Armitage (1805) 12 Ves. Jr. 78, 33 **Eng.** Reprint, 31, that, "where the answer is not as positive as the testimony of the witness, the testimony of the witness will prevail against the answer."

And see Applewhite v. Foxworth (1901) 79 **Miss.** 773, 31 So. 533.

[293] Supra, X. c, (1.)

[294] **Fla.**—Southern Lumber & Supply Co. v. Verdier (1905) 51 Fla. 570, 40 So. 676; Russell v. Stickney (1911) 62 Fla. 569, 56 So. 691; Barnes & J. Co. v. Williams (1913) 64 Fla. 190, 60 So. 787; Mitchell v. Mason (1913) 65 Fla. 208, 61 So. 579; AMERICAN SECURITIES CO. v. GOLDSBERRY (reported herewith) ante, 15; Pittman v. Milton (1915) 69 Fla. 304, 68 So. 658; Johns v. Bowden (1916) 72 Fla. 530, 73 So. 603; FAR-

the form of a negative pregnant,[295] such being included in the rule against evasiveness in general. It is the rule, however, that evasiveness as to part of an answer will not destroy the effect, as evidence, of the remainder of the pleading, not evasive.[296]

(b) Facts not within pleader's knowledge.

When it appears from the pleader's direct admission in his pleading, or, indirectly, from the facts set out therein, or from his inability to make the allegations of his answer except upon

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RELL v. FOREST INVEST. Co. (reported herewith) ante, 25.

Illinois.—Stouffer v. Machen (1855) 16 Ill. 553; Taintor v. Keyes (1867) 43 Ill. 332.

Iowa.—Pierce v. Wilson (1855) 2 Iowa, 20.

Kentucky.—Phillips v. Richardson (1830) 4 J. J. Marsh. 212.

Massachusetts.—Parkman v. Welch (1837) 19 Pick. 231.

Missouri. — Roundtree v. Gordon (1843) 8 Mo. 19 (obiter).

New Hampshire.—Bellows v. Stone (1846) 18 N. H. 465; Busby v. Littlefield (1856) 33 N. H. 76.

North Carolina.—Speight v. Speight (1839) 22 N. C. (2 Dev. & B. Eq.) 280; Lewis v. Owen (1840) 36 N. C. (1 Ired. Eq.) 290; Hawkins v. Alston (1845) 39 N. C. (4 Ired. Eq.) 137; Longmire v. Herndon (1875) 72 N. C. 629.

Tennessee.—McLard v. Linnville (1849) 10 Humph. 163.

United States.—Berry v. Sawyer (1882) 19 Fed. 286; Southern Development Co. v. Silva (1888) 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435.

In Mayo v. Hughes (1906) 51 **Fla.** 495, 40 So. 499, it is said that "a failure of consideration should be directly, positively and unequivocally averred, in order to impose the burden of proof on the complainant."

And in Kellogg v. Singer Mfg. Co. (1895) 35 **Fla.** 99, 17 So. 68, the answer of defendant is held not to put the burden of proof of certain matters upon the complainant, although their existence is denied therein, such denials not being direct, positive, and unequivocal.

[295] In Roberts v. Miles (1864) 12 **Mich.** 297, it is said: "The bill calling for an answer under oath, defendants denied most of the charges by following verbatim the language of the complainant. The answer was not excepted to, but, in considering its value as a piece of testimony, it is to be observed that the object of a discovery is to be informed touching the entire transaction referred to, and a literal denial, which does not deny that the charge may, after all, be substantially true, is, in many cases, a mere evasion. . . . In chancery, as at law, a case is made out by proof of the substance of an allegation, and if such an answer, is to be allowed the usual weight, so far as it goes, it cannot fairly be made to extend beyond its strict language."

And in Moors v. Moors (1845) 17 **N. H.** 481, it is said: "A simple denial of the plaintiff's case, literally, as stated, is wholly insufficient. He must meet it with full and circumstantial denial, and not with a negative pregnant, which, while it controverts the case in the precise terms in which it is stated, is perfectly consistent with one not substantially differing from it."

Where, in a suit to compel the execution of a deed, the bill charges the making of an "express agreement, officially, in writing," by the agent of the defendant railroad, and the answer denies that the agent "entered into an express agreement, officially, in writing," it is held in Erie & P. R. Co's Appeal (1882) 3 Penny p. (**Pa.**) 164, that the answer is not sufficiently positive and distinct "to afford ground for the application of the rule in equity, that a denial in the answer must be met and overcome by more than one witness."

And it is said in Hobbs v. Norton (1862) 1 Vern. 136, 23 **Eng.** Reprint, 370, 2 Ch. Cas. 128, 22 **Eng.** Reprint, 879, that, in the case of a negative pregnant in the answer, one witness will be sufficient to overcome it.

[296] It is held in Whitney v. Robbins (1866) 17 **N. J. Eq.** 360, that, although answers are insufficient in some particulars, such insufficiency does not destroy their effect as to the points upon which they answer directly.

After admitting portions of the answer to be evasive, in Jackson v. Hart (1833) 11 Wend. (**N. Y.**) 343, Tracy, Senator, says: "But for these defects in the answer, the proper course for the complainant was to except to it, and obtain more direct and positive evidence. By not doing so, he accepted the whole as evidence; and there-

information and belief, that facts set out in his pleading are not within his personal knowledge, the pleading is not entitled, with respect to the facts in question, to the weight usually accorded to pleadings as evidence.[297] And, in a few of these cases, it is even said that such pleadings do not constitute evidence at all. But this seems nothing more than a different method of stating

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fore as to facts responsive to the bill, which are distinctly asserted by the defendant, and not disproved by the complainant, he is concluded."

[297] **Alabama.**—Pearce v. Nix (1859) 34 Ala. 183.

Arkansas.—See Byrd v. Belding (1856) 18 Ark. 118; Spence v. Dodd (1857) 19 Ark. 166; Fairhurst v. Lewis (1861) 23 Ark. 435; Barclay v. Dawson (1871) 26 Ark. 417.

Delaware.—Robinson v. Jefferson (1823) 1 Del. Ch. 244; Lattomus v. Garman (1869) 3 Del. Ch. 232.

Florida.—Mayo v. Hughes (1906) 51 Fla. 495, 40 So. 499; Pittman v. Milton (1915) 69 Fla. 304, 68 So. 658.

Georgia.—Rogers v. French (1856) 19 Ga. 316; Arline v. Miller (1857) 22 Ga. 330; Fletcher v. Faust (1857) 22 Ga. 559; Heard v. Nix (1895) 96 Ga. 51, 23 S. E. 122; Toomer v. Warren (1905) 123 Ga. 477, 51 S. E. 393.

Hawaii.—Wond v. Mikalemi (1912) 21 Haw. 288.

Illinois.—Fryrear v. Lawrence (1848) 10 Ill. 325; Cunningham v. Ferry (1874) 74 Ill. 426; Deimel v. Brown (1891) 136 Ill. 586, 27 N. E. 44, affirming (1890) 35 Ill. App. 303.

Indiana.—State v. Holloway (1846) 8 Blackf. 45.

Kentucky.—Laurence v. Laurence (1816) 4 Bibb. 357; Carneal v. Day (1821) Litt. Sel. Cas. 492; Mitchell v. Maupin (1826) 3 T. B. Mon. 185; Whittington v. Roberts (1826) 4 T. B. Mon. 173; Young v. Hopkins (1827) 6 T. B. Mon. 19; Harlan v. Wingate (1829) 2 J. J. Marsh. 138; Taylor v. Morton (1830) 5 J. J. Marsh. 65; Combs v. Boswell (1833) 1 Dana, 473; Williamson v. McConnell (1836) 4 Dana, 454; Price v. Boswell (1842) 3 B. Mon. 13.

Louisiana.—Franklin v. Kemball (1818) 5 Mart. 666.

Maryland.—Drury v. Conner (1823) 6 Harr. & J. 288.

Mississippi. — Toulme v. Clark (1886) 64 Miss. 471, 1 So. 624; Purvis v. Woodward (1901) 78 Miss. 922, 29 So. 917.

New Hampshire.—Bellows v. Stone (1846) 18 N. H. 465.

New Jersey.—Kinna v. Smith (1834) 3 N. J. Eq. 14; Stevens v. Post (1858) 12 N. J. Eq. 408; Brown v. Bulkley (1862) 14 N. J. Eq. 294; Bent v. Smith (1869) 20 N. J. Eq. 199 (obiter); Lawrence v. Lawrence (1871) 21 N. J. Eq. 317; Sweet v. Parker (1871) 22 N. J. Eq. 453; Stearns v. Stearns (1872) 23 N. J. Eq. 167 (obiter); Clawson v. Riley (1881) 34 N. J. Eq. 348; Frink v. Adams (1883) 36 N. J. Eq. 485 (obiter) affirmed in (1884) 38 N. J. Eq. 287; Corporation for Relief v. Eden (1901) 62 N. J. Eq. 542, 50 Atl. 606.

New York.—Knickerbocker v. Harris (1828) 1 Paige, 209, reversed on another point in (1830) 5 Wend. 638; Town v. Needham (1832) 3 Paige, 545, 24 Am. Dec. 246.

Pennsylvania. — Spencer's Appeal (1876) 80 Pa. 317; Bougher v. Conn (1885) 17 Phila. 81, affirmed without opinion (1887) 6 Sadler (Pa.) 100, 8 Atl. 838; Socher's Appeal (1884) 104 Pa. 609; Riegel v. American L. Ins. Co. (1893) 153 Pa. 134, 19 L.R.A. 166, 25 Atl. 1070; Bussier v. Weekey (1899) 11 Pa. Super. Ct. 463; Petry v. Clark (1903) 12 Pa. Dist. R. 249; Alcania Co. v. Avonmore Land & Improv. Co. (1914) 23 Pa. Dist. R. 990; Cornwell v. Sparks (1915) 248 Pa. 109, 93 Atl. 868.

Rhode Island.—Atlantic F. & M. Ins. Co. v. Wilson (1858) 5 R. I. 479.

Tennessee.—McLard v. Linnville (1849) 10 Humph. 163; Wilkins v. May (1859) 3 Head. 173; McKissick v. Martin (1873) 12 Heisk. 311.

Vermont.—Sanborn v. Kittredge (1847) 20 Vt. 632, 50 Am. Dec. 58; Loomis v. Fay (1852) 24 Vt. 240; Wooley v. Chamberlain (1852) 24 Vt. 270; Veile v. Blodgett (1877) 49 Vt. 270.

Virginia.—Frank v. Lilienfeld (1880) 33 Gratt. 377; Jones v. Abraham (1881) 75 Va. 466; Chapman v. Chapman (1895) 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813.

Wisconsin.—Gear v. Parish (1842) Burnett, 99; Remington v. Willard (1862) 15 Wis. 583.

United States.—Dutilh v. Coursault (1837) 5 Cranch, C. C. 349, Fed. Cas. No. 4,206; Tobey v. Leonard (1861) 2 Cliff. 40, Fed. Cas. No. 14,067; Badger v. Badger (1862) 2 Cliff. 137, Fed. Cas. No. 718, affirmed in (1864) 2 Wall. 87, 17 L. ed. 836; Robinson v. Mandell (1868) 3 Cliff. 169, Fed. Cas. No. 11,959; Hayward v. Eliot Nat. Bank

the same thing, the result being the same in both cases, the difference in statement growing apparently out of carelessness, rather than any conscious intent, the meaning in both instances being that pleadings of that kind do not constitute evidence, within the ordinary rules with respect to weight. This rule with respect to facts not within the pleader's knowledge finds fre-

(1874) 4 Cliff. 294, Fed. Cas. No. 6,273, affirmed in (1878) 96 U. S. 611, 24 L. ed. 855; Berry v. Sawyer (1882) 19 Fed. 286; Holladay Case (1886) 27 Fed. 830; Blair v. Silver Peak Mines (1899) 93 Fed. 332, denying rehearing (1898) 84 Fed. 737; Earle v. Art Library Pub. Co. (1899) 95 Fed. 544; Hanchett v. Blair (1900) 41 C. C. A. 76, 100 Fed. 817; Cady v. Barnes (1913) 208 Fed. 361; Slater v. Maxwell (1868) 6 Wall. 268, 18 L. ed. 796.

England.—Arnot v. Biscoe (1743) 1 Ves. Sr. 97, 27 Eng. Reprint, 914, 18 Eng. Rul. Cas. 156; Le Neve v. Le Neve (1747) 1 Ves. Sr. 66, 27 Eng. Reprint, 893.

It is said obiter in Waters v. Creagh (1830) 4 Stew. & P. (Ala.) 410, that the rule requiring two witnesses to disprove a denial in an answer does not apply, where the defendant refers to facts not within his knowledge, unless he gives satisfactory reasons for having such knowledge of the facts denied as to justify him in making such denial.

In Biscoe v. Coulter (1857) 18 Ark. 423, it is said that an answer, responsive to an allegation of the bill, but of matter not within the peculiar knowledge of the defendants, "will be treated as merely putting the allegation in issue."

Upon motion to set aside a preliminary injunction, it is held in Luburg's Appeal (1889) 1 Monaghan (Pa.) 329, 17 Atl. 245, that averments in the answer, "from information received," and not based upon the knowledge of the defendant, are not evidence.

And so, in a suit by the assignee of a mortgage for foreclosure, defendant's denial of "any knowledge of the assignment of said note and mortgage" is not such a denial as to put complainant upon proof. Brown v. Woodbury (1854) 5 Ind. 254.

In Gibbs v. Frost (1843) 4 Ala. 720, it is held that, where the bill does not charge defendant with knowledge of certain facts, and where defendant admits, in his answer, that he knows nothing thereof except by the information of his counsel, his denial with respect thereto will not subject the complainant to the necessity of establishing the allegations of the bill with regard thereto, by the testimony of two witnesses.

It is held in Paulding v. Watson (1852) 21 Ala. 279, that an answer, denying personal knowledge of a portion of the facts alleged in the bill, amounts only to a formal denial of the allegations of the bill upon that subject; and the complainant is put thereby merely to the necessity of making ordinary proof.

In Clark v. Van Riemsdyk (1815) 9 Cranch (U. S.) 153, 3 L. ed. 688, an action on a bill of exchange drawn by the supercargo of a vessel owned by defendant's testator, it is said: "The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be charged by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an infallible deduction from facts which were known to him, he may assert that belief, or that deduction, in terms which convey the idea of his knowing the fact itself. Thus, when the executors say that John Innis Clark [testator] never gave Benjamin Munro [supercargo] authority to take up money or to draw bills, when they assert that Riemsdyk, who was in Batavia, did not take this bill on the credit of the owners of the Patterson, but on the sole credit of Benjamin Munro, they assert facts which cannot be within their own knowledge. In the first instance, they speak from belief; in the last, they swear to a deduction which they make from the admitted fact that Munro could show no written authority. These traits in the character of testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or a deposition."

In Buckingham v. McLean (1851) 13 How. (U. S.) 151, 14 L. ed. 91, fol-

quent application to the pleadings of executors and administrators,[298] and

lowing Clark v. Van Riemsdyk (U. S.) supra, the answer of a creditor of a bankrupt, setting out that he did not believe that at the time of the conveyance by the bankrupt of the property in question to him, the bankrupt contemplated bankruptcy, is held to be "entitled to little weight, concerning the state of mind of the debtor."

It is held, in Godwin v. Yonge (1853) 22 Ala. 553, that where a bill is filed by a cestui que trust against the trustee and certain judgment creditors of the grantor, to have the deed reformed on account of an alleged mistake, and decrees pro confesso are taken against all the defendants except the trustee, who answers that he knows nothing about the alleged mistake, the clear and direct testimony of one witness is sufficient to authorize the reformation of the deed.

In Givens v. Tidmore (1845) 8 Ala. 745, it is said: "The defendants do not positively affirm that the service of process was effected upon complainant, but their answers are merely an expression of their opinion or belief. To overbalance such a denial of an allegation, it certainly does not require proof the most stringent and conclusive."

In Bourke v. Falck (1897) 52 Neb. 768, 73 N. W. 223, an answer in equity, sworn on information and belief, is held not to be evidence on behalf of defendant. In that case, a judgment based on such evidence alone is reversed.

An answer in equity, upon information and belief, is held in Miller v. District of Columbia (1886) 5 Mackey (D. C.) 291, not to be "sufficient evidence to the court so as to constitute, in itself, proof negativing the proof of one or more witnesses; and it is not evidence at all, because it is a simple statement of matter of hearsay."

And it is held in Newman v. James (1847) 12 Ala. 29, that a portion of an answer upon information and belief, not professing to be founded upon the personal knowledge of the pleader, may be overcome by the testimony of one witness.

It is said in Watson v. Palmer (1844) 5 Ark. 501, that "where defendant, by his answer, only denies a fact charged in the bill according to his knowledge and belief, a single witness on the part of the complainant will authorize a decree."

And it is said in Snell v. Fewell (1887) 64 Miss. 655, 1 So. 908, involving an answer on information and belief, that "though statements so made raise an issue between the parties, and put the complainant to proof, . . . it is not incumbent on him to establish the truth of his bill by two witnesses, or one witness and corroborating circumstances."

With respect to the admissibility and weight of answers, made on behalf of corporations by the officers thereof, who do not have personal knowledge of the facts set out, reference is made to III. b, 3, (b).

[298] In Pennington v. Gittings (1830) 2 Gill & J. (Md.) 208, it is said: "A plaintiff, by calling on the defendant to answer the allegations in his bill upon oath, makes the answer evidence; and as one witness would only be equivalent to the answer, and the plaintiff, to prevail, must have preponderating proof, it is necessary that he should have another witness, or circumstances in addition to the testimony of one, in order to turn the scale. But, looking to an answer as testimony only, it must be treated as any other testimony, and the weight of it must, from the very nature of evidence, in some degree, depend on the fact it asserts. Therefore, when an executor or administrator, answering in his representative character, alleges facts of which he can have no personal knowledge, it can but amount to an assertion of his impressions; and his speaking positively cannot alter the character of his testimony, merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge. And upon the obvious principle that when a witness asserts a fact, of which further developments in the course of his examination prove him to be in a situation to prevent his having a full knowledge of the subject, his testimony is not entitled to the weight of that of a man, swearing to facts which may be fully within his knowledge. The answer in this case is of that description. . . . But, as it does not admit the allegations in

the bill, it puts the complainant on proof, and leaves him to sustain them as he can, unembarrassed by any supposed responsive features of the answer."

And the preceding case is cited and followed in Dugan v. Gittings (1845) 3 Gill (Md.) 138, 43 Am. Dec. 306.

And it is said by the chancellor in Hagthorp v. Hook (1829) 1 Gill & J. (Md.) 270, that "where an administrator is called upon to answer certain matters, which appear to have rested exclusively within the knowledge of his intestate, it will be sufficient that he swears as he is informed and believes; . . . but such an answer is to be taken with reference to the reasons given for his belief; for, if the reasons are futile, and especially, if the alleged belief be, in a high degree, irreconcilable with the admitted or established circumstances of the case, the answer cannot be credited; nor be allowed thus loosely to swear away the equity of the bill."

Where, in Ormsby v. Ansom (1842) 21 Me. 23, it is contended that an answer by the administratrix of a trustee in attachment is not sufficient to entitle the estate of the trustee to a discharge, because such answer is made only to the best of the pleader's knowledge, the contention is overruled, it being said that such answer "might not be satisfactory if the answer had come from one having certain knowledge of the business; but it cannot be expected that the administratrix should be possessed of the same degree of knowledge, and this appears to be the best evidence which can be obtained."

So, where, in Barclay v. Dawson (1871) 26 Ark. 417, the defendant is an administrator, it is held that one witness is sufficient to overcome the averments of his answer, "for, as administrator, in which capacity he was sued, the material facts stated in his answer could not be supposed to be within his knowledge."

It is held in Garrow v. Carpenter (1834) 1 Port. (Ala.) 359, that the answer of a defendant in chancery, formally denying that which he is not alleged to know, and which, from his situation, he cannot know with certainty, is not so conclusive as to require two witnesses to overcome it. "Is it not reasonable that the answer of such a one should be less weighty in the balances of justice than the positive asseverations of a disinterested witness?" the court asks. In this case, the defendant's lack of knowledge was due to the fact that he was acting in the capacity of administrator.

In Lawrence v. Lawrence (1871) 21 N. J. Eq. 317, involving an answer by the legatees and executors of a decedent, it is held that "the denial in the answer has not the effect of evidence because, although responsive to the bill, none of the facts are within the personal knowledge of any of the defendants."

And where a testator dies pending a suit against him, and his administrator is made a party and files a formal answer, putting the allegations of the bill in issue, the complainant is not compelled thereby to sustain the allegations of his bill by the proof of two witnesses. Reynolds v. Pharr (1846) 9 Ala. 560.

It is said in McCullough v. Barr (1891) 145 Pa. 459, 22 Atl. 962, that "it is not the rule in equity, any more than in law, that a plain acknowledgment in writing, by a decedent, of an existing debt, will be overcome by an answer of his executor, 'to the best of his knowledge and belief,' that no such debt was owing."

In holding, in McAllister v. Clopton (1875) 51 Miss. 257, that an answer by an administrator, disclaiming knowledge and demanding strict proof, does not amount to a denial of the facts, it is said: "The general rule is, if the facts are stated to be on the defendant's personal knowledge, he must answer positively, and not to his remembrance and belief, unless they occurred several years before. As to facts which have not happened within his own knowledge, he must answer as to his information and belief, and not as to his information only."

In Andrews v. Hyde (1872) 3 Cliff. 516, Fed. Cas. No. 377, involving the answer of administrators and heirs of a decedent, it is said: "Administrators and heirs cannot be supposed, in such a case, to have personal knowledge upon the subject, but the decision of the Supreme Court warrants the conclusion that, in such a case, the complainant, is not entitled to decree, upon the uncorroborated testimony of a single witness; certainly not, unless his statements are positive, and the witness appears to be without bias, prejudice, or interest adverse to the respondent."

heirs,[299] where they are without personal knowledge of the transactions of the decedent. For a time, it was the rule, in Mississippi, that the court would look no further than the positive averment or denial in a pleading, regardless of the extent of the pleader's personal knowledge of the facts;[300] but the court subsequently overruled itself, and got in line with the other states.[301] In applying this rule with respect to matter not in the pleader's knowledge, a distinction is to be made in the case of a fact of which the pleader must have had personal knowledge, had it existed, but of which he denies all knowledge or recollection.[302] Such a

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And see Tong v. Oliver (1803) 1 Bland, Ch. (Md.) 198, note.

[299] In a bill filed to avoid a deed, on the ground that it was never delivered to the grantee, but was fraudulently taken from his possession, the answer of the grantee's heirs, who have no personal knowledge of the facts and who can answer only upon information and belief, is not evidence in their behalf. Benson v. Woolverton (1862) 15 N. J. Eq. 158.

Andrews v. Hyde (Fed.) supra.

[300] In M'Gehee v. White (1856) 31 Miss. 41, defendant, who admits in his answer that he never had any conversation with his daughter with respect to her acceptance of a deed delivered by him to her husband, for her account, denies that she ever accepted such deed. The court says: "This denial is not by way of inference or argument, but it is a direct and unequivocal response to the allegation of the bill. Under the view in which we are now considering the matter, it is immaterial whether the defendant was justified, by the facts of the case, in his denial. He may have made the denial upon information which he had received, or from a state of facts which he knew to exist, which satisfied his mind of the correctness of what he stated. Whether the evidence upon which he founded his answer was sufficient to justify it, or whether he had any evidence at all to support it, is not the question. He was called upon to answer a specific and material charge, upon his oath, and he responded to the call by a positive denial, and, whether true or false, it must have the force of evidence in the cause. . . . It cannot be said that an answer which is a direct and positive denial of a charge in a bill shall not have its legal effect as evidence, because it is made upon insufficient grounds."

So, it is said in Toulme v. Clarke (1886) 64 Miss. 471, 1 So. 624, that "the rule of courts of chancery, which requires more than the testimony of one witness to overthrow an answer denying allegations of the bill, applies only when the denial is positive, and does not apply where the denial is as to belief, or is as matter of inference or argument. . . . It is true that, when the answer positively denies, the court will not inquire into the grounds of the denial, as held in M'Gehee v. White (Miss.) supra, but the rule as stated above remains."

And see Carpenter v. Edwards (1887) 64 Miss. 595, 1 So. 764.

[301] M'Gehee v. White (Miss.) supra, is specifically overruled in Shackelford v. Brown (1894) 72 Miss. 380, 17 So. 896, where it is said that that decision "converts what is a rule of evidence into one of pleading, and its effect is, or may be, to obstruct the search for truth, or to prevent effect being given to the truth, when discovered."

[302] In Marvel v. Fralinger (1903) 65 N. J. Eq. 161, 55 Atl. 818, reversed on another point in (1904) 67 N. J. Eq. 622, 63 Atl. 166, involving an answer "to the best of the knowledge and belief" of the defendants, it is said: "The phraseology used by the affiants, it is contended, deprive their answers of the force which they would have had, had they positively sworn that the explanatory agreement was never executed. It is insisted that the answers have no greater force than if they were sworn to on information and belief. The strength of the affidavit sworn to in this language must depend upon the fact which is the subject of the affidavit. Where the fact is one concerning which the affiant may have had no knowledge, the affidavit amounts to no more than one made upon belief only. Where, however, as in this case, the fact is one concerning the affiant's personal act, of which he must have had knowledge, had it existed, the affidavit is an assertion, under oath, that the affiant, using his best recollection, is unable to recall such an occurrence."

And where, in Harris v. Knicker-

denial is a denial of fact, and does not come within the exception under discussion. As to the effect of the lack of knowledge on the part of the pleaders, as to the facts set out in affidavits on application for injunctions pendente lite, or on motions to dissolve such injunctions, reference is made to a former section of this note.[303]

(c) Pleading contradicted as to material fact.

By application of the rule, "Falsus in uno, falsus in omnibus," it is held that pleadings contradicted as to a material point lose their weight as evidence, with respect to all the facts set out therein.[304] This rule is of general application, Virginia, alone, having refused to adopt it.[305]

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backer (1830) 5 Wend. (N. Y.) 638, reversing (1828) 1 Paige, 209, the complainant excepts to defendant's answer, on the ground that he does not set forth "according to the best and utmost of his knowledge, remembrance, information, and belief, whether . . . interest was . . . to be paid," and defendant answers the exception, saying that "he has no knowledge, remembrance, or belief that . . . any interest was to be paid," it is held that the denial of the answer is positive, and not a mere denial upon information and belief, requiring but one witness to overcome it.

[303] Supra, III. b, 5, (c).

[304] Prout v. Roberts (1858) 32 Ala. 427; Pittman v. Milton (1915) 69 Fla. 304, 68 So. 658; Young v. Hopkins (1827) 6 T. B. Mon. (Ky.) 19; Roundtree v. Gordon (1843) 8 Mo. 19; Gamble v. Johnson (1845) 9 Mo. 605; Commercial Bank v. Reckless (1849) 5 N. J. Eq. 650, reversing (1846) 5 N. J. Eq. 430; Brown v. Brown (1836) 10 Yerg. (Tenn.) 84; Fay v. Oatley (1857) 6 Wis. 42.

It is said in Pharis v. Leachman (1852) 20 Ala. 662, that the answer of the defendant is entitled to no weight, inasmuch as a material statement therein has been disproved by the testimony of witnesses. "The rule is," the court says, "that an answer disproved in a material statement loses its weight as evidence."

So, where an answer alleging a transfer of property to the defendant to have been absolute is contradicted by the terms of the instrument itself, the rule that an answer contradicted in a material point loses its weight as evidence applies to the denials of the answer with respect to fraud in the transaction. Gunn v. Brantley (1852) 21 Ala. 633.

And it was held in Marshall v. Green (1866) 24 Ark. 410, that if the chancellor was satisfied by the absurdity of an allegation made by defendant that it was not true, he would be justified, on the principle, "Falsus in uno, falsus in omnibus," in concluding the whole of the answer to be untrue.

It is said in Nobles v. L'Engle (1909) 58 Fla. 480, 51 So. 405, that "when the probative force of a material averment in an answer under oath is overcome by proof, the answer is thereby diminished in force as evidence."

In Roundtree v. Gordon (1843) 8 Mo. 19, it is said: "Where an answer is contradicted in any one or more important particulars by sufficient evidence, that is, by two witnesses, or one witness with corroborating circumstances, it is deprived, in all other respects, of that weight which is allowed to answers by the rules of a court of equity; for, being falsified in one thing, no confidence can be placed in it as to others, according to the maxim, 'Falsus in uno, falsus in omnibus.'"

It is said in Countz v. Geiger (1797) 1 Call (Va.) 191, that, the answer in that case having been contradicted by the evidence in several important points, it is "deprived of that weight which is allowed to answers by the rules of a court of equity."

And where, in Forsyth v. Clark (1829) 3 Wend. (N. Y.) 637, the plaintiff made use of admissions contained in the answer, which had been impeached in material parts by proof, it is said: "Upon no principle can we wholly reject as evidence what is said in the answer responsive to the bill, in relation to the matters concerning which the appellant has resorted to the answers for admissions in his favor; but they ought not, in my judgment, to have the same weight as evidence, in those particulars wherein they are not impeached, as they would command if they had not been discredited in any respect whatever."

[305] Where, in Fant v. Miller (1867) 17 Gratt. (Va.) 187, it is urged that

(d) Conclusion pleaded instead of facts.

In some cases, it is held that pleadings containing conclusions of law, rather than facts, do not constitute evidence,[306] and, in others, it is said that such pleadings do not require the usual amount of evidence to overcome them.[307] Between these cases there is no apparent distinction, the difference in language being due, most probably, to inadvertence. What seems to be meant in both kinds of cases is that such pleadings do not constitute evidence, wthin the ordinary rules with respect to weight. This rule, with respect to the effect of pleading conclusions instead of facts, is especially true where facts admitted in a pleading tend to contradict the conclusion.[308] As to the effect of conclusions contained

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the credit of an answer, contradicted in several material respects, is entirely destroyed, the court, in denying such a rule, says: "The plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit; nor can he indirectly do so by proving that the answer is false in one respect, or several respects; the only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery."

And in Broughton v. Coffer (1868) 18 Gratt. (Va.) 184, a suit for the specific performance of a contract, it is said that "the fact that the answer was proved to be false as to the quantity of land embraced in the original parol contract did not destroy the weight ascribed to it by law, in respect to other matters, as to which it was not disproved by the requisite amount of evidence."

[306] The court, in Parkman v. Welch (1837) 19 Pick. (Mass.) 231, holds the view that a mere general denial in the answer, of all fraud as charged in the bill, shows that defendant "proposes shielding himself under a denial of the legal effect of his actions, rather than to deny, under oath, the particular acts imputed to him," and that, accordingly, while such an answer does not amount to an admission of the particular acts of fraud charged, it constitutes no evidence on behalf of defendant.

So, allegations in an answer, which are not of the facts themselves, but of the construction placed upon such facts by the pleader, do not constitute evidence for the defendant. Northern P. R. Co. v. Boyd (1910) 101 C. C. A. 18, 177 Fed. 804, affirming (1909) 170 Fed. 779. In that case the defendant, in his answer, set out his own interpretation of certain agreements, and other papers in question.

In Miller v. Armstrong (1912) 169 Ill. App. 185, it is said that the sworn answer to the bill is a statement of conclusions, and not a direct answer to the allegations of the bill; and it is held not to be evidence.

And see Everhart's Appeal (1884) 106 Pa. 349, supra, note 292.

[307] Where a bill in chancery charges that notice of the tax sale under which defendant claims title was published for an inadequate period, it is held, in Lyon v. Hunt (1847) 11 Ala. 295, 46 Am. Dec. 216, that statements in the answer, affirming that the sale was advertised "according to law," are too general to require the testimony of two witnesses to overcome them, such being a mere expression of opinion.

And where, in Matthaei v. Pownall (1912) 235 Pa. 460, 84 Atl. 444, the defendant denied defrauding the plaintiff, the court says: "The rule that a responsive answer must be overcome by two witnesses, etc., has no application to a case like this, where the denial goes only to the legal effect of the essential facts, and not to their existence."

[308] It is held in Sayre v. Fredericks (1863) 16 N. J. Eq. 205, that, although an answer may deny the existence of constructive fraud, such is merely a conclusion of law, and that, where facts are admitted from which the existence of fraud follows as a natural conclusion, such denial will be of no avail.

And in the similar case of Hoboken Bank v. Beckman (1880) 33 N. J. Eq. 53, it is said: "A denial by the answer, in such a case as this, of the existence of fraud, will not avail to disprove it, where the answer admits facts from which fraud follows as a natural and legal, if not a necessary and unavoidable, conclusion."

The mere denial, in an answer, of a fraudulent intent, in conveying property, while admitting all the facts which constitute a fraudulent conveyance, is held in Gainer v. Russ (1883) 20 Fla. 157, not to be such denial as

in affidavits on application for injunction pendente lite, reference is made to a former section of this note.[309]

(c) Where the opposing pleading is verified.

It has been held in a few instances that, where the bill is verified, the oath of the complainant offsets the oath of the defendant, and that the ordinary rules with respect to the weight of evidence necessary to overcome a sworn answer do not apply.[310] And such is the rule under a statute providing for the verification of both bill and answer, and prescribing that such verification shall not make greater proof necessary on the side of the adverse party.[311] But under a statute abolishing the equity rule with respect to the weight of evidence necessary to overcome a sworn answer, where the bill is verified, the verification of the bill by attorney,[312] or by other agent who has no personal knowledge of the facts,[313] is not sufficient. In Tennessee, it is the law that where a bill, by the rules of chancery practice, is required to be sworn to, and oath is made on the knowledge of the complainant, the verified answer is of effect only as a pleading, and not as evidence, within the ordinary rules with respect to weight.[314] But where the bill is verified only

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must be overcome by two witnesses, or by one witness and corroborating circumstances. "The denials in an answer," says the court, "in order to make it evidence, and to require it to be overcome by the testimony of two witnesses, or its equivalent, must be denials of the facts stated in the bill, and not merely denials of conclusions."

[309] Supra, III. b, 5, (d).

[310] Where the bill is sworn to, it is said in Garrow v. Carpenter (1835) 1 Port. (Ala.) 359, "it is oath against oath; and, in such case, one witness is sufficient" to overcome the sworn answer.

After stating, in Atkins v. Farr (1738) 2 Eq. Cas. Abr. 247, 22 Eng. Reprint, 210, the general rule requiring two witnesses to overcome the sworn denial of an answer in chancery, it is said that "the rule is misapplied here, for in this case the plaintiff's daughter was entitled to make the first oath, which she has done; and has also proved the same matter by one witness, so that it is only the oath of the defendant, in this answer, against two oaths." In this case the bill was verified.

And see Autrey v. Cannon (1853) 11 Tex. 110.

[311] Under a statute providing that both the bill and the answer shall be verified, and that "such verification shall not make other or greater proof necessary on the side of the adverse party," it has been held that the equity rule with respect to the necessity of two witnesses, or one witness and corroborating circumstances, to overcome a verified answer, is no longer controlling. Albro v. Lawson (1856) 17 B. Mon. (Ky.) 642; Enders v. Williams (1858) 1 Met. (Ky.) 346; Worley v. Tuggle (1868) 4 Bush (Ky.) 168. This is on the ground that "the oath of the plaintiff and defendant, making an issue, are equivalents."

[312] It is held in Jacks v. Bridewell (1875) 51 Miss. 881, that the verification of a bill by an attorney, and not by the complainants, is not sufficient to entitle complainants to claim the benefit of a statute, providing that the rule requiring two witnesses, or one with corroborating circumstances, to overcome the effect of a sworn answer, is abolished "when the bill is sworn to," and that "such answer shall have only such weight and credit as it may be fairly entitled to, in view of the circumstances of the case, and the interest of the party answering."

And the preceding case is followed in the similar cases of Waller v. Shannon (1876) 53 Miss. 500; Purvis v. Woodward (1901) 78 Miss. 922, 29 So. 917.

[313] Where a bill is verified by an agent, who does not profess to have any knowledge of the facts stated, the verification will not entitle the complainant to the benefit of the statute, by which the rule requiring two witnesses, or one witness and corroborating circumstances, to overthrow the answer, is dispensed with. Holmes v. Lemon (1894) — Miss. —, 15 So. 141.

[314] It is said obiter, in Meek v. McCormick (1897) — Tenn. —, 42 S. W. 458, that where a bill, by the rules of chancery practice, is required to be sworn to, and oath is made on the knowledge of the complainant, the verified answer raises only an issue, and is not evidence; but that where

only on information and belief,[315] the usual rules with respect to the answer apply.

the bill is verified only on information and belief, and the answer is verified upon knowledge, the answer is evidence. It is also said that, where the bill is not required to be verified, an answer required to be verified will be evidence, although the bill is sworn.

So, it is said in Brown v. Daniels (1898) — Tenn. —, 51 S. W. 991, that "when the bill is such as the law requires to be sworn to, as an injunction bill, and it requires an answer under oath, the oath to the bill stands against the oath to the answer, and a mere issue is made."

After referring to the rule requiring but one witness to sustain a sworn bill, required to be sworn, in opposition to a sworn answer, in Trabue v. Turner (1873) 10 Heisk. (**Tenn.**) 447, it is said: "The rule rests upon the assumption that there is oath against oath, as to the same facts; that is, if the complainant, of his own knowledge, swears that certain facts are true, and the defendant, on his own knowledge, swears they are not true, or denies their truth, that makes a case of oath against oath, and the two oaths neutralize each other, leaving the complainant under the necessity of making out his own case by other evidence. But if the complainant, either by himself, or by an agent, makes allegations of facts upon information, and swears to them according to his belief, and the defendant, upon his own knowledge, denies the facts so alleged upon oath, that does not make a case of oath against oath, according to the true meaning and spirit of the rule; but such an answer to such a bill will stand, unless overturned by two witnesses, or one with strong corroborating circumstances."

Where, in Boyd v. Reed (1871) 6 Heisk. (**Tenn.**) 631, both the bill and the answer were verified, the testimony of one witness is held sufficient to sustain the allegations of the complainants, even granting that an answer as to a fact, as to which defendants could have no personal knowledge, is to be taken as a denial. But with respect to facts in defendant's knowledge, and not overcome by one witness, the averments of the answer are binding on the complainants.

And where, in Searcy v. Pannell (1812) Cooke (**Tenn.**) 110, the answer to complainant's sworn bill for injunction was contradicted by one witness, it is held that complainant's oath, together with that of the witness, will not be overcome by the answer.

And the preceding case is cited and followed in McLard v. Linnville (1849) 10 Humph. (**Tenn.**) 163.

[315] It is held in Carrick v. Prater (1849) 10 Humph. (**Tenn.**) 270, that where the complainant's bill for injunction is verified only upon information, and the answer denying the allegations of the bill is verified positively, one witness is not sufficient to overcome the denials of the answer.

So, in Spurlock v. Fulks (1851) 1 Swan (**Tenn.**) 289, where the portion of the bill, to which the answer in question was a response, was sworn merely upon information and belief, the direct answer of the defendant is held to be evidence for him, and not to be overcome by the testimony of one witness.

And see Meek v. McCormick and Trabue v. Turner (**Tenn.**) supra.

E. L. D.

E. J. SMITH, Appt.,

v.

THOMAS SPILLMAN et al.

Arkansas Supreme Court—June 24, 1918.

(— Ark. —, 205 S. W. 107.)

Constitutional law — extending time for redemption.

1. The attempt by the legislature to extend the time for redemption from a sale under a decree foreclosing a tax lien, after the period in force when

the sale was made for such redemption has expired, is void as impairing the obligation of a contract, even though the sale had not been confirmed when the extension was attempted.

[See note on this question beginning on page 143.]

Tax — setting aside sale — collateral attack.

2. A sale under a decree foreclosing a tax lien cannot be set aside on the ground that no taxes were due after expiration of the time allowed by statute for presenting such claims.

(Hart and Smith, JJ., dissent.)

APPEAL by plaintiff from a decree of the Chancery Court for Greene County in favor of defendants in an action brought to recover possession of land sold for drainage assessment. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **R. P. Taylor** for appellant.

Mr. R. E. L. Johnson, for appellees:

Plaintiff had no vested right secured by contract, or otherwise, in and to the property involved by virtue of same being knocked off to him by the commissioner.

24 Cyc. 33; Stotts v. Brookfield, 55 Ark. 307, 18 S. W. 179; Thomason v. Craighead, 32 Ark. 391; Wells v. Rice, 34 Ark. 346; Reid v. Hart, 45 Ark. 41; Currie v. Franklin, 51 Ark. 338, 11 S. W. 477; Alexander v. Hardin, 54 Ark. 480, 16 S. W. 264; Miller v. Henry, 105 Ark. 265, 150 S. W. 700, Ann. Cas. 1914D, 754; Greer v. Anderson, 62 Ark. 215, 35 S. W. 215; Brasch v. Mumey, 99 Ark. 328, 138 S. W. 454, Ann. Cas. 1913B, 38; 37 Cyc. 1383; Gault's Appeal, 33 Pa. 94; Philadelphia v. Lukens, 3 Phila. 333; Morrow v. James, 69 Ark. 539, 64 S. W. 269.

The mere expiration of the period of redemption under the Acts of 1911 of one year before the passage of Act 43, Acts 1915, gave plaintiff no vested rights in the property.

Gantt's Appeal, 33 Pa. 94; Hill v. State, 23 Ark. 604; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209.

All the equities in this case are in favor of defendants, and the chancellor so found in his decree.

Wade v. Major, L.R.A.1917E, 637, and note, 36 N. D. 331, 162 N. W. 399; State ex rel. Forest Lake State Bank v. Herman, 36 N. D. 177, 161 N. W. 1017; Hedlin v. Lee, 21 N. D. 495, 131 S. W. 390; Murphy v. Teutsch, 22 N. D. 102, 35 L.R.A.(N.S.) 1139, 132 N. W. 435, Ann. Cas. 1913E, 1185.

McCulloch, Ch. J., delivered the opinion of the court:

The controversy in this case involves the right of appellees to redeem a certain lot or tract of real estate from sale under decree of a chancery court, enforcing a lien for drainage assessments. The chancery court upheld the appellees' asserted right to redemption, and an appeal has been prosecuted from the decree allowing the redemption.

Appellees were the owners of the land in controversy, and the same was assessed for taxation for drainage purposes in a district designated as "Eight-mile Drainage District No. 2," organized under the general statute authorizing the organization of such districts and the levying of special taxes for the purpose of constructing that kind of improvement. Acts 1907, p. 276. In a suit in the chancery court to foreclose the lien for unpaid assessments, the chancery court of Greene county rendered a decree in the year 1913, condemning this tract of land for sale to raise funds to discharge the lien for unpaid assessments, and the sale was made by a commissioner of the court on January 14, 1914. Appellant became the purchaser of this tract at the commissioner's sale, which was reported to and confirmed by the chancery court on November 3, 1915, and the commissioner executed a deed to appellant, which was approved by the court. Appellees remained in possession of the land, and this action was originally instituted at law by appellant to recover possession. Appellees

filed an answer in the action on March 5, 1917, asserting the right to redeem the land from said sale, pursuant to the terms of a statute enacted by the General Assembly and approved February 9, 1915. Laws 1915, p. 123. On motion of appellees the cause was transferred to the chancery court, and a final decree was rendered, as before stated, allowing appellees to redeem. Appellees also alleged in their answer that the drainage taxes on the land in controversy had been paid prior to the rendition of the decree, and they asked that the decree of the court and the sale thereunder be set aside on that account, but the court refused to grant relief on that ground.

The statute in force at the time of the sale provides that "at any time within three years from the date of the sale of said land, as aforesaid, the owner of the lands may file his petition in the court rendering the decree, alleging the payment of the amount for which the lien was decreed against said land in said suit, and upon proving the same, the court shall vacate and set aside said decree and sale." Acts 1911, p. 28, § 1.

The answer of appellees, alleging the payment of taxes for which the land was sold, was not filed within three years after the date of the sale by the commissioner. Therefore the statute quoted above was not applicable, and the attack on the validity of the sale on the ground that the taxes had been paid was purely collateral. The court was therefore correct in refusing to set aside the decree and sale on that ground. McCarter v. Neil, 50 Ark. 188, 6 S. W. 731; Collier v. Smith, — Ark. —, 200 S. W. 1008.

Tax—setting aside sale—collateral attack.

The right of redemption turns solely upon the validity and effect to be given to the Act of 1915, page 123, which was approved and went into effect on February 9, 1915, more than a year after the commissioner's sale at which appellant purchased the land, and after the expiration of the period of redemption prescribed by the statute in force on the date of the sale. The statute in force on the date of the sale contained a provision that "any landowner shall have the right to redeem any and all lands sold at such sale within one year thereafter, which shall run from the day when the lands are offered for sale, and not from the day when the sale is confirmed." Acts 1911, p. 28, § 1.

The sale in question was not an ordinary tax sale, but was one made by a commissioner of the chancery court in a suit authorized by statute, to enforce a tax lien. The statute in question authorized the court to render a decree declaring the lien for taxes and ordering the land sold by commissioner at public outcry for cash to raise funds to discharge the lien. The statute enacted in 1915, supra, under which the present redemption is sought, extends to five years the period of redemption under decrees of courts for foreclosure of delinquent assessments. The language of the statute is that "any person, firm or corporation, or the heirs, assigns or legal representatives of any person, firm or corporation, who would have been permitted to redeem had the sale been by the collector for state and county taxes, or who was in possession under color of title at the time of said decree of sale, shall have the right to redeem from said sale at any time within five (5) years" (Acts 1915, p. 124, § 1), by payment of the prescribed amount to the commissioner.

We have therefore before us a case where, after confirmation by the court of a judicial sale, the right of redemption is asserted under a statute enacted after the expiration of the time for redemption prescribed by the statute in force at the time the sale was made, but before the confirmation in this instance, and the question presented on this state of facts is whether or not it was within the power of the legislature, under such circum-

stances, to enlarge the period of redemption.

We pretermit any analysis of the statute for the purpose of determining whether or not, according to the interpretation of the language used, it was intended by the lawmakers to give retroactive effect to the statute, and we go at once to a consideration of the question as to the power of the legislature, under the circumstances, to pass such a statute, giving it that effect.

We have dealt with this statute in two decisions, involving the assertion of the right to redeem from sales of the character involved in the present litigation. Collier v. Smith, supra; Hogg v. Nichols, — Ark. —, 204 S. W. 211. In the first of the cases just referred to there was involved an attempt to redeem under this statute from a confirmed sale made more than a year before the passage of this statute, the law, as it existed at the time of the sale, allowing one year within which there could be a redemption, and we decided that the Act of 1915 had no application under those circumstances, but that the rights of the parties concerning the redemption must be determined in accordance with the law as it existed at the time of the sale. The doctrine of that case was reiterated in the other case referred to above, but the facts were materially different, in that the sale was made less than a year before the passage of the Act of 1915. But we again held that the statute had no application, for the reason that the law, as it existed at the time of the sale, controlled the rights of the parties, and that the legislature could not thereafter change it so as to affect existing rights. The present case differs from each of the other cases, in that the sale was not confirmed until after the passage of the Act of 1915, but it also differs from the last case in the fact that the period of redemption required by the statute in existence at the time of the sale had expired before the present statute was enacted. The subject was very thoroughly discussed in Hogg v. Nichols, supra, and the law as announced there absolutely controls, in appellant's favor, the decision of the present case. In the opinion in that case it was said: "We have examined the authorities carefully, and find that the law regards and treats a judicial sale as contractual; and the laws of redemption in force at the time of the sale are a condition attached to the sale. In other words, the authorities seem practically unanimous in holding that the right to redeem from a tax sale is governed by the statute in force and effect at the time the sale was made."

Many authorities were cited in support of the court's declaration of the law.

The only additional question which concerns us in the present case is the distinction found here in the fact that the sale had not been confirmed, but we are of the opinion that, when the sale is viewed in the light of the rights which this court has frequently declared arise in favor of a purchaser at a judicial sale, it necessarily follows that to give this statute a retroactive effect so as to extend the right of redemption beyond the period under the law as it stood at the time of the sale would be an impairment of the obligation of the contract, which is expressly forbidden, not only by the Constitution of this state (art. 2, § 17), but likewise the Constitution of the United States. It was stated in that opinion that the authorities are practically unanimous in holding that the right of redemption from a tax sale must be determined according to the law in force at the time of the sale, and that the lawmakers cannot extend the period of redemption by a statute passed after the sale takes place. In addition to the authorities cited in the opinion, we call attention to a decision of the supreme court of South Dakota, expressly holding that a sale of lands for delinquent taxes constitutes a contract between the

purchaser and the state, and that a statute extending the period of redemption cannot be enacted so as to apply to a sale already made. State ex rel. Waldo v. Fylpaa, 3 S. D. 586, 54 N. W. 599. The same rule was stated by Judge Cooley in his work on Constitutional Limitations, 7th ed. p. 412, as follows: "So, a law is void which extends the time for the redemption of lands sold on execution, or for delinquent taxes, after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note."

In Freeman on Executions, § 315, the same rule is stated with reference to redemption from execution sales, and the author states the rule unequivocally that the legislature cannot pass a law extending the period of redemption so as to apply to a sale already made.

The case of Thompson v. Sherrill, 51 Ark. 453, 11 S. W. 689, which we cited in Hogg v. Nichols, supra, declared the law to be that "the right to redeem lands from a tax sale depends upon the statute in force at the date of the sale," and in that case the sale was one made by a commissioner of the chancery court under an overdue tax decree. In other words, there was involved, as in this case, the right of redemption under a judicial sale, and the court held that the right must be determined according to the statute in force at the date of the sale. The rule has been frequently declared by this court to be that a purchaser at a judicial sale acquires something more than a mere option to purchase at the price specified in his bid, that he acquires a right to an acceptance and confirmation of his bid which is consummated by the approval of the court, and that he has a right to insist upon such a confirmation where the sale has been regularly and fairly made in accordance with the law as it existed at the time of the sale.

It has been said that some of the earlier decisions of this court declare a different rule, but we do not find that to be true. An examination of the whole line of decisions of this court on that subject shows them to be in complete harmony. For instance, in the case of Sessions v. Peay, 23 Ark. 39, which is claimed to be in conflict with the rule just stated, the court said: "The theory of sales of this character is that the court is itself the vendor, and the commissioner or master is [a] mere agent in executing its will. The whole proceeding, from its incipient stage up to the final ratification of the reported sale, and the passing of the title to the vendee, and the money to the person entitled to it, is under the supervision and control of the court. The court will confirm or reject the reported sale, or suspend its completion, as the law and justice of the case may require."

The same statement is found in the later cases of Thomason v. Craighead, 32 Ark. 391, and Wells v. Rice, 34 Ark. 346.

That statement of the rule concerning the control of the court over sales made by its commissioners does not imply that a purchaser, prior to confirmation, has acquired no substantial right. On the contrary, the rule is stated in those decisions to be that the court must pass upon the sale and approve or reject it "as the law or justice may require," meaning, of course, the law as it stood at the time the sale was made. Again in the case of Greer v. Anderson, 62 Ark. 213, 35 S. W. 215, we said that "no purchaser at such a sale has the right to rely absolutely upon the order of the court directing the sale, and the fact that the agent of the court has pursued the terms prescribed in making the sale."

That statement, too, is in harmony with later decisions, because the court retains control of the sale

for the purpose of determining whether it has been made in accordance with the law, and the purchaser, though he has acquired a right to confirmation, subject to the approval of the court, according to the law at the time of the purchase, has no absolute right to his purchase, and must await the action of the court in approving the sale. The subject was fully reviewed by Judge Battle in the case of Colonial & U. S. Mortg. Co. v. Sweet, 65 Ark. 152, 67 Am. St. Rep. 910, 45 S. W. 60, and the old English rule of allowing interested parties to raise the bid at any time before confirmation of judicial sales was rejected, and the rule was, in substance, stated to be that, where the sale was fair and regular in all respects, it should be confirmed by the court.

In the case of Banks v. Francis Levee Dist. 66 Ark. 490, 51 S. W. 830, which was a case involving confirmation of a sale of lands under decree for delinquent taxes, the owner having appeared before the confirmation and offered to redeem, we held that "where a judicial sale of land has been conducted fairly, and in substantial compliance with the law and the orders of the court directing the same to be made, it is error to permit the original owner to redeem before confirmation."

In George v. Norwood, 77 Ark. 216, 113 Am. St. Rep. 143, 91 S. W. 557, 7 Ann. Cas. 171, we again discussed the question of the rights of a purchaser at a judicial sale, and we held that the purchaser, upon the acceptance of his bid at the sale, acquired a right to have the sale confirmed "in the absence of fraud, irregularity, or misconduct affecting the validity of a judicial sale," and we reversed the chancellor for refusing to confirm a sale.

In Robertson v. McClintock, 86 Ark. 255, 110 S. W. 1052, the subject was again fully discussed, and the law in this state was stated to be as follows: "In some jurisdictions the commissioner is treated as a mere agent to take bids to be reported to the court. The highest bidder acquires no rights by his bid, and it is customary to open the bidding and to award the property to the man who will offer the highest price after the sale has been reported. The language employed in some of our earlier cases would indicate that this system was in the mind of the judge delivering the opinion, though the point was not decided. It is now, however, the settled law of this state, as it is of most of the states, that the highest bidder at a judicial sale, to whom the property has been struck off by the commissioner, acquires vested rights, which must be respected by the court."

The following rule was announced by this court in the case of Brasch v. Mumey, 99 Ark. 324, 138 S. W. 458, Ann. Cas. 1913B, 38: "The right of the owner to redeem from a judicial sale exists, therefore, only in those cases which fall within the statute giving such privilege, and can be asserted within the time and manner prescribed by the statute, and not otherwise."

The case of Groves v. Keene, 105 Ark. 40, 150 S. W. 575, is especially in point here, for the reason that it came here on appeal from an order confirming a sale of lands sold under a delinquent tax decree, the original owner having appeared before the court, before confirmation, and offered to redeem by paying the taxes. We quoted with approval from the cases cited herein, and said: "There was nothing in the facts of this record that would have justified the chancery court in refusing to approve and confirm the report of the commissioner who made the sale of the lands under the decree of the court. Appellee therefore acquired by his purchase at that sale vested rights. . . . These rights are created by statute, and a court of chancery cannot annul them."

The last case on the subject is Gailey v. Ricketts, 123 Ark. 18, 184 S. W. 422, and the doctrine is again stated in harmony with that so frequently announced by this court, as follows: "It is settled that, until

confirmation by the court, a sale made by a commissioner under a decree of court is not final and complete so as to pass the title to the property sold, and that such sale may be set aside before confirmation thereof, upon good and valid grounds. Still the purchaser at such a sale does not acquire a mere option, but a right to a deed, which becomes perfect upon the confirmation of his purchase, and which, if confirmed, relates back to the time of his purchase, and the deed to him conveys such interests as he would have acquired if he had received his deed at the time of his purchase."

It is seen, therefore, to be just as well settled as a rule of law can be settled, by repeated declarations of this court, that a purchaser acquires a vested right by his bid accepted at a judicial sale, and it necessarily follows that, if a right is thus acquired, it is one which must be respected by the courts and by the lawmakers, and that any effort on the part of the lawmakers to change the law so as to disturb those rights would operate as an impairment of the obligations of the contract. The protection of the Constitution extends to inchoate interests as well as to consummated rights, and makes no distinction as to the magnitude or value of contracts, but shields the obligation of them all from impairment.

Constitutional law—extending time for redemption.

In all the vast array of judicial authority and exposition of the law by text-writers, the only discordant note that has been sounded is in the one decision of the supreme court of Pennsylvania in the case of Gault's Appeal, 33 Pa. 94. That case stands alone against the great weight of authority in holding that the legislature had the power to extend the right of redemption under a sale already made, and the court based its conclusion on the control of the legislature over the whole matter of taxation. The reasoning of the court is, we think, unsound, as the legislative control over the matter of taxation or any other subject does not imply the power to disturb vested rights in the exercise of that control. However, that decision related to a statute passed before the expiration of the period of redemption under the statute in force at the time of the sale, and for that reason it has no application to the present case. But aside from that, we think the case was decided wrong, and is in conflict with the great weight of authority, and in conflict with what we have often said and decided here.

It is argued that the question of redemption relates merely to the remedy, and a litigant can have no vested right in a mere remedy. Our view of the matter is that a right of redemption does not come within the limits of a mere remedy, but that it affects substantial rights, and where those rights are acquired before the passage of the statute they cannot be disturbed.

There is an effort also to liken statutes conferring rights of redemption to those creating periods of limitation upon the institution of an action, but we find no analogy between the two classes of statutes. Under a statute of limitations there is no vested right until the statute bar has attached, but a sale, either a judicial sale or a tax sale, as soon as the property is struck off to the highest bidder, creates contractual rights which vest immediately, and those rights must be determined according to the law existing at the time they accrue.

After careful consideration of the whole subject, a majority of the court has reached the conclusion that the Act of 1915 can have no application to sales already made at the time the statute went into effect. The decree of the Chancellor is therefore reversed, and the cause is remanded, with directions to enter a decree in appellant's favor in accordance with this opinion.

Hart and Smith, JJ., dissent.

ANNOTATION.

Constitutionality of statute extending period for redemption from judicial or tax sale, or sale upon mortgage foreclosure.

Notwithstanding some early decisions to the contrary, it is now settled that a law extending the time for redemption from a judicial or tax sale, or giving such a right where none before existed, cannot constitutionally be given a retroactive operation. Such a statute does not act merely on the remedy, but directly upon the contract itself.

Thus, it has been held that statutes extending the period for redemption, or giving a right of redemption when none before existed, are not constitutional, as applied to sales upon execution under judgments rendered on contracts made, or debts incurred, before its adoption. Oliver v. McClure (1873) 28 Ark. 555; People ex rel. Thorne v. Hays (1854) 4 Cal. 141; Seale v. Mitchell (1855) 5 Cal. 401; Thresher v. Atchison (1897) 117 Cal. 73, 59 Am. St. Rep. 159, 48 Pac. 1020 (obiter); Welsh v. Cross (1905) 146 Cal. 621, 106 Am. St. Rep. 63, 81 Pac. 229, 2 Ann. Cas. 796 (overruling Moore v. Martin (1869) 38 Cal. 428); Scobey v. Gibson (1861) 17 Ind. 572, 79 Am. Dec. 490; Iglehart v. Wolfin (1863) 20 Ind. 32; Greenwood v. Butler (1853) 52 Kan. 424, 22 L.R.A. 465, 32 Pac. 967; Moore v. Barstow (1893) 52 Kan. 431, 34 Pac. 969; Sheldon v. Pruessner (1894) 52 Kan. 593, 35 Pac. 204; Collins v. Collins (1880) 79 Ky. 88; Henderson v. Felker (1870) 1 Heisk. (Tenn.) 271. Contra: Iverson v. Shorter (1846) 9 Ala. 713. There is no difference in principle, so far as the constitutional question is concerned, whether the purchaser bid in the property for an amount less than his claim, or bid a sum in excess of that claim. Haynes v. Tredway (1901) 133 Cal. 400, 65 Pac. 892. A statute extending the time for redemption from a sale upon execution cannot be applied to the case of a sale on which the time for redemption had expired prior to its enactment, without violating that clause of the Bill of Rights which ordains that no freeman shall be deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land. Reynolds v. Baker (1869) 6 Coldw. (Tenn.) 221.

It is likewise held that the obligation of a mortgage or deed of trust is impaired by applying to a sale thereunder a statute enacted since its execution, authorizing the redemption of property sold upon foreclosure, where no right of redemption previously existed, or extending the period of redemption beyond the time formerly allowed. Bronson v. Kinzie (1843) 1 How. (U. S.) 311, 11 L. ed. 143; Howard v. Bugbee (1861) 24 How. (U. S.) 461, 16 L. ed. 753, reversing (1858) 32 Ala. 713; Barnitz v. Beverly (1895) 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, reversing (1895) 55 Kan. 466, 31 L.R.A. 74, 49 Am. St. Rep. 257, 42 Pac. 725; Robards v. Brown (1883) 40 Ark. 423; Hudgins v. Morrow (1886) 47 Ark. 515, 2 S. W. 104; Savings Bank v. Barrett (1899) 126 Cal. 413, 58 Pac. 914; Haynes v. Tredway (1901) 133 Cal. 400, 65 Pac. 892; Malone v. Roy (1901) 134 Cal. 344, 66 Pac. 313; Wilder v. Campbell (1896) 4 Idaho, 695, 43 Pac. 677; Malony v. Fortune (1862) 14 Iowa, 417; Bixby v. Bailey (1873) 11 Kan. 359; Ogden v. Walters (1873) 12 Kan. 282; Phinney v. Phinney (1889) 81 Me. 450, 4 L.R.A. 348, 10 Am. St. Rep. 266, 17 Atl. 405; State ex rel. Thomas Cruse Sav. Bank v. Gilliam (1886) 18 Mont. 104, 33 L.R.A. 556, 45 Pac. 661, overruling on rehearing (1896) 18 Mont. 94, 31 L.R.A. 721, 44 Pac. 394; Coddington v. Bispham (1883) 36 N. J. Eq. 574; Bremen Min. & Mill. Co. v. Bremen (1905) 13 N. M. 111, 79 Pac. 806; State ex rel. German Sav. & L. Soc. v. Sears (1896) 29 Or. 580, 54 Am. St. Rep. 808, 46 Pac. 785, reversing (1896) — Or. —, 43 Pac. 482; Hollister v. Donahoe (1899) 11 S. D. 497, 78 N. W. 959. The distinction taken in

some early Minnesota decisions, which hold that a statute giving a right of redemption from a mortgage foreclosure is not unconstitutional, so far as it applies to sales under judgments or decrees of foreclosure, though it is unconstitutional as to sales under the power of sale contained in the mortgage (Heyward v. Judd (1860) 4 Minn. 483, Gil. 375; Stone v. Bassett (1860) 4 Minn. 298, Gil. 215; Goenen v. Schroeder (1863) 8 Minn. 387, Gil. 344; Carroll v. Rossiter (1865) 10 Minn. 174, Gil. 141), is negatived by the decisions of other courts upon the question.

The right of a purchaser, other than a state or some governmental agency, acting as such, at a sale of land for taxes under a statute which fixes a certain period for redemption, is a contract right, which cannot be impaired by a statute passed subsequently to such sale, which proposes to extend the period formerly allowed by law for redeeming the lands from such sale, even though such statute may have been enacted before the expiration of the original period for redemption. Hogg v. Nichols (1918) — Ark. —, 204 S. W. 211; Lawrence v. Defenbach (1912) 23 Idaho, 78, 128 Pac. 81; Hull v. State (1892) 29 Fla. 79, 16 L.R.A. 308, 30 Am. St. Rep. 95, 11 So. 97; Solis v. Williams (1910) 205 Mass. 350, 91 N. E. 148; Merrill v. Dearing (1884) 32 Minn. 479, 21 N. W. 721; Dikeman v. Dikeman (1845) 11 Paige (N. Y.) 484; State ex rel. Waldo v. Fylpaa (1893) 3 S. D. 586, 54 N. W. 599; Robinson v. Howe (1861) 13 Wis. 342. The same is true, a fortiori, where the original time for redemption had expired before the statute took effect. Collier v. Smith (1918) — Ark. —, 200 S. W. 1008.

The only decision to the contrary is Gault's Appeal (1859) 33 Pa. 94, in which it was held that the statute extending the time for redemption was not unconstitutional as applied to a tax sale made before its passage, but in which no deed had then been executed to the purchaser. The court said: "Regarding this act of assembly as one of those regulations of the taxing power that are peculiarly within legislative control, we think it of no importance how definite or real the interest which Raimond acquired by bidding off some $50,000 worth of real estate for $25, since the whole proceeding, until it was fully consummate, was entirely under legislative control. The legislature might have repealed all the laws on the subject, between the time of Raimond's purchase and the date of his deed, and against whom would he then have had remedy? Certainly not against the sheriff, for he was a mere ministerial agent, who could only act as he was acted upon. He transfers titles, but does not warrant them. Nor against the land, for all pretense to title would be gone. Nor against the state, for the taxing power is exercised without accountability to parties. If the legislature might thus have blotted out Raimond's inchoate right, it cannot be said that the extension of the right of redemption for a year was unconstitutional." In State ex rel. Waldo v. Fylpaa (1893) 3 S. D. 586, 54 N. W. 599, it was said, with reference to Gault's Appeal, that it cannot be overlooked that the decision of the court seems to have been greatly influenced by the peculiarity of the statutory proceeding under which the sale was made. The lot was sold by the sheriff under the judgment of the court on the 3d of March, 1856, but the sheriff's deed was not made or acknowledged until the 18th of April, 1857; meanwhile, on the 13th of May, 1856, the act in question was passed. The court held that until the deed was made the sale was still pending, under control of the court, and liable to be set aside. It was not a completed sale, and therefore no contract rights of the parties attached. Having so construed the effect of the proceeding under their statute, it was easy to reach the conclusion that the statute passed intermediate the striking off of the lot, and the completion of the sale by deed did not disturb any vested rights.

It makes no difference whether the assignee of a tax certificate acquired it before or after the law extending the time for redemption took effect. If in the hands of the original owner it was protected by the Constitution, it is equally so in the hands of the

assignee. Robinson v. Howe (1861) 13 Wis. 342.

It is, however, within the power of the legislature after an assessment has been made and before the sale, to prescribe the conditions under which redemption may be had if the premises taxed are sold, and acts of this character are not considered unconstitutional, as impairing any vested or contractual rights that might be acquired by a purchaser. Rogers v. Nichols (1904) 186 Mass. 440, 71 N. E. 950.

The rule that a statute extending the time to redeem from a tax sale is not constitutionally applicable to sales made before its enactment is subject to an exception where the state or one of its governmental subdivisions was the purchaser. The legislature may bind the state and its assignee by an act extending the time of redemption from tax sales, because as to the state the grant of additional time to landowners to redeem is with its consent, and, as respects subsequent assignees of the interest acquired by the state, they, of course, take subject to the conditions imposed by the existing statute. State ex rel. Western Land Asso. v. Smith (1887) 36 Minn. 456, 32 N. W. 174; Adkin v. Pillen (1904) 136 Mich. 682, 100 N. W. 176. This exception, however, does not extend to a case where the governmental agency has assigned the certificate originally issued to it, to a private individual, prior to the time when the statute extending the time for redemption took effect. State ex rel. Stieff v. Bradshaw (1897) 39 Fla. 137, 22 So. 296.

No contract right is impaired by a statute giving the right to redeem from a sale to enforce a mechanic's lien, where no such right had previously existed, as applied to a sale under a decree pronounced after the act took effect, although the proceedings had been previously instituted; as its effect is simply to vary a statutory remedy. Templeton v. Horne (1876) 82 Ill. 491. E. S. O.

STATE OF MINNESOTA EX REL. ELLA S. BOSSUNG, Admrx., etc., of Henry Bossung, Deceased,

v.

DISTRICT COURT OF HENNEPIN COUNTY et al.

Minnesota Supreme Court—August 2, 1918.

(— Minn. —, 168 N. W. 589.)

Injunction — against foreign action — effect.

An injunction in the state of plaintiff's residence, against his bringing action in another state, is no ground for refusal by the courts of the latter state to take jurisdiction of a suit so brought.

[See note on this question beginning on page 148.]

ORIGINAL PROCEEDING by mandamus to compel respondent to proceed with relator's action, brought to recover damages for the alleged wrongful death of her husband. *Writ issued.*

The facts are stated in the opinion of the court.

Messrs. **George C. Stiles and D. C. Edwards** for relator.

Messrs. **A. G. Ellick and Hoke, Faegre, & Bauers,** for respondents:

The courts of every state have jurisdiction of the citizens thereof, resident therein, and may, in the lawful exercise of that jurisdiction, enjoin them from prosecuting a suit or action in another state; and an injunction, issued in the exercise of this authority, is not an interference with the courts of the other state.

Cole v. Cunningham, 133 U. S. 107,

33 L. ed. 538, 10 Sup. Ct. Rep. 269; Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73; Freick v. Hinkly, 122 Minn. 24, 46 L.R.A.(N.S.) 695, 141 N. W. 1096; Wilser v. Wilser, 132 Minn. 167, 156 N. W. 271; Fisher v. Pacfic Mut. L. Ins. Co. 112 Miss. 30, 72 So. 846; 1 Joyce, Inj. ¶ 606; 1 High, Inj. ¶ 106; 7 R.C.L. ¶ 65, p. 1035; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

If no principle of public policy or right of a citizen of this state intervenes, then, by a fair and liberal spirit of interstate comity, our courts ought to give the same force and effect to the proceedings in question in Nebraska, under which the administratrix was enjoined, as they would have in the courts of that state.

Fisher v. Pacific Mut. L. Ins. Co. 112 Miss. 30, 72 So. 846; Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 23 L.R.A. 52, 36 Am. St. Rep. 899, 54 N. W. 395; Bacon v. Horne, 123 Pa. 452, 2 L.R.A. 355, 16 Atl. 794; 1 Joyce, Inj. ¶ 79; Beach, Inj. § 79.

Per Curiam:

The relator is administratrix of her husband, who was killed in a collision between an automobile in which he was riding and a train of the Union Pacific Railroad Company, at a public crossing in Lexington, Nebraska, on March 31, 1917. On August 2, 1917, she commenced an action in Hennepin county, Minnesota, to recover damages for his death upon a cause of action given by the Nebraska statute. Issues were joined and the action was set for trial on February 18, 1918. On February 2, 1918, the Union Pacific Company commenced an action in Nebraska to enjoin the relator from prosecuting the Minnesota action. On February 4th the relator was restrained by the Nebraska court from further prosecution until February 25, 1918, for which date the hearing on the application for a temporary injunction was set. On February 13, 1918, the district court of Hennepin issued an order to show cause why the Minnesota action, because of the Nebraska injunction, should not be stayed until the final determination of the issues in the Nebraska action, and on February 16, 1918, an order granting such stay was entered. We are not advised of further proceedings in the Nebraska action.

The railway company is organized under the laws of Utah, and has a line in Nebraska, but none in Minnesota, though subject to jurisdiction here. It is assumed by counsel throughout that the plaintiff is a citizen of Nebraska, as was her husband, though it is perhaps nowhere distinctly so alleged or admitted. This is an original proceeding in this court by mandamus to compel the district court of Hennepin to proceed with the action. The only question is the propriety of the order granting a stay. In the return the respondents called attention to the order of the Director General of Railroads, known as general order No. 18, dated April 9, 1918, made in view of the act of Congress of March 21, 1918, directing that suits be brought in the county or district where the plaintiff resides, or where the cause of action arose. When the case was finally submitted, they withdrew all claim by virtue of this order, and the effect of it is not considered by us.

A cause of action given by the Nebraska statute for death occurring there will be enforced in Minnesota, unless contrary to its public policy. In Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413, a pioneer case, it was held that a cause of action occurring in Iowa, making a railroad liable to its employees for injuries sustained through the negligence of coemployees, would be enforced in this state, though at that time we had no railway fellow-servant act, and for an injury in this state there would not have been liability. So we have held that a cause of action given by the statute of another state for death by wrongful act, though differing from ours, if not contrary to its policy, will be

enforced here. Powell v. Great Northern R. Co. 102 Minn. 448, 113 N. W. 1017, and cases cited; 2 Minn. Notes, 452, and cases; Dunnell's Minn. Dig. & Supp. § 2603. This is the rule prevailing everywhere. It is the policy of the state, as evidenced by our decisions, to enforce such causes of action. It is the policy, as evidenced by our statute, which permits a foreign executor or administrator to maintain such an action. Gen. Stat. 1913, § 8178.

Such causes of action are enforced as a matter of comity. Neither the full faith and credit clause nor the privileges and immunities clause of the Constitution (U. S. Const. art. 4, §§ 1, 2) requires their enforcement when contrary to state policy. In State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198, we held that the district court could not decline jurisdiction of a transitory action for tort arising in a foreign state, though the plaintiff was a citizen of that state and the defendant incorporated under the laws of another. The basis of the decision was § 2, the privileges and immunities clause, requiring the same treatment of a suitor, citizen of another state, as is accorded to a suitor, citizen of this state. Authority was thought to be found in Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34. A little later, in Davis v. Minneapolis, St. P. & S. Ste. M. R. Co. 134 Minn. 455, 159 N. W. 1084, we held that a citizen of another state, who had a cause of action under the Federal Employers' Liability Act (Act Cong. April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1916, §§ 8657–8665), and who had brought his action in Minnesota, would not be restrained from proceeding in this state until the determination of an action for injunction pending against him in the foreign state. This decision was substantially upon the ground that § 2 gave the plaintiff the right to proceed. And this is the effect of the cases. Eingartner v. Illinois Steel Co. 94 Wis. 70, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; Cofrode v. Gartner, 79 Mich. 332, 7 L.R.A. 511, 44 N. W. 623; Steed v. Harvey, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011; Reynolds v. Day, 79 Wash. 499, L.R.A.1916A, 432, 140 Pac. 681, 5 N. C. C. A. 814; Dougherty v. American-McKenna Process Co. 255 Ill. 369, L.R.A. 1915F, 955, 99 N. E. 619, Ann. Cas. 1913D, 568. Neither of the Minnesota cases was a death case. Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34, was a death case, and so was Dougherty v. American McKenna Process Co. supra. Each of these involved a state statute assuming to fix the right to sue in the state. A death case is transitory in its nature. The policy of Nebraska, in giving a cause of action for death, harmonizes with ours. We do not refuse a Nebraska citizen access to our courts to recover for a death occurring in Nebraska, because he is a citizen of Nebraska. If we refuse the plaintiff, it is because of the Nebraska injunction. Should it have that effect? We conclude that it should not.

That the courts of Nebraska, on equitable grounds, may enjoin its citizens from proceeding in Minnesota courts, without violating either the full faith and credit or the privileges and immunities clause, is clear. Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, is a leading Federal case. And so other cases hold. Weaver v. Alabama, G. N. R. Co. — Ala. —, 76 So. 264; Wierse v. Thomas, 145 N. C. 261, 15 L.R.A.(N.S.) 1008, 122 Am. St. Rep. 446, 59 S. E. 58. And the right to enjoin has frequently been recognized in this state, but without reference to the provisions of the Constitution. Wilser v. Wilser, 132 Minn. 167, 156 N. W. 271; Freick v. Hinkly, 122 Minn. 24, 46 L.R.A.(N.S.) 695, 141 N. W. 1096; Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73. And see generally 6 Pom. Eq. Jur. § 670; Story, Eq. Jur. §§ 899,

900, 14 R. C. L. pp. 412–419, §§ 113–121; notes in 10 Ann. Cas. 26, 16 Ann. Cas. 673; L.R.A.1915A, 832; 122 Am. St. Rep. 446; and 59 Am. St. Rep. 859. The injunction operates in personam upon the one to whom it is directed, and not upon the tribunal of the foreign state. Such tribunal is not directed to refrain, and is not subject to control.

It may be noted in passing that the legislature cannot create a transitory cause of action, and by statute confine its enforcement to its own courts, upon a claim that the full faith and credit clause requires the courts of another state to decline jurisdiction. Tennessee Coal, I. & R. Co. v. George, 233 U. S. 354, 58 L. ed. 997, L.R.A.1916D, 685, 34 Sup. Ct. Rep. 587; Atchison T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397. The party of whom the court has jurisdiction is bound by the commands of the injunction, and against him the court may exercise such coercive measures as are appropriate and at its command. The Nebraska court, by enjoining, does not offend the Constitution. It does not refuse access to its courts. We are not concerned with the propriety of the Nebraska action. We are concerned only with the propriety of the act of the Hennepin court in refusing to proceed. If one of our citizens was the plaintiff in a Nebraska cause of action, transitory in nature and properly brought here, it does not seem that we ought to refuse his case, though he was restrained by a Nebraska court. If we should not, it does not seem that the privileges and immunities clause permits a different rule applicable to a citizen of another state. If we require our citizens to refrain from proceeding in our courts, because enjoined by the courts of another state, such courts are given quite substantial control over our litigation. That they may enforce their injunctions in personam no one questions.

Injunction—against foreign action—effect.

The view we take is opposed to Fisher v. Pacific Mut. L. Ins. Co. 112 Miss. 30, 72 So. 846. There it was held that, so long as an injunction was in force in another state, restraining a citizen of that state from suing a citizen in another, such other, on principles of comity, would respect the injunction and refuse his suit. If we would allow a plaintiff, a citizen of Minnesota, to maintain his action here, though enjoined by the courts of another state, as we think we should, the case of Davis v. Minneapolis, St. P. & S. Ste. M. R. Co. 134 Minn. 455, 159 N. W. 1084, is substantially controlling in favor of the result which we reach. The Minnesota action should not have been stayed.

Let a peremptory writ issue.

ANNOTATION.

Extraterritorial recognition of injunction against actions or prosecutions in other states.

Very few cases have passed upon the question of the effect of an injunction in one state against actions or proceedings in another state, upon the right to maintain a suit in the latter state, or, in other words, whether or not the courts of one state will recognize and give effect to an injunction issued by a court of another state against suits in other states. And these decisions are not uniform.

Thus, on the one hand, we have the rule laid down in the reported case STATE EX REL. BOSSUNG v. DISTRICT CT. ante, 145, to the effect that an injunc- in one state, restraining a resident thereof from bringing an action in another state, is not a ground for refusal, by the courts of the latter state, to take jurisdiction of a suit brought in violation of the injunction. In this case, the court seems to have based its decision upon the ground that the court of the foreign state would not

be allowed to control a citizen of the local state, as to the bringing of a transitory action therein, and that the privileges and immunities clause does not permit a different rule as to non-residents.

And support for this decision is afforded by the Kentucky case of Nichols & S. Co. v. Wheeler (1912) 150 Ky. 169, 150 S. W. 33, wherein it was held that the pendency of a suit in Tennessee, brought by one signer of a note for the purpose of having it canceled, and the granting by such court of an interlocutory injunction, restraining the payee from proceeding to collect the note, does not bar the bringing of an action in Kentucky by such payee against the comaker, a resident of the latter state, but who alleges that he was only a surety; at least, where it does not appear that the Tennessee action was instituted by the suit in Kentucky. Here, however, the court did not state the grounds for its decision.

Directly opposed to the decision in STATE EX REL. BOSSUNG V. DISTRICT CT. is Fisher v. Pacific Mut. L. Ins. Co. (1916) 112 Miss. 30, 72 So. 846, wherein the court said that it had "no hesitation in deciding upon principles of comity" that, so long as an injunction issued by a Tennessee court against a citizen of that state remained in force, such person would not be permitted to maintain an action in the courts of Mississippi in violation of the injunction.

And the principle adopted in the Fisher Case (Miss.) supra, was applied in Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) (1893) 84 Wis. 60, 23 L.R.A. 52, 36 Am. St. Rep. 899, 54 N. W. 395, wherein it was held that where, in voluntary proceedings for the dissolution of a New York corporation, a receiver was appointed by a court of that state and the creditors enjoined from prosecuting actions against the corporation, the courts of Wisconsin, in the exercise of interstate comity, would uphold the foreign injunction so far as it did not conflict with the rights of citizens of Wisconsin, by recognizing the superior rights of the receiver to recover on corporate claims against citizens of Wisconsin, and refusing to aid a New York creditor so enjoined, who violated the injunction by bringing an action against the corporation and garnisheeing the Wisconsin debtor.

And a similar conclusion was reached in Dobson v. Pearce (1854) 12 N. Y. 156, 62 Am. Dec. 152, although the court used language which seems to support the rule laid down in the BOSSUNG CASE. In the New York case, the plaintiff in a judgment recovered in New York brought action upon it in Connecticut, whereupon the defendant, in a suit where the court had jurisdiction of the subject-matter and of the parties, obtained an injunction against the maintaining of the action on the judgment, on the ground that it had been obtained by fraud. An assignee of the judgment then brought suit in a New York court, and it was held by that court that the Connecticut judgment should be given effect, and that the finding of the court in the injunction proceeding, that the judgment was fraudulent, was conclusive upon the New York court, a duly authenticated copy of the proceedings and judgment in the Connecticut court having been introduced in evidence. However, in the course of the argument the court said: "The decree of the court of chancery of the state of Connecticut as an operative decree, so far as it enjoined and restrained the parties, had and has no extraterritorial efficacy, as an injunction does not affect the courts of this state; but the judgment of the court upon the matters litigated is conclusive upon the parties everywhere, and in every forum where the same matters are drawn in question. It is not the particular relief which was granted which affects the parties litigating in the courts of this state; but it is the adjudication and determination of the facts by that court, the final decision that the judgment was procured by fraud, which is operative here, and necessarily prevents the plaintiff from asserting any claim under it."

G. J. C.

CREAM OF WHEAT COMPANY, Appt.,
v.
ARTHUR H. CRIST COMPANY, Respt.
(Two Cases.)

New York Court of Appeals—February 15, 1918.

(222 N. Y. 487, 119 N. E. 74.)

Contract — advertising — definition of paid subscriber.

Delinquent subscribers cannot be counted in determining whether or not there has been a breach of an advertising contract guaranteeing a certain number of paid subscribers.

[See note on this question beginning on page 153.]

APPEAL by plaintiff from judgments of the Appellate Division of the Supreme Court, Third Department, affirming judgments entered upon the report of a referee dismissing the complaints, in actions brought to recover rebates and cost of auditing defendant's books under certain advertising contracts. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Messrs. **Rome G. Brown** and **Evan Hollister** for appellant.

Mr. **James F. Hubbell** for respondent.

Hogan, J., delivered the opinion of the court:

The plaintiff is a manufacturer of cereal products. The defendant is engaged in the printing business, and publishes a monthly magazine known as American Motherhood.

August 27, 1910, the parties entered into a contract, wherein defendant undertook to insert in a magazine published by defendant a full-page advertisement, to be furnished by plaintiff during each month of the year 1911, in consideration of a stated sum to be paid therefor by plaintiff. The contract provided: "Party of the first part [defendant] does hereby guarantee that the average circulation of the above-mentioned publication shall be not less than sixty-three thousand (63,000) copies per issue for the time during which the above advertisement shall run, and it is understood and agreed that the term 'circulation,' for the purposes above mentioned, shall be construed as follows: The total number of copies of each issue of the publication above-mentioned, which shall be published and sold and delivered by the publishers thereof both to paid subscribers and to news agencies, exclusive of all returns from news agencies and copies given away in any manner whatsoever."

The plaintiff was, by said contract, at any time to be permitted access to the books of defendant to ascertain the circulation of the magazine, not oftener than twice in each year. In the event that such examination or examinations did not bear out the circulation embodied in the contract and should be found to have averaged materially less than 63,000 copies per issue during the term for which the advertising was to run, the expense of the examination was to be borne by defendant, otherwise by plaintiff. Should such examination disclose the circulation to be materially less than stated in the contract, defendant agreed to make a pro rata rebate in cash for such shortage in circulation.

About September 1, 1912, the plaintiff caused an examination to

be made of the books of the defendant for the year 1911, which audit disclosed, as asserted by plaintiff, that the total net paid circulation per issue was 25,975, as compared with 63,000 as provided for in the contract. The rebate upon such examination would amount to $423.14, the cost of the examination was $326.05, making a total of $749.19, and to recover that sum plaintiff brought an action.

A second contract was entered into between the parties, identical in terms with the contract above referred to, save that the second contract covered the year 1912. An audit of the books of defendant was made by plaintiff between May 20 and July 1, 1913, which disclosed that the average circulation per month during the year 1912 was 27,428, instead of 63,000, as guaranteed by the contract, and by reason thereof plaintiff in the second action sought a recovery for the rebate of $328.28, and the further sum of $809.06 cost of the audit, a total of $1,137.34.

The two actions were tried together before a referee, and resulted in the dismissal of the complaint in each case.

The referee found, as matter of fact, that at the time the plaintiff entered into the contract there was a general usage and custom existing in this country, known to plaintiff, and which prevailed among advertisers and between advertisers and publishers, to the effect that, in determining the number of subscribers to a magazine in a given year, for the purpose of calculating its value as an advertising medium, the subscribers were divided into two classes, namely, paid and unpaid; that the first class, or paid subscribers, should and did include those who had paid their subscriptions for the year in question and also those who had subscribed and paid for some years prior to the year in question, who had not discontinued their subscriptions, who had not been omitted or written off by the publishers, but to whom the publisher had regularly mailed each issue for the year in question; that the second class, or unpaid subscribers, included all other copies of the magazine given away in any manner whatsoever, and, as conclusions of law, that the words "paid subscribers" in said contract included the subscribers who, at the time of said audit, had paid their subscriptions for the year 1911 or some previous year, and all subscribers who had subscribed and paid for the magazine at some time prior to 1911, and had received the issues of said magazine for the year 1911, and were legally liable by contract, express or implied, to pay the subscription price for the year 1911.

The foregoing finding of fact, and the conclusion of law by reason thereof, which is the basis of the decisions made in these cases, discloses that the courts below ignored the definition which the parties to the contract gave to the term "circulation," and held, in substance, that a person who subscribed and paid for the year 1903, who had not discontinued his subscription and whose name had not been written off by the publisher and to whom the publisher had regularly mailed a copy of each issue, was a "paid subscriber" for the year 1912, and embodied in the term "circulation." Such construction is unwarranted. The intention of the parties and their understanding of the provisions of the contract at the time of the execution of the same is apparent from the language employed therein, especially when considered in relation to the subject-matter. The parties were proficient in the business in which each was engaged. They severally understood the value of advertising and the advantages of circulation of the medium of advertisements. They met on equal footing. By the terms of the contracts, defendant guaranteed that the average circulation of the publication should not be less than 63,000 copies per issue. Had

Contract—advertising—definition of paid subscriber.

the contract terminated there, the term "circulation" might be subject to construction dependent upon general custom and usage prevailing between advertiser and publisher. The parties, however, did not desire to leave the construction of the term "circulation" in doubt, and thereupon, for the purpose of making definite and certain the meaning of the same, and with full knowledge of the significance thereof, with a view of avoiding misunderstanding in the future, they covenanted that the term "circulation" should be construed as the total number of copies of each issue which shall be published and sold and delivered by the publisher thereof to *paid subscribers* and to news agencies, exclusive of all returns from news agencies and copies given away in any manner whatsoever, and the guaranty on the part of the defendant was that the average number of each publication to be sold and delivered to "paid subscribers and news agencies," exclusive of copies returned or given away, should not be less than 63,000 per issue.

When the contracts were made, the plaintiff was privileged to and did insist that for the consideration to be paid by it the minimum circulation should be measured by the number of magazines sold and delivered to paid subscribers and to news agencies, with the exclusions noted, and the defendant acceded to that proposition.

It was found by the referee that the average number per issue for 1911, for which the subscription price had been paid at the time of the audit (about September 1st after the expiration of the year), was 25,975, and for 1912, at the time of the audit, 27,428, and as claimed by plaintiff. The price of the magazine was $1 per year. An examination of the books of defendant disclosed that the gross income from the sale of the magazine in 1911 was $29,903.05, and in 1912 $28,255.66, which included sums paid down to the date of the audit made in each year, respectively, a most material fact which seemingly was disregarded. The slight excess in each year over the number of subscriptions found was accounted for by the auditors, and the record discloses that plaintiff's audit was eminently fair, and that no attempt was made to secure a narrow or unreasonable enforcement of the contract; that allowances were made by the auditors for not only every subscriber who paid during the year 1911, but down to the time of the audit months later, and who had paid his subscription for the full year or merely a portion thereof; and like allowance was made for old subscribers long delinquent, who paid during the year or down to the time of the audit. Plaintiff therefore not only made allowance for paid-up subscribers, but included therein paying subscribers down for several months after the close of the year for which the audit was made. The number thus estimated on the trial by plaintiff was as stated found by the referee, and was undisputed on the trial.

A suggestion that an individual resident in some distant state, who had paid a subscription for *some* year, ten, twenty or more years before the year 1911, and had not formally and expressly discontinued his subscription, might be liable under an implied contract, although not paying for said year, and be considered under the contracts in question a "paid subscriber" for the year 1911, and for as many years thereafter as a publisher may keep his name on a mailing list and fail to mark it off his books, does not merit acquiescence on our part.

The conclusion reached by us is not in conflict with Newhall v. Appleton, 114 N. Y. 140, 3 L.R.A. 859, 21 N. E. 105. Had the contract in the Appleton Case been specific, and defined the term "each and every order," it would be more similar to the contracts under consideration here, and another question than the one there considered would be submitted for consideration.

The contracts in question were definite and unambiguous. The parties thereto expressed in plain terms the undertaking of each party and the mutual intention existing between them. It is not for the courts to make new contracts between them, or to give their express language a strained or unreasonable construction.

The judgments herein should be reversed, and judgment in action No. 1 ordered in favor of plaintiff against the defendant for the sum of $749.19, with interest thereon from the time of the commencement of the action, together with costs in all courts, and in action No. 2 judgment is ordered in favor of plaintiff against defendant in the sum of $1,137.34, and interest thereon from the date of the commencement of the action, with costs in the courts below.

Hiscock, Ch. J., and **Chase**, **Cardozo**, **Pound**, **McLaughlin**, and **Andrews**, JJ., concur.

ANNOTATION.

Construction and effect of guaranty of circulation in advertising contract.

Only one case other than the reported case CREAM OF WHEAT CO. v. CRIST CO. ante, 150, has been found within the scope of this note. In Mooney v. United States Industrial Pub. Co. (1901) 27 **Ind.** App. 407, 61 N. E. 607, the publishers sued to recover $250 under a contract for advertising in their "Manufacturers' Expert Code, published in Spanish and English, for which we agree to pay you $250 on publication thereof and delivery to us two copies. . . . The guaranty of circulation, as stated on the last page of your booklet, is made a condition of this contract." The guaranty of circulation was: "(1) That the first edition printed will consist of 5,000 copies. (2) That at the present time, January 1, 1897, 1,130 copies have already been subscribed for. (3) That within six months after publication 2,500 copies will be in use. (4) That within a reasonable time thereafter the remainder of the first edition will be in use." The plaintiff had judgment, which was reversed on appeal. One of the allegations in the complaint, which was held to be a necessary one, was "that the plaintiff has fully complied with all the stipulations of the agreement." It was held that, under the allegation of performance, the plaintiff was bound to prove the publication of an edition of 5,000 copies of its book, and that in the absence of any evidence to this effect the judgment must be reversed. The court said: "The guaranty of circulation provides that the first edition printed will consist of 5,000 copies. . . . The publication of the agreed number of books containing the advertisement was the consideration of the promise to pay the $250, and it is contractual. The publication upon which the obligation to pay $250 would arise was such publication as had been agreed upon. The term publication is defined by Webster, as 'the act of offering a book to the public by sale or distribution;' by Worcester, as 'putting forth, issuing to the public;' by the Standard Dictionary, as 'issuing, sending out, placing on sale.' The publication referred to in the contract is the publication of the first edition. An edition is the 'total number of copies issued or published at once.'"

B. B. B.

CAROLINE V. CRAMER et al., Respts.,
v.
GRAND RAPIDS SHOW CASE COMPANY, Appt.

New York Court of Appeals—March 5, 1918.

(223 N. Y. 63, 119 N. E. 227.)

Damages — loss of profits — future business.

Loss of profits estimated from the volume of business done the year after the store was opened cannot be allowed as damages for breach of contract to furnish fixtures, which prevents the opening at the time intended.

[See note on this question beginning on page 156.]

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a trial term for Schuyler County in plaintiffs' favor, and from an order denying a motion for new trial, in an action brought to recover damages for breach of a contract to furnish store fixtures. *Reversed.*

The facts are stated in the opinion of the court.

Mr. E. W. Personius, with **Mr. B. W. Nye,** for appellant:

Expected profits are not a proper measure of damages.

13 Cyc. 59; Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. 58; 8 Am. & Eng. Enc. Law, 2d ed. 627; 1 Sedgw. Damages, 9th ed. ¶¶ 183, 197; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 97; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Wehle v. Haviland, 69 N. Y. 448; Blanchard v. Ely, 21 Wend. 343, 34 Am. Dec. 250; Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398; Cassidy v. LeFevre, 45 N. Y. 562.

Mr. Halsey Sayles for respondents.

Hogan, J., delivered the opinion of the court:

In May, 1910, the plaintiffs, residents of Watkins, Schuyler county, formed a copartnership to carry on the business of dealing in ladies' furnishings in the city of Amsterdam. The plaintiff Gurnett, though a business man, had no previous experience in that line of business. The plaintiff Cramer had taught school in Amsterdam from September, 1909, until some time in May, 1910, when she secured employment in a department store in the city of Elmira, and worked there from May 26, 1910, until the latter part of July following.

Early in May, 1910, the plaintiffs leased a store in the city of Amsterdam at a monthly rental of $100 a month. The store was devoid of fixtures except electric wiring. Plaintiffs, desirous of securing the necessary furniture and fixtures to carry on the business and to open the store in September, on or about June 9, 1910, sought to procure the same from the Watkins Undertaking Company. That company, following consultation with plaintiffs and one Marks, a representative of defendant, gave to Marks a purchase order in writing, dated that day, addressed to the defendant, to ship the articles of furniture therein enumerated and described as "sold to Watkins Undertaking Company, Watkins, New York, ship to J. W. Gurnett, Amsterdam, New York." The furniture was specified in detail, the purchase price at $1,376.25, net fifty days, f. o. b. Grand Rapids, to be delivered not later than August 15th. The contract was signed by defendant Marks, salesman, and accepted by the Watkins Undertaking Company.

About August 15th the plaintiffs were in the city of New York. They called on Marks and told him that they were in the city for the purpose of purchasing a stock of seasonable goods, which they would not purchase if they were going to be delayed in receiving the furniture. They were assured by defendant, through Marks, that the furniture would be shipped in a few days. Plaintiffs thereupon purchased a stock of goods suitable for the fall and winter trade at a cost of $7,842.37, and planned to open the store in Amsterdam between September 15th and 20th. The defendant failed to ship the fixtures and furniture, and this action was brought to recover damages for a breach of the contract. The amended bill of particulars of the damages claimed consists of seven separate items, and in view of the evidence adduced on the trial, reference to the same is material. The total amount claimed was $6,703.62. Of that amount $5,916 was stated as damages sustained by reason of fall and winter trade and the profits which plaintiffs otherwise would have made from the sale of goods. The balance of $787.62 consisted of loss of rent of store, two months, $200; temporary fixtures, $100; interference of business, placing new furnishings, $200; increased price for same, $100; obligation to pay commissions, $137.62; small items for board, $50. The evidence fails to disclose that plaintiffs, after purchase of new fixtures, paid any sums therefor in excess of the amount stated in the contract to be paid, or that any amount was paid or obligated to be paid for commissions or for board bills. Those items deducted would leave the claim sought to be established $5,916 for loss of profits, and remaining items $500. The jury rendered a verdict in favor of plaintiffs for $3,310. The appellate division reduced the same to $1,500, which was assented to by plaintiffs, and as thus modified the judgment was affirmed.

It is apparent that the verdict largely included an allowance to plaintiffs for loss of profits. As the appellate division affirmed without opinion we are unable to determine the basis of the modification made by it. The recovery allowed by the modification, however, is greatly in excess of the amount of damages claimed by plaintiffs other than for loss of profits.

Upon the trial, plaintiffs, over objection and exception of defendant, were permitted to prove the amount of sales made by them and the profits thereof from September 15 to November 14, 1911, one year subsequent to the breach of the contract, also sales made from November 14, 1910, to April 1, 1911, and an estimated loss of 35 per cent on such sales made, as well as additional facts of like nature. The trial justice, in submitting the case to the jury upon this question, instructed them as follows: "If a man has arranged to start a business at a certain time, and is prevented from starting it by reason of wrong or breach of contract by somebody else, he is entitled to recover whatever profits he can show he would have made during that time for the breach of contract by the other party,"—to which instruction to the jury exception was duly taken by defendant's counsel.

I have pointed out the limited business experience of plaintiffs, the fact that the enterprise was an adventure in a locality where neither one of them had before been engaged in business. No doubt the plaintiffs entertained hope that the business venture upon which they were about to embark would prove successful. Such expectation was evidently based upon a consideration of the resident population of the city of Amsterdam, the business activity of the residents of that city, and the number and character of competitors in the same general line of business. Plaintiffs, however, had no assurance that the venture would not prove to be a failure. At the time the contract was made they had the lease of a vacant, unfinished

store. They had not as yet purchased goods, placed goods on sale, or secured one customer. They had before them the labor of building up a new business. Nevertheless, the courts below have held that plaintiffs may recover for the breach of the contract such an amount of profits as they would have made had they not been prevented from starting in business, such damages not to be based upon a business theretofore carried on, but measured by profits during a period of time corresponding to the period of interruption one year later. Therein material error was committed.

Damages—loss of profits—future business.

The evidence of loss of profits and the submission of that question to the jury by the trial justice was in conflict with the determination of this court in Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. 58, where the rule of damages is fully considered, and the case of Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264, relied upon by counsel for plaintiffs, distinguished. The reasoning in the Witherbee Case renders unnecessary additional citations from other jurisdictions or the United States Supreme Court in harmony with that decision.

A distinction exists between the interruption of an established business and a new venture. The owner of an established business may have it in his power to establish with reasonable certainty the amount of capital invested, the monthly and yearly expenses of operating his business, and the daily, monthly, or yearly income he derived from it for a long time prior thereto and for the time during which the interruption of which he complains continued, thereby furnishing a reasonably correct estimate of the nature of the legal injury and the amount of damages which resulted therefrom. While evidence of such facts may be admissible, they must not be uncertain or problematical. Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801. The requirement imposed upon one whose business has been established and interrupted cannot be enforced as to him and made less stringent to one embarking in a new business, who cannot furnish data of past business from which the fact that anticipated profits would have been realized can be legally deduced.

The conclusion reached requires a reversal of the judgment and a new trial. Upon a second trial we are of opinion, without detailing the facts as they appear in the record, that the question as to whether or not the Watkins Undertaking Company was a principal in the contract, or the agent of plaintiff, is a question of fact.

The judgment should be reversed, and new trial granted; costs to abide the event.

Hiscock, Ch. J., and **Chase, Collin, Cuddeback, McLaughlin,** and **Crane, JJ.**, concur.

ANNOTATION.

Measure of damages for breach of contract preventing operation of nonindustrial business in contemplation, but not established or in actual operation.

The present annotation is confined to the question of the measure of damages for breach of a contract preventing the opening or operating of a contemplated or new mercantile, professional, or other business, generally classified as nonindustrial, as distinguished from an industrial or manufacturing business. Upon this question, at least in those cases which distinguish between a new business or enterprise and one in actual operation, the rule is that prospective profits of a new nonindustrial business or one merely in contemplation are too uncertain and speculative to form a basis for recovery, for the reason that there are no facts extant as in the

case of an existing business from which the amount of such profits may be estimated with reasonable certainty.

This distinction and the reason therefor are pointed out in the reported case (CRAMER v. GRAND RAPIDS SHOW CASE CO. ante, 154), holding that profits anticipated from the conducting of a ladies' furnishing business just commencing could not be recovered in an action for damages for breach of a contract to deliver store fixtures at a certain time, which breach necessitated a delay in the opening of the store, it being maintained that damages for the period of delay could not be measured by the profits during a corresponding part of the ensuing year.

And in Favar v. Riverview Park (1908) 144 Ill. App. 86, it was held that the measure of damages for breach of a contract to grant an amusement park privilege for the operation of a new venture was the difference between the actual rental value and rent reserved, and did not include profits, if any, which might have been realized, since there was no tangible basis of computation; and the court pointed out that the rule in such a case varies from that where the business is an established one, in which case "the measure of damages would be the difference between the rent and the value of the lessee's business, which would necessarily include an allowance for profit."

And in Engstrom v. Merriam (1901) 25 Wash. 73, 64 Pac. 914, an action to recover damages for failure to give possession of property leased for the purpose of establishing and conducting a saloon, it was held that since the business was a new one, the measure of damages was the difference between the rental value and the rent reserved, and not the difference between the rent and the value of the plaintiff's business, since the latter rule necessitates an estimate of profits, which is impossible in case of a new business, as there is no basis in such a case for an estimate. So, in Gross v. Heckert (1904) 120 Wis. 314, 97 N. W. 952, where the lessor of a building purposed to be used for a saloon failed to deliver possession, it was held that the measure of damages for breach of the contract was the excess in the actual rental value of the term over the agreed rent, plus such special damages as were properly alleged and proved, and which could be said to have been within the contemplation of the parties. And applying the rule, it was held that since the defendant knew of the plaintiff's purpose to use the premises for a saloon and to prepare, prior to the commencement of the term, for the enjoyment thereof, recovery could be had for the loss sustained on fixtures and equipment purchased for the place and for other expenses necessary to occupancy, but that no recovery could be had either for money advanced to a prospective employee or for loss of contemplated profits of the business, it being said that, as the business was a new one, prospective profits were too conjectural and uncertain, although it was established that the premises were especially valuable for saloon purposes, and that a former tenant had made $2,000 per year in that business. Upon the value of the latter evidence the court said that the business was one which depended largely on the personal following and personality of the proprietor, and that the fact that another person had made money there was not proof that plaintiff could have established such a business and conducted it with like success. And in Dennery v. Bisa (1851) 6 La. Ann. 365, an action for failure to lease a store as agreed, it was held that a judgment for prospective profits was not warranted, the evidence merely establishing what profits other persons had previously made in the same kind of business contemplated by the plaintiff at the same place, such evidence being insufficient per se to make proof of any fact.

And again, in Jarrait v. Peters (1906) 145 Mich. 29, 108 N. W. 432, an action to recover damages for refusal to give possession under a lease of a place wherein the lessee intended to carry on a carpet cleaning and weav-

ing business, it was held that the measure of damages was the difference between the actual rental value and the rent reserved, and that prospective profits could not be allowed, the court applying the rule that where the business is a new one, there can be no basis upon which to estimate profits, and pointing out that a different rule applies in such a case than when a business has been interrupted after its establishment. It was also held that the case was not taken out of the general rule by reason of the fact that the plaintiff had been permitted to use the place and its equipment to some extent before the beginning of the term of the lease.

And in Texas Power & Light Co. v. Roberts (1916) — Tex. Civ. App. —, 187 S. W. 225, an action for delay in obtaining possession of a leased store wherein plaintiff intended to carry on a millinery business, in holding that loss of profits alleged to have resulted from the breach of contract could not be recovered, because too remote, the court pointed out the distinction between the anticipated profits of a new and of an established business as follows: "The reason why courts have refused to allow recovery for net profits which the plaintiff alleges he would have made from a business which was not in existence at the time the contract was made and breached seems to be that such alleged net profits are not capable of proof with that degree of certainty required by the law. Whereas, when a business is already established and is making a profit when the contract is breached or the tort committed, such pre-existing profit, together with other facts and circumstances, may indicate with reasonable certainty the amount of profit which would have been made but for the wrongful conduct complained of." It was also ruled in this case that the loss of the stock of millinery purchased for the store, resulting from the delay in opening a business, could be recovered, it appearing that such goods quickly depreciated in value, due to changes in style, and that defendant knew that injury would attend any considerable delay in delivery of possession. In Hodges v. Fries (1894) 34 Fla. 63, 15 So. 682, the court adopted the rule that the measure of damages for breach of a contract to rent a place of business, as, for example, a store for a millinery shop, generally is the difference between the rent agreed upon and the value of the premises to the tenant for the term, together with such other damages as result directly and necessarily as the natural consequence of the breach, and are capable of being estimated by reliable data; but held that prospective profits of a contemplated business were not recoverable in an action to recover damages for breach of a contract to rent a store, where the business venture was an entirely new one upon the part of the plaintiff in the city in question, the court reasoning that, under the circumstances, such prospective profits were entirely speculative and conjectural, and stating that such profits are generally rejected because there is no satisfactory data upon which to establish them, and not because of anything in their nature per se which demands their rejection. And in Green v. Williams (1867) 45 Ill. 206, another action for breach of a contract to deliver possession of premises to be used as a millinery shop, the court held that all expenses necessary in consequence of the breach could be recovered, but that profits which might have been made by conducting business on the demised premises were too remote, speculative, and incapable of acertainment to be considered as a recoverable element of damages.

So, in Webster v. Beau (1914) 77 Wash. 444, 51 L.R.A.(N.S.) 81, 139 Pac. 1013, an action for breach of contract of partnership to establish and conduct a fur trading business in a remote and sparsely settled country, under dangerous and adverse conditions, it was held that prospective profits could not be recovered because too remote and speculative, but that the plaintiff could recover any actual losses in the form of expenses incurred and time lost. In connection with the question of the right of plain-

tiff to recover prospective profits lost by reason of breach of contract, the court said: "The contract contemplated the establishment of a future business in a remote and sparsely settled country, under dangerous and adverse conditions. It did not pertain to any existing business. Any loss of profits would necessarily mean the loss of such anticipated profits as might possibly be earned in the future from a business not yet created, installed, or conducted. There was no going business which had previously earned profits sufficient to form a basis upon which to estimate probable future profits. Evidence offered to show a loss of profits in this action would necessarily consist of opinions of witnesses, uncertain and speculative in character. Who could anticipate or foretell that circumstances or contingencies might not have arisen after the business had been actually installed which would result in a total failure to earn any profits whatever? It is common knowledge that parties expecting profitable results frequently enter upon business enterprises which terminate in failure. . . . A clear distinction is manifest between an interruption of, or an injury to, an existing business which has been successfully conducted for a considerable period of time, and the prevention of the establishment of an entirely new business. When the business is in contemplation, but not established, profits that may be anticipated therefrom are too speculative, uncertain, and conjectural to become a basis for the recovery of damages in an action for the subsequent loss of such profits."

And in Marrin v. Graver (1885) 8 Ont. Rep. 39, an action for breach of contract in failing to deliver possession of a store pursuant to the terms of a lease thereof, it was held, no special damages being shown, that the measure of damages was the difference between the rental value and the stipulated rent, and that recovery could not be had for anticipated profits which plaintiff might have made had he been let into possession, since such damages were too remote and entirely speculative. In reaching this conclusion, Armour, J., said: "How can the loss of profits which the plaintiff might have made on the sale of goods which he intended to sell on the premises be said to be damages either arising naturally from the breach of the contract to lease the said premises, or which might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach? The plaintiff was not at the time in the business which he calculated to carry on, nor had he contracted for the goods which he calculated to sell on the premises. If the defendant had, as well as contracting for the lease of the premises to the plaintiff, also contracted for the sale to him of the goods to be sold therein, and had broken both contracts, this anomaly would arise,—that for the breach of the contract for the sale of the goods he could not recover the profit which he might have made from the sale of them, but only the difference between what he was to pay the defendant for the goods and the market price of the goods; but on the breach of the contract to lease, he could recover the profit he might have made on the sale of these goods. Would this be because the loss of the profits which he might have made on the sale of the goods in the premises would more naturally arise from the breach of the contract to lease the premises, than it would from the breach of the contract to sell the goods? or because such a loss of profits might be more reasonably supposed to have been in the contemplation of both parties at the time they made the contract for leasing the premises than at the time they made the contract for the sale of the goods?"

In Kenny v. Collier (1887) 79 Ga. 743, 8 S. E. 58, the court adopted the general rule that the measure of damages for not letting a tenant into possession of a "certain storeroom and basement" in which he comtemplated establishing a business (nature not stated) was the excess in value of

the term over the amount stipulated as rent, and if no excess, a nominal sum only, and held that anticipated profits from the intended business could not be recovered, saying: "If anything is speculative, remote, or contingent, it is the net income from a business never begun, upon premises never occupied, during a period of time but partially elapsed. Less than half of the year had expired when suit was brought. The business was unborn, and so far as appears, no one but the plaintiff knew what business had been conceived. That secret lay concealed in his bosom and has not yet been published."

And in Leslie E. Brooks Co. v. Long (1914) 67 Fla. 68, 64 So. 452, the court applied the rule that the damages for breach of a contract to deliver possession of the premises is generally the difference, if any, between the rent contracted to be paid and the actual rental value of the premises, holding that prospective profits from the conducting of a barber shop which the lessee had intended to establish in the place were too remote and speculative to constitute the admeasurement of damages in such a case.

Of course, where lost profits are regarded as special damages, and complaint does not contain allegations of such specific damages, they cannot be recovered. See Drischman v. McManemin (1902) 68 N. J. L. 337, 53 Atl. 548, which was an action to recover profits which might have been made in a boarding house during a period of delay in delivery of possession, and in which the court said that the declaration not averring special damages, the measure of damages was not what the plaintiff might have made out of the boarders, but the rental value of the property while she was kept out of possession. And the rule with respect to all special damages is that the same cannot be recovered unless properly alleged and proved. See Sloan v. Hart (1909) 150 N. C. 269, 21 L.R.A.(N.S.) 239, 134 Am. St. Rep. 911, 63 S. E. 1037.

But in connection with the foregoing cases, see Yeager v. Weaver (1870) 64 Pa. 425, an action for damages for failure to deliver possession of a hotel pursuant to lease, wherein it was held that proof that the lessee, in reliance upon his lease, had sold his house and property and was compelled to board, was permissible as showing lost time, trouble, and inconvenience as a result of the breach, and in which the trial court also permitted him to estimate his anticipated profit from the business during the term of the lease. The supreme court refused to pass upon the correctness of a ruling or to strike out the testimony regarding anticipated profits upon the ground that defendant's counsel had not followed the proper course to permit of the taking of an exception.

In Walter Box Co. v. Blackburn (1913) — Tex. Civ. App. —, 157 S. W. 220, an action for damages for withholding possession of a leased storehouse, which was to be used for the purpose of conducting a mercantile business, the court laid down the rule that special damages may be recovered provided they were within the contemplation of the parties and could be shown with reasonable certainty. It was further ruled that "the uncertainty does not depend upon the difficulty of proving as to the exact amount of damages in such cases, but upon the determination of the fact as to whether or not there would have been any profit at all." And applying these rules, it was held that the plaintiff could recover the amount it had paid its manager during the time it was kept from using the demised premises (he having been hired after the leasing of the store, and his services having been reasonable and necessary, and the lessor having known that the business was to be conducted by employees), as well as the amount which it had reasonably expended for drayage, storage, and demurrage; but that a recovery for loss of profits could not be based upon the showing that some years before, plaintiff had conducted a similar business in the same city, but in another building, that many old customers had promised their patronage, that the new place was as well located as the old,

and that, after possession was obtained, the plaintiff (during the best season of the year) made profits in a certain amount, the court maintaining that it was still entirely problematical as to whether he could have operated at a profit during the period of withholding, there having been no going or established business upon which to predicate a claim for lost profits, and it not appearing whether the former business was conducted at a loss or a profit, nor that similar conditions existed when such former business was conducted.

In several cases involving the question of damages for breach of a contract preventing the establishment and operation of a new nonindustrial business the courts have applied the rule that prospective profits are so remote, uncertain, and speculative, that recovery cannot be had therefor, without expressly recognizing any distinction between such a case and one where the business was already established and in operation. Thus, in Giles v. O'Toole (1848) 4 Barb. (N. Y.) 261, an action to recover damages for refusal to give possession under a lease for a store to be used by the lessee as a millinery shop, it was held that the plaintiff could recover damages arising from expenses incurred in preparing to occupy the premises, together with the difference between the real value of the rent and the contract price, but that no recovery can be had under the rule allowing the value of the store to plaintiff, as that involved a determination of what the profits would have been from the business, which would have been mere matter of opinion. And in Red v. Augusta (1858) 25 Ga. 386, it was held that the conjectural profits which one expected to make at a stall in a public market were too remote and uncertain to be recoverable in an action for breach of a contract to erect and let to plaintiff such a stall. So, in Benyakar v. Scherz (1905) 103 App. Div. 192, 92 N. Y. Supp. 1089, where defendant contracted to allow plaintiff to erect booths for the sale of tobacco, candy, etc., in front of his hotel, but, after the same were erected, tore them down and refused to allow plaintiff to use the space, it was held, in an action for breach of the contract, that the measure of damages was the value of the contract, but that no recovery could be sustained which was based upon an estimate of what business would have been done, since such an estimate would be pure supposition because insusceptible of proof. And in Sloan v. Hart (1909) 150 N. C. 269, 21 L.R.A.(N.S.) 239, 134 Am. St. Rep. 911, 63 S. E. 1037, it was held, in an action to recover damages for failure to deliver possession of two stores according to a lease thereof, that the measure of damages was the difference between the rent agreed upon and the market or rental value of the term, plus any special damages such as might have been reasonably within the contemplation of the parties and which were alleged and proved, and that "rental value" did not mean the probable profits that might accrue from occupancy under the lease. And in Deluise v. Long Island R. Co. (1901) 65 App. Div. 487, 72 N. Y. Supp. 988, affirmed without opinion in (1903) 174 N. Y. 516, 66 N. E. 1106, an action to recover damages for loss of business caused by breach of a contract of the lease of a bootblack stand in a railroad station, it was held that the lessee could recover the rent which he had paid in advance, together with costs, but could not recover for loss of profits.

But in McDonald v. English (1881) Newfoundl. Rep. 278, it was held in an action on a covenant in a lease of premises to be used for a grocery business, to recover damages for delay in giving possession, that damages for anticipated profits lost during the unexcused period of delay could be recovered, but the court did not state the reason for the allowance of such element of damages other than to cite for its holding Ward v. Smith (1822) 11 Price, 19, 147 Eng. Reprint, 388, wherein it was held that profits alleged to have been lost as a result of being kept out of premises which defendant agreed to lease to plaintiff for the purpose of carrying on a mil-

linery business therein could be recovered. In Marrin v. Graver (1885) 8 **Ont.** Rep. 39, it was held that the Ward Case cannot be regarded as good authority. This was in view of subsequent English cases on analogous questions which do not fall within the scope of the present annotation.

A few cases in which no distinction was drawn between old and new business have involved the question of measure of damages without discussion of the question of loss of profits.

Thus, in Bernhard v. Curtis (1903) 75 **Conn.** 476, 54 Atl. 213, where a lessor breached his contract for lease of a store to be used for the establishment of a millinery business by failing to deliver possession, it was held that plaintiff's measure of damages was the difference between the rent agreed to be paid and the value of the term, plus such special damages as the circumstances showed the lessee to be entitled to. And applying the rule, the court held that plaintiff could recover for the reasonable cost of all steps necessarily taken by him to protect himself from loss, including expenses necessarily incurred in renting and fitting up another store, and the loss occasioned by having made proper preparation to enter the leased premises, including the loss sustained by reserving or procuring goods for the store, and for the cost of fixtures obtained for the leased place, less the value thereof, but that he could not recover either expenses incurred in procuring another store merely for the purpose of opening a millinery store in the town in a building as well adapted as that originally rented, or expenditures made toward the occupancy of the leased store after notification that possession could not be given, or the depreciation in value of any goods on hand which ordinarily would not be and was not contemplated by the parties to the broken contract.

And in Koneman v. Seymour (1913) 176 **Ill.** App. 629, an action for failure to deliver possession of leased premises, it was held that one month's rent, which had been paid in advance, the drayage on goods sent to the place, and any increase in rent which the tenant had been compelled to pay for another place, could be recovered, but that neither the month's rent, nor a lessor amount paid for other quarters, nor the salary of employees for such month, could be recovered.

And in Price v. Eisen (1900) 31 Misc. 457, 64 **N. Y.** Supp. 405, an action to recover damages for refusal to deliver possession of a store rented for the conducting of a candy, cigar, and soda water business, it was held that the measure of damages was the difference between the rent reserved and the rental value, including a return of rent paid in advance, and that no recovery could be had for loss on store fixtures purchased in advance and without knowledge of the lessor, in the open market, and which were such as could be obtained at any time without delay, or for a loss on goods bought to stock the store, since there was no necessity for purchasing in advance in order to have the benefit of the whole term, because they could have been purchased after possession was obtained without sustaining special loss, they being obtainable in the same city in the open market immediately upon being ordered.

Of course, damages which do not result from the breach of a contract cannot be recovered. This is illustrated by Greer v. Varnell (1901) 27 **Tex.** Civ. App. 255, 65 S. W. 196, an action for breach of a contract to lease premises for a mercantile business, wherein it was held that plaintiffs, who had been in the business of running a boarding house, and who had dismissed their boarders in anticipation of entering into a new business on the leased premises, could not recover any damages resulting from the boarders so leaving them, since, as they would have been dismissed had the contract been performed, the loss did not result from the breach.

G. J. C.

MARION L. EVANS, Exrx., etc., of Griffith Evans, Deceased, Respt.,
v.
SUPREME COUNCIL OF ROYAL ARCANUM et al., Appts.

New York Court of Appeals—May 28, 1918.

(223 N. Y. 497, 120 N. E. 93.)

Insurance — benefit — injunction against suspension — effect.

1. An injunction restraining a mutual benefit society from suspending a member for nonpayment of dues pending a suit to test the validity of an increase in assessment, or from in any manner interfering with his rights and privileges as a member, accompanied by a bond to hold the society harmless in case the rate is found to be legal, will not preserve his status quo in case the suit goes against him, if, by the terms of the contract, he forfeits his right upon failure to pay dues.

[See note on this question beginning on page 169.]

Judgment — right to act upon.

2. A decision which is still subject to appeal, that a rate fixed by a mutual benefit society is invalid as to existing members, will not justify a member not a party to the suit in refusing to pay it.

Insurance — decree to pay assessment — effect.

3. A decree in a suit by a member of a mutual benefit society to test the validity of a by-law raising the rate of assessments, that he pay the increased rate, will not have the effect of restoring him to membership if he made no payments during the pendency of the suit.

Action — party plaintiff — executor.

4. The executor of a member of a mutual benefit society has no interest to maintain an action to secure restoration of the member, after suspension for nonpayment of dues, where the benefit certificate is in favor of his widow.

(Crane, J., dissents.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a special term for Oneida County in plaintiff's favor, in an action brought to establish rights in a mutual benefit society. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **Howard C. Wiggins**, for appellants:

The executrix of the last will and testament of Griffith Evans cannot maintain this action.

Bown v. Supreme Council, C. M. B. A. 33 Hun, 263; Beeckel v. Imperial Council, O. U. F. 58 Hun, 7, 11 N. Y. Supp. 321, affirmed in 124 N. Y. 661, 27 N. E. 413; Dominick v. Stern, 79 Misc. 271, 139 N. Y. Supp. 59; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. 580; Bacon, Ben. Soc. 3d ed. § 237; Wist v. Grand Lodge, A. O. U. W. 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; Alexander v. Page, 150 N. Y. Supp. 104; Holland v. Taylor, 111 Ind. 125, 12 N. E. 116.

Griffith Evans voluntarily forfeited his membership in the order by failing to pay the assessments lawfully chargeable against him.

Sabin v. Phinney, 134 N. Y. 428, 30 Am. St. Rep. 681, 31 N. E. 1087; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. 580; Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83; Brenizer v. Supreme Council, R. A. 141 N. C. 409, 6 L.R.A. (N.S.) 235, 53 S. E. 835; Makman v. Independent Order, F. S. J. 86 Misc. 13; Paster v. Nagelsmith, 30 Misc. 791, 63 N. Y. Supp. 154; Marshall v. Grand Lodge, A. O. U. W. 133 Cal. 686, 66 Pac. 25; Freckmann v. Supreme Council, R. A. 96 Wis. 133, 70 N. W. 1113;

Bost v. Supreme Council, R. A. 87 Minn. 417, 92 N. W. 337; Feiber v. Supreme Council, A. L. H. 112 La. 960, 36 So. 818; National Union v. Hunter, 99 Ill. App. 146, affirmed in 197 Ill. 478, 64 N. E. 356; National Union v. Shipley, 92 Ill. App. 355; Supreme Lodge, K. H. v. Keener, 6 Tex. Civ. App. 267, 25 S. W. 1084; Chapple v. Sovereign Camp, W. W. 64 Neb. 55, 89 N. W. 423; Hansen v. Supreme Lodge, K. H. 40 Ill. App. 219, affirmed in 140 Ill. 301, 29 N. E. 1121; Beeman v. Supreme Lodge, S. H. 29 Pa. Super. Ct. 387; Stanley v. Northwestern Life Asso. 36 Fed. 75; Roehner v. Knickerbocker L. Ins. Co. 63 N. Y. 163; Wheeler v. Connecticut Mut. L. Ins. Co. 82 N. Y. 543, 37 Am. Rep. 594; Anderson v. Supreme Council, O. C. F. 135 N. Y. 107, 31 N. E. 1092; Hartford L. Ins. Co. v. Ibs, 237 U. S. 662, 59 L. ed. 1165, L.R.A.1916A, 765, 35 Sup. Ct. Rep. 692.

Equity has no power to annul the suspension which resulted from the failure to pay the assessments.

Kerr, Ins. p. 451; Whiteside v. North American Acci. Ins. Co. 200 N. Y. 320, 35 L.R.A.(N.S.) 696, 93 N. E. 948; Atty. Gen. v. Continental L. Ins. Co. 93 N. Y. 70; New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789, 19 Am. Rep. 512; Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662; Rose v. Rose, 1 Ambl. 332, 27 Eng. Reprint, 222; Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765.

The injunction and undertaking did not prevent suspension.

Scott v. Donald, 165 U. S. 86, 41 L. ed. 636, 17 Sup. Ct. Rep. 265; Crane v. Peer, 43 N. J. Eq. 553, 4 Atl. 72; Barrett v. Bowers, 87 Me. 187, 32 Atl. 871.

Messrs. **Lee & Dowling**, for respondent:

At the time of his death Griffith Evans was a member in good standing, and his contract of insurance with defendant was in full force and effect.

Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932; Makman v. Independent Order, F. S. J. 86 Misc. 13, 148 N. Y. Supp. 141; Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730.

Defendants were amply protected by the bond given by the plaintiff at the time the restraining order was granted, which continued Griffith Evans as member of the Royal Arcanum.

Re Globe Mut. Ben. Asso. 63 Hun, 263, 17 N. Y. Supp. 852; Gray v. Daly, 40 App. Div. 41, 57 N. Y. Supp. 527; Smith v. Bown, 75 Hun, 231, 27 N. Y. Supp. 11; Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932; Makman v. Independent Order, F. S. J. 86 Misc. 13, 148 N. Y. Supp. 141; Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155.

Under the broad powers of equity, relief similar to that granted in this case has often been administered.

Meyer v. Knickerbocker L. Ins. Co. 73 N. Y. 516, 29 Am. Rep. 200; Kenyon v. National Life Asso. 39 App. Div. 293, 57 N. Y. Supp. 60; Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155; Cohen v. New York Mut. L. Ins. Co. 50 N. Y. 610, 10 Am. Rep. 522; Kelly v. Security Mut. L. Ins. Co. 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661, 106 App. Div. 354, 94 N. Y. Supp. 601; McClement v. Supreme Court, I. O. F. 88 Misc. 475, 152 N. Y. Supp. 136; Rockwell v. Knights Templars & M. Mut. Aid Asso. 134 App. Div. 741, 119 N. Y. Supp. 515.

McLaughlin J., delivered the opinion of the court:

In March, 1886, Griffith Evans, the plaintiff's testator, became a member of the defendant Supreme Council of the Royal Arcanum, a fraternal benefit society. One of its by-laws provided that the object of the society was to establish a widows' and orphans' benefit fund, from which, on satisfactory evidence of the death of a member in good standing, a sum not exceeding $3,000 would be paid to his widow, if he had so directed.

In his application for membership he agreed that his suspension or expulsion from or his voluntarily severing his connection with the society would forfeit the right of himself and his family, or dependents, to all benefits and privileges therein. He also agreed to make punctual payments of all dues and assessments for which he might become liable, and to conform in all respects to the laws, rules, and usages of the society then in force,

or which might thereafter be adopted. Upon this application a certificate of membership was issued to him which provided, in part, that if he complied with the laws, rules, and regulations then existing, or which might thereafter be enacted, governing the council and fund, the society would, upon receiving satisfactory evidence of his death, pay to his widow Marion L. Evans, a sum not exceeding $3,000.

At the time he became a member, assessments of $1.68 were imposed at irregular intervals, which he paid until 1898, when the by-laws were amended and he was required to pay a monthly assessment of $3.44. These assessments he paid until 1905, when the by-laws were again amended, and he was required to pay a monthly assessment of $6.33 until he attained the age of sixty-five, when it was increased to $16.08. He paid the monthly assessment of $6.33 to and including February, 1913, when he became sixty-five years of age, and thereafter paid $16.08 each month until the 1st of October of that year, when he tendered the assessment of $3.44 under the amendment of 1898 and also the sum of $6.33 under the amendment of 1905. The tenders were refused upon the ground that the amount due was $16.08, and he was notified at the time of such refusal that unless he paid that sum he would be suspended from membership, and lose all the benefits accruing under the by-laws. In refusing to pay the assessments he relied upon a decision of this court (Green v. Supreme Council, R. A. 206 N. Y. 591, 100 N. E. 411), to the effect that the amendment of 1905, increasing the assessment to $16.08, was unauthorized and invalid.

He then brought this action, the purpose of which was to procure a judgment directing the society to receive the sum of $3.44 each month as his assessment, and to enjoin it from suspending him upon his making such payment. Upon the complaint and affidavits he obtained an injunction pendente lite, enjoining the society from suspending him as a member and from in any manner interfering with his rights and privileges as such. To obtain the injunction he gave an undertaking in the sum of $250, to the effect that he would pay to the defendant such damages, not exceeding that sum, as it might sustain by reason of the injunction, if it were finally determined that he was not entitled thereto.

This was the situation when he died on March 23, 1915. After his death the action was continued in the name of his executrix, who served a supplemental complaint, in which she asked that it be adjudged he was a member in good standing at the time of his death; that the contract was then in force; and that the valid, legal rate of assessment from October 1, 1913, to the time of his death be determined. At the trial the facts were stipulated, from which it appeared that an appeal was taken from the decision of this court in Green v. Supreme Council R. A. supra, to the Supreme Court of the United States, which reversed this court and held, in substance, that the amendment of 1905 was valid, and assessments made thereunder were binding upon all members of the society. Notwithstanding such decision, and the fact that the assessments stated had not been paid, the trial court reached the conclusion that Mr. Evans, at the time of his death, was a member in good standing; that his contract of insurance was then in force; that the valid and legal rate of assessment for him from October 1, 1913, to March 23, 1915, was $16.08 per month, which the plaintiff was directed to pay, and she was awarded costs against the society. Judgment to this effect was entered upon the decision, from which an appeal was taken to the appellate division, where the same was affirmed, two of the justices dissenting, and defendants now appeal to this court.

I am of the opinion the judgment of the appellate division and of the

special term should be reversed and the complaint dismissed. Mr. Evans, at the time of his death, was not a member of the society. The contract between him and the society was the constitution, by-laws, his application for membership, and the benefit certificate issued thereon. Sabin v. Phinney, 134 N. Y. 423, 428, 30 Am. St. Rep. 681, 31 N. E. 1087; Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83; Brenizer v. Supreme Council, R. A. 141 N. C. 409, 6 L.R.A.(N.S.) 235, 53 S. E. 835.

Under the by-laws he had, by his own act in refusing to pay the legal assessments, ceased to be a member, and had terminated his relations with the society. The temporary injunction did not continue him a member. All that did, or pretended to do, was to enjoin the society "from suspending" him as a member, "and from in any manner interfering with his rights and privileges" therein. The society did not suspend him, nor did it in any manner interfere with his rights and privileges. He suspended himself.

Insurance—benefit—injunction against suspension—effect.

One of the by-laws provided that "any member failing to pay any regular assessment before the time prescribed for such payment in the laws of the order, or to pay any extra assessment within the time limited or prescribed therefor in the notice thereof, shall stand suspended from the order and all benefits therefrom."

Nonpayment of the monthly assessments, ipso facto, operated as a suspension. Anderson v. Supreme Council, O. C. F. 135 N. Y. 107, 31 N. E. 1092. No affirmative action on the part of the society was required. The by-laws were self-executing. Roehner v. Knickerbocker L. Ins. Co. 63 N. Y. 160; Freckmann v. Supreme Council, R. A. 96 Wis. 133, 70 N. W. 1113; Bost v. Supreme Council, R. A. 87 Minn. 417, 92 N. W. 337; Marshall v. Grand Lodge, A. O. U. W. 133 Cal. 686, 66 Pac. 25; Hunter v. National Union, 197 Ill. 478, 64 N. E. 356.

The fact that this court in Green v. Supreme Council, R. A. supra, had erroneously decided that the assessments which he refused to pay were invalid, was not a legal excuse for nonpayment. This was conclusively settled and determined by the Supreme Court of the United States (Supreme Council, R. A. v. Green, 237 U. S. 531, 59 L. ed. 1089, L.R.A.1916A, 771, 35 Sup. Ct. Rep. 724) when it reversed the judgment of this court. When he refused to pay the assessments, he took his chances that the decision of this court, on appeal, would be sustained. In October, 1913, when he tendered $6.33 as his assessment for that month, he was obligated to pay $16.08, and he should have paid that amount. A valid by-law so provided, and he had agreed that his rights were to be determined by it. He therefore, by his own voluntary act, severed his membership in the society when he violated his part of the agreement, which was "to make punctual payments of all dues and assessments for which I may become liable." For nearly a year and a half before his death he paid nothing to the benefit fund. He could not, during that time, be a member for the purpose of receiving benefits, and not for the purpose of making payments imposed.

Judgment—right to act upon.

It is no answer to the suggestion to say that the court, by its decree, directed his executrix to pay the assessments which he ought to have paid in his lifetime. A contract of this character, once destroyed, cannot be brought back to life in that way. It is beyond the power of a court of equity to so decree. Had Mr. Evans lived he would have been under no obligation to make the payments. The society could not have compelled him to make them. The injunction given imposed no such obligation. He did not even offer or agree to

Insurance—decree to pay assessment—effect.

make such payments in case he were unsuccessful in the action.

I am also of the opinion that plaintiff, as his executrix, cannot maintain the action. She, as such, has no interest in its subject-matter.

Action—party plaintiff—executor.

It is elementary that an executor can maintain an action only when the subject-matter thereof affects the estate of his testator. Her testator had no interest in the proceeds of the certificate issued to him, and his estate had none. He was merely authorized to designate someone to receive the proceeds to be paid upon his death. He designated his wife, and the certificate issued to him provided that the society would pay to her, and not to his estate. If, at the time of his death, he had been a member in good standing, she personally would have been entitled to receive whatever the society paid. Beeckel v. Imperial Council, O. U. F. 58 Hun, 7, 11 N. Y. Supp. 321, affirmed in 124 N. Y. 661, 27 N. E. 413; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. 580; Bown v. Supreme Council, C. M. B. A. 33 Hun, 263; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Kentucky Masonic Mut. L. Ins. Co. v. Miller, 13 Bush, 489; McClure v. Johnson, 56 Iowa, 620, 10 N. W. 217; Maryland Mut. Ben. Soc. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52. Costs in an equity action are not a part of or in any way connected with the subject-matter of it. They are mere incidents of the litigation. Crosby v. Stephan, 97 N. Y. 606; Eastburn v. Kirk, 2 Johns. Ch. 317.

My conclusion, therefore, is that the judgments of the Appellate Division and Special Term should be reversed, and the complaint dismissed, with costs in all courts.

Hiscock, Ch. J., and **Cuddeback** and **Andrews**, JJ., concur with **McLaughlin**, J., and **Cardozo**, J., concurs in result.

Crane, J., dissenting:

The opinion in this case makes the injunction order granted by the supreme court a useless formality and a nugatory process. I cannot agree that the injunction, which concededly restrained the officers from expelling Griffith Evans from the Royal Arcanum for the alleged nonpayment of dues, was useless and a vain and empty effort upon the part of the court to preserve his rights. The officers and the organization were restrained, but a by-law or contract of the member, it is said, was so passively effective as to nullify the injunction.

Griffith Evans was a member of Rome Council, No. 150, of the Royal Arcanum. He was sixty-five years of age, and had paid dues for over twenty-five years. The organization had increased his dues from $1.86 to $3.44, and then to $6.33, a month, and finally, when he became sixty-five years of age, to $16.08 a month. This action had been held illegal by our court. Green v. Supreme Council, R. A. 206 N. Y. 591, 100 N. E. 411. He tendered in payment of his dues the amount which the courts had determined was all that could be demanded. The tender being refused, and threatened with expulsion, he resorted to the courts for determination of the controversy. The supreme court, upon his application, granted an injunction reading as follows: "Ordered, that the above-named defendants, their officers, agents, attorneys and employees, and any and all other persons be, and each and all of them are hereby enjoined, restrained and prohibited from suspending the plaintiff, as a member of the defendants, and from in any manner interfering with his rights and privileges in said Supreme Council of the Royal Arcanum, or in said Rome Council, No. 150, of the Royal Arcanum, until the further order of this court."

A bond was given to accompany

the injunction, agreeing to idemnify defendant for any loss or damage occasioned by reason thereof. The supplemental complaint, according to the agreed statement of facts, asked that the valid legal rate of assessment be determined. This court is now about to hold that this injunction did not prevent the expulsion of Griffith Evans; that the working of the by-laws of the association did that which the association was restrained from doing. The by-laws read: "Any member failing to pay any rate or assessment before the time prescribed for such payment in the laws of the order or to pay any extra assessment within the time limited or prescribed therefor in the notice thereof shall stand suspended from the order and all benefits therefrom."

The prevailing opinion states that while the supreme court enjoined his expulsion, and sought by means of injunction and bond to preserve the membership until the amount of the dues should be determined by the court, yet the effort was abortive as the member expelled himself under the by-laws for the nonpayment of the duties demanded. To state such a proposition is to answer it. What was the object of resorting to the courts to determine the controversy between the member and the order, if the court had no power to grant relief? We are about to decide that the very contract which the court was called upon to construe deprived the court of jurisdiction. Careful search fails to discover any case where equity is without power to maintain the membership in an organization like the Royal Arcanum until a controversy over that membership is settled. The following cases indicate that such power does exist: In Meyer v. Knickerbocker L. Ins. Co. 73 N. Y. 516, 29 Am. Rep. 200, it was decided that a suit in equity would lie to determine the rights and obligations of the parties, where the plaintiff had tendered his premium and the defendant has refused it, claiming the policy forfeited. In Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 271, 66 N. E. 932, an amended by-law of the defendant reduced the maximum death benefit to $2,000. The plaintiff held a benefit certificate for $5,000 and considered the by-law illegal. He tendered the assessment for the higher amount, and, it being refused, brought action for breach of contract. It was held that there was no breach of contract which justified an action for damages, but that he "might resort to a court of equity and, upon the facts, ask its intervention in a decree which would compel the defendant to live up to its contract, and which would restrain it from proceeding under its void by-law." The Langan Case has frequently been cited with approval as authority for the proposition that the courts of this state may interfere by injunction to preserve contract rights. Kelly v. Security Mut. L. Ins. Co. 106 App. Div. 352, 94 N. Y. Supp. 601, id. 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661; Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155; Rockwell v. Knight Templars & M. Mut. Aid Asso. 134 App. Div. 736, 742, 119 N. Y. Supp. 515.

The undertaking furnished, as in this case, saves harmless the association from any damage accruing by reason of the injunction. It is said that the member does not agree to remain in the order, provided the court determines that the higher amount is due. He remains a member as long as the injunction continues, and his bond is liable for the dues ultimately determined as the amount payable under the by-laws. No other reasonable interpretation can be given to the proceedings. The spirit and the fair intent of the injunction order should govern. Stolts v. Tuska, 82 App. Div. 81, 81 N. Y. Supp. 638; People ex rel. New York v. Pendleton, 64 N. Y. 622, 624. We have held, as to contracts, that the obligation to do a certain thing upon the part of one party may imply an obligation upon the part of the other. Wood v. Duff-

Gordon, 222 N. Y. 88, 118 N. E. 214. When, in this case, the plaintiff asked that his membership be continued by an injunction, and furnished a bond to pay damages, he agreed in so doing to pay the dues up to the dissolution of the injunction. There would be no other damages to pay, and the giving of the bond would otherwise be frivolous. The supplemental complaint—a part of the agreed statement of facts—asks that Evans be declared a member in good standing at his death, *and the amount of the assessments till then determined.*

Before Griffith Evan's action came to trial he died, and his widow, as executrix, was substituted in his place, and a supplemental complaint served in which she states that the estate is ready to pay the increased amount if the court should determine that such were the sum due, and further asks that the membership certificate be declared in force and effect. Objection is made, in the main opinion, to the continuance of the action by the executrix. It is said that the estate has no interest in the costs. This may be so, but the executrix has an interest in protecting the estate from liability upon the bond given on the injunction, and also in having judicially determined the liability of Griffith Evans upon the membership certificate, up to the time of his death. The validity of this point seems to be predicated upon the correctness of the opinion that the certificate of membership was canceled.

The fact that Green v. Supreme Council, R. A. 206 N. Y. 591, 100 N. E. 411, was subsequently reversed by the United States Supreme Court (237 U. S. 531, 59 L. ed. 1089, L.R.A.1916A, 771, 35 Sup. Ct. Rep. 724) can have no further effect than if our own supreme court had decided, upon the trial of the Evans action, that the increase in rate was proper. The judgment which has been entered in this case by the lower courts follows the decision of the United States Supreme Court, in determining that the rate of dues for Evans was $16.08 per month, and further holds that Griffith Evans was a member of the Royal Arcanum up to the time of his death, that his contract of insurance was then in full force and effect, and that the defendant recover from the plaintiff the full amount of the dues according to this increased rate. The death of Griffith Evans and the error of this court are but incidents in this litigation, and in no way affect the jurisdiction and relief which a court of equity may afford.

Pound, J., not voting.

ANNOTATION.

Effect of injunction restraining expulsion of member from benefit society.

The decision in the reported case (EVANS v. SUPREME COUNCIL, R. A. ante, 163) is a rather novel one. At least, an extended search has revealed no case which directly supports the prevailing opinion, wherein it was, in effect, held that a by-law of a benefit society, which automatically expels a member upon failure to pay assessments, nullified an injunction enjoining the society from suspending him as a member pending a judicial determination of the validity of certain assessments with respect to the amount thereof; and this, even though, in refusing to pay the assessments, he had acted in good faith, in reliance on a decision of the highest court of the state to the effect that the assessments were invalid, which decision, however, was subsequently reversed by the United States Supreme Court, and although, upon obtaining the temporary injunction, he had given bond agreeing to indemnify defendant for any loss or damages occasioned thereby. This was upon the theory that the member acted in reliance upon the decision of the state court, at his peril as to its correctness. It

should also be noted that Crane, J., rendered a very strong dissenting opinion. There is, perhaps, some analogy between the decision of the majority and the rule that an appeal, which otherwise operates as a supersedeas, does not suspend the operation of a prohibitory injunction, the operation and effect of which do not depend upon any affirmative acts.

In Society of Italian Union & Brotherhood v. Montedonico (1884) 5 Ky. L. Rep. 586, which involved a charitable corporation formed for the purpose of aiding and assisting members and their families, it was expressly held that where the corporation, notwithstanding a decree enjoining it from expelling a certain member, proceeded to do so in disregard of the injunction, it was liable both for contempt of court and to the expelled member for damages, and that the act of expulsion was null and void. The court said: "A different doctrine would render wholly null the chancellor's effort to restrain a contemplated wrong. Where he has issued his order commanding the defendant not to do a particular thing, the party so enjoined cannot disregard the injunction without becoming liable for the damages resulting from his acts, and also subjecting himself to punishment for contempt. But this is not all; the acts of the defendant in violation of the restraining order, being unlawful, will be declared null and void at the option of the injured party. To this extent must equity go in order to make the writ of injunction a shield to wholly ward off the threatened injury." It will be observed, however, that in this case the expulsion was by affirmative action, pending the injunction, and not as in the EVANS CASE, the result of the automatic operation of an existing by-law. That courts of equity generally may interfere by injunction to preserve the contract rights of a member of a benefit society, see Langan v. Supreme Council, A. L. H. (1903) 174 N. Y. 266, 66 S. E. 932, as set out in the dissenting opinion of Crane, J., in EVANS v. SUPREME COUNCIL, R. A.; Rockwell v. Knights Templars & M. Mut. Aid. Asso. (1909) 134 App. Div. 736, 119 N. Y. Supp. 515; Thomas v. Ellmaker (1844) 1 Pars. Sel. Eq. Cas. (Pa.) 98; Leech v. Harris (1869) 2 Brewst. (Pa.) 571; and Lowry v. Read (Knights of Pythias Case) (1870) 3 Brewst. (Pa.) 452. G. J. C.

STATE OF NEW MEXICO EX REL. NORTHWESTERN COLONIZATION & IMPROVEMENT COMPANY OF CHIHUAHUA

v.

LUIS HULLER et al., Appts.

New Mexico Supreme Court—October 1, 1917.

(— N. M. —, 168 Pac. 528.)

Quo warranto — corporate relator.

1. In a proceeding on information in the nature of quo warranto, to oust individual respondents from franchises alleged to be usurped in a private corporation, the corporation is a proper relator, by reason of its special interest in the matter of the inquiry.

[See note on this question beginning on page 197.]

Same — office in private corporation.

2. An action of quo warranto, or in the nature of quo warranto, is the proper remedy to test the right of office in a private corporation.

Same — person interested.

3. Informations in the nature of quo warranto, brought against individuals to inquire by what right they use or exercise the liberties and privileges of a corporation, may be brought on behalf of the state on the relation of any

Headnotes by HANNA, Ch. J.

person or persons having an interest injuriously affected.

Same — against whom lies.

4. Quo warranto, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, or who has been admitted thereto.

Same — failure to require bond.

5. The failure to require a bond of the relator in a proceeding in the natrue of an information in quo warranto, while erroneous, does not amount to prejudicial error, where, after judgment of ouster against the respondent, such judgment is affirmed on appeal.

Same — civil proceeding.

6. An information in the nature of quo warranto, while retaining its criminal form, is in modern practice regarded as a civil proceeding.

Same — certainty of information.

7. An information in the nature of quo warranto, while criminal in form, need not be drawn with that certainty required of indictments, and the principles of good pleading will apply to both parties as in ordinary civil actions.

Appearance — general or special.

8. Whether the appearance is general or special is governed by the purpose and object of the appearance. If the appearance be for the purpose of objecting to the jurisdiction of the court, and is confined solely to the question of jurisdiction, then the appearance is special, but any action upon the part of the defendant, except to object to the jurisdiction which recognizes the case is in court, will amount to a general appearance.

Quo warranto — plea.

9. To a quo warranto charging an illegal exercise of corporate functions, the plea should, as a general rule, be either of justification or a disclaimer, and the plea of justification must contain allegations of all such facts as are necessary to show authority for the use of the franchises.

(Roberts, J., dissents.)

APPEAL by respondents from a judgment of the District Court for Bernalillo County in favor of relator in a quo warranto proceeding charging respondents with usurpation of corporate franchises. *Affirmed.*

Statement by **Hanna**, Ch. J.:

On March 16, 1914, a petition for leave to file an information in the nature of quo warranto was filed in the district court of Bernalillo county, by the Northwestern Colonization & Improvement Company of Chihuahua, representing that it had obtained the consent of the attorney general to institute the action, and that the said company was, and is, a corporation organized under the laws of the territory of New Mexico, in the year 1889, and, after certain formal allegations concerning the organization of said company, its board of directors, officers, and location of its office in the state of New Mexico, the petition further recited that certain persons, the respondents herein named, conspiring together with one George R. Pierce, since deceased, undertook to act together and to exercise corporate functions in the name and pretending to be in behalf of the said Northwestern Colonization & Improvement Company of Chihuahua; that they met and held a meeting at Deming, New Mexico, on the 14th day of December, 1910, and, pretending to be stockholders of the said corporation, elected certain persons as directors of the said corporation, and passed a resolution authorizing the directors, so pretending to be elected, to meet in the city and republic of Mexico, for the purpose of transacting business as a corporation organized under the laws of New Mexico and in the name of the relator herein, and did other acts in the name of the petitioner, such as causing to be issued certificates of stock in the name of the petitioner, and certain false statements or certificates appointing Arthur A. Temke the resident agent, upon whom process could be

served, and causing the same to be filed with the State Corporation Commission of the state of New Mexico, and likewise assumed to exercise corporate powers in the name of the relator, causing to be issued certain false and fraudulent power or powers of attorney, authorizing the attorneys, in fact, to appear in certain proceedings pending in the courts of New Mexico, and to represent themselves as attorneys to act in behalf of the relator.

The petition further continued with recitals as follows: That no one of said persons is the owner of any shares of stock in the relator corporation, excepting S. D. Haskell, who claims and appears to be the owner of 1,000 shares of stock in the said company; and that all of the offices, liberties, privileges, franchises, and authority exercised by the said persons named as respondents have been usurped upon the petitioner and the state of New Mexico, and they have exercised and are still assuming to exercise, without legal authority, the said offices and franchises, to the damage and prejudice of the relator and of the state; concluding with a prayer for a judgment of ouster.

An order to show cause, addressed to the respondent, was thereafter made by the district court of Bernalillo county, requiring them to appear on April 3, 1914, and show cause why an information should not be filed against them, and directing personal service of a copy of the order, together with a copy of the petition, upon the resident agent of the said company as constituted by the respondents, acting as a board of directors of the alleged company. On the said 3d day of April, 1914, there was filed in the office of the clerk of said court a demurrer setting up numerous grounds, which was shortly thereafter overruled and leave granted to file information, which was accordingly filed on April 16, 1914, in substantially the same form as the petition.

Thereupon the trial court summoned the respondents to appear on the 1st day of June, 1914, and make answer unto the information, and directed service of process to be made upon Arthur A. Temke, who had been appointed by respondents as their resident corporate agent for service of process in New Mexico. The respondents other than Lindauer, appearing specially for that purpose, or so denominating their appearance, filed (1) a motion to quash the return of the sheriff upon said order or citation, and vacate the order authorizing such service; (2) to quash the said information or strike the same from the files of the court; and (3) to vacate the order indorsed on said citation; and the said Lindauer, also appearing specially, or so denominating his appearance, filed his plea to the jurisdiction of the court and a plea in abatement of said citation or summons, all of which motions and pleas were overruled by the court. Thereafter various demurrers and pleas were filed by the respondents, and relator subsequently filed replications. Demurrers were filed by respondents to the replications, which were overruled, and thereafter rejoinders were filed. To the rejoinders the relator filed a surrejoinder, setting up as exhibits two certain contracts. The respondents thereafter filed rebutters, and other pleadings, demurrers, and motions too numerous to include in this statement of facts were interposed, from time to time, culminating in a motion for judgment on the pleadings, which motion was sustained and a judgment of ouster entered by the trial court.

Messrs. **Renehan & Wright** and **W. D. Hawk** for appellants.

Messrs. **Frank W. Clancy**, Attorney General, **H. B. Jamison**, **Francis C. Wilson**, **James R. Garfield**, and **D. J. Cable**, for appellee:

If it appears from the pleadings that the acts charged in the information were committed by respondents, they must show the legal right, under the

laws of the state and the by-laws of the company, to exercise the corporate privileges and franchises, and their justification in this respect must be complete. If they fail in the latter particular, judgment of ouster will follow as a matter of course.

32 Cyc. 1453, 1454; Whelchel v. State, 76 Ga. 644; People ex rel. Atty. Gen. v. River Raisin & L. E. R. Co. 12 Mich. 389, 86 Am. Dec. 64; People v. Northern R. Co. 42 N. Y. 217; Enterprise v. State, 29 Fla. 128, 10 So. 743; State ex rel. Law v. Saxon, 25 Fla. 342, 5 So. 801; Rex v. Philips, 1 Burr. 292, 97 Eng. Reprint, 321; Shortt, Quo Warranto, 178, 202; Reg. v. Blagden, 10 Mod. 211, 88 Eng. Reprint, 698; State ex rel. Immanuel Presby. Church v. Riedy, 50 La. Ann. 258, 23 So. 327.

A proceeding on an information in the nature of quo warranto is a civil and not a criminal action.

Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; State ex rel. Brison v. Lingo, 26 Mo. 496; State ex rel. Atty. Gen. v. Vail, 53 Mo. 97; Atty. Gen. v. Sullivan, 163 Mass. 446, 28 L.R.A. 455, 40 N. E. 843.

Defendants by their special pleas, notices, etc., filed in the action, entered their general appearance to the information and to the action.

Dailey v. Foster, 17 N. M. 377, 128 Pac. 71; 3 Cyc. 504; Boulder, Colorado, Sanatorium v. Vanston, 14 N. M. 436, 94 Pac. 945; Fowler v. Continental Casualty Co. 17 N. M. 188, 124 Pac. 479; Edgell v. Felder, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69; Elliott v. Lawhead, 43 Ohio St. 176, 1 N. E. 577; Maholm v. Marshall, 29 Ohio St. 611; Marsden v. Soper, 11 Ohio St. 503; Evans v. Iles, 7 Ohio St. 234; Smith v. Hoover, 39 Ohio St. 249; Cincinnati, S. & C. R. Co. v. Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Burdette v. Corgan, 26 Kan. 102; Sugg v. Thornton, 132 U. S. 524, 529, 33 L. ed. 447, 449, 10 Sup. Ct. Rep. 163; Cohen v. Trowbridge, 6 Kan. 385; Grantier v. Rosecrance, 27 Wis. 488; Alderson v. White, 32 Wis. 309; Fee v. Big Sand Iron Co. 13 Ohio St. 563.

The word "person" should and does include a corporation whenever the property right of the corporation is involved, under a statute or law referring to a person or persons. The rules of the common law of England do not have effect where the Constitution declares a different rule.

Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 391, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Santa Clara County v. Southern P. R. Co. 118 U. S. 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 189, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578–592, 41 L. ed. 560–565, 17 Sup. Ct. Rep. 198; Dayton Coal & I. Co. v. Barton, 103 Tenn. 611, 53 S. W. 971; Thomp. Corp. § 7366; Crafford v. Warwick County, 87 Va. 110, 10 L.R.A. 129, 12 S. E. 147; Jeffries Neck Pasture v. Ipswich, 153 Mass. 42, 26 N. E. 239.

A corporation may become a relator.

Beverly v. Hattiesburg, 83 Miss. 621, 36 So. 74; State ex rel. Kansas City v. East Fifth Street R. Co. 140 Mo. 539, 38 L.R.A. 218, 62 Am. St. Rep. 742, 41 S. W. 955; State ex rel. Jones v. Light & Development Co. 246 Mo. 618, 152 S. W. 67; Olathe v. Missouri & K. Interurban R. Co. 78 Kan. 193, 96 Pac. 43; State ex rel. Vilter Mfg. Co. v. Milwaukee, B. & L. G. R. Co. 116 Wis. 142, 92 N. W. 546; State ex rel. Green Bay Gas & E. Co. v. Minahan Bldg. Co. 141 Wis. 400, 123 N. W. 258.

In an information in the nature of a quo warranto it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms.

People ex rel. Atty. Gen. v. River Raisin & L. E. R. Co. 12 Mich. 389, 86 Am. Dec. 64; 2 Kyd, Corp. 399, 403, 440; Angell & A. Priv. Corp. §§ 734, 756, 759, 760; People v. Bank of Niagara, 6 Cow. 196; People v. Bank of Hudson, 6 Cow. 217; 32 Cyc. 1448, 1449; Whelchel v. State, 76 Ga. 644.

Hanna, Ch. J., delivered the opinion of the court:

We shall consider the assignments of error from the standpoint of the importance of the questions raised, as the order in which the assignments of error are presented is not the same in the briefs, and tends to confusion.

The first question to be considered is whether an information in the nature of quo warranto is the proper remedy to try the title to office in a private corporation. In this jurisdiction we unfortunately have no statute upon the subject of this remedy, and are left entirely to the common-law principles and

our interpretation of the scope of the Statute 9th Anne, chapter 20. The English rule is that, to justify the employment of quo warranto to try title to office, it is essential that the office be such as the law deems of a public nature. The Massachusetts courts seem to be the only American courts which follow the English rule. All other American courts agree in holding that an action of quo warranto, or in the nature of quo warranto, is the proper remedy to test the right of office in a private corporation. The American cases are collected in the note to the case of Brooks v. State ex rel. Richards, 51 L.R.A.(N.S.) 1126, Ann. Cas. 1915A, 1133. See also High, Extr. Leg. Rem. 3d ed. § 653.

Quo warranto—office in private corporation.

The next question in order of importance is raised by point 6 in appellant's brief, that a corporation cannot act as relator in informations in the nature of quo warranto. It is argued that, under the provisions of the Statute of Queen Anne, § 4, the right to exhibit quo warranto informations upon relation was confined to "any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators." It is further pointed out that the costs to be recovered are "his or their costs," which would preclude the assumption that a corporation falls within the purview of the statute. It is said that the reason for the rule is that an informer or relator in quo warranto proceedings must be a person or individual, as distinct from the corporate entity, because the entire purpose of the informer or relator is to inform the Crown or state officer of certain facts under oath, for the purpose of moving him officially to take action in the premises, and that a corporate entity is not capable of taking an oath or giving him the information.

We cannot see the appropriateness or force of this argument. It might just as well be argued that a trustee could not bring an action on behalf of his cestui que trust, or that a guardian could not bring an action on behalf of his ward, under appropriate circumstances. Appellant has cited numerous authorities which we do not, however, consider in point, and we are disposed to agree with the contention of the appellee that the real test of the right of the relator to bring a proceeding in quo warranto is whether the relator has the necessary interest to maintain the action. We are of the opinion that an information for the purpose of dissolving a corporation or seizing its franchises cannot be prosecuted in the name of the state at the relation of private persons, even though leave be first obtained of the court, but that such proceeding must be instituted by the attorney general. High, Extr. Leg. Rem. 3d ed. § 698. In this case, however, it is not a suit to dissolve the corporation, but to inquire by what right or authority individuals named as respondents are exercising the franchises of the corporation, and it would seem to be clear that the corporation itself would be, necessarily, materially interested in any alleged usurpation of its franchises. It is contended that no cases in point upon this question can be found. A number of cases, however, have been cited by appellee, involving the right of municipalities to maintain an action, and, while these cases are not strictly in point, we cannot agree that a different line of reasoning should apply to private corporations, but consider that the rule as applied to municipal corporations must logically be extended to private corporations, as both are necessarily compelled to act through officers or agents. The cases cited by appellee are Beverly v. Hattiesburg, 83 Miss. 621–624, 36 So. 74; State ex rel. Kansas City v. East Fifth Street R. Co. 140 Mo. 539, 38 L.R.A. 218, 62 Am. St. Rep. 742, 41 S. W. 955; State ex rel. Jones v.

Same—corporate relator.

Light & Development Co. 246 Mo. 618–637, 152 S. W. 67; Olathe v. Missouri & K. Interurban R. Co. 78 Kan. 193, 96 Pac. 42.

In the last-mentioned case, the court distinctly held that a municipal corporation is a person, within the meaning of the word as used in a statute providing that "Where the action is brought by a person claiming an interest in the office, franchise or corporation, or claiming any interest adverse to the franchise, gift or grant which is the subject of the action, it shall be prosecuted in the name and under the direction and at the expense of such persons."

In State ex rel. Vilter Mfg. Co. v. Milwaukee, B. & L. G. R. Co. 116 Wis. 142, 92 N. W. 546, the court said a private corporation is a person, within the meaning of § 3466, Stat. 1898, providing that an action may be brought by the attorney general in the name of the state, "when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within the state."

Cases to the same effect might be multiplied, but it is sufficient to say that American authorities are in one accord in holding that the word "person" is a generic term of comprehensive nature, embracing natural and artificial persons, such as corporations.

The so-called Tularosa Case is referred to as an authority upon the point under consideration. This case was first reported under the title of Community Ditches v. Tularosa Community Ditch, 16 N. M. 750, 120 Pac. 301, in which case it was held that "the remedy for the unlawful assumption of the right to act as a corporation, and the exercise of corporate rights ultra vires, is by quo warranto and not in equity."

On a second appeal of this case, reported in 19 N. M. 352, 143 Pac. 207, this court referred to the question of whether the common law or the Statute of Anne applied to a proceeding where the object sought is to oust individuals from the exercise of a corporate franchise, or against a corporation for usurping a franchise. The court said that, the information having been filed on the assumption that the Statute of Anne applied to a proceeding in the nature of the one before the court, and there having been no objection upon that ground, the court would treat the information as properly filed, although there was doubt as to whether the statute had any application to the proceeding, citing Rex v. Carmarthen, 2 Burr, 869, 97 Eng. Reprint, 607, 1 W. Bl. 187, 96 Eng. Reprint, 99, and other cases relied upon by appellants.

For the reasons indicated, the Tularosa Case can have little importance as authority in the consideration of the question before the court.

We conclude that, in a proceeding on information in the nature of quo warranto, to oust individual respondents from franchises alleged to be usurped in a private corporation, the corporation is a proper relator, by reason of its special interest in the matter of the inquiry.

This brings us to the next phase of appellant's objection, as to the right of relator to be heard. This objection, as stated under point 2 in appellant's brief, is that "informations in the nature of quo warranto, brought against individuals to inquire by what right they use and exercise the liberties, privileges, and franchises of a corporation, must be brought by and in behalf of the state, and filed and prosecuted by the attorney general of the state."

In support of this contention appellants cite numerous authorities. The most succinct statement of the entire question, however, we believe, is given in Bailey on Habeas Corpus, at § 343, from which we quote as follows: "At common law, private individuals, without the intervention of the attorney general, cannot, either as of right or by

leave of court, file an information in the nature of a quo warranto. The abuse of a public franchise under color of a legislative grant is a public wrong, as distinguished from a private grievance; hence, the remedy by quo warranto must proceed from the attorney general, or some authorized agent of the sovereign power, to dissolve it. In cases involving merely administration of corporate functions or duties which touch practically only individual right, such as the election of officers, admission of a corporate officer or member, and the like, the writ may issue at the suit of the attorney general, or of any person desiring to prosecute the same, where such method has the sanction of statutory permission; and where not, and such private person has an interest which is injuriously affected, of such a character as will satisfy the proceedings, he may, upon leave of the court, in the name of the state or attorney general, prosecute such proceedings."

It is our opinion that the appellants have fallen into error in an assumption that the sole question under consideration in the present case is one affecting public interest, such as might be said to arise from the abuse of a public franchise, referred to by Mr. Bailey. We have already pointed out in this opinion that, where the object of a suit is to dissolve a corporation or seize its franchises, the action can only be prosecuted in the name of the state. This principle is well stated by Mr. High, in his work on Extraordinary Legal Remedies, in the following language (§ 624): "Since, under the American system, all power emanates from the people, who constitute the sovereignty, the right to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise is regarded as inherent in the people in the right of their sovereignty."

This case does not involve a public question, such as would arise were an attack made upon the franchise of the corporation, but is a case involving a private right, and one such as referred to by Mr. Bailey, when he speaks of a case involving merely the administration of corporate functions or duties, which touch practically only individual rights, such as election of officers, admission of a corporate officer or member, and the like; in which cases this author recognizes the right of a private person, having an interest which is injuriously affected, to maintain proceedings in the nature of quo warranto, upon leave of court, in the name of the state or attorney general. See also High, Extra. Leg. Rem. § 654. Mr. Bailey supports his text by the citation of the following authorities: Murphy v. Farmers' Bank, 20 Pa. 415; People ex rel. Jones v. North Chicago R. Co. 88 Ill. 537; Kenney v. Consumers' Gas Co. 142 Mass. 417, 8 N. E. 138; State v. Paterson & H. Turnp. Co. 21 N. J. L. 9.

Upon examination of the Pennsylvania case referred to, a first impression would seem to warrant the conclusion that the case was not authority, because the opinion of the court is an interpretation of a legislative act of 1836, conferring the right to maintain the action on "any person or persons desiring to prosecute the same." A more careful examination of the case, however, discloses that the same words appear in the Statute of Anne, and were evidently taken from that statute. So that we may reasonably assume that the conclusion of the court would have been the same had the Statute of Anne been alone under consideration. This case is so instructive as pointing out the distinction between the use of the remedy of quo warranto in cases involving public right only and in cases involving individual grievances, that we take the liberty of quoting somewhat extensively therefrom. The court said:

"The Statute of Anne was enacted in 1710, and gave jurisdiction in quo warranto to the Queen's bench. In 1722 our su-

preme court was authorized to issue habeas corpus, certiorari, writs of error, and all remedial writs, and were clothed with the same jurisdiction and powers as the justices of the court of King's bench, common pleas, and exchequer, at Westminster. This was a sufficient warrant for this court to adopt in practice a rule prescribed in the Statute of Anne, and justifies the remark of Judge Gibson in Burrell's Case, 7 Pa. 34, that the substance of that statute had been adopted before our Revolution, as part of our common law.

"These words have been the subject of judicial decision, and the authorities show that they do not give a private relator the writ of quo warranto in a case of public prerogative involving no individual grievance. On this point the authorities are full, direct, and harmonious. The usurpation of an office, established by the Constitution, under color of an executive appointment, and the abuse of a public franchise under color of a legislative grant, are public wrongs and not private injuries, and the remedy by quo warranto, in this court at least, must be on the suggestion of the attorney general, or some authorized agent of the commonwealth.

"For the authorities, I refer myself to those cited in the argument of the respondent's counsel. They establish this as the uniform construction. In questions involving . . . merely the administration of corporate functions, or duties which touch only individual rights, such as the election of officers, admission of a corporate officer, or member, and the like, the writ may issue at the suit of the attorney general, or of any person or persons desiring to prosecute the same."

The supreme court of Illinois in the case of the People ex rel. Jones v. North Chicago R. Co. 88 Ill. 537, in a well-considered opinion, clearly pointed out the difference between an offense against the public, where the state alone may punish or waive its right to do so, and cases affecting private or individual rights, such as "those which merely affect the administration of corporate functions without affecting the existence of the corporation." In the latter case it was held that the courts may interpose on a proper showing.

We therefore conclude that information in the nature of quo warranto, brought against individuals to inquire by what right they use or exercise the liberties, franchises, and privileges of a corporation, may be brought on behalf of the state, on the relation of any person or persons having an interest injuriously affected.

Same—person interested.

We are now brought to a consideration of the sufficiency of the petition. It is first contended by appellant that the information merely charges the conclusions of the pleader, which, if true, are unnecessary and irrelevant, and that the relator expressly denies and repudiates any suggestion that the defendants, or any of them, had ever entered into, usurped, or had possession of any office, liberty, privilege, or franchise.

It is to be conceded that the information should do more than assert a mere claim to the right to exercise an office or franchise, and that possession and user of the office by other than relator without color of right is essential to be pleaded. The principle is well established as applied to usurpation of office in private corporations, and the usurpation by persons claiming public office as well. The rule in this respect is thus stated in 17 Enc. Pl. & Pr. 407: "Quo warranto, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, and not against one who merely lays claim to the office, or who has never been admitted thereto."

Same—against whom lies.

See also Spelling, Inj. & Extr. Rem. § 1774. We cannot agree,

however, that appellants' objection to the petition is well taken in this respect. Appellants rely upon the case of People ex rel. Taylor v. Thompson, 16 Wend. 655, which was an information brought by the attorney general of New York, charging the defendants with claiming, using, and exercising the liberties, privileges, and franchises of being a body politic and corporate, without being legally incorporated. The court, in its opinion, pointed out that the language of the statute was derived from the statute of Anne, and while providing that an information in the nature of quo warranto might be filed, "where any person shall usurp, intrude into, or unlawfully hold any public office, civil or military, or any franchise, . . ." yet something was obviously required beyond a claim to the office or the exercise of a franchise to authorize the institution of proceedings. In the case at bar, however, the information, after first setting up facts showing the organization of the relator corporation, represented that the respondents undertook to act together and to exercise corporate functions in the name of the relator, and caused to be published a notice calling a meeting of the stockholders of the relator; that the stockholders held a meeting at Deming, New Mexico, on the date fixed, at which they claimed to have elected respondents, except two named, as directors of the relator, caused minutes to be made and entered in a book as minutes of the said relator corporation, and elected officers of said corporation for the purpose of transacting business as a corporation in the name of the relator, and caused to be issued certificates of stock in the name of the relator, and attached thereto a false and fraudulent seal with the name of the relator engraved thereon, and caused to be executed certain false statements appointing a resident agent, for whom service of process could be had, and caused same to be filed with the secretary of the territory, and later with the Corporation Commission of the state, and, assuming to exercise corporate powers in the name of the relator, caused to be issued certain false and fraudulent powers of attorney.

After continuing with other allegations pertaining to the status of one of the respondents as a stockholder, the information concludes with a general allegation as follows: "All of which liberties, privileges, franchises, and authority the respondents have usurped and do still usurp upon the state of New Mexico, and have exercised and are still assuming to exercise in said state, without being legally authorized so to do, and without any warrant, grant, or authority of law, to the great damage and prejudice of the relator and of the state."

We deem several allegations to be sufficient as evidencing user and possession, and therefore consider this objection to the information not well taken.

The next objection urged to the information is that the relator, if entitled to any remedy, has mistaken its remedy; that it should have brought mandamus or bill to permanently enjoin. This position of the appellants is based upon the contention that the information alleges facts which, if true, show the respondents were not, except Haskell, members of the corporation de jure; that they were not in possession, nor were they members of the corporation de facto, and that their acts were merely pretensions and claims under conspiracy. The argument of appellants upon this question is primarily addressed to the proposition that because the petition is said to treat the respondents as usurpers, and because the attitude of counsel for relator was that the respondents were outsiders, that relator has therefore no right to maintain the action, because, under the allegations of the information, respondents would neither be de jure nor de facto officers. Authority is cited in support of appellants' position to

the effect that where an election of officers is merely colorable, so as to be really no election at all, it does not confer even a de facto position upon the office holders, and that the remedy of relator is not in quo warranto but mandamus.

We do not desire to unduly lengthen this opinion by discussion of the remedies of mandamus and injunction, either of which might be available under certain circumstances. The question before us at this time, however, is whether an information in the nature of quo warranto is available. We have pointed out the allegations of the information, and it is clear that it does not charge that the privileges, franchises, and authority used and possessed by the respondents have been usurped and are still being usurped without legal authority. The difficulty of appellants apparently arises out of the failure to appreciate that the information in this case charges usurpation of the franchises of the corporation. We have pointed out in this opinion that the mere claim to exercise an office or corporate right, privileges, or franchises would not be sufficient, but that user and possession must be attendant circumstances. The necessity for the presence of something more than a claim to the office or franchise is clearly pointed out by the supreme court of Wisconsin, in the case of Atty. Gen. v. Superior & St. C. R. Co. 93 Wis. 604, 67 N. W. 1138. We add this authority to the authorities already cited in this opinion, because, while construing a Wisconsin statute, it points out that the language of the statute is traceable to the Statute of Anne, and the opinion clearly shows that there may be a usurpation of the franchises as distinguished from the office. We agree that usurpation of the offices of the corporation by the respondents may not be established by the pleadings, and that for this reason the action might not lie against the respondents as officers, were that the sole question involved; but the petition in this case clearly charges usurpation and user of the franchises of the corporation, and, as we have pointed out, sufficient acts are set out to indicate that there has been a user and possession of the franchises of the corporation, if not the usurpation and user of the officers themselves. The case of People ex rel. Taylor v. Thompson, supra, heretofore cited, is also instructive on this point.

To concede the contention that men associated for the purposes of usurping corporate functions or powers must be directors or officers, either de facto or de jure, of the corporation, in order to authorize an ouster by proceedings in quo warranto, would be to deny a remedy where, perhaps, none other might be adequate or available. It is clear that quo warranto lies to oust usurpers from the attempted exercise of corporate franchises and powers not granted by the state. Where usurpers set up a pretended corporation where none exists, the remedy is also available, and in the latter case, there being no corporation, clearly they could not be either de facto or de jure officers of such corporation, which has no existence; yet the state doubtless would have the right to oust them from the exercise of the usurped privileges or the franchises of the alleged corporation, and it would be the duty of the state so to do, in order to protect the public against the fraud of the usurpers. Mr. High, in his work on Extraordinary Legal Remedies, at § 655 says: "It is to be borne in mind that the question whether an information will lie in the case of a corporate office is dependent upon the fact of possession or user of the office or franchise, and unless an actual user can be shown, in addition to a claim to the office, the information will not lie."

This we believe to be a clear statement of the situation, as applied to the facts of the case under consideration. It is, in other words, not a question alone of the possession or user of the office, but is a question as to the possession or user

of the franchise, which is both charged and admitted by the pleadings. Therefore, the failure to show user and possession of the office is not necessarily fatal, where there is both user and possession of the franchise. In the light of all that we have had to say in this opinion, we cannot agree that this point now under consideration is well taken.

Appellants also contend that a bond is a prerequisite to the filing of an information. We deem it unnecessary to enter into the discussion of the merits of this question, as we do not believe that appellants can be heard upon this point, because they are not prejudiced by the ruling of the trial court in the matter of the bond, however erroneous such ruling might have been. It is axiomatic that an error without prejudice is always harmless error. See Elliott, App. Proc. § 632. The same author, at § 631, points out that harmless errors are generally such as concern matters of procedure, while errors affecting primary right are generally prejudicial. A primary right is said to be a fundamental right, as contradistinguished from rights which exist by virtue of rules established for the conduct and regulation of matters of procedure. Clearly, the matter of the bond is a matter of procedure, unless by the provisions of the Statute 4th and 5th, William & Mary, requiring a recognizance from the person or persons procuring such information in the penalty of £20, a common-law rule has been established, having force and effect under our practice. It is pointed out by appellees in this connection that the Statute 4th and 5th, William & Mary, chapter 11, referred to, had reference to criminal proceedings, and because of the fact that quo warranto is no longer considered a criminal proceeding, but is to be treated as a civil proceeding, that the Statute 4th and 5th, William & Mary, has no application to the proceeding of quo warranto, as it now exists in this jurisdiction.

Same—failure to require bond.

With this view of the matter we are disposed to agree, and we therefore hold that the failure to require a bond of the relator in a proceeding in an information in the nature of quo warranto, if erroneous, does not amount to prejudicial error, where, after judgment of ouster against the respondents, such judgment is affirmed on appeal.

Appellants further contend that the district court of Bernalillo county was without jurisdiction to try the case, basing their contention in this respect upon the ground that informations in the nature of quo warranto are criminal as to matters of pleading and jurisdiction, for which reason the district court of Luna county alone had jurisdiction of the respondents, or of such of them as resided there. Mr. High, in his work on Extr. Leg. Rem. 3d ed. § 591, says: "The object of the information, as now employed in the courts of England and America, is substantially the same as that of the ancient writ of quo warranto, and, while still retaining its criminal form, it has long since come to be regarded as, in substance, a civil proceeding, instituted by the public prosecutor, upon the relation of private citizens for the determination of purely civil rights."

Same—civil proceeding.

We, therefore, find no merit in the contention that the district court of Bernalillo county was without jurisdiction.

It is also contended that an information in the nature of quo warranto must be drawn with the certainty of an indictment. In this contention, however, appellants are again in error. The rule is thus announced by Spelling 2d ed. Inj. & Extr. Rem. § 1846; "Such actions should in most of the states, be commenced and prosecuted like other civil actions, and are governed in respect to the pleadings by the same rule."

Same—certainty of information.

This author after pointing out the

few jurisdictions which have a different rule, further says: "With these exceptions, it is thought the principles of good pleading will be found to apply to both parties, as in other actions."

Again, this author, in § 1852, says: "Where a number of individuals assume to act as a corporation, an information containing a general denial of their right to do so will be sufficient to put them to their plea of justification."

Likewise, it has been held that a proceeding by information in the nature of quo warranto is usually subject to amendment, it being a civil proceeding, criminal in form only. State ex rel. Atty. Gen. v. Gleason, 12 Fla. 190. We therefore conclude that an information in the nature of quo warranto, while criminal in form, need not be drawn with the certainty required of indictments, but that the principles of good pleading will apply to both parties as ordinary civil actions.

The next proposition submitted for our consideration is that the trial court did not acquire jurisdiction of the person of Luis Huller by any method known to the law. It appears that the trial court overruled motions to quash and a plea to the jurisdiction of the court, which alleged that seven of the respondents were not residents of the state of New Mexico, and had not been served with process, and had not entered their appearances. Six of these individuals, who were respondents, pleaded over with pleas in bar before Luis Huller filed his plea in abatement under a so-called special appearance, setting up that he was a citizen and resident of Mexico, and that process had not been served upon him personally. It is contended that he denied the jurisdiction of the court over his person by a properly verified plea, raising issues of fact which should have been and were not determined. This appellant Luis Huller contends that the plea in bar after the special appearance and plea to the jurisdiction of the person, which was erroneously overruled by the court, and a rule being entered against the pleader to plead in bar, does not waive a plea to the jurisdiction upon appeal, if the pleader is unwillingly forced to plead, and does so, objecting, protesting, and excepting to the order of the court compelling him to plead in bar or stand in default. Other contentions are made which we do not deem it necessary to set out.

By appellees it is contended that anyone who desires to appear specially, for the purpose of objecting to the jurisdiction of the court over his person, must do so without raising any question of jurisdiction over the subject-matter, or any question concerning the cause of action in the complaint or information, or any question which goes to the merits of the action as distinguished from jurisdiction of the person. The rule of common-law pleading is thus set out in 2 Co. Litt. 305: "I. In good order of pleading, a man must plead to the jurisdiction of the court. II. To the person; and therein (1) to the person of the plaintiff and then to the person of the defendant. III. To the count; and IV. To the writ; V. To the action, etc. Which order and form of pleading you shall read in the ancient authors agreeable to the law at this time, and if the defendant misses order in any of these he loseth the benefit of the form."

It appears that Mr. Luis Huller joined in the motion to quash the service, and in a motion to vacate the order of the trial court allowing service upon an alleged agent for service of process, and the motion to quash the information and, in the alternative, to strike it from the files. Each of these appearances was denominated a special appearance; but the question naturally arises as to whether the appearance was, in fact, a general one and not a special appearance. This court, held, in the case of Dailey v. Foster, 17 N. M. 377, 128 Pac. 71, that "whether the appearance is general

Appearance—general or special.

or special is governed by the purpose and object of the appearance. If the appearance be for the purpose of objecting to the jurisdiction of the court, and is confined solely to the question of jurisdiction, then the appearance is special, but any action upon the part of the defendant, except to object to the jurisdiction which recognizes the case as in court, will amount to a general appearance." Citing 3 Cyc. 504.

Under this rule, as heretofore announced, it must be evident that this respondent has entered a general appearance, for by the several appearances, though denominated special, he has brought into question matters other than the jurisdiction of the court. These pleadings are somewhat lengthy and we will not consider them in detail.

We believe the first objection to the position of this respondent is that his several pleadings showed that he raised questions of fact not going to the jurisdiction of the court, the first being that the writ was not served upon the respondent, but upon one Arthur Temke, who was not and never had been a resident agent of the respondent. It was next urged that the writ should be issued in the name of the state of New Mexico, whereas it appears to have been issued upon the order of the court. It was also contended that, by the statute of the state, service of summons must be made by delivering a copy of the process or papers to be served to the defendant, or, in case of the defendant refusing to receive such copy, the service should be made by delivering a copy to some person residing at the usual place of abode of the defendant, and, if such person be not found, then that service should be made by posting copies in some public place on the defendant's premises. These several grounds were set out in a motion to vacate an order allowing service upon the resident agent Temke. The other grounds of the motion attacked the jurisdiction of the court over the cause of action. The same grounds were also urged by the respondent Huller in support of a special appearance and motion to quash service. Subsequently, Huller and others joined in a motion to quash the information or to strike the same from the files, setting out, first, that the court had not authority in law to entertain an information in the nature of quo warranto; that, while an information upon the relation of a private person or corporation cannot be filed without leave of court, no leave was given to file such an information, and that the information is filed under the name of a private relator and not in the name of the state; that the court had no jurisdiction unless the purpose of the proceeding was to inquire into the right or to redress a wrong concerning the state. It was also contended that the leave given to file the information was on behalf of the state, whereas the proceeding was brought by private attorneys without competent authority to represent the state; that the attorney general was without authority to waive the Constitution and give his consent to a private corporation or person to bring suit on the relation of the state, or to delegate his official duties to private parties; that the said information is a different information than that which the petitioner asked leave to file; that the relator asks judgment of ouster against respondents for alleged usurpation of privileges, liberties, and franchises not created or recognized by the state; that the verification was made by one not authorized by law to make the same.

It thus becomes evident that again this respondent raises questions not pertaining to the jurisdiction of the court over the cause of action, and by so doing must necessarily be held to have entered a general appearance in the cause.

This court also held, in the case of Fowler v. Continental Casualty Co. 17 N. M. 188, 124 Pac. 479, that

"when a party moves to set aside a default and judgment upon the ground that the court had no jurisdiction over his person because there has been no valid service of summons, he must carefully occupy that ground exclusively."

Clearly, the respondent, by his motion to vacate the order of the trial court entered on the 16th day of April, 1914, and by his subsequent motion to quash service, set out grounds other than jurisdictional, and must be held to have entered a general appearance in the casue.

Our conclusion in this respect makes it unnecessary for us to consider the point raised by appellee, that this respondent subsequently entered a general appearance by joining in the demurrers and other pleadings filed by his associate respondents.

The relator was given judgment of ouster upon a motion for a judgment on the pleadings, and it is contended that because there were issuable facts to be determined, and because the respondents' pleas constituted a justification, that the court fell into error in granting the prayer of the relator for a judgment on the pleadings. The pleadings in this case cover 200 pages of the record, and it is impossible to thoroughly discuss this contention.

Mr. High, in his work on Extr. Leg. Rem. at § 718, in this connection says: "From the nature of the quo warranto information for the usurpation of an office or franchise, which calls upon the respondent to show by what warrant he exercises the functions of the office, it follows of necessity that non usurpavit, or a simple plea of not guilty, does not constitute a sufficient plea, since it discloses no title to the office, which is the very gist of the controversy."

The same author, at § 661, says: "If, however, the action is instituted against individuals, charging them with usurping the privileges and franchises of a body politic and corporate, it is not a sufficient return by such respondents to show the act of incorporation and that they own a portion of the capital stock of the company, being members thereof, and that as such members, in connection with other members, they have exercised the franchises in question. In such case the returns should also show that the respondents are empowered by the corporation to do the acts in question, and that their action is binding and obligatory upon the corporation itself, since otherwise it is merely their individual action."

At § 716, this author further says: "When the proceedings are instituted for the purpose of testing the title to an office or franchise, the proper course for a respondent is to either disclaim or to justify. If he disclaims all right to the office, the people are at once entitled to judgment as of course. If, upon the other hand, the respondent seeks to justify, he must set out his title specially and distinctly, and it will not suffice that he alleges generally that he was duly elected or appointed to the office, but he must state specifically how he was appointed, and, if appointed to fill a vacancy, caused by the removal of a former incumbent, the particulars of the dismissal as well as of the appointment must appear. The people are not bound to show anything, and the respondent must show on the face of his plea that he has a valid and sufficient title, and, if he fails to exhibit sufficient authority for exercising the functions of the office, the people are entitled to judgment of ouster."

In 32 Cyc. 1454: "Any information in quo warranto is sufficiently answered by a plea which sets out all material facts relative to the questions properly raised by the information; but a plea is insufficient if it contains nothing upon which a material issue can be formed, and in such case judgment may be rendered on the record, without any evidence being introduced."

In 32 Cyc. 1455, is also the following: "To a quo warranto charging an illegal exercise of corporate

franchises, the plea should as a general rule, be either of justification or a disclaimer, and the plea of justification must contain allegations of all such facts as are necessary to show authority for the use of the franchises."

Quo warranto—plea.

With these statements of principle in mind, we turn to an inquiry concerning the propriety of the action of the trial court in sustaining a motion for judgment on the pleadings. Clearly, the question before the trial court was whether the respondent had justified or had failed to do so. All the respondents did not join in the same answers. It appears that respondents admit that there were issued by them some certificates of stock in the name of the relator, that they held a meeting, but that they denied ever having had control of the record, seal, or stock certificate book. They deny that they fraudulently created a seal, record, or stock certificate book, but they fail to set out the facts justifying the validity of their acts in these respects. Generally speaking, respondents seem to largely rely upon the fact that because Luis Huller, now deceased, was at one time the owner of practically all of the stock of relator corporation, and that he died possessed of such stock, which came into the hands of his administrators, that the burden of the responsibility to prove that he had parted with ownership in this stock was shifted to the relator. In this, respondents have lost sight of the fact that the burden rests upon them, at all times, to justify their alleged acts of usurpation. There is no doubt concerning the right of the owner of the stock in any corporation to become registered as such upon the books of the corporation, and to compel such registration if he is entitled thereto. It does not appear that the respondents, or either of them, except Haskell, who was admitted to be the owner of 1,000 shares, were registered as stockholders or that they sought registration. They seemingly elected to issue new shares of stock, under new seal, pursuant to authority of the board of directors organized by them, and to set up a rival corporation thereby, without establishing any claims that they may have had.

The manner in which Luis Huller, deceased, parted with his stock, set up in the pleadings by incorporation therein of two certain contracts entered into by Luis Huller, deceased. These contracts show that Luis Huller, deceased, recognized ownership of the stock in one Sisson, by virtue of the contract of July 6, 1889, and thereafter recognized the title to the same stock by virtue of the contract of February 19, 1890, in one Faurot. The rejoinder of S. Lindauer admits that the contracts in question were entered into, but denies that the said Faurot was the holder of said stock, other than 5,009 shares, as security for sums of money previously loaned and advanced to the said Huller. Appellants or respondents contend that their pleadings specifically set forth the ownership of the shares of stock of the corporation. They say that Luis Huller was the original owner of the shares of stock; that he did not at any time transfer or dispose of such shares of stock so owned by him, and that he died the owner of all of such stock, except the 5,009 shares referred to. They attempt justification upon the ground that Luis Huller, one of the respondents, as administrator and executor, is the owner and holder of such shares of stock originally issued to his father Luis Huller, and that because of these allegations, made under oath, the relator, by its motion for judgment on the pleadings, necessarily admits the truth thereof, and cannot be heard to deny them.

It is to be borne in mind, however, that the pleadings of the relator point out how Luis Huller, Sr., parted with the stock in question under the contracts referred to, and it would seem to be clear that the statement of facts thus brought to the attention of the court would

necessarily require something more than denial to relieve the respondents of their legal duty to justify. It is not enough for the respondents to say that they are the owners of the stock in the corporation, when their stock in question is shown by contracts incorporated in the pleading, to be owned by others and respondents did not meet their full responsibility in the matter by justification of this character. We therefore conclude that the motion of the relator for judgment on the pleadings was properly granted.

It is next urged that the court committed error in not granting the demand of the defendants for a jury trial. There is considerable doubt in our minds as to the right of the respondents to demand a trial by jury in any event, but we are not called upon to enter into the merits of the question, because, even though the right existed, if there is no question of fact to be submitted to the jury, and the court was correct in its ruling on the motion for judgment on the pleadings, the respondents would not be entitled to a jury trial, and cannot be heard to complain of this error assigned.

It is next urged that the appellee in the trial court contended that the proceeding is authorized by the Statute of Anne, for which reason it cannot now be permitted to shift its position and contend for affirmance on any other theory of the pleadings. Having sustained appellee's contention as to the Statute of Anne having application to the facts in this case, this assignment becomes of no consequence.

The concluding portion of the brief of appellants is devoted to a discussion of the charges of conspiracy and of false and fraudulent acts contained in the information. The discussion is general and has application to different assignments of error, which have already been considered and disposed of. It is also argued that the district court, in sustaining relator's motion for judgment on the pleadings, ignored and did not consider matters of record, and judgment was rendered upon consideration of partial pleadings and matters of record in this case only. We have considered the action of the trial court in sustaining the motion for judgment on the pleadings, and have found no error in its action thereupon. We therefore conclude that the judgment of the lower court should be affirmed, and it is so ordered.

Parker, J., concurs.

Roberts, J., dissenting:

In setting forth the reasons for my dissent, I deem it advisable to state the facts more fully than they are set forth in the majority opinion.

On the 16th day of March, 1914, there was filed in the office of the clerk of the district court of Bernalillo county a petition for leave to file information in the nature of quo warranto. The petition was entitled, "In the Matter of the Petition of the Northwestern Colonization & Improvement Company of Chihuahua for Leave to File Information in the Nature of Quo Warranto," and recited: "Comes now the Northwestern Colonization & Improvement Company of Chihuahua and respectfully petitions the court for leave to file information in the nature of quo warranto, and for grounds of petition gives the court to be informed as follows."

It then represents that the action is brought by and with the consent of the Honorable Frank W. Clancy, attorney general of the state of New Mexico; that the Northwestern Colonization & Improvement Company of Chihuahua is a corporation organized under the laws of the territory of New Mexico in 1889, and has since existed as such; that the board of directors and the officers of the corporation are as named therein; that the office of such corporation in the state of New Mexico is in the city of Albuquerque, and, outside of said state, in the Garfield Building, Cleveland, Ohio, and that there is

no other corporation by that name within the state of New Mexico.

The petition then proceeds: "Your petitioner further represents on information and belief that certain persons, to wit, Luis Huller, whom petitioner is informed is a citizen of the republic of Mexico, William J. Cox, a citizen of the state of Texas, S. Lindauer, a citizen of Deming, New Mexico, S. D. Haskell, a citizen of the state of Illinois, Harvey A. Basham, Thomas Fitzhugh Lee, George W. Johnson, and Miguel Grub, citizens of the state of Illinois, all conspiring together with one George R. Pierce, since deceased, undertook to act together, and to exercise corporate functions in the name and pretending to be in behalf of the said Northwestern Colonization Improvement Company of Chihuahua, and said persons, or some of them, caused to be published a notice pretending to be in behalf of petitioner in a newspaper published in the town of Deming, New Mexico, attempting to call a meeting of the stockholders of petitioner for the 14th day of December, 1910, and said parties, or some of them, in pursuance to said notice, together with said Walter D. Hawk and Arthur A. Temke, met at a hotel in the town of Deming, New Mexico, on said date, and pretending or some of them pretending, to be stockholders of petitioner, held a meeting and claim to have elected the said persons, except said Hawk and Temke as directors of said petitioner, and said pretended stockholders at said meeting caused minutes of said meeting to be made and afterwards entered in a book as minutes of the said corporation, and so pretending to be stockholders elected George R. Pierce president, said Luis Huller secretary, of said corporation, and passed a resolution authorizing the directors so pretended to have been elected to meet in the city and republic of Mexico, for the purpose of transacting business as a corporation organized under the laws of New Mexico and in the name of petitioner, and doing other acts in the name of petitioner, and caused to be issued certificate or certificates of stock in the name of petitioner with the name of petitioner engraved thereon, and also caused to be executed certain false statements or certificates appointing Arthur A. Temke the resident agent, upon whom service of summons could be served whenever process may be issued against petitioner, and caused such certificates to be filed with the state Corporation Commission of the state of New Mexico at its public office in the city of Santa Fe, and likewise, assuming to exercise corporate powers in the name of petitioner, caused to be issued certain false and fraudulent power or powers of attorney to Jeorge Vera Estañol, to Burton W. Wilson, and to Romulo Becerra, purporting to authorize said attorneys in fact to appear in certain proceedings pending in the courts of the republic of Mexico, and to represent themselves as attorneys to act for and in behalf of the petitioner, the Northwestern Colonization & Improvement Company of Chihuahua; that the said Walter D. Hawk pretends to represent, without right and without any valid authority, as attorney at law, the Northwestern Colonization & Improvement Company of Chihuahua, by virtue of alleged authority which he received, or pretends to have received, from the said Luis Huller, or from the said other persons, at the meeting so held at the town of Deming, New Mexico, December 14, 1910, or at some other time or place, and has attempted to delegate his said pretended authority to other attorneys at law to act in the name of said corporation."

The petitioner, after setting out the supposed conspiracies, claims, and pretenses of respondents, alleged respondents have usurped said "offices, liberties, privileges, and franchises, and authority" upon said corporation and the state of New Mexico, and have exercised and assumed to exercise them, without being legally authorized so to do, to

the great damage and prejudice of said corporation and the state, and concludes with a prayer by the petitioner, alone, that respondents be required to show cause why leave to file an information in the nature of quo warranto in behalf of said state at the relation of said petitioner should not be granted. The petition was signed by private counsel as attorneys for the petitioner.

An order to show cause was issued upon said petition, which, with a copy of said petition, was personally served in Luna county, upon the respondent Lindauer, and upon Arthur A. Temke as alleged resident agent of the company, under an order of court dated March 16, 1914, directing service so to be made, and directing that such service upon Temke should be sufficient service to bring said respondents, acting as a pretended board of directors of said company, except respondent Lindauer, into court.

Upon the return date of said order to show cause, a demurrer to the sufficiency of the petition for leave to file the information was filed by S. Lindauer and Arthur A. Temke. This demurrer was overruled, and leave granted to file the information on April 16, 1914.

On April 10, 1914, there was filed in the clerk's office of said court a letter from Frank W. Clancy, attorney general, to "Mr. D. J. Cable, Secretary of the Northwestern Colonization & Improvement Company of Chihuahua," purporting to give the consent of said Clancy to the bringing of quo warranto proceedings in the name of the state of New Mexico ex rel. the said company, against Luis Huller and nine others. Upon April 16, 1914, there was filed an information in the nature of quo warranto against the said respondents, substantially in the same form as the petition, except that the same was entitled in the name of the state of New Mexico ex rel. the Northwestern Colonization & Improvement Company, and usurpations were alleged to have been upon the state alone. The word "office" was omitted, and the verification was made by James R. Garfield, as vice president of the relator.

Thereupon, on the same day, an order or citation entitled in the same form as said information and as a summons, and reciting the filing of said information, issued out of said district court, addressed to the said respondents, and commanding them under penalty of the law and pain of judgment to appear at 10 o'clock, A. M., on June 1, 1914, before said district court, there to answer said information; which said order had the seal of said court impressed thereon, and was signed, "H. F. Raynolds, District Judge, etc."

An order for service was indorsed on said last-named order, reciting that, as it appears Arthur A. Temke has been appointed by respondents their resident agent for service of process, "it is ordered that service of this summons be served upon said Arthur A. Temke, and shall be service upon the respondents (naming them). H. F. Raynolds, District Judge, etc." And service was thereupon had on Temke and Lindauer in Luna county.

In response to such service, the respondents, other than said Lindauer, appearing specially for that purpose, or at least attempting to do so, filed their motions respectively: (1) To quash the return of the sheriff of Luna county upon said order or citation and vacate the order authorizing such service on said Temke; (2) to quash said information or strike the same from the files of the court; and (3) to vacate the order indorsed on said citation; and the said Lindauer, also appearing specially for that purpose, filed his plea to the jurisdiction of the court and a plea in abatement of said citation or summons, all of which motions and pleas were overruled by the court. Thereafter various demurrers and pleas were filed by the respondents, some on jurisdictional grounds and others to the merits, to which the relator filed replications. Demurrers were filed by respondents to the replications or, at least,

by some of the respondents, which were overruled and thereupon rejoinders were filed. To the rejoinders the relator filed a paper denominated a surrejoinder, setting up as exhibits two certain contracts, and praying that the court construe the same. There were so many different pleadings, demurrers, motions, etc., filed in the case by the various parties, that it would unduly lengthen this statement of facts to give in detail the history of the pleadings. It will suffice to say that down to and including the filing of the rebutter, the respondents arranged themselves as follows: (a) The respondent Haskell stood upon the demurrer to the original information in the nature of quo warranto, and refused to further plead; (b) the respondent Johnson stood upon the demurrer to the replication and his motions for judgment upon the pleadings, and refused to further plead: (c) the other respondents filed pleas down to and including their rejoinders.

The cause was set down for trial on June 1, 1915, upon which date, or shortly thereafter, the relator elected to file a motion for judgment upon the pleadings, which motion was sustained, and final judgment of ouster was entered thereon upon the pleadings filed by the relator, for and in behalf of the state of New Mexico, from which judgment of ouster the respondents prayed this appeal.

The first question with which we are confronted is the action of the court in overruling the motions interposed by certain of the respondents, to quash service. That the method employed in obtaining service upon the nonresident respondents was illegal and void hardly requires discussion. The relator was proceeding against the respondents as individuals, and alleged that they were not directors of the corporation and had no connection therewith, but were usurpers and intruders. In view of these allegations and of the relief sought, it could hardly be contended that the service of summons upon an individual, designated by these alleged usurpers as resident agent of the corporation, for the purpose of accepting service upon the corporation and the directors and officers of the corporation, as such, would be effectual to bring the individuals legally before a court in an action of this kind.

Sections 932 and 934, Code 1915, which require a corporation to designate a resident agent upon whom process against the corporation may be served, and which provide: "And whenever by the provisions of any law of this state notice is required to be given to the corporation, its officers, stockholders or directors, such notice shall be sent by mail or otherwise, as the law may require, to such registered office, and such notice so given shall be deemed sufficient notice," do not authorize service of process upon a supposed agent, alleged to have been designated as such by parties who have usurped and intruded into the offices of directors of such corporation, or to have usurped franchises of the corporation, in an action by information in the nature of quo warranto against such individuals, to oust them from the exercise of such offices and franchises. Indeed, these sections provide no warrant whatever for the service of process upon individuals who may be directors of a corporation, and, as such, have designated an agent of the corporation upon whom service of process against the corporation may be had, where the action is against such directors or other officers of the corporation in their individual capacities, and not as directors or officers of the corporation.

Appellee contends, however, that if the service should be defective, that appellants have entered a general appearance in the case, and that they are bound by the judgment.

Appellants admit that as to all of the respondents save Huller the appearance was general, or, to say the least, they do not contend that the

remaining respondents have not generally appeared. It is strenuously insisted, however, that the court never acquired jurisdiction over Luis Huller, and while I am inclined to agree with this contention, I shall not discuss the question at length. Huller, with others, filed, first, a motion to quash the return of the sheriff; second, a motion to vacate the order made April 16, 1914, allowing service upon Temke to be service upon respondents; and, third, a motion to quash the information or, in the alternative, to strike it from the files.

In these various motions two questions were raised: First, jurisdiction of the court over the subject-matter; and, second, jurisdiction over the person. The rule of pleading at common law and the orders in which the pleas may be made are: (1) To the jurisdiction of the court. (2) To the persons: (a) Of plaintiff; (b) of defendant. (3) To the count. (4) To the writ therein: (a) To the form of a writ; (b) to the action of a writ. (5) To the action itself in bar thereof.

By this order of pleading each subsequent plea admits the former; as, when the defendant pleads to the person, he admits the jurisdiction of the court. When he pleads to the count, he admits the competency of the plaintiff and his responsibility. When he pleads to the form of the writ, he admits the form of the count and, in like manner, of the rest. 1 Tidd, Pr. 630.

Here, Huller joined in the same plea questions relating to the jurisdiction of the court over the subject-matter and jurisdiction over the person. By so doing he doubtless waived the question of jurisdiction of the court over the subject of the action, but I do not believe that it can be maintained, with any degree of logic, that he waived the question of jurisdiction of the person.

Nor did he waive this jurisdictional question by pleading to the merits when forced to do so by the overruling of his jurisdictional pleas. This question is settled by decisions of the Supreme Court of the United States. See Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Before giving consideration to what I deem the decisive question in this case, it is necessary to determine the nature and purpose of this proceeding. In the district court, appellee insisted that the action was instituted under the provisions of 9th Anne, chapter 20, which has been held to be a part of the common law adopted in this jurisdiction by § 1354, Code 1915. While cognizant of the fact that many of the state courts have held that this statute was no part of the common law of England, and was not a part of the law of such states, by virtue of the adoption by such states of the common law of England as the rule of practice and decision, still the rule has been so long established and so consistently adhered to in this state that it would be unwise, at this late date, to enter upon a reinvestigation of the question. Hence, I shall accept the repeated declarations of both the territorial and state supreme courts, that such statute is a part of the common law adopted by the statute above referred to as settled law.

By 9 Anne, chap. 20, § 4, it is enacted "that . . . in case any person or persons shall usurp, intrude into, or unlawfully hold and execute [the offices of mayors, bailiffs, portreeves, or other offices within cities, towns corporate, boroughs, or places in England or Wales, or into the franchises of being burgesses or freemen of such cities, towns corporate, boroughs or places] it shall and may be lawful to and for the proper officer [of the court of Queen's bench, the courts of sessions of counties palatine, or the court of grand sessions in Wales], with the leave of the said courts respectively, to ex-

hibit one or more information or informations in the nature of a quo warranto, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons, so usurping, intruding into, or unlawfully holding and executing any of the said offices, or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a quo warranto; and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises; and such person or persons, against whom such information or informations in the nature of a quo warranto shall be sued or prosecuted, shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed, shall give further time to such person or persons, against whom such information shall be exhibited, to plead; and such person or persons, who shall sue or prosecute such information or informations in the nature of a quo warranto, shall proceed thereupon with the most convenient speed that may be."

And it is further enacted (§ 5) "that . . . in case any person or persons, against whom any information or informations in the nature of a quo warranto shall in any of the said cases be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices, or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of ouster against such person or persons, of and from any of the said offices and franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts respectively, to give judgment that the relator or relators in such information named shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they, for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators; such costs to be levied by capias ad satisfaciendum, fieri facias, or elegit."

A writ of quo warranto was in the nature of a writ of right for the King, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim in order to determine the right. Little is known of its origin, but that it was employed in the English courts centuries ago is not to be doubted, because in the earliest English Reports we find cases wherein it was employed and the right was not questioned. Likewise, there is no historical certainty as to the origin of the remedy by information in the nature of quo warranto. That the writ was employed long prior to the Statute of Anne is not doubted. Such an action, however, was always, I believe, instituted by the Crown attorney or on his relation, and a private relator was never admitted to institute the suit. That the procedure was different in many respects between the common-law action by information in the nature of quo warranto and the procedure under the Statute of Anne is not subject to question. The former, as stated, was always instituted by the Crown attorney, and this without leave of court, and as a matter of right; the latter could only be filed by leave of court first had and obtained. A private relator was un-

known in the former proceedings, had no control over the cause, and if his name was added it was regarded as surplusage.

Prior to the Statute of Anne, the information in the nature of quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation upon the franchises or liberties granted by the Crown, and it was never used as a remedy for private citizens, desiring to test the title of persons claiming to exercise a public franchise. And although such informations were exhibited by the King's attorney general long before the enactment of the statute, yet the remedy thereby given was never enlarged beyond the limits prescribed for the original writ of quo warranto, which extended only to encroachments upon the royal prerogative. High, Extr. Leg. Rem. § 602. The employment of the information in the nature of quo warranto, as a means of investigating and determining civil rights between parties, was unknown prior to the Statute of Anne.

The usurpation of a right or franchise upon the Crown concerned the Crown alone, and whether the party so usurping should be ousted or permitted to continue and enjoy the franchise was a matter resting solely with the King; hence, a private individual was never permitted to interfere or intrude in such matters as concerned the King alone. Whether the suit should be filed to oust such person from such franchise, or claimed right, rested solely with the Crown attorney, and leave of the court was never required.

Notwithstanding the fact that relator framed its pleadings and proceeded in the trial court upon the theory that the action was instituted under the provisions of the Statute of Anne, and counsel so stated to the trial court, it is here contended that this court should uphold the action of the trial court, upon the theory that the suit was instituted by the attorney general, upon his own relation, for the purpose of ousting respondents from the exercise of franchises and privileges which they are usurping upon the state, and that we should disregard the relator named in the proceedings, and sustain the judgment of ouster. Hence, the first question to be determined is whether the petitioner should be held to the theory of the case adopted in the court below. That we must do so is readily apparent, unless this case comes within the exception to the general and well-established rule that the case, on appeal, must be decided on the same theory on which it was tried in the court below. 2 R. C. L. p. 183; 4 C. J. pp. 661, 662; Cadwell v. Higginbotham, 20 N. M. 482, 151 Pac. 315. The exception to the rule is thus stated in 4 C. J. 662; "But, as shown, there are exceptions and limitations to this rule, and it is clear that the appellate court is not necessarily restricted to the theory on which the lower court proceeded, but may review any error apparent on the record, and base its affirmance or reversal on a different theory or on different grounds, provided the question involved was properly before the lower court."

Here, the relator refuses to definitely plant its feet upon either theory. It neither takes the position that the proceeding was instituted under the Statute of Anne nor under the common-law proceeding by quo warranto, or information in the nature of quo warranto. It says: "If the proceeding could not be instituted under the Statute of Anne, it could under the common-law writ of quo warranto, or information in the nature of quo warranto; if the relator named could not be a relator, or if the proceeding could not be instituted by a private relator, disregard the relator and treat the naming of the one as surplusage, and sustain the judgment upon the theory that the cause was instituted by the attorney general on behalf of the state."

The manifest infirmity of this contention is that the proceeding was not instituted by the attorney

general on behalf of the state, or on his relation, but was instituted by a private relator, with his consent. This consent first appears by a letter filed in the district clerk's office, written by the attorney general to private counsel of the relator, in which he consents that the suit may be instituted on behalf of a private relator by the state, and permits the use of his name and the name of the state. This was necessary in a proceeding under the Statute of Anne.

Again, from a perusal of the petition, it is apparent that relator is endeavoring to test the right of the respondents to usurp franchises and rights claimed by private parties, viz., the right of the "old board of directors" to exercise the rights and privileges claimed to be usurped and exercised by the respondents.

Assuming that the exercise, without right, of offices within a corporation, and the doing of acts affecting the rights of a corporation, or of its lawful board of directors, without right or authority, would be the usurpation of a franchise upon the state, it is clear that the state could proceed to reclaim these usurped franchises and rights, or refuse to do so, at its election and option. Private parties could not proceed in its name, or on relation, to reclaim them for the state, save under the provisions of the Statute of Anne, or in some other mode authorized by statute.

The attorney general did not, in this proceeding, attempt to reclaim them for the state. He did not, in his discretion, elect to institute the action. He merely gave his consent, as the law officer of the state, that the relator might institute the proceeding, and this the relator did, by leave of the court first had and obtained. It would present an anomalous situation if a private relator could obtain the consent of the attorney general to the institution of proceedings by information in the nature of quo warranto, upon the theory that he was interested in the supposed usurpation of an office or franchise within a corporation, and, when his lack of interest appeared, still sustain the proceeding upon the theory that, because the attorney general gave his consent to the institution of the proceedings, the court should treat it as though it were a suit instituted by the state, or on relation of the attorney general, and proceed to oust the intruders from the usurpation of a franchise, which the state might have been willing to condone or overlook.

In the trial court, respondents insisted from their first appearance that the cause could not be instituted or conducted under the Statute of Anne; that such statute had no application. This question was raised by demurrers, motions, and the pleadings in the case, but, despite their objections, they were held strictly to the rule of procedure under the statute and, upon the theory that this statute applied, judgment of ouster was rendered upon the pleadings. It will be manifestly unfair to permit relator or the state to shift its position in this court, and to uphold the judgment, upon the theory that the cause was instituted by the state, or by the state upon the relation of its attorney general, to oust the respondents from the usurpation of a franchise upon the state, when such was clearly not the case, and the state was not the moving party, but only consenting to the litigation of private rights affecting a corporation which it had created, or the right to exercise offices and franchises within such corporation.

An apt illustration of the injustice of such a holding is illustrated by the following example: Suppose that A is exercising the duties of state auditor, either lawfully or without right; B secures the consent of the attorney general that he may institute proceedings by information in the nature of quo warranto to test his right to the office. B files the suit and, upon issue joined, it appears that he has no in-

terest whatever in the office, and is not even a citizen of the state. Could and would the court proceed with the cause, and oust the incumbent, upon the theory that the cause was instituted by the state, or by the state on the relation of the attorney general? Assuredly not.

Because of the foregoing considerations I believe that relator is bound by the theory of the case in the court below, and shall therefore proceed to a consideration of the same upon the merits, and treat the suit as having been instituted under the provisions of the Statute of Anne.

In this case, very able, learned, and elaborate briefs have been presented by counsel on both sides, discussing many questions raised by the appellants. To consider and decide all the questions thus presented would require an unwarranted expenditure of time, research, and labor, because in this jurisdiction, unfortunately, we have no legislative enactment regulating the employment of the writ of quo warranto or the information in the nature of a writ of quo warranto; hence, are relegated to the practice and procedure under the common law of England, assuming, necessarily, that the Statute of Anne was a part of the common law of the jurisdiction adopted here, as stated. Practically all of the American states have enacted statutes upon the subject, many of them of different import, and providing a different rule of procedure; hence, the decisions of the state courts of this country fail to render much assistance to a jurisdiction where the procedure is still under the common law. Many of the questions presented are novel and of first impression.

The first question which I shall consider is whether a corporation can act as a relator, in a proceeding by information in the nature of quo warranto, to test the right of named individuals to act as its officers and directors, or in its name to exercise franchises and rights which could be exercised by them were they de facto or de jure officers of such corporation. Appellants state the proposition thus: "A corporation cannot act as a relator in information in the nature of quo warranto;" but I think this question is a much narrower question than as thus stated.

While the appellee insists here that no question of office in the corporation is involved, and, by a skilfully worded petition, has sought to evade raising an issue as to the right to office within the corporation, still the acts and doings charged against the respondents would have been legal and valid, and within their power, were such acts done by them as officers of the corporation in fact. Hence, the issue in this case, as probably it would be in every like case, was as to whether the respondents were de jure officers of the corporation. It is true the court held that the various pleadings filed by them failed to establish their title to the offices, but that could have no effect upon the primary question as to the right of the corporation itself to be the relator in such a proceeding. For, if it be conceded that a corporation could be a relator in an action to determine rival claims to its directorate,—the agency through which it acts, and the very agency which puts it in as such a relator,—until it should appear from the pleadings that the respondents were officers de jure, then, logically, we would be required to go but a step further, and hold that it could act as relator in such a case until it appeared from the evidence that the respondents had established their title to the offices, or the right to perform the functions, or execute the franchises which they were charged with usurping. This would mean, necessarily, that a corporation could in all cases act as a relator in such instances; for, when the evidence disclosed respondents' title, the case would be ripe for judgment or subject to dismissal,

and a judgment for respondents would leave no relator in the case. In such a case, assuming that the respondents were the de facto or de jure directors of the corporation, the relator would be put into the case, as such relator, by the act of a pretended board of directors, which the court would be compelled to hold were not, in fact, either de jure or de facto directors; hence, the act of the board in putting it in would not be the act of the corporation, and would in no sense be binding upon the corporation. Therefore, two very important essentials would be lacking, viz., there would be no informer, and no one responsible for costs.

I have found no reported case, and none has been cited by counsel on either side, where a corporation was put in as a relator in such a case as the one now before us for consideration. Appellants assert that no case is to be found, either in England or America, where a corporation has been permitted to act as a common informer, or as a relator, in a quo warranto proceeding. Appellee has cited us to the case of Beverly v. Hattiesburg, 83 Miss. 621, 36 So. 74, wherein the right of the city to act as a relator in a quo warranto proceeding against a police captain or some minor city official was upheld. In that case the court says: "The relator in such proceeding need not necessarily be an individual. A municipal corporation empowered to sue and liable to be sued may be the relator, and, in the case before us, ought to be."

Whether the decision was influenced by a local statute does not appear, but certainly such a case stands on quite a different footing from the present one.

Further citation is made to the case of State ex rel. Kansas City v. East Fifth Street R. Co. 140 Mo. 539, 38 L.R.A. 218, 62 Am. St. Rep. 742, 41 S. W. 955; in which case the city sought to forfeit the franchise of a railway company. The court said: A suit to enforce such forfeiture might be maintained by the municipality, and in its name the state may maintain quo warranto to enforce such forfeiture.

Other cases cited of similar import are State ex rel. Jones v. Light & Development Co. 246 Mo. 619, 152 S. W. 67; Olathe v. Missouri & K. Interurban R. Co. 78 Kan. 193, 96 Pac. 42; State ex rel. Vilter Mfg. Co. v. Milwaukee B. & L. G. R. Co. 116 Wis. 142, 92 N. W. 546; and State ex rel. Green Bay Gas & E. Co. v. Minahan Bldg. Co. 141 Wis. 400, 123 N. W. 258.

The influence of local statutory enactments upon the above-cited cases is not readily ascertainable; but even assuming that they were not influenced thereby, and that such states still adhere to the common-law rule of practice and decision in such cases, they afford no precedents for sustaining the right of a corporation to act as a relator in a suit to test the right of persons to exercise corporate functions in its name and behalf, where the right of the corporation to act as a relator is dependent upon whether such parties are rightly assuming to act for it; in other words, where the right of the officers of the corporation to name it as a relator depended upon the determination of the issues which are presented, or which may be presented, in the quo warranto proceedings which it institutes.

The present case is like unto a case wherein a city council might put the city in as a relator in a quo warranto proceeding to determine the question as to whether the city council, so directing the city to appear as relator, was the de jure council, or whether others usurping the offices and pretending to act for the city were councilmen.

Appellee argues, however, that because the information filed by relator shows that respondents were not in office as directors of the company, and were mere pretenders to such offices, and because it shows that such respondents were without right, using a spurious seal of the

company, and likewise a spurious minute book, and were pretending, without right, to represent the corporation, the information, with the corporation as a relator, was proper, and the majority opinion so holds.

While I entertain grave doubt as to the correctness of the majority rule in the United States to the effect that an information in the nature of quo warranto is the proper remedy to try title to offices in private corporations, in the absence of a statute extending the remedy to such offices, and am inclined to believe that the Massachusetts doctrine is the correct one under the Statute of Anne (Goddard v. Smithett, 3 Gray, 116; Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080), still, if we proceed upon the assumption that the majority holding is the correct doctrine, the majority opinion in this case, in my judgment, is unsound. It holds, if I correctly understand the language, that a corporation is a proper relator in a case brought to determine the right of certain individuals to exercise "privileges and franchises in the corporation," and proceeds upon the assumption that if an individual holds himself out to the public as an officer or agent of the corporation, and, as such, pretends to transact business in the name of the corporation, without any right or authority whatever, that he is exercising a franchise of the corporation, and in which event an information may be filed by the corporation as a relator to inquire by what right he does so. This statement of the law is inaccurate, as I shall attempt to show. In the first place, under the law, rights and privileges within the corporation can only be exercised by either de jure or de facto officers or agents of the corporation. In other words, before an act may be done on behalf of the corporation which binds it, it must be done by the officers possessed of authority to do the act. Here it is charged that the pretended board of directors elected at Deming filed a certificate appointing a resident agent; that it adopted a corporate seal for the corporation; that it appointed attorneys to represent it in the republic of Mexico, and did other like acts. These acts could only be done by the directors of the company, and, in order to be a director, the person pretending to act as such must be in possession of the office. If the acts in question were done by individuals not in possession of the offices through which only the acts could be lawfully done, the corporation would not be bound thereby, and no person would be in position to claim or assert any rights growing out of such action. There cannot be two individuals in possession of the same office at the same time, where, by law, only one individual can fill the office. Mechem, Pub. Off. §§ 322 and 323. This being true, if the Deming board of directors was in possession of the offices, as such, necessarily the claimed Ohio directors were out of office, and had no power to act for the corporation as such in any manner. This claimed board, therefore, would have no power to put the corporation in as a relator in this case. If the Ohio board had possession of the offices of directors at the time the suit was instituted, most undoubtedly the information would not lie, because, if they were so possessed of the offices of directors, necessarily this board was in possession and control of all the rights, privileges, and franchises of the corporation, and they could not bring an information in the nature of quo warranto against the Deming crowd, for the purpose of testing their right to exercise the franchises of the corporation, which the Deming crowd did not enjoy or possess. The majority opinion proceeds upon the assumption that there may be usurpation of the franchises, as distinguished from the office, and cites as authority for this view, Atty. Gen. v. Superior & St. C. R. Co. 93 Wis. 604, 67 N. W. 1138, and People ex rel. Taylor v.

Thompson, 16 Wend. 655. I have read both of these opinions with care, but failed to find a single word in either case supporting any such contention. I do not believe authority can be found, and certainly none is cited in the majority opinion, supporting such view. Bouvier, vol. 2, p. 1299, defines a franchise as follows: "A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right."

The author quotes Kent's definition, which is: "A certain privilege conferred by grant from government and vested in individuals."

And also gives Blackstone's definition, which is: "A royal privilege or branch of the King's prerogative subsisting in the hands of a subject."

Nor is there support for the majority opinion in the Statute of Anne, and certainly the position taken to be sound must find its support in this statute. In that statute it is said "that . . . in case any person or persons shall usurp, intrude into, or unlawfully hold and execute [the offices of mayors, bailiffs, portreeves, or other offices within cities, towns corporate, boroughs, or places in England or Wales, or into the franchises of being burgesses or freemen of such cities, towns corporate]" etc., in which cases only the information may be filed. Without thorough investigation I take it that the franchise of being a freeman of a city refers to being an inhabitant of such city or town, or possibly it meant a freeholder as distinguished from a villain. A burgess was an inhabitant of the town; a freeman; one legally admitted as a member of the corporation; a qualified voter; a representative in parliament of a town or borough. Bouvier's Law Dict. 404. Regardless, however, of which definition we may accept as the correct one, under the Statute of Anne it will be seen that the right to exhibit the information in the nature of quo warranto, in so far as franchises were concerned, was limited to two instances, viz., the franchises of being burgesses or freemen "of such cities, towns corporate, boroughs or places," and if it be assumed that a person may exercise a franchise within a corporation without being in possession of the offices through which the franchises may be lawfully exercised, still an information in the nature of quo warranto would not lie, because it is not given by the Statute of Anne, under which the authority is derived. The reason given in the majority opinion, quoting therefrom, is: "To concede the contention that men associated for the purpose of usurping corporate functions or powers must be directors or officers, either de facto or de jure, of the corporation, in order to authorize an ouster by proceedings in quo warranto, would be to deny a remedy where perhaps none other might be adequate or available."

The mere statement of this proposition carries with it, in my judgment, its own answer. An information in the nature of quo warranto is a proceeding at law, and if it does not provide an adequate remedy for a wrong, equity will afford the remedy. It is clear in my mind that in this case injunction was the proper remedy. According to the allegations of the petition, the respondents were intermeddling with the affairs of the corporation; they were issuing spurious powers of attorney and certificates, and doing other acts which might tend to embarrass the corporation, and all such acts were being done without right or color of authority, to restrain which equity would extend its aid. Certainly, if there was a remedy at law a court of equity would not assume jurisdiction.

As illustrative of my contention, suppose, for example, that John Smith was the legal, qualified, and acting clerk of the district court of Santa Fe county, and in full possession of the office; that Peter Roe would set himself up in some office,

rented or occupied outside the courthouse, and should hold out to the public that he was the clerk of the district court, and should proceed to issue summons, warrants, and other process; would it be contended for a moment that John Smith could institute proceedings by information in the nature of quo warranto to test out the right of Peter Roe to continue to so exercise such rights and privileges. Most assuredly not. John Smith's remedy would be by injunction.

For these reasons, I cannot give my assent to the majority opinion; and, while dissenting upon these grounds, I do not desire to be understood as concurring in the views expressed in the majority opinion upon points which I have not discussed.

Petition for rehearing denied November 12, 1917.

Petition for writ of certiorari denied by the Supreme Court of the United States March 25, 1918, in 246 U. S. 667, 62 L. ed. 929, 38 Sup. Ct. Rep. 336.

Writ of error dismissed by the Supreme Court of the United States, May 6, 1918, in 247 U. S. 503, 62 L. ed. 1239, 38 Sup. Ct. Rep. 426.

ANNOTATION.

Right of corporation to act as relator in information in the nature of quo warranto.

A search has failed to disclose the existence of any other decision upon the question whether a private corporation may be the relator in an information in the nature of quo warranto, to test the right of persons assuming to act as its directors.

There are, however, cases holding that the relator in such a proceeding need not be an individual. Thus, in Olathe v. Missouri & K. Interurban R. Co. (1908) 78 Kan. 193, 96 Pac. 43, it was held that a municipal corporation is a "person," within the meaning of a statute authorizing a proceeding in quo warranto to be prosecuted by "a person . . . claiming any interest adverse to the franchise . . . or grant which is the subject of the action;" and, accordingly, that a municipal corporation might institute such a proceeding to forfeit the rights granted by ordinance to an interurban railway company, to operate its road in certain streets of the city, because of the abuse or nonuser of the rights granted.

And in Beverly v. Hattiesburg (1903) 83 Miss. 621, 36 So. 74, it was held that a municipal corporation, empowered to sue and liable to be sued, may be the relator in a quo warranto proceeding to oust an intruder who has usurped the office of policeman.

So, in Kansas City v. Sullivan (1910) 83 Kan. 406, 111 Pac. 482, it was held that, under Civil Code Procedure, §§ 680, 681 (Gen. Stat. 1909, §§ 6276, 6277), giving the right to sue in quo warranto, and prescribing in whose name the action may be brought, the mayor and commissioners of a city which has adopted the commission form of government may bring quo warranto to oust members of a board of park commissioners from exercising powers claimed to devolve upon the relator, by virtue of the statute providing for the commission form of government.

In State ex rel. Kansas City v. East Fifth Street R. Co. (1897) 140 Mo. 539, 38 L.R.A. 218, 62 Am. St. Rep. 742, 41 S. W. 955, the right of a municipal coporation to act as relator, in a quo warranto proceeding to oust a street railway company of its corporate franchise, under a statute expressly providing that if any person usurps or unlawfully holds any franchise the attorney general or prosecuting attorney shall exhibit to the court an information in the nature of a quo warranto "upon the relation of any

persons desiring to prosecute the same," seems not to have been questioned.

And in State ex rel. Jones v. Light & Development Co. (1912) 246 Mo. 618, 152 S. W. 67, the foregoing case was held conclusive of the right of a municipal corporation to appear as relator, in a proceeding to oust a corporation of a public lighting franchise.

It has also been held that a public utility corporation is a "private party" within the meaning of a statute authorizing an action of quo warranto on the complaint of any "private party." State ex rel. Green Bay Gas & E. Co. v. Minahan Bldg. Co. (1910) 141 Wis. 400, 123 N. E. 258.

The reader may be interested to know that it is settled law that the right of a person assuming to act as an officer or director of a private corporation may be tested upon the relation of anyone having a direct interest in the affairs of the corporation (Com. v. Union F. & M. Ins. Co. (1809) 5 Mass. 230, 4 Am. Dec. 50), such as another director (Place v. People (1899) 83 Ill. App. 84), or a stockholder (People ex rel. Matthiessen v. Lihme (1915) 193 Ill. App. 341, affirmed in (1915) 269 Ill. 351, 109 N. E. 1051, Ann. Cas. 1916E, 959; Com. ex rel. Morris v. Stevens (1895) 168 Pa. 582, 32 Atl. 111; Com. ex rel. Lauffer v. Stevenson (1901) 200 Pa. 509, 50 Atl. 91; State ex rel. Mitchell v. Horan (1900) 22 Wash. 197, 60 Pac. 135). E. S. O.

CITY OF ELKINS, Appt.,

v.

WESTERN MARYLAND RAILWAY COMPANY.

West Virginia Supreme Court of Appeals—October 12, 1915.

(76 W. Va. 733, 86 S. E. 762.)

Railroad — crossing — failure to stop — negligence.

It is not negligence per se in all cases for travelers upon a public street or road, on approaching a railroad crossing, not to stop, as well as to look and listen before attempting to cross the track. Whether one has been negligent in failing to stop is generally presented as a mixed question of law and fact to be submitted to the jury, and not as one of law for the judgment of the court.

[See note on this question beginning on page 203.]

Headnote by MILLER, J.

APPEAL by plaintiff from a judgment of the Circuit Court for Randolph County in defendant's favor in an action brought to recover the value of a horse belonging to plaintiff, alleged to have been negligently run over and killed by one of defendant's engines in charge of its servants. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **R. H. Allen** and **F. E. Tallman**, for appellant:

A traveler on the highway is bound to exercise the reasonable care and caution of a prudent man, and it is left for the jury to say in each case whether or not he has done so. Both the carrier and the traveler are charged with the duty of using reasonable care, and, if the circumstances of a case are such as to demand greater caution, both must observe it.

Beyel v. Newport News & M. Valley R. Co. 34 W. Va. 538, 12 S. E. 532; Norfolk & W. R. Co. v. Burge, 84 Va. 63, 4 S. E. 21; Atlantic & D. R. Co. v.

Reiger, 95 Va. 418, 28 S. E. 590; Norfolk & P. R. Co. v. Ormsby, 27 Gratt. 455; Nuzum v. Pittsburgh, C. & St. L. R. Co. 30 W. Va. 228, 4 S. E. 242; Meeks v. Ohio River R. Co. 52 W. Va. 99, 43 S. E. 118; Virginia Midland R. Co. v. White, 84 Va. 498, 10 Am. St. Rep. 874, 5 S. E. 573; Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542, 7 Am. Neg. Cas. 345; Berkeley v. Chesapeake & O. R. Co. 43 W. Va. 11, 26 S. E. 349; Southern R. Co. v. Bryant, 95 Va. 212, 28 S. E. 183; Southern R. Co. v. Aldridge, 101 Va. 142, 43 S. E. 333; Melton v. Chesapeake & O. R. Co. 71 W. Va. 701, 78 S. E. 369; Bassford v. Pittsburgh, C. C. & St. L. R. Co. 70 W. Va. 280, 73 S. E. 926; Schoonover v. Baltimore & O. R. Co. 69 W. Va. 560, L.R.A. 1917F, 1, 73 S. E. 266, Ann. Cas. 1913B, 964; Riedel v. Wheeling Traction Co. 69 W. Va. 18, 71 S. E. 174; Bowles v. Chesapeake & O. R. Co. 61 W. Va. 272, 57 S. E. 131; Atlantic Coast Line R. Co. v. Grubbs, 113 Va. 214, 74 S. E. 144; Young v. West Virginia & P. R. Co. 44 W. Va. 218, 28 S. E. 932; Shepard v. Norfolk & S. R. Co. 166 N. C. 539, 82 S. E. 872; Cooper v. North Carolina R. Co. 140 N. C. 209, 3 L.R.A. (N.S.) 391, 52 S. E. 932, 6 Ann. Cas. 71; Malott v Hawkins, 159 Ind. 127, 63 N. E. 308; 2 Thomp. Neg. §§ 1645, 1649, 1654; Kimball v. Friend, 95 Va. 125, 27 S. E. 901.

Mr. **E. A. Bowers**, for appellee:

It is the traveler's duty to listen for signals and look attentively up and down the track, and the traveler must even come to a halt for this purpose; his failure is negligence per se.

Beach, Contrib. Neg. 2d ed. § 180; Beyel v Newport News & M. Valley R. Co. 34 W. Va. 541, 12 S. E. 532; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; North Pennsylvania R. Co. v. Heileman, 49 Pa. 60, 88 Am. Dec. 482; Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Carnefix v. Kanawha & M. R. Co. 73 W. Va. 534, 82 S. E. 219.

In proportion as the danger is increased, the vigilance of the person who attempts to cross must be increased; and at an obstructed crossing it is duty of traveler to exercise a greater degree of care and caution than is incumbent upon him usually.

Beach, Contrib. Neg. 2d ed. § 196; Southern R. Co. v. Hansbrough, 107 Va. 733, 60 S. E. 58; Beyel v. Newport News & M. Valley R. Co. 34 W. Va. 538, 12 S. E. 532.

Failure to give the statutory warnings will render the railroad liable for any injury, only where such failure is the sole proximate cause, and where injured party is without fault.

3 Elliott, Railroads, § 1153; Southern R. Co. v. Hansbrough, 107 Va. 733, 60 S. E. 58; Beyel v. Newport News & M. Valley R. Co. 34 W. Va. 538, 12 S. E. 532; Butcher v. West Virginia & P. R. Co. 37 W. Va. 180, 18 L.R.A. 519, 16 S. E. 457; Berkeley v. Chesapeake & O. R. Co. 43 W. Va. 11, 26 S. E. 349; 2 Shearm. & Redf. Neg. § 482; Southern R. Co. v. Daves, 108 Va. 378, 61 S. E. 748.

No recovery can be had by a traveler where his negligence in any degree contributed to the injury received at a public crossing, unless defendant, being aware of plaintiff's danger and having the opportunity to avert it, fails to use ordinary caution.

Butcher v. West Virginia & P. R. Co. 37 W. Va. 180, 18 L.R.A. 519, 16 S. E. 457; Schoonover v. Baltimore & O. R. Co. 69 W. Va. 560, L.R.A.1917F, 1, 73 S. E. 266, Ann. Cas. 1913B, 964; Phillips v. Ritchie County, 31 W. Va. 478, 7 S. E. 427.

Where the fault of a traveler and of a railroad company appear from plaintiff's evidence to be mutual, plaintiff cannot recover.

Butcher v. West Virginia & P. R. Co. 37 W. Va. 180, 18 L.R.A. 519, 16 S. E. 457; Gerity v. Haley, 29 W. Va. 98, 11 S. E. 901; Beyel v. Newport News & M. Valley R. Co. 34 W. Va. 544, 12 S. E. 532; Richmond & D. R. Co. v. Morris, 31 Gratt. 200, 7 Am. Neg. Cas. 5; Richmond & D. R. Co. v. Anderson, 34 Gratt. 814, 31 Am. Rep. 750; Pennsylvania R. Co. v. Aspell, 23 Pa. 149, 62 Am. Dec. 323, 6 Am. Neg. Cas. 225; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506, 7 Am. Neg. Cas. 340; Fisher v. West Virginia & P. R. Co. 42 W. Va. 192, 33 L.R.A. 69, 24 S. E. 570, 10 Am. Neg. Cas. 459; Williams v. Belmont Coal & Coke Co. 55 W. Va. 95, 46 S. E. 802.

Miller, J., delivered the opinion of the court:

The court below, on motion of defendant, struck out all of plaintiff's evidence, directed a verdict for defendant, and pronounced the judg-

ment complained of, that plaintiff take nothing by its action.

The action was to recover the value of a horse, belonging to plaintiff, alleged to have been negligently run over and killed at a public crossing, by one of defendant's engines in charge of its servants.

The horse, at the time it was injured, was in charge of and being driven by two of plaintiff's servants, in hauling road material across the railway tracks of defendant, to one of the public streets of said city.

The evidence was sufficient and competent to go to the jury on the question whether any bell was rung or whistle blown by defendant's enginemen in approaching the crossing. And the evidence is uncontradicted that plaintiff's servants in approaching the crossing, and from their position on the seat of the wagon, and driving the team in a walk, both looked and listened, but, their view being obstructed by a long line of freight cars standing on the first of the four parallel tracks of defendant, they neither saw the approaching engine, nor heard any bell rung, or whistle blown, nor any noise of or steam escaping from the engine, until it came up on the second track from behind the freight cars on the first track, just as the horses stepped upon the track upon which the engine was. Both servants say they did not stop; they only looked and listened. The sole question presented for our decision is whether, under all the facts and circumstances attending them at the time, plaintiff's servants were guilty per se, and as matter of law, of contributory negligence in not stopping before going upon the track, precluding recovery for the alleged negligence of defendant. The evidence proves conclusively that on the first of defendant's tracks, and in the direction from which the engine was approaching, there was a long string of freight cars, some, if not all, of them loaded with coal, and which completely obstructed the view of the plaintiff's servants of the other tracks in that direction and of all objects thereon; that there were also one or more cars on the same track on the opposite side of the crossing, obstructing to that extent the view in that direction; that the space between the cars on the track was about 20 feet, giving ample room for teams to pass between the cars, but very little room to see objects on the tracks on either side of the crossing. The evidence furthermore shows a slight up grade in going up to the railroad tracks; that plaintiff's teamsters had crossed these tracks with their load but a few moments before the accident, and were at the time on their way back with the empty wagon; that at least one of the horses was a spirited animal, needing watching when about railway trains and engines; that the tracks on both sides of the crossing for some distance, except the first one, were clear of cars and engines, except as to the engine doing the injury, and that plaintiff's servants were familiar with the crossing, and of the dangers incident to crossing the same.

It is conceded by counsel for defendant, and as we think it must be, that it is not negligence per se, in all cases, for travelers upon public roads and streets, on approaching a railroad crossing, not to stop, as well as to look and listen for approaching trains, before attempting to cross the track, as, for example, where there is a long stretch of level track in both directions, and with nothing intervening to obstruct the view; for in such cases there would be nothing to gain by stopping.

But it is earnestly insisted that when the facts and conditions are not as assumed, but are like those disclosed in this case, and under our decisions, not to stop, as well as look and listen, is per se negligence, precluding recovery for the alleged negligence of the railway company in failing to perform its statutory duties to ring the bell or blow the whistle. In such cases, it is argued, it must be assumed that the injury

would not have occurred if the traveler had also stopped, as well as looked and listened.

The case mainly relied on to support the judgment is our case of Beyel v. Newport News & M. Valley R. Co. 34 W. Va. 538, 12 S. E. 532, regarded as the leading case on the subject, and frequently referred to as such and followed in subsequent decisions. While the opinion in that case, arguendo, does refer to and quote approvingly from numerous Pennsylvania cases, where, it seems, a hard and fast rule has been established, requiring a traveler in all cases, before crossing a railroad at grade, to stop, look, and listen, that case cannot, we think, be regarded as having committed us to the unalterable rule of practice in Pennsylvania. No such rule is announced in the syllabus of the case, and in our opinion it is contrary to sound reason, and to the great weight of authority on the subject.

True, in cases of peculiar circumstances, this duty to stop, when no two minds could differ as to the facts and the propriety and necessity therefor, should be imposed as matter of law; but such a rule can have no general application. In the Beyel Case, the proof was that the plaintiff neither stopped, looked, nor listened at any place in the public road where he could or should have heard the signals from the approaching engine, but drove heedlessly upon the track of the defendant. He was behind a hill running down almost to the railroad, cutting off his sight and to some extent his hearing, until he got within a short distance of the track and when he knew that the train which struck him was about due. In such a case, his own evidence disclosing the facts, the court could properly say, as matter of law, that plaintiff was guilty of contributory negligence. But the syllabus of the case goes no further than to declare the general rule of reasonable care and caution in such cases. The rule invoked is distinctly known as the hard and fast rule of Pennsylvania, and as opposed to the great weight of authority. 2 Thomp. Neg. § 1646; 3 Rapalje & M. Dig. of Railway Law, 561, ¶ 232. And in Pennsylvania, in the more recent case of Ash v. Wilmington & N. R. Co. 148 Pa. 133, 23 Atl. 898, this rigid rule seems to have been somewhat relaxed, for we find it stated in the syllabus, that "while the law does not prescribe that in all cases a man must stop, look, and listen before crossing a private siding, it does require that he shall exercise ordinary care."

As noted, exceptional cases, like our Beyel Case, may require a traveler to stop, in order to aid his hearing, but as a general rule this question presents itself as a mixed question of law and fact for submission to the jury. Malott v. Hawkins, 159 Ind. 127, 63 N. W. 308, citing Elliott, Railroads, § 1167, and decided cases. See also Shepard v. Norfolk & S. R. Co. 166 N. C. 539, 82 S. E. 874, and authorities cited. As is said in 2 Thompson on Negligence, § 1647: "Most of the decisions which emphasize the duty of the traveler to stop, connect it with the duty of listening, since the object of stopping is to enable him the better to listen." Such was the Beyel Case. And such seems to have been the cases presented in Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278, cited in the Beyel Case, and in Brady v. Toledo, A. A. & N. M. R. Co. 81 Mich. 616, 45 N. W. 1110. "But," says Mr. Thompson, "it is plain that there can be no absolute rule of law on the question of the duty of the traveler to stop and listen, which will be applicable to all cases." And further: "It will in many, perhaps in most, cases, be a question of fact for the jury."

Generally, the rule is that the vigilance of the traveler must be in proportion to the danger, and as the danger increases he must the more vigilantly employ his faculties and senses to avert injury. Beach, Contrib. Neg. 3d ed. 289, § 196. And where the track is obstructed by cars or otherwise, interfering with

sight or hearing, extra caution should be observed, and resort to other means should be taken to avoid injury. 3 Rapalje & M. Dig. of Railway Law, p. 612, ¶ 297, and cases cited; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316.

But do such other means, as matter of law, require a traveler, who has used his senses and has not seen or heard, to stop, get down off his wagon or other vehicle, and go forward upon the crossing, and look and listen there, before driving upon the track? In answer to this inquiry, 2 Thompson on Negligence, § 1646, says: "The suggestions of ordinary caution and prudence may require the traveler, under peculiar circumstances, to get out of his vehicle and approach the track and look up and down it in both directions before attempting to cross it. But plainly, there can be no rule of law establishing such a duty for all cases; but whether the circumstances are of that peculiar character which requires the traveler so to act will be a question of fact for the jury."

See also Southern R. Co. v. Alridge, 101 Va. 142, 43 S. E. 333; Judson v. Central Vermont R. Co. 158 N. Y. 597, 53 N. E. 514, 6 Am. Neg. Rep. 167; Continental Improv. Co. v. Stead, 95 U. S. 161, 168, 24 L. ed. 403; Malott v. Hawkins and Shepard v. Norfolk & S. R. Co. supra.

In Continental Improv. Co. v. Stead, supra, it was sought to have the jury instructed that failure to take such extra precaution to avoid injury constituted contributory negligence, precluding recovery, and it was said that this was an attempt to state the rule in a more absolute and unqualified form than was admissible. The rule laid down by the court in that case was that the degree of diligence to be used on either side, by the railroad company on the one side, and by the traveler on the other, is such as a prudent man would exercise under the circumstances.

Applying the rules and principles of these authorities, can it properly be said that the plaintiff's teamsters, as a matter of law, were guilty of contributory negligence, precluding recovery? Contributory negligence is always a matter of defense, but if such negligence fully appears from the evidence of the plaintiff, the plaintiff will be regarded as having proven himself out of court, and the rule may be applied. But is such a case presented here? That the teamsters did not stop, but did look and listen, and that the view was obstructed by the cars standing on the track is fully proven; but it is also proven, or at least the jury would have had the right to conclude from the evidence, that defendant was wholly negligent in the performance of its statutory duties to blow the whistle or ring the bell. The authorities say that a traveler has the right to anticipate that these duties will be performed; and at a public crossing in a city, such as was involved in this case, it seems to us that that duty was more imperative than under different circumstances. These teamsters prove compliance with duty upon their part, to look and listen, and that their hearing could not have been materially impaired by the movement of their wagon over the cinder road. If no bell was rung or whistle blown, of course they could not have heard these signals, and the stopping of the wagon could have made no difference. There was no neglect of duty upon their part to hear signals not given. A very different case would be presented if it had been proven that the railway company had discharged its statutory duty. Can we properly say then, as matter of law, that these servants of the plaintiff failed to act as reasonable and prudent men should or would have acted under like circumstances? What we might say as jurors is one thing, but as a court we cannot invade the province of the jury. We do not think the court

was justified in holding in this case that plaintiff's servants were guilty per se of contributory negligence. This proposition we think well supported by high authority. 2 Wood, Railroads, 1522, citing in note at page 1527, Dimick v. Chicago & N. W. R. Co. 80 Ill. 338, and Kelly v. St. Paul, M. & M. R. Co. 29 Minn. 1, 11 N. W. 67. See also Judson v. Central Vermont R. Co. 158 N. Y. 597, 53 N. E. 514, 6 Am. Neg. Rep. 167; Southern R. Co. v. Aldridge, supra; Southern R. Co. v. Bryant, 95 Va. 212, 219, 28 S. E. 185. At page 219 of the last case cited, the Virginia court says, citing authorities: "Where the view of the track is obstructed, and the railroad company has failed to give notice of the approach of its train to a crossing upon the highway, and a person in attempting to go across the track, not being able to see the train on account of obstructions, and being obliged to act upon his judgment at the time of crossing, is injured, the propriety of his going upon the track under such circumstances is not a question of law to be decided by the court, but a matter of fact to be determined by the jury."

Railroad—crossing—failure to stop—negligence.

We think this, as a general rule, correctly states the law.

For the foregoing reasons we are of opinion that the judgment below should be reversed, and the plaintiff awarded a new trial.

ANNOTATION.

Failure to stop, look, and listen at railroad crossing as negligence per se.

The invariable rule is that one approaching a railroad crossing must exercise such care as an ordinarily prudent person would under the circumstances. And a determination of what constitutes a proper degree of care involves the question of the necessity for the traveler to stop, look, and listen for approaching trains, the general rule being that such precautions should be taken. Then, of course, arises the question of the effect of a failure to stop, look, and listen. Upon the latter question there seem to be two main classes of holdings; those cases which hold that a failure to stop, look, and listen before crossing a railroad is, or may be under the circumstances, negligence as a matter of law, forming one class, and the other being formed by those cases which hold that such a failure is not negligence per se, but evidence of negligence, to be considered by the jury. The first of these classes is again divided, the majority of the cases adhering to the rule that a failure to stop, look, and listen is not necessarily, in all cases, negligence per se, and a decided minority attempting to establish a rule to the effect that such a failure is negligence, as matter of law, under any and all circumstances. It is only with this distinction that the present annotation deals. In other words, it is the purpose of the present treatment merely to show whether or not the so-called rule that a failure to stop, look, and listen at a railroad crossing, for approaching engines or cars, is negligence per se, is a hard and fast one, and absolute in all cases and under all circumstances. Consequently, the cases included herein have been set out merely with a view of showing what the rule is in each jurisdiction upon this particular point. This limitation, of course, excludes all questions as to whether or not a failure to stop, look, and listen is negligence per se under any particular given circumstances. And no attempt has been made to make an exhaustive collection of cases, only such cases having been used as tend to show the actual state of the law in the various jurisdictions, irrespective of the language used in any particular case or cases.

The so-called hard and fast rule, that under all circumstances a travel-

er must stop, look, and listen for approaching trains, engines, or cars before crossing a railroad track, is known as the Pennsylvania rule, it having been first laid down in that state, and, undoubtedly having been more strictly adhered to there than anywhere else. This rule has been severely criticized in many cases, and by practically every annotator and text-writer who has dealt with the question. For instance, in Patterson's Railroad Accident Law, § 175, the author, himself a Pennsylvania lawyer, says that the Pennsylvania rule "is really a judicial usurpation of the function of the jury, for there are conceivable cases in which the person injured might justifiably go upon the railway's line without pausing to 'stop, look, and listen.'" And for a well-reasoned argument see the dissenting opinion in Benner v. Philadelphia & R. R. Co. (1918) — Pa. —, 105 Atl. 283. Moreover, an extended examination of authorities from practically every English-speaking jurisdiction in the world has convinced the present annotator that there is no absolute rule to the effect that a failure to stop, look, and listen at a railroad crossing is negligence per se under any and all circumstances. Perhaps it might be said that the rule that such a failure is negligence, as a matter of law, is absolute in some jurisdictions, where no facts other than the failure to stop, etc., appear; and in other jurisdictions, that such a failure is always negligence per se under certain circumstances, as, for example, in the Federal courts, where all of the later cases upon the question hold that the rule that it is negligence per se for the driver of an automobile to cross a railroad track without first stopping, looking, and listening, where the view is obstructed, is absolute. In the last analysis, it may be said that some courts go much farther than others, and hold under nearly but not all circumstances that a failure to stop, look, and listen is negligence per se, while other courts maintain that such facts are merely evidence to be considered by the jury.

However, in Pennsylvania, the courts of which, as before stated, undoubtedly go farther than those of any other jurisdiction, and in which the general rule is that the failure to stop, look, and listen, immediately before crossing a railroad track, is negligence per se and for the court, and not merely evidence of negligence for the jury, it has often been declared that the rule is a hard and fast one. For instance, it has been said that the rule is "peremptory, absolute, and unbending" (Aiken v. Pennsylvania R. Co. (1889) 130 Pa. 380, 17 Am. St. Rep. 775, 18 Atl. 619, quoted with approval in Ihrig v. Erie R. Co. (1904) 210 Pa. 98, 59 Atl. 686; Atlantic Ref. Co. v. New York, C. & St. L. R. Co. (1917) 67 Pa. Super Ct. 320, holding that the rule is "peremptory, absolute, unbending," and that "the jury can never be permitted to ignore it, to evade it, or to pare it away by distinction and exception;" Philadelphia & R. R. Co. v. Skerman (1917) 247 Fed. 269, holding that the stop, look, and listen rule is not a rule of evidence in Pennsylvania, but a rule of law, peremptory, absolute, and unbending, and that the jury should never be permitted to ignore or evade or pare it away by distinctions and, exceptions); "absolute and unbending" (Benner v. Philadelphia & R. R. Co. (1918) — Pa. —, 105 Atl. 283, wherein the facts and opinions illustrate the injustice and absurdity of attempting to apply a rigid rule to all cases; Haas v. Northern C. R. Co. (1912) 49 Pa. Super. Ct. 106); "absolute and unyielding" (Lake Shore & M. S. R. Co. v. Franz (1889) 127 Pa. 297, 4 L.R.A. 389, 18 Atl. 22); "unbending" (Pennsylvania R. Co. v. Beale (1873) 73 Pa. 504, 13 Am. Rep. 753, a leading case, wherein it was said that the fact of collision showed the necessity there was of stopping; wherefore, in every case of collision the rule must be an unbending one, and that there never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se, and a question for the

court; Ayers v. Pittsburg, C. C. & St. L. R. Co. (1902) 201 Pa. 124, 50 Atl. 958; Eline v. Western Maryland R. Co. (1918) — Pa. —, 104 Atl. 857, holding that the rule is unbending under all circumstances, and that darkness is no excuse); "inflexible" (Pennsylvania R. Co. v. Peters (1887) 116 Pa. 206, 9 Atl. 317, 6 Am. Neg. Cas. 300; Omslaer v. Pittsburg & B. Traction Co. (1895) 168 Pa. 519, 47 Am. St. Rep. 901, 32 Atl. 50; Ihrig v. Erie R. Co. (1904) 210 Pa. 98, 59 Atl. 686, holding that the rule is inflexible, and admits of no exception); "imperative" (Crane v. Pennsylvania R. Co. (1907) 218 Pa. 560, 67 Atl. 877; Gibson v. Erie R. Co. (1913) 54 Pa. Super. Ct. 131); "imperative and invariable" (Barthelmas v. Lake Shore & M. S. R. Co. (1909) 225 Pa. 597, 74 Atl. 556, holding that the fact that there was no safe place to stop did not acquit a traveler of contributory negligence); "imperative and unbending" (Follmer v. Pennsylvania R. Co. (1914) 246 Pa. 367, 92 Atl. 340); "imperative and without exceptions" (Thompson v. Pennsylvania R. Co. (1906) 215 Pa. 113, 64 Atl. 323, 7 Ann. Cas. 351, 20 Am. Neg. Rep. 483, holding that the rule applies to drivers of fire apparatus); and that it is a clear and certain rule of duty, which cannot be allowed to be undermined by exceptions (Greenwood v. Philadelphia, W. & B. R. Co. (1889) 124 Pa. 572, 3 L.R.A. 44, 10 Am. St. Rep. 614, 17 Atl. 188).

And in some cases in Alabama it has been stated that a person approaching a railroad track at a crossing, and who is about to go upon or over same, is under an "absolute" duty to first stop, look, and listen for approaching trains, a failure to perform which renders him guilty of contributory negligence as matter of law, and precludes recovery of damages. See Spradley v. Alabama Midland R. Co. (1895) 110 Ala. 687, 20 So. 1022, and Hooks v. Huntsville R. Light & P. Co. (1906) 147 Ala. 700, 41 So. 273. And see also Atlantic Coast Line R. Co. v. Jones (1918) — Ala. —, 80 So. 44, wherein it was said that when a traveler "can" stop, look and listen, it is his absolute duty to do so "regardless of the time or place of crossing or of the schedule or infrequency of passing trains."

And, as subsequently shown, it has been held in some cases that the rule is absolute under certain circumstances.

In numerous jurisdictions it has been ruled with a considerable degree of consistency, either that it is negligence per se to go upon a railroad track without first stopping, looking, and listening for approaching trains, or that under certain circumstances such a failure was, or might be, negligence, as matter of law; and in such jurisdictions a question might be made as to the absoluteness of the negligence per se rule. For cases which fall within the above-stated class, see Atlantic Coast Line R. Co. v. Jones (1918) — Ala. —, 80 So. 44; Tiffin v. St. Louis, I. M. & S. R. Co. (1906) 78 Ark. 55, 93 S. W. 564; Scott v. St. Louis, I. M. & S. R. Co. (1906) 79 Ark. 137, 116 Am. St. Rep. 67, 95 S. W. 490, 9 Ann. Cas. 212; St. Louis, I. M. & S. R. Co. v. Coleman (1911) 97 Ark. 438, 135 S. W. 338; St. Louis, I. M. & S. R. Co. v. Chamberlain (1912) 105 Ark. 180, 150 S. W. 157; St. Louis Southwestern R. Co. v. Carmack (1916) — Ark. —, 187 S. W. 635; Green v. Los Angeles Terminal R. Co. (1904) 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 724; Queen Anne's R. Co. v. Reed (1905) 5 Penn. (Del.) 226, 119 Am. St. Rep. 301, 59 Atl. 860; DuRoss v. Philadelphia, B. & W. R. Co. (1915) 5 Boyce (Del.) 467, 94 Atl. 766; Wheeler v. Oregon R. & Nav. Co. (1909) 16 Idaho, 375, 102 Pac. 347; Burrow v. Idaho & W. N. R. Co. (1913) 24 Idaho, 652, 135 Pac. 838; Smith v. Wabash R. Co. (1894) 141 Ind. 92, 40 N. E. 270; Oleson v. Lake Shore & M. S. R. Co. (1895) 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736; Cincinnati, H. & I. R. Co. v. Duncan (1895) 143 Ind. 524, 42 N. E. 37; Chicago & E. R. Co. v. Thomas (1900) — Ind. —, 55 N. E. 861; Malott v. Hawkins (1902) 159 Ind. 127, 63 N. E. 308; Union Traction Co. v. Haworth (1917) — Ind. —, 115 N. E. 753; rehearing overruled in (1918) — Ind. —, 119 N. E.

869; Baltimore & O. R. Co. v. Talmage (1895) 15 **Ind.** App. 203, 43 N. E. 1019; Cleveland, C. C. & St. L. R. Co. v. Starks (1914) 58 **Ind.** App. 341, 106 N. E. 646; Funston v. Chicago, R. I. & P. R. Co. (1883) 61 **Iowa**, 452, 16 N. W. 518; Nosler v. Chicago, B. & Q. R. Co. (1887) 73 **Iowa**, 268, 34 N. W. 850; Nixon v. Chicago, R. I. & P. R. Co. (1892) 84 **Iowa**, 331, 51 N. W. 157; Lorenz v. Burlington, C. R. & N. R. Co. (1902) 115 **Iowa**, 377, 56 L.R.A. 752, 88 N. W. 835; Heinmiller v. Winston Bros. (1906) 131 **Iowa**, 32, 6 L.R.A. (N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102; Swanger v. Chicago, M. & St. P. R. Co. (1906) 132 **Iowa**, 32, 109 N. W. 308; Wilson v. Illinois C. R. Co. (1911) 150 **Iowa**, 33, 34 L.R.A. (N.S.) 689, 129 N. W. 340; Landis v. Inter-Urban R. Co. (1914) 166 **Iowa**, 20, 147 N. W. 318; Union P. R. Co. v. Adams (1885) 33 **Kan.** 427, 6 Pac. 529; Missouri, K. & T. R. Co. v. Bussey (1903) 66 **Kan.** 735, 71 Pac. 261; Chicago, R. I. & P. R. Co. v. Wheelbarger (1907) 75 **Kan.** 811, 88 Pac. 531; Rupard v. Chesapeake & O. R. Co. (1889) 88 **Ky.** 280, 7 L.R.A. 316, 11 S. W. 70; Brown v. Texas & P. R. Co. (1890) 42 **La. Ann.** 350, 21 Am. St. Rep. 374, 7 So. 682; Herlisch v. Louisville, N. O. & T. R. Co. (1892) 44 **La. Ann.** 280, 10 So. 628; Vincent v. Morgan's L. & T. R. & S. S. Co. (1896) 48 **La. Ann.** 933, 55 Am. St. Rep. 287, 20 So. 207; Callery v. Morgan's L. & T. R. & S. S. Co. (1916) 139 **La.** 763, 72 So. 222; Foreman v. Louisiana Western R. Co. (1916) 140 **La.** 389, 73 So. 242; Perrin v. New Orleans Terminal Co. (1917) 140 **La.** 818, 74 So. 160; Chase v. Maine C. R. Co. (1886) 78 **Me.** 346, 5 Atl. 771; York v. Maine C. R. Co. (1891) 84 **Me.** 117, 18 L.R.A. 60, 24 Atl. 790; Borders v. Boston & M. R. Co. (1916) 115 **Me.** 207, 98 Atl. 662; Philadelphia, W. & B. R. Co. v. Hogeland (1886) 66 **Md.** 149, 59 Am. Rep. 159, 7 Atl. 105; State use of Price v. Cumberland & P. R. Co. (1898) 87 **Md.** 183, 39 Atl. 610; Philadelphia & B. C. R. Co. v. Holden (1901) 93 **Md.** 417, 49 Atl. 625; Baltimore & O. R. Co. v. State (1902) 96 **Md.** 67, 53 Atl. 672; State use of Manfuso v. Western Maryland R. Co. (1905) 102 **Md.** 257, 62 Atl. 754; Glick v. Cumberland & W. Electric R. Co. (1914) 124 **Md.** 308, 92 Atl. 778; Fletcher v. Fitchburg R. Co. (1889) 149 **Mass.** 127, 3 L.R.A. 743, 21 N. E. 302; Fogg v. New York, N. H. & H. R. Co. (1916) 223 **Mass.** 444, 111 N. E. 960; Lake Shore & M. S. R. Co. v. Miller (1872) 25 **Mich.** 291; Mynning v. Detroit, L. & N. R. Co. (1887) 64 **Mich.** 93, 8 Am. St. Rep. 804, 31 N. W. 147; Jensen v. Michigan C. R. Co. (1894) 102 **Mich.** 176, 60 N. W. 57; Bannister v. Lake Shore & M. S. R. Co. (1897) 113 **Mich.** 530, 71 N. W. 861; Morgan v. Pere Marquette R. Co. (1910) 162 **Mich.** 573, 127 N. W. 683; Baker v. Delano (1916) 191 **Mich.** 204, 157 N. W. 427; Griswold v. Great Northern R. Co. (1902) 86 **Minn.** 67, 90 N. W. 2; Jenkins v. Minneapolis & St. L. R. Co. (1914) 124 **Minn.** 368, 145 N. W. 40; Holm v. Great Northern R. Co. (1918) 139 **Minn.** 258, 166 N. W. 224; Louisville & N. R. Co. v. Crominarity (1905) 86 **Miss.** 464, 39 So. 633; Jackson v. Mobile & O. R. Co. (1906) 89 **Miss.** 32, 42 So. 236; Yazoo & M. Valley R. Co. v. Williams (1917) 114 **Miss.** 236, 74 So. 835; Zimmerman v. Hannibal & St. J. R. Co. (1880) 71 **Mo.** 476; Kenney v. Hannibal & St. J. R. Co. (1891) 105 **Mo.** 270, 15 S. W. 983, 16 S. W. 837; Gratiot v. Missouri P. R. Co. (1891) — **Mo.** —, 16 L.R.A. 189, 16 S. W. 384, 19 S. W. 31; Kelsay v. Missouri P. R. Co. (1895) 129 **Mo.** 362, 30 S. W. 339; Sanguinette v. Mississippi River & B. T. R. Co. (1906) 196 **Mo.** 466, 95 S. W. 386; Farris v. St. Louis & S. F. R. Co. (1912) 167 **Mo. App.** 392, 151 S. W. 979; Owens v. St. Louis Southwestern R. Co. (1915) 188 **Mo. App.** 450, 174 S. W. 116; Underwood v. West (1916) — **Mo. App.** —, 187 S. W. 84; Meehan v. Great Northern R. Co. (1911) 43 **Mont.** 72, 114 Pac. 781, 3 N. C. C. A. 556; Omaha & R. Valley R. Co. v. Talbot (1896) 48 **Neb.** 627, 67 N. W. 599; Smith v. Chicago, M. & St. P. R. Co. (1916) 99 **Neb.** 378, 156 N. W. 639; Rickert v. Union P. R. Co. (1916) 100 **Neb.** 304, 160 N. W. 86; Bunting v. Central P. R. Co. (1879) 14 **Nev.** 351; Gahagan v. Boston & M. R. Co. (1900) 70 **N. H.** 441, 55 L.R.A. 426, 50 Atl. 146; Pennsylvania R. Co.

v. Middleton (1894) 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616; Pennsylvania R. Co. v. Pfuelb (1897) 60 N. J. L. 278, 37 Atl. 1100, 3 Am. Neg. Rep. 433, affirmed on opinion below in (1897) 61 N. J. L. 287, 41 Atl. 1116; Wise v. Delaware, L. & W. R. Co. (1911) 81 N. J. L. 397, 80 Atl. 459, Ann. Cas. 1914D, 1071, 3 N. C. C. A. 456; Gorton v. Erie R. Co. (1871) 45 N. Y. 660; Salter v. Utica & B. River R. Co. (1878) 75 N. Y. 273; Howard v. Northern C. R. Co. (1888) 49 Hun, 605, 17 N. Y. S. R. 190, 1 N. Y. Supp. 528; Campbell v. Union R. Co. (1894) 9 Misc. 484, 30 N. Y. Supp. 246; Cooper v. North Carolina R. Co. (1905) 140 N. C. 209, 3 L.R.A.(N.S.) 391, 52 S. E. 932, 6 Ann. Cas. 71; Allen v. Atlanta & C. Air Line R. Co. (1906) 141 N. C. 340, 53 S. E. 866; Farris v. Southern R. Co. (1909) 151 N. C. 483, 40 L.R.A. (N.S.) 1115, 66 S. E. 457; Shepard v. Norfolk & S. R. Co. (1914) 166 N. C. 539, 82 S. E. 872; Davidson v. Seaboard Air Line R. Co. (1915) 170 N. C. 281, 87 S. E. 35; Pendroy v. Great Northern R. Co. (1908) 17 N. D. 433, 117 N. W. 531; Hope v. Great Northern R. Co. (1909) 19 N. D. 438, 122 N. W. 997; Cleveland, C. & C. R. Co. v. Crawford (1874) 24 Ohio St. 631, 15 Am. Rep. 633, 12 Am. Neg. Cas. 419; Clark v. St. Louis & S. F. R. Co. (1909) 24 Okla. 764, 108 Pac. 361; Chicago, R. I. & P. R. Co. v. Baroni (1912) 32 Okla. 540, 122 Pac. 926; Durbin v. Oregon R. & Nav. Co. (1888) 17 Or. 5, 11 Am. St. Rep. 778, 17 Pac. 5; Blackburn v. Southern P. Co. (1898) 34 Or. 215, 55 Pac. 225; Long v. Pacific R. & Nav. Co. (1915) 74 Or. 502, L.R.A. 1915F, 1152, 144 Pac. 462, 145 Pac. 1068; Ormsbee v. Boston & P. R. Co. (1883) 14 R. I. 102, 51 Am. Rep. 354; McGoran v. New York, N. H. & H. R. Co. (1903) 25 R. I. 387, 55 Atl. 929; Price v. Rhode Island Co. (1907) 28 R. I. 220, 125 Am. St. Rep. 736, 66 Atl. 200; Bamberg v. Atlantic Coast Line R. Co. (1905) 72 S. C. 389, 51 S. E. 988; Louisville & N. R. Co. v. Satterwhite (1903) 112 Tenn. 185, 79 S. W. 106; Middle Tennessee R. Co. v. McMillan (1915) 134 Tenn. 490, 184 S. W. 20; Southern R. Co. v. Terry (1913) 3 Tenn. C. C. A. 445; Ayers v. Norfolk & W. R. Co. (1897) 2 Va. Dec. 526, 27 S. E. 582; Southern R. Co. v. Bryant (1897) 95 Va. 212, 28 S. E. 183; Washington & O. D. R. Co. v. Zell (1915) 118 Va. 755, 88 S. E. 309; Northern P. R. Co. v. Holmes (1887) 3 Wash. Terr. 202, 14 Pac. 688, as modified on subsequent opinion in (1888) 3 Wash. Terr. 543, 18 Pac. 76; Ladouceur v. Northern P. R. Co. (1892) 4 Wash. 38, 29 Pac. 942; Beyel v. Newport News & M. Valley R. Co. (1890) 34 W. Va. 541, 12 S. E. 532, explained in ELKINS v. WESTERN MARYLAND R. Co. ante, 198; Seefeld v. Chicago, M. & St. P. R. Co. (1887) 70 Wis. 216, 5 Am. St. Rep. 168, 35 N. W. 278; Kujawa v. Chicago, M. & St. P. R. Co. (1908) 135 Wis. 562, 116 N. W. 249; Swalm v. Northern P. R. Co. (1910) 143 Wis. 442, 128 N. W. 62; Schofield v. Chicago, M. & St. P. R. Co. (1885) 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; Cincinnati, N. O. & T. P. R. Co. v. Farra (1895) 13 C. C. A. 602, 31 U. S. App. 306, 66 Fed. 496; Shatto v. Erie R. Co. (1903) 59 C. C. A. 1, 121 Fed. 678, 13 Am. Neg. Rep. 698; Davis v. Chicago, R. I. & P. R. Co. (1907) 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; New York C. & H. R. R. Co. v. Maidment (1909) 21 L.R.A.(N.S.) 794, 93 C. C. A. 413, 168 Fed. 21; Chicago, B. & Q. R. Co. v. Munger (1909) 94 C. C. A. 176, 168 Fed. 690; Brommer v. Pennsylvania R. Co. (1910) 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577, certiorari denied in (1911) 223 U. S. 718, 56 L. ed. 628, 32 Sup. Ct. Rep. 522; Delaware, L. & W. R. Co. v. Welshman (1915) L.R.A.1916E, 816, 143 C. C. A. 358, 229 Fed. 82; Boggs v. Great Western R. Co. (1874) 23 U. C. C. P. 573; Misener v. Wabash R. Co. (1906) 12 Ont. L. Rep. 71, holding that there may be rare cases where the court may decide as matter of law; Davey v. London & S. W. R. Co. (1883) 53 L. J. Q. B. N. S. (Eng.) 58, L. R. 12 Q. B. Div. 70, 49 L. T. N. S. 739, 48 J. P. 279.

But in practically every jurisdiction in which the courts at one time or another have held that the failure of a person to stop, look, and listen before attempting to cross a railroad track was negligence per se, preclud-

ing recovery, it has been held that the rule is not absolute, or, at least, decisions have been rendered showing that it does not apply under all circumstances.

Thus, even in Pennsylvania, it has been held that the rule that it is negligence per se for a person about to cross a railroad track to fail to stop, look, and listen is not applicable, where the failure was the result of reliance upon a rule of the company, forbidding a train to pass another while discharging passengers at a station. Thus, in Betts v. Lehigh Valley R. Co. (1899) 191 **Pa.** 575, 45 L.R.A. 261, 43 Atl. 362, 6 Am. Neg. Rep. 391, after expressly stating that the Pennsylvania courts "recognize an exception to the general rule," it was held that an intending passenger, approaching a railroad crossing at which a train was standing on a sidetrack to receive or discharge passengers, was not guilty of contributory negligence, as matter of law, in failing to stop, look, and listen before attempting to cross the main track, when he knew of the rule of the carrier, requiring a train to stop before reaching a station when another train is receiving or discharging passengers. And in Pennsylvania R. Co. v. White (1879) 88 **Pa.** 327, 6 Am. Neg. Cas. 276, this exception to the rule was again made, and the question of contributory negligence held for the jury, where a passenger was injured while crossing the track to reach the station at his destination. So, in Flanagan v. Philadelphia, W. & B. R. Co. (1897) 181 **Pa.** 237, 37 Atl. 341, 2 Am. Neg. Rep. 451, it was held that the duty of a person about to cross a railroad track, to stop, look, and listen for an approaching train, is not always applicable to a passenger at a station going to or from his train.

In some instances, it has been held that the so-called negligence per se rule applies only where the traveler approaches the railroad under ordinary circumstances and conditions. Georgia P. R. Co. v. Lee (1890) 92 **Ala.** 262, 9 So. 230, 11 Am. Neg. Cas. 54; Bailey v. Southern R. Co. (1916) 196 **Ala.** 133, 72 So. 67; Little Rock & Ft. S. R. Co. v. Blewitt (1898) 65 **Ark.** 235, 45 S. W. 548; Tiffin v. St. Louis, I. M. & S. R. Co. (1906) 78 **Ark.** 55, 93 S. W. 564; Scott v. St. Louis, I. M. & S. R. Co. (1906) 79 **Ark.** 137, 116 Am. St. Rep. 67, 95 S. W. 490, 9 Ann. Cas. 212; Laverenz v. Chicago, R. I. & P. R. Co. (1881) 56 **Iowa,** 689, 10 N. W. 268.

Conversely, in some cases, it has been held that the rule does not apply where there are exceptional circumstances. Little Rock & Ft. S. R. Co. v. Blewitt (1898) 65 **Ark.** 235, 45 S. W. 548; Tiffin v. St. Louis, I. M. & S. R. Co. (1906) 78 **Ark.** 55, 93 S. W. 564; Scott v. St. Louis, I. M. & S. R. Co. (1906) 79 **Ark.** 137, 116 Am. St. Rep. 67, 95 S. W. 490, 9 Ann. Cas. 212; Chicago, R. I. & P. R. Co. v. Hamilton (1909) 92 **Ark.** 400, 123 S. W. 379; Garrison v. St. Louis, I. M. & S. R. Co. (1909) 92 **Ark.** 437, 123 S. W. 657; St. Louis, I. M. & S. R. Co. v. Coleman (1911) 97 **Ark.** 438, 135 S. W. 338; Atlantic Coast Line R. Co. v. Wallace (1913) 66 **Fla.** 321, 63 So. 583; Wheeler v. Oregon R. & Nav. Co. (1909) 16 **Idaho,** 375, 102 Pac. 347; Nixon v. Chicago, R. I. & P. R. Co. (1892) 84 **Iowa,** 331, 51 N. W. 157; Lorenz v. Burlington, C. R. & N. R. Co. (1902) 115 **Iowa,** 377, 56 L.R.A. 752, 88 N. W. 835; Southern R. Co. v. Bryant (1897) 95 **Va.** 212, 28 S. E. 183; Southern R. Co. v. Aldridge (1903) 101 **Va.** 142, 43 S. E. 333.

Upon the other hand it has been ruled that the stop, look, and listen rule is applicable, only where there are exceptional circumstances. See Atchison, T. & S. F. R. Co. v. Hague (1894) 54 **Kan.** 284, 45 Am. St. Rep. 278, 38 Pac. 257; St. Louis & S. F. R. Co. v. Knowles (1897) 6 **Kan. App.** 790, 51 Pac. 230; Union P. R. Co. v. Ruzicka (1902) 65 **Neb.** 621, 91 N. W. 543; Dickinson v. Erie R. Co. (1911) 81 **N. J. L.** 464, 37 L.R.A.(N.S.) 150, 81 Atl. 104; Seefeld v. Chicago, M. & St. P. R. Co. (1887) 70 **Wis.** 216, 5 Am. St. Rep. 168, 35 N. W. 278; Kujawa v. Chicago, M. & St. P. R. Co. (1908) 135 **Wis.** 562, 116 N. W. 249; Davis v. Chicago, R. I. & P. R. Co. (1907) 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 **Fed.** 10; and Delaware, L. & W. R. Co.

v. Welshman (1915) L.R.A.1916E, 816, 143 C. C. A. 358, 229 Fed. 82.

Another exception has been made where the failure was not the proximate cause of the negligence, as in the case where the traveler was not in a position or had no opportunity to stop, look, and listen, or to do so would not have been effective, or the traveler was so incompetent as not to understand the necessity for doing so. Central of Georgia R. Co. v. Hyatt (1907) 151 Ala. 355, 43 So. 867; Birmingham, R. Light & P. Co. v. Landrum (1907) 153 Ala. 192, 127 Am. St. Rep. 25, 45 So. 198; Central of Georgia R. Co. v. Jones (1915) 195 Ala. 378, 70 So. 729; Atlantic Coast Line R. Co. v. Jones (1918) — Ala. —, 80 So. 44; Farris v. St. Louis & S. F. R. Co. (1912) 167 Mo. App. 392, 151 S. W. 979; Underwood v. West (1916) — Mo. App. —, 187 S. W. 84; Cleveland, C. & C. R. Co. v. Crawford (1874) 24 Ohio St. 631, 15 Am. Rep. 633, 12 Am. Neg. Cas. 419; Seaboard Air Line R. Co. v. Abernathy (1917) 121 Va. 173, 92 S. E. 913; Sarles v. Chicago, M. & St. P. R. Co. (1909) 138 Wis. 498, 21 L.R.A. (N.S.) 415, 120 N. W. 232, 16 Ann. Cas. 952; Illinois C. R. Co. v. Jones (1899) 37 C. C. A. 106, 95 Fed. 370.

And the same has been held where the conditions were such that it would have availed nothing to have stopped, looked, and listened. Central of Georgia R. Co. v. Hyatt (1907) 151 Ala. 355, 43 So. 867; Tiffin v. St. Louis, I. M. & S. F. R. Co. (1906) 78 Ark. 55, 93 S. W. 564; Arkansas & L. R. Co. v. Graves (1910) 96 Ark. 638, 132 S. W. 992; Chicago, R. I. & P. R. Co. v. Batsel (1911) 100 Ark. 526, 140 S. W. 726; Alloggi v. Southern P. Co. (1918) — Cal. App. —, 173 Pac. 1117; Wheeler v. Oregon R. & Nav. Co. (1909) 16 Idaho, 375, 102 Pac. 347; Chicago & E. R. Co. v. Thomas (1900) — Ind. —, 55 N. E. 861; Union Traction Co. v. Haworth (1917) — Ind. —, 115 N. E. 753, rehearing overruled in (1918) — Ind. —, 119 N. E. 869; Frederickson v. Iowa C. R. Co. (1912) 156 Iowa, 26, 135 N. W. 12, Ann. Cas. 1915B, 224; Goodell v. New York C. & H. R. R. Co. (1901) 67 App. Div. 271, 73 N. Y. Supp. 428, 11 Am. Neg. Rep. 109; Ladouceur v. Northern P. R. Co. (1892) 4 Wash. 38, 29 Pac. 942.

And an exception has been made where the omission to take the proper precautions was caused by some act or omission of the company, which misled the traveler, and threw him off his guard. Oleson v. Lake Shore & M. S. R. Co. (1895) 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736, holding that in Indiana there is no other exception; Union Traction Co. v. Haworth (1918) — Ind. —, 119 N. E. 869, overruling petition for rehearing of (1917) — Ind. —, 115 N. E. 753; Indianapolis Union R. Co. v. Neubacher (1896) 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669; Cleveland, C. C. & St. L. R. Co. v. Schneider (1906) 40 Ind. App. 38, 80 N. E. 985; Borders v. Boston & M. R. Co. (1916) 115 Me. 207, 98 Atl. 662; Hendrickson v. Great Northern R. Co. (1892) 49 Minn. 245, 16 L.R.A. 261, 32 Am. St. Rep. 540, 51 N. W. 1044; Woehrle v. Minnesota Transfer R. Co. (1901) 82 Minn. 165, 52 L.R.A. 348, 84 N. W. 791; Edwards v. Chicago & A. R. Co. (1902) 94 Mo. App. 36, 67 S. W. 950; Yonkers v. St. Louis, I. M. & S. R. Co. (1914) 182 Mo. App. 558, 168 S. W. 307; Ernst v. Hudson River R. Co. (1866) 35 N. Y. 9, 90 Am. Dec. 761, explained in Wilcox v. Rome, W. & O. R. Co. (1868) 39 N. Y. 358, 100 Am. Dec. 440; Palmer v. New York C. & H. R. R. Co. (1889) 112 N. Y. 234, 19 N. E. 678; Kane v. New York, N. H. & H. R. Co (1892) 132 N. Y. 160, 30 N. E. 256, Duame v. Chicago & N. W. R. Co. (1888) 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394; Whelan v. New York, L. E. & W. R. Co. (1889) 38 Fed. 15; Chicago & N. W. R. Co. v. Prescott (1893) 23 L.R.A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237; Erie R. Co. v. Schultz (1911) 106 C. C. A. 23, 183 Fed. 673 and see Warren v. Fitchburg R. Co. (1864) 8 Allen (Mass.) 227, 85 Am. Dec. 700, 3 Am. Neg. Cas. 748; Bond v. New York C. & H. R. R. Co. (1893) 69 Hun, 476, 23 N. Y. Supp. 450, and Dougherty v. Chicago, M. & St. P. R. Co. (1905) 20 S. D. 46, 104 N. W. 672.

And even in Pennsylvania, where the negligence per se rule is usually

applied very strictly, the courts have not gone so far as to hold that it is a rule of law that a pedestrian must stop, look, and listen between different tracks, lying close together. See Pennsylvania R. Co. v. Garvey (1885) 108 Pa. 369 (holding that not to stop between each track instead of hastening to cross all of them is not negligence per se, and that the making of such stops might itself be evidence of negligence); Lake Shore & M. S. R. Co. v. Frantz (1889) 127 Pa. 297, 4 L.R.A. 389, 18 Atl. 22; Ayers v. Pittsburg, C. C. & St. L. R. Co. (1902) 201 Pa. 124, 50 Atl. 958, and Cohen v. Philadelphia & R. R. Co. (1905) 211 Pa. 227, 60 Atl. 729. And this rule was applied in Gibson v. Erie R. Co. (1913) 54 Pa. Super. Ct. 131, where the plaintiff, after crossing the four tracks of one company and an intervening space of 12 feet, was struck while crossing the second track of another railroad company.

In Ash v. Wilmington & N. R. Co. (1892) 148 Pa. 133, 23 Atl. 898, it was held that the law does not prescribe that in all cases a man must stop, look, and listen before crossing a private siding. However, in People v. Pennsylvania R. Co. (1916) 251 Pa. 275, 96 Atl. 652, it was held that there is no degree of distinction between the care required at a main-track crossing, and that required at a public crossing over a siding which is in frequent and daily use. And see Benner v. Philadelphia & R. R. Co. (1918) — Pa. —, 105 Atl. 283, wherein the majority of the court held that a traveler who failed to stop, look, and listen before going on a side track was thereby convicted of negligence, no matter what the other circumstances were, and although he was not injured on that track, but later on the main track, and this notwithstanding he actually did stop on the side track, and look and listen, from which point he had a good view of the main track, whereas, had he stopped before passing onto the side track, his view would have been obstructed (this case affords an apt illustration of the absurdity of attempting to apply a hard and fast rule to all cases, irrespective of the circumstances).

There are also a number of jurisdictions in which the rule has been held not applicable, provided the defendant was guilty of wanton or wilful negligence (see, for example, Central of Georgia R. Co. v. Forshee (1899) 125 Ala. 215, 27 So. 1006; Burns v. Louisville & N. R. Co. (1912) 136 Ala. 522, 33 So. 891; Western R. Co. v. Wallace (1911) 170 Ala. 584, 54 So. 533; Freeman v. Duluth, S. S. & A. R. Co. (1889) 74 Mich. 86, 3 L.R.A. 594, 41 N. W. 872; Rouse v. Blair (1915) 185 Mich. 632, 152 N. W. 204, 8 N. C. C. A. 1033; Southern R. Co. v. Terry (1913) 3 Tenn. C. C. A. 445), or because the doctrine of comparative or concurrent negligence (see Yazoo & M. Valley R. Co. v. Williams (1917) 114 Miss. 236, 74 So. 835; Louisville & N. R. Co. v. Summers (1903) 60 C. C. A. 487, 125 Fed. 719, certiorari denied in (1904) 192 U. S. 607, 48 L. ed. 585, 24 Sup. Ct. Rep. 851, which applies to Tennessee statute), or the rule of last clear chance, obtained; but it is obvious that the cases which so hold are not real exceptions to the rule that a failure to stop, look, and listen before crossing a railroad track is negligence per se, under any and all circumstances, and sufficient to bar recovery, since the decisions therein are the result of the application of rules or principles which, under certain circumstances, would permit a recovery, even though the plaintiff be deemed guilty of contributory negligence as a matter of law.

And the courts of many jurisdictions have considered and expressly rejected the so-called Pennsylvania rule.

Thus in Alabama, Idaho, Iowa, Minnesota, New Jersey, North Carolina, Tennessee, Utah, and Washington it has been expressly said that it cannot be affirmed, as matter of law, that there is an "absolute" duty to stop, look, and listen, in all cases. Louisville & N. R. Co. v. Williams (1911) 172 Ala. 560, 55 So. 218; Atlantic Coast Line R. Co. v. Jones (1918) — Ala. App. —, 78 So. 645 reversed on other grounds in (1918) — Ala —, 80 So. 44; Graves v. Northern P. R. Co. (1917) 30 Idaho, 542, 166

Pac. 571; Lorenz v. Burlington, C. R. & N. R. Co. (1902) 115 **Iowa**, 377, 56 L.R.A. 752, 88 N. W. 835; Woehrle v. Minnesota Transfer R. Co. (1901) 82 **Minn.** 165, 52 L.R.A. 348, 84 N. W. 791; Campbell v. Chicago G. W. R. Co. (1909) 108 **Minn.** 104, 28 L.R.A. (N.S.) 346, 133 Am. St. Rep. 417, 121 N. W. 429; Pennsylvania R. Co. v. Middleton (1894) 57 **N. J. L.** 154, 51 Am. St. Rep. 597, 31 Atl. 616; Johnson v. Seaboard Air Line R. Co. (1913) 163 **N. C.** 431, 79 S. E. 690, Ann. Cas. 1915B, 598, 4 N. C. C. A. 627; Davidson v. Seaboard Air Line Co. (1915) 170 **N. C.** 281, 87 S. E. 35; Case v. Atlantic & C. Air Line R. Co. (1917) 107 **S. C.** 216, 92 S. E. 472, holding that the rule is not absolute in North Carolina; Southern R. Co. v. Terry (1913) 3 **Tenn.** C. C. A. 445; Olsen v. Oregon Short Line & U. N. R. Co. (1893) 9 **Utah**, 129, 33 Pac. 623; Hull v. Seattle, R. & S. R. Co. (1910) 60 **Wash.** 162, 110 Pac. 804; McKinney v. Port Townsend & P. S. R. Co. (1916) 91 **Wash.** 387, 158 Pac. 1007. And see Lake Shore & M. S. R. Co. v. Anthony (1894) 12 **Ind.** App. 126, 38 N. E. 831, wherein it was said that "the law does not require a traveler upon a highway, in all instances, to stop, look, and listen for an approaching train."

In Indiana, the supreme court has said that the "look and listen rule cannot be treated as an arbitrary standard of care, to be inflexibly applied by the courts in all cases." Stoy v. Louisville, E. & St. L. Consol. R. Co. (1903) 160 **Ind.** 144, 66 N. E. 615.

In Connecticut, there is "no unbending rule of law" that one who fails to stop, look, and listen before crossing a railroad track is, by that fact, guilty of contributory negligence. Metcalf v. Central Vermont R. Co. (1906) 78 **Conn.** 614, 63 Atl. 633.

In Michigan and North Carolina as well as in at least one Federal case, and in Ontario, it has been said that the rule is not "imperative" under all circumstances. Morgan v. Pere Marquette R. Co. (1910) 162 **Mich.** 573, 127 N. W. 683; Shepard v. Norfolk & S. R. Co. (1914) 166 **N. C.** 539, 82 S. E. 872; Cincinnati, N. O. & T. P. R. Co. v. Farra (1895) 13 C. C. A. 602, 31 U. S. App. 306, 66 **Fed.** 496 (wherein it was also said that the Pennsylvania rule, which seems to make it a duty to stop under all circumstances, seems much calculated to condone carelessness and recklessness by railroad companies at public crossings, where the rights and duties of the public and of the company are reciprocal); Miller v. Grand Trunk R. Co. (1875) 25 **U. C. C. P.** 389.

In Iowa and Mississippi the rule of "stop, look, and listen" is not of "invariable" application. Hartman v. Chicago G. W. R. Co. (1906) 132 **Iowa**, 584, 110 N. W. 11; Louisville & N. R. Co. v. Crominarity (1905) 86 **Miss.** 464, 39 So. 633.

In New York, Tennessee, and Virginia, that the rule is not applied inflexibly and in all cases, without regard to age or other circumstances, was stated in McGovern v. New York C. & H. R. R. Co. (1876) 67 **N. Y.** 417; Louisville & N. R. Co. v. Satterwhite (1903) 112 **Tenn.** 185, 79 S. W. 106, and Southern R. Co. v. Bryant (1897) 95 **Va.** 212, 28 S. E. 183.

In Missouri, it is not of "universal application" (Jennings v. St. Louis, I. M. & S. R. Co. (1892) 112 **Mo.** 268, 20 S. W. 490), and there is no inflexible formula and no Procrustean standard of negligence (Kenney v. Hannibal & St. J. R. Co. (1891) 105 **Mo.** 270, 15 S. W. 983, 16 S. W. 837).

In Iowa, Minnesota, and Nova Scotia, it has been expressly declared that the rule that the failure of a person, when about to cross a railroad track, to stop, look, and listen for approaching trains, constitutes contributory negligence, barring recovery, is not a "hard and fast" one, under all circumstances. Lockridge v. Minneapolis & St. L. R. Co. (1913) 161 **Iowa**, 74, 140 N. W. 834, Ann. Cas. 1916A, 158; Dusold v. Chicago G. W. R. Co. (1913) 162 **Iowa**, 441, 142 N. W. 213; Campbell v. Chicago G. W. R. Co. (1909) 108 **Minn.** 104, 28 L.R.A.(N.S.) 346, 133 Am. St. Rep. 417, 121 N. W. 429; Keith v. Inter-Colonial Coal Min.

Co. (1885) 18 N. S. 226, 6 Can. L. T. 446.

In the District of Columbia, and in Missouri, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, West Virginia, and Wisconsin, as well as in two Federal cases and in Ontario, it has been said that there is no rule of law that a man, before crossing a railroad track, must always stop as well as look and listen under any and all circumstances. Baltimore & P. R. Co. v. Carrington (1894) 3 App. D. C. 101; Zimmerman v. Hannibal & St. J. R. Co. (1880) 71 Mo. 476 (holding for example, that the rule does not apply to a pedestrian); Hunt v. North Carolina R. Co. (1915) 170 N. C. 442, 87 S. E. 210; Cleveland, C. & C. R. Co. v. Crawford (1874) 24 Ohio St. 631, 15 Am. Rep. 633, 12 Am. Neg. Cas. 419; Baltimore & O. R. Co. v. VanHorn (1898) 21 Ohio C. C. 337, 12 Ohio C. D. 106; Wheeling & L. E. R. Co. v. Suhrwiar (1901) 22 Ohio C. C. 560, 12 Ohio C. D. 809; Chicago, R. I. & P. R. Co. v. Baroni (1912) 32 Okla. 540, 122 Pac. 926; Blackburn v. Southern P. R. Co. (1898) 34 Or. 215, 55 Pac. 225; Bamberg v. Atlantic Coast Line R. Co. (1905) 72 S. C. 389, 51 S. E. 988; Middle Tennessee R. Co. v. McMillan (1915) 134 Tenn. 490, 184 S. W. 20; ELKINS v. WESTERN MARYLAND R. CO. ante, 198; Kujawa v. Chicago, M. & St. P. R. Co. (1908) 135 Wis. 562, 116 N. W. 249; Whiton v. Chicago & N. W. R. Co. (1870) 2 Biss. 282, Fed. Cas. No. (U. S.) 270, 20 L. ed. 571; Illinois C. R. Co. v. Jones (1899) 37 C. C. A. 106, 95 Fed. 370; Champaigne v. Grand Trunk R. Co. (1905) 9 Ont. L. Rep. 589.

In New Hampshire, it has been said that a mere failure to stop, look, and listen is not, as matter of law, conclusive of want of care, contributing to a crossing accident, but that it depends upon the attending circumstances. Lyman v. Boston & M. R. Co. (1890) 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; Davis v. Concord & M. R. Co. (1894) 68 N. H. 247, 44 Atl. 388; Smith v. Boston & M. R. Co. (1899) 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290.

In other states, among which are Indiana, Iowa, Missouri, North Carolina, Rhode Island, Virginia, and Wisconsin, it has been said that there are exceptions to the rule. See Oleson v. Lake Shore & M. S. R. Co. (1895) 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736; Funston v. Chicago, R. I. & P. R. Co. (1883) 61 Iowa, 452, 16 N. W. 518; Nosler v. Chicago, B. & Q. R. Co. (1887) 73 Iowa, 268, 34 N. W. 850; Nixon v. Chicago, R. I. &. P. R. Co. (1892) 84 Iowa, 331, 51 N. W. 157; Jennings v. St. Louis, I. M. & S. R. Co. (1892) 112 Mo. 268, 20 S. W. 490; Baker v. Kansas City, Ft. S. & M. R. Co. (1898) 147 Mo. 145, 48 S. W. 838; Farris v. Southern R. Co. (1909) 151 N. C. 483, 40 L.R.A.(N.S.) 1115, 66 S. E. 457; Ormsbee v. Boston & P. R. Co. (1882) 14 R. I. 102, 51 Am. Rep. 354; McGoran v. New York, N. H. & H. R. Co. (1883) 25 R. I. 387, 55 Atl. 929; Southern R. Co. v. Bryant (1897) 95 Va. 212, 28 S. E. 183 and Winchell v. Abbot (1890) 77 Wis. 371, 46 N. W. 665.

And in the Ontario case of Hollinger v. Canadian P. R. Co. (1892) 21 Ont. Rep. 705, it was said that the rule, "stop, look, and listen," as applied by the Pennsylvania courts, "is not binding on us, nor does it so commend itself to our judgment that we think that we ought to adopt it."

And in Kentucky (Wilson v. Chesapeake & O. R. Co. (1905) 27 Ky. L. Rep. 778, 86 S. W. 690), "to decide that failure of a person to look along a railroad before attempting to cross it is, under all circumstances, and necessarily, negligence, would be arbitrary and without reason; for there may be evidence sufficient to satisfy a person of ordinary carefulness that the track is clear, without taking that precaution."

And it seems that there is no absolute rule that a failure to stop, look, and listen at a railroad crossing is negligence, as matter of law, and for the court under any and all circumstances, in any jurisdiction where it has ever been held that in view of all the surrounding circumstances, including a failure to stop, look, and listen, the question of the traveler's

negligence was for the jury; such a holding conclusively negativing the proposition that the rule absolutely is a hard and fast one. In the following jurisdictions, the question of the plaintiff's negligence in failing to take the usual precautions at a railroad crossing was held to be for the jury, in the listed cases, which are cited for purposes of illustration:

Alabama.—Central of Georgia R. Co. v. Hyatt (1907) 151 Ala. 355, 43 So. 867; Birmingham R. Light & P. Co. v. Landrum (1907) 153 Ala. 192, 127 Am. St. Rep. 25, 45 So. 198.

Arkansas.—St. Louis, I. M. & S. R. Co. v. Amos (1891) 54 Ark. 159, 15 S. W. 362; Little Rock & Ft. S. R. Co. v. Blewitt (1898) 65 Ark. 235, 45 S. W. 548; Tiffin v. St. Louis, I. M. & S. R. Co. (1906) 78 Ark. 55, 93 S. W. 564; St. Louis, I. M. & S. R. Co. v. Tomlinson (1906) 78 Ark. 251, 94 S. W. 613; Choctaw, O. & G. R. Co. v. Baskins (1906) 78 Ark. 355, 93 S. W. 757; Scott v. St. Louis, I. M. & S. R. Co. (1906) 79 Ark. 137, 116 Am. St. Rep. 67, 95 S. W. 490, 9 Ann. Cas. 212; Arkansas & L. R. Co. v. Graves (1910) 96 Ark. 638, 132 S. W. 992; St. Louis, I. M. & S. R. Co. v. Coleman (1911) 97 Ark. 438, 135 S. W. 338; Chicago, R. I. & P. R. Co. v. Batsel (1911) 100 Ark. 526, 140 S. W. 726.

Colorado.—Colorado & S. R. Co. v. Chiles (1911) 50 Colo. 191, 114 Pac. 661; Colorado & S. R. Co. v. Lauter (1912) 21 Colo. App. 101, 121 Pac. 137.

Florida.—Atlantic Coast Line R. Co. v. Wallace (1913) 66 Fla. 321, 63 So. 583.

Georgia.—Richmond & D. R. Co. v. Howard (1887) 79 Ga. 44, 3 S. E. 426.

Idaho.—Wheeler v. Oregon R. & Nav. Co. (1909) 16 Idaho, 375, 102 Pac. 347; Graves v. Northern P. R. Co. (1917) 30 Idaho, 542, 166 Pac. 571.

Indiana.—Chicago & E. I. R. Co. v. Hedges (1885) 105 Ind. 398, 7 N. E. 801; Chicago & E. R. Co. v. Thomas (1900) — Ind. —, 55 N. E. 861; Malott v. Hawkins (1902) 159 Ind. 127, 63 N. E. 309; Grand Rapids & I. R. Co. v. Cox (1893) 8 Ind. App. 29, 35 N. E. 183; Lake Shore & M. S. R. Co. v. Anthony (1894) 12 Ind. App. 126, 38 N. E. 831; Indianapolis Union R. Co. v. Neubacher (1896) 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669; Cleveland, C. C. & St. L. R. Co. v. Penketh (1901) 27 Ind. App. 210, 60 N. E. 1095; New York, C. & St. L. R. Co. v. Robbins (1906) 38 Ind. App. 172, 76 N. E. 804; Cleveland, C. C. & St. L. R. Co. v. Schneider (1907) 40 Ind. App. 38, 80 N. E. 985; Cleveland, C. C. & St. L. R. Co. v. Nichols (1912) 52 Ind. App. 349, 99 N. E. 497; Cleveland, C. C. & St. L. R. Co. v. Starkes (1914) 58 Ind. App. 341, 106 N. E. 646.

Iowa.—Laverenz v. Chicago, R. I. & P. R. Co. (1881) 56 Iowa, 689, 10 N. W. 268; Funston v. Chicago, R. I. & P. R. Co. (1883) 61 Iowa, 452, 16 N. W. 518; Nosler v. Chicago, B. & Q. R. Co. (1887) 73 Iowa, 268, 34 N. W. 850; Reed v. Chicago, St. P. M. & O. R. Co. (1887) 74 Iowa, 188, 37 N. W. 149; Moore v. Chicago, St. P. & K. C. R. Co. (1897) 102 Iowa, 595, 71 N. W. 569; Lorenz v. Burlington, C. R. & N. R. Co. (1902) 115 Iowa, 377, 56 L.R.A. 752, 88 N. W. 835; Hartman v. Chicago G. W. R. Co. (1906) 132 Iowa, 584, 110 N. W. 11; Dusold v. Chicago G. W. R. Co. (1913) 162 Iowa, 441, 142 N. W. 213.

Kansas.—Atchison, T. & S. F. R. Co. v. Hague (1894) 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; Chicago, R. I. & P. R. Co. v. Williams (1896) 56 Kan. 333, 43 Pac. 246, 11 Am. Neg. Cas. 545; Atchison, T. & S. F. R. Co. v. Powers (1897) 58 Kan. 544, 50 Pac. 452; St. Louis & S. F. R. Co. v. Knowles (1897) 6 Kan. App. 790, 51 Pac. 230.

Kentucky.—Wright v. Cincinnati, N. O. & T. P. R. Co. (1893) 94 Ky. 114, 21 S. W. 581; Illinois C. R. Co. v. Mizell (1896) 100 Ky. 235, 38 S. W. 5; Wilson v. Chesapeake & O. R. Co. (1905) 27 Ky. L. Rep. 778, 86 S. W. 690; Chesapeake & O. R. Co. v. Williams (1918) 179 Ky. 333, 200 S. W. 451.

Maine.—York v. Maine C. R. Co. (1891) 84 Me. 117, 18 L.R.A. 60, 24 Atl. 790; Wood v. Maine C. R. Co. (1906) 101 Me. 469, 64 Atl. 833; Borders v. Boston & M. R. Co. (1916) 115 Me. 207, 98 Atl. 662.

Maryland.—Philadelphia, W. & B. R.

Co. v. Hogeland (1886) 66 Md. 149, 59 Am. Rep. 159, 7 Atl. 105.

Massachusetts.—Warren v. Fitchburg R. Co. (1864) 8 Allen (Mass.) 227, 85 Am. Dec. 700, 3 Am. Neg. Cas. 748; French v. Taunton Branch R. Co. (1875) 116 Mass. 537; Tyler v. New York & N. E. R. Co. (1884) 137 Mass. 238; Manley v. Boston & M. R. Co. (1893) 159 Mass. 493, 34 N. E. 951.

Michigan.—Van Auken v. Chicago & W. M. R. Co. (1893) 96 Mich. 307, 22 L.R.A. 33, 55 N. W. 971; Morgan v. Pere Marquette R. Co. (1910) 162 Mich. 573, 127 N. W. 683; Rouse v. Blair (1915) 185 Mich. 632, 152 N. W. 204, 8 N. C. C. A. 1033; Mills v. Waters (1917) — Mich —, 165 N. W. 740.

Minnesota.—Kelly v. St. Paul, M. & M. R. Co. (1881) 29 Minn. 1, 11 N. W. 67; Loucks v. Chicago, M. & St. P. R. Co. (1884) 31 Minn. 526, 18 N. W. 651; Hendrickson v. Great Northern R. Co. (1892) 49 Minn. 245, 16 L.R.A. 261, 32 Am. St. Rep. 540, 51 N. W. 1044; Woehrle v. Minnesota Transfer R. Co. (1901) 82 Minn. 165, 52 L.R.A. 348, 84 N. W. 791; Campbell v. Chicago G. W. R. Co. (1909) 108 Minn. 104, 28 L.R.A.(N.S.) 346, 133 Am. St. Rep. 417, 121 N. W. 429; Jenkins v. Minneapolis & St. L. R. Co. (1914) 124 Minn. 368, 145 N. W. 40.

Mississippi.—Louisville & N. R. Co. v. Crominarity (1905) 86 Miss. 464, 38 So. 633; Mississippi C. R. Co. v. Hanna (1911) 98 Miss. 609, 54 So. 74.

Missouri.—Petty v. Hannibal & St. J. R. Co. (1885) 88 Mo. 306; Kenney v. Hannibal & St. J. R. Co. (1891) 105 Mo. 270, 15 S. W. 983, 16 S. W. 837; Gratiot v. Missouri P. R. Co. (1891) — Mo. —, 16 L.R.A. 189, 19 S. W. 31; Jennings v. St. Louis, I. M. & S. R. Co. (1892) 112 Mo. 268, 20 S. W. 490; Baker v. Kansas City, Ft. S. & M. R. Co. (1898) 147 Mo. 140, 48 S. W. 838; Byars v. Wabash R. Co. (1911) 161 Mo. App. 692, 141 S. W. 926; Chappell v. United R. Co. (1913) 174 Mo. App. 126, 156 S. W. 819; Feldewerth v. Wabash R. Co. (1914) 181 Mo. App. 630, 164 S. W. 711; Yonkers v. St. Louis, I. M. & S. R. Co. (1914) 182 Mo. App. 558, 168 S. W. 307; Underwood v. St. Louis, I. M. & S. R. Co. (1914) 182 Mo. App. 252, 168 S. W. 803, on subsequent appeal in (1915) 190 Mo. App. 407, 177 S. W. 724; Lagarce v. Missouri P. R. Co. (1914) 183 Mo. App. 70, 166 S. W. 1063; De Rousse v. West (1918) 198 Mo. App. 293, 200 S. W. 783.

Montana.—Mason v. Northern P. R. Co. (1912) 45 Mont. 474, 124 Pac. 271; Walters v. Chicago, M. & P. S. R. Co. (1913) 47 Mont. 501, 46 L.R.A.(N.S.) 702, 133 Pac. 357.

Nebraska.—Crabtree v. Missouri P. R. Co. (1910) 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932.

Nevada.—Bunting v. Central P. R. Co. (1879) 14 Nev. 351.

New Hampshire.—Lyman v. Boston & M. R. Co. (1890) 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; Davis v. Concord & M. R. Co. (1894) 68 N. H. 247, 44 Atl. 38; Smith v. Boston & M. R. Co. (1899) 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290; Stone v. Boston & M. R. Co. (1903) 72 N. H. 206, 55 Atl. 359.

New Jersey.—Bonnell v. Delaware, L. & W. R. Co. (1877) 39 N. J. L. 189; Pennsylvania R. Co. v. Middleton (1894) 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616; Goodwin v. Central R. Co. (1906) 73 N. J. L. 576, 64 Atl. 134, 20 Am. Neg. Rep. 433; Shafer v. Lehigh Valley R. Co. (1907) 75 N. J. L. 75, 66 Atl. 1072; Willoughby v. Erie R. Co. (1908) 77 N. J. L. 149, 71 Atl. 41; Wise v. Delaware, L. & W. R. Co. (1910) 81 N. J. L. 397, 80 Atl. 459, Ann. Cas. 1914D, 1072, 3 N. C. C. A. 456; Dickinson v. Erie R. Co. (1911) 81 N. J. L. 464, 37 L.R.A.(N.S.) 150, 81 Atl. 104.

New Mexico.—DePadilla v. Atchison, T. & S. F. R. Co. (1911) 16 N. M. 576, 120 Pac. 724.

New York.—Ernst v. Hudson River R. Co. (1866) 35 N. Y. 9, 90 Am. Dec. 761; Havens v. Erie R. Co. (1869) 41 N. Y. 296, reversing (1869) 53 Barb. 328; McGovern v. New York C. & H. R. R. Co. (1876) 67 N. Y. 417; Greany v. Long Island R. Co. (1886) 101 N. Y. 419, 5 N. E. 425; Kane v. New York, N. H. & H. R. Co. (1892) 132 N. Y. 160, 30 N. E. 256.

North Carolina.—Scott v. Wilmington & W. R. Co. (1887) 96 N. C. 428, 2 S. E. 151; Cooper v. North Carolina R.

Co. (1905) 140 N. C. 209, 3 L.R.A. (N.S.) 391, 52 S. E. 932, 6 Ann. Cas. 71; Farris v. Southern R. Co. (1909) 151 N. C. 483, 40 L.R.A.(N.S.) 1115, 66 S. E. 457; Johnson v. Seaboard Air Line R. Co. (1913) 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598, 4 N. C. C. A. 677; Shepard v. Norfolk & S. R. Co. (1914) 166 N. C. 539, 28 S. E. 872, on subsequent appeal in (1915) 169 N. C. 239, 84 S. E. 277; Davidson v. Seaboard Air Line R. Co. (1915) 170 N. C. 281, 87 S. E. 35; Hunt v. North Carolina R. Co. (1915) 170 N. C. 442, 87 S. E. 210.

North Dakota.—Pendroy v. Great Northern R. Co. (1908) 17 N. D. 433, 117 N. W. 531.

Ohio.—Cleveland, C. & C. R. Co. v. Crawford (1874) 24 Ohio St. 631, 15 Am. Rep. 633, 12 Am. Neg. Cas. 419; Baltimore & O. R. Co. v. Stoltz (1899) 18 Ohio C. C. 93, 9 Ohio C. D. 638; Baltimore & O. R. Co. v. Van Horn (1898) 21 Ohio C. C. 337, 12 Ohio C. D. 106; Wheeling & L. E. R. Co. v. Suhrwiar (1901) 22 Ohio C. C. 560, 12 Ohio C. D. 809; Cleveland, C. C. & St. L. R. Co. v. Sivey (1905) 27 Ohio C. C. 248; Cincinnati, H. & D. R. Co. v. Taylor (1905) 27 Ohio C. C. 757.

Oklahoma.—Clark v. St. Louis & S. F. R. Co. (1909) 24 Okla. 764, 108 Pac. 361; Chicago, R. I. & P. R. Co. v. Baroni (1912) 32 Okla. 540, 122 Pac. 926.

Oregon.—Durbin v. Oregon R. & Nav. Co. (1888) 17 Or. 5, 11 Am. St. Rep. 778, 17 Pac. 5; Hecker v. Oregon R. & Nav. Co. (1901) 40 Or. 6, 66 Pac. 270.

Rhode Island.—La Belle v. Rhode Island Co. (1909) — R. I. —, 73 Atl. 306.

South Carolina.—Bamberg v. Atlantic Coast Line R. Co. (1905) 72 S. C. 389, 51 S. E. 988.

South Dakota.—Dougherty v. Chicago, M. & St. P. R. Co. (1905) 20 S. D. 46, 104 N. W. 672.

Tennessee.—Louisville & N. R. Co. v. Satterwhite (1903) 112 Tenn. 185, 79 S. W. 106; Middle Tennessee R. Co. v. McMillan (1915) 134 Tenn. 490, 184 S. W. 20; Southern R. Co. v. Terry (1913) 3 Tenn. C. C. A. 445.

Virginia.—Southern R. Co. v. Bryant (1897) 95 Va. 212, 28 S. E. 183; Southern R. Co. v. Aldridge (1903) 101 Va. 142, 43 S. E. 333; Southern R. Co. v. Stockdon (1907) 106 Va. 693, 56 S. E. 713; Seaboard Air Line R. Co. v. Abernathy (1917) 121 Va. 173, 92 S. E. 913.

Washington.—Northern P. R. Co. v. Holmes (1885) 3 Wash. Terr. 543, 18 Pac. 76; Ladouceur v. Northern P. R. Co. (1892) 4 Wash. 38, 29 Pac. 942; Hull v. Seattle R. & S. R. Co. (1910) 60 Wash. 162, 110 Pac. 804; McKinney v. Port Townsend & P. S. R. Co. (1916) 91 Wash. 387, 158 Pac. 107.

West Virginia.—ELKINS v. WESTERN MARYLAND R. Co. ante, 198.

Wisconsin.—Eilert v. Green Bay & M. R. Co. (1879) 48 Wis. 606, 4 N. W. 769; Ferguson v. Wisconsin C. R. Co. (1885) 63 Wis. 152, 23 N. W. 123; Duame v. Chicago & N. W. R. Co. (1888) 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394; Winchell v. Abbot (1890) 77 Wis. 371, 46 N. W. 661; Ward v. Chicago, St. P. M. & O. R. Co. (1893) 85 Wis. 601, 55 N. W. 771; Kujawa v. Chicago, M. & St. P. R. Co. (1908) 135 Wis. 562, 116 N. W. 249; Swalm v. Northern P. R. Co. (1910) 143 Wis. 442, 128 N. W. 62.

Federal.—Whiton v. Chicago & N. W. R. Co. (1870) 2 Biss. 282, Fed. Cas. No. 17,597, affirmed in (1871) 13 Wall. 270, 20 L. ed. 571; Continental Improv. Co. v. Stead (1877) 95 U. S. 161, 24 L. ed. 403; Jones v. East Tennessee, V. & G. R. Co. (1888) 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; Flannelly v. Delaware & H. Co. (1912) 225 U. S. 597, 56 L. ed. 1221, 44 L.R.A. (N.S.) 154, 32 Sup. Ct. Rep. 783; Chicago & N. W. R. Co. v. Prescott (1893) 23 L.R.A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237; Illinois C. R. Co. v. Jones (1899) 37 C. C. A. 106, 95 Fed. 370; Louisville & N. R. Co. v. Summers (1903) 60 C. C. A. 487, 125 Fed. 719, certiorari denied in (1904) 192 U. S. 607, 48 L. ed. 585, 24 Sup. Ct. Rep. 851.

Ontario.—Miller v. Grand Trunk R. Co. (1875) 25 U. C. C. P. 389; Peart v. Grand Trunk R. Co. (1886) 10 Ont. L. Rep. 753, affirming (1884) 10 Ont. App. Rep. 191; Morrow v. Canadian P. R. Co. (1894) 21 Ont. App. Rep. 149; Vallee v. Grand Trunk R. Co.

(1901) 1 Ont. L. Rep. 224; Champaigne v. Grand Trunk R. Co. (1905) 9 Ont. L. Rep. 589; Misener v. Wabash R. Co. (1906) 12 Ont. L. Rep. 71; London v. Grand Trunk R. Co. (1914) 32 Ont. L. Rep. 642, 7 Ont. Week. Notes, 502.

Eng.—Brown v. Great Western R. Co. (1885) 52 L. T. N. S. 622; Smith v. Southeastern R. Co. [1896] 1 Q. B. 178, 65 L. J. Q. B. N. S. 219, 73 L. T. N. S. 614, 44 Week. Rep. 291, 60 J. P. 148; Grand Trunk R. Co. v. McAlpine [1913] A. C. 838, 29 Times L. R. 315, Ann. Cas. 1914A, 532; British Columbia Electric R. Co. v. Loach [1916] 1 A. C. 719, 85 L. J. P. C. N. S. 23, 113 L. T. N. S. 946.

As above stated, in some jurisdictions the courts have expressly rejected the rule that the mere failure to stop, look, and listen by one who is about to cross a railroad track is negligence per se, and have held that such a failure, in itself, does not amount to negligence per se, and that the question whether it is such negligence as will defeat a recovery is one of fact, to be determined by a jury, after taking into consideration all of the circumstances of the case; and, of course, in such jurisdictions the Pennsylvania rule does not obtain. See Western & A. R. Co. v. Ferguson (1901) 113 Ga. 708, 54 L.R.A. 802, 39 S. E. 306, 10 Am. Neg. Rep. 227; Atlanta & W. P. R. Co. v. Lovelace (1904) 121 Ga. 487, 49 S. E. 607; Bryson v. Southern R. Co. (1907) 3 Ga. App. 407, 59 S. E. 1124; Southern R. Co. v. Tankersley (1908) 3 Ga. App. 548, 60 S. E. 297; Chicago, M. & St. P. R. Co. v. Wilson (1890) 133 Ill. 55, 24 N. E. 555; Toledo, St. L. & K. C. R. Co. v. Cline (1890) 135 Ill. 41, 25 N. E. 846; Chicago & A. R. Co. v. Kelly (1899) 182 Ill. 267, 6 Am. Neg. Rep. 488, 54 N. E. 979, affirming (1899) 80 Ill. App. 675; Chicago & A. R. Co. v. Pulliam (1903) 111 Ill. App. 305, affirmed in (1904) 208 Ill. 456, 70 N. E. 460; Chicago City R. Co. v. Barker (1904) 209 Ill. 321, 70 N. E. 624; Elgin, J. & E. R. Co. v. Lawlor (1907) 229 Ill. 621, 82 N. E. 407; Dukeman v. Cleveland, C. C. & St. L. R. Co. (1908) 237 Ill. 104, 86 N. E. 712; Cleveland, C. C. & St. L. R. Co. v. Henry (1908) 143 Ill. App. 265, affirmed in (1908) 236 Ill. 219, 86 N. E. 231; Rosenthal v. Chicago & A. R. Co. (1912) 255 Ill. 552, 99 N. E. 672; Gibbons v. Aurora, E. & C. R. Co. (1914) 263 Ill. 266, 104 N. E. 1063; Terre Haute & P. R. Co. v. Barr (1888) 31 Ill. App. 57; Lake Shore & M. S. R. Co. v. Foster (1897) 74 Ill. App. 387; Illinois C. R. Co. v. Batson (1899) 81 Ill. App. 142 (holding that a failure to perform a duty of the character under consideration is not, in law, negligence per se, but that it is negligence in fact, if there are no conditions or circumstances which excuse); Cleveland, C. C. & St. L. R. Co. v. Beard (1902) 106 Ill. App. 486; Chicago & J. R. Co. v. Barrows (1906) 128 Ill. App. 11; Storm v. Cleveland, C. C. & St. L. R. Co. (1910) 156 Ill. App. 88; Eidem v. Chicago, R. I. & P. R. Co. (1910) 158 Ill. App. 82; Baethke v. Aurora, E. & C. R. Co. (1911) 163 Ill. App. 30; Scranton v. Chicago & A. R. Co. (1911) 164 Ill. App. 20; Brand v. Osborne (1913) 184 Ill. App. 11; Louisville & N. R. Co. v. Price (1903) 25 Ky. L. Rep. 1033, 76 S. W. 836; Louisville & N. R. Co. v. Lucas (1906) 30 Ky. L. Rep. 359, 98 S. W. 308; Louisville & N. R. Co. v. McNary (1908) 128 Ky. 408, 17 L.R.A. (N.S.) 224, 129 Am. St. Rep. 308, 108 S. W. 898; Louisville & N. R. Co. v. Miller (1909) 134 Ky. 716, 135 Am. St. Rep. 433, 121 S. W. 648; Chesapeake & O. R. Co. v. Hawkins (1910) — Ky. —, 124 S. W. 836; Cincinnati, N. O. & T. P. R. Co. v. Winningham (1913) 156 Ky. 434, 161 S. W. 506; Illinois C. R. Co. v. Sullenger (1914) 160 Ky. 455, 169 S. W. 858; Chesapeake & O. R. Co. v. Hoskins (1915) 164 Ky. 575, 176 S. W. 29; Louisville & N. R. Co. v. Benke (1915) 164 Ky. 798, 176 S. W. 212; Cincinnati, N. O. & T. P. R. Co. v. Hughes (1917) 173 Ky. 693, 191 S. W. 495; Danskin v. Pennsylvania R. Co. (1912) 83 N. J. L. 522, 83 Atl. 1006; Kellogg v. New York C. & H. R. R. Co. (1879) 79 N. Y. 72; Judson v. Central Vermont R. Co. (1899) 158 N. Y. 597, 53 N. E. 514, 6 Am. Neg. Rep. 167; Lewis v. Long Island R. Co. (1900) 162 N. Y. 52, 56 N. E. 548, 7 Am. Neg. Rep. 299; Smith v. Lehigh

Valley R. Co. (1901) 61 App. Div. 46, 69 N. Y. Supp. 1112, reversed on other grounds in (1902) 170 N. Y. 394, 63 N. E. 338, 11 Am. Neg. Rep. 322; Neudoerffer v. Brooklyn Heights R. Co. (1896) 9 App. Div. 66, 41 N. Y. Supp. 50; Sandresky v. Erie R. Co. (1915) 91 Misc. 67, 153 N. Y. Supp. 612, affirmed without opinion in (1916) 156 N. Y. Supp. 1144; Texas & P. R. Co. v. Chapman (1882) 57 Tex. 75; Houston & T. C. R. Co. v. Wilson (1883) 60 Tex. 142; Texas & P. R. Co. v. Anderson (1884) 2 Tex. App. Civ. Cas. (Willson) 161; Gulf, C. & S. F. R. Co. v. Greenlee (1888) 70 Tex. 553, 8 S. W. 129; Gulf, C. & S. F. R. Co. v. Anderson (1890) 76 Tex. 244, 13 S. W. 196; International & G. N. R. Co. v. Neff (1894) 87 Tex. 303, 28 S. W. 283; Gulf, C. & S. F. R. Co. v. Daniels (1893) — Tex. Civ. App. —, 24 S. W. 337; Austin & N. W. R. Co. v. Duty (1894) — Tex. Civ. App. —, 28 S. W. 463; Central Texas & N. W. R. Co. v. Bush (1896) 12 Tex. Civ. App. 291, 34 S. W. 133; International & G. N. R. Co. v. Eason (1896) — Tex. Civ. App. —, 35 S. W. 208; Galveston, H. & S. A. R. Co. v. Harris (1899) 22 Tex. Civ. App. 16, 53 S. W. 598; Frugia v. Texarkana & Ft. S. R. Co. (1904) 36 Tex. Civ. App. 648, 82 S. W. 814; Gulf, C. & S. F. R. Co. v. Dolson (1905) 38 Tex. Civ. App. 324, 85 S. W. 444; Gulf, C. & S. F. R. Co. v. Melville (1905) — Tex. Civ. App. —, 87 S. W. 863; Texas & P. R. Co. v. Hilgartner (1912) — Tex. Civ. App. —, 149 S. W. 1091; St. Louis Southwestern R. Co. v. Tarver (1912) — Tex. Civ. App. —, 150 S. W. 958; International & G. N. R. Co. v. Walker (1913) — Tex. Civ. App. —, 161 S. W. 961, rehearing denied in (1914) — Tex. Civ. App. —, 162 S. W. 958; International & G. N. R. Co. v. Linney (1914) — Tex. Civ. App. —, 163 S. W. 1035; Texas & P. R. Co. v. Moody (1914) — Tex. Civ. App. —, 169 S. W. 1057; Ft. Worth & D. C. R. Co. v. Alcorn (1915) — Tex. Civ. App. —, 178 S. W. 833; Olsen v. Oregon Short Line & U. N. R. Co. (1893) 9 Utah, 129, 33 Pac. 623; Smith v. Rio Grande Western R. Co. (1893) 9 Utah, 141, 33 Pac. 626; Peck v. Oregon Short Line R. Co. (1902) 25 Utah, 21, 69 Pac. 153; Manley v. Delaware & H. Canal Co. (1896) 69 Vt. 101, 37 Atl. 279; Hemingway v. Illinois C. R. Co. (1902) 52 C. C. A. 477, 114 Fed. 843; Pennsylvania R. Co. v. Cash (1912) 118 C. C. A. 443, 200 Fed. 337, holding such to be the law of New Jersey. And see also Graves v. Northern P. R. Co. (1917) 30 Idaho, 542, 166 Pac. 571; Case v. Chicago G. W. R. Co. (1910) 147 Iowa, 747, 126 N. W. 1037; Lyman v. Boston & M. R. Co. (1890) 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; Davis v. Concord & M. R. Co. (1894) 68 N. H. 247, 44 Atl. 388; Smith v. Boston & M. R. Co. (1899) 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290; Wise v. Delaware, L. & W. R. Co. (1910) 81 N. J. L. 397, 80 Atl. 459, Ann. Cas. 1914D, 1071, 3 N. C. C. A. 456; Davis v. New York C. & H. R. R. Co. (1872) 47 N. Y. 400; Alexander v. Richmond & D. R. Co. (1893) 112 N. C. 720, 16 S. E. 896; Shepard v. Norfolk & S. R. Co. (1914) 166 N. C. 539, 82 S. E. 872; Pendroy v. Great Northern R. Co. (1908) 17 N. D. 433, 117 N. W. 531; Hecker v. Oregon R. & Nav. Co. (1901) 40 Or. 6, 66 Pac. 270; Cathcart v. Oregon-Washington R. & Nav. Co. (1917) 86 Or. 250, 168 Pac. 308 and Sims v. Grand Trunk R. Co. (1905) 10 Ont. L. Rep. 330, affirmed in (1906) 12 Ont. L. Rep. 39. But in connection with the above cited Texas cases see St. Louis Southwestern R. Co. v. Branom (1903) — Tex. Civ. App. —, 73 S. W. 1064 (wherein it was held that, under the facts, the plaintiff was guilty of contributory negligence as matter of law).

In California, the courts have laid down the rule that it is never negligence per se for a traveler to fail to stop, look, and listen at a railroad crossing, but that it is for the jury to say, from the facts of the particular case, whether a stop should have been made. Antonian v. Southern P. R. Co. (1909) 9 Cal. App. 718, 100 Pac. 877; Alloggi v. Southern P. Co. (1918) — Cal. App. —, 173 Pac. 1117.

And in some states it is provided by statute that, under certain circumstances, a cause of action cannot be barred by a failure of the person injured to stop, look, and listen before

passing over a railroad crossing, and that in such cases the question of contributory negligence is for the jury, which statutes, of course, conclusively establish that, for purposes of recovery, a failure to stop, look, and listen is not negligence as matter of law, barring recovery, under all circumstances, and preclude any absolute rule that such a failure is negligence per se. See, for illustration, Fernetti v. West Jersey & S. R. Co. (1915) 87 N. J. L. 268, 93 Atl. 765; Brown v. Erie R. Co. (1915) 87 N. J. L. 487, 91 Atl. 1023, Ann. Cas. 1917C, 496, and Hatch v. Erie R. Co. (1916) 88 N. J. L. 545, 97 Atl. 38, all of which apply N. J. Pamph. Laws 1909, p. 137.

To briefly summarize the foregoing authorities it may be said that there is no jurisdiction in which the courts have, in every instance, held that a failure to stop, look, and listen before crossing a railroad track was negligence per se, irrespective of the surrounding circumstances. However, in Pennsylvania, the rule is so strictly applied that it is almost without exception. G. J. C.

STATE OF ALABAMA, Appt.,

v.

R. F. KOLB et al.

Alabama Supreme Court—February 14, 1918.

(— Ala. —, 78 So. 817.)

Office — liability of officer for act of assistant.

1. Neither an officer nor his bondsman is, in the absence of a statute imposing liability, or of negligence on his part in appointing or supervising his assistant, liable for the defaults and misfeasance of assistants appointed by him under statutory authority.

[See note on this question beginning on page 222.]

Statute — repeal — subsequent general statute.

2. A provision in a statute regulating the control of feedstuffs, which imposes liability upon the commissioner for acts of his assistants, is repealed by a subsequent act intended to cover the entire subject, but omitting a provision for such liability.

APPEAL by the State from a judgment of the Circuit Court for Montgomery County in favor of defendants in a suit brought to hold defendants liable for default or fraud of a clerk appointed by the defendant commissioner. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **F. Loyd Tate**, Attorney General, and **Emmett S. Thigpen**, Assistant Attorney General, for the State.

Messrs. **Rushton, Williams, & Crenshaw**, for appellees:

The act of the legislature approved August 26, 1909, entitled, "An Act to Provide for and Regulate the Manufacture, Sale, and Inspection of Mixed Feedstuffs in Alabama, and to Provide Penalties for Violations of This Act," was repealed by a subsequent act approved March 9, 1911.

Lemay v. Walker, 62 Ala. 39; Prowell v. Hasty, 142 Ala. 80, 39 So. 164; Edson v. State, 134 Ala. 50, 32 So. 308; State v. Lamar, 5 Ala. App. 259, 59 So. 737.

Defendants were not liable for the defaults or misfeasance of the assistant clerk.

Raisler v. Oliver, 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238; United States v. Rodge, 214 Fed. 283; District of Columbia v. Petty, 229 U. S. 593, 57 L. ed. 1343, 33 Sup. Ct. Rep. 881; Com. v. Boles, 160 Ky. 775, 170 S. W. 170;

Robertson v. Sichel, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286; Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613; Lane v. Cotton, 1 Ld. Raym. 646, 91 Eng. Reprint, 1332, 12 Mod. 472, 88 Eng. Reprint, 1458; Whitfield v. Le De Spender, Cowp. pt. 2, p. 754, 98 Eng. Reprint, 1344; Dunlop v. Munroe, 7 Cranch, 242, 3 L. ed. 329; Schroyer v. Lynch, 8 Watts. 453; Bishop v. Williamson, 11 Me. 495; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499; Sawyer v. Corse, 17 Gratt. 230, 94 Am. Dec. 445; Elder v. Bemis, 2 Met. 599; Shepherd v. Lincoln, 17 Wend. 250; Nicholson v. Mouncey, 15 East, 384, 104 Eng. Reprint, 890, 13 Revised Rep. 501; Anne Arundel County v. Duvall, 54 Md. 350, 39 Am. Rep. 393; Feller v. Gates, 91 Am. St. Rep. 497, note.

Mayfield, J., delivered the opinion of the court:

This appeal involves the question of the liability to the state of the commissioner of agriculture and industries and his official bondsman as for the default or fraud of the special food and drug clerk appointed by the commissioner, such default consisting in the conversion of state funds by such clerk, in his official capacity, under and by virtue of statutes of this state providing regulations as to the manufacture and sale of feedstuffs. See Acts 1909, p. 269; Acts 1911, p. 104. There is no attempt here to fix liability on the state officer or his surety as for any fault, neglect, or fraud on the part of the officer in the making of the appointment of this particular clerk, nor as for subsequently improperly watching or supervising this defaulting employee. The contention of the state is that the law in the particular case made the commissioner liable, and that of course the commissioner's bond is liable as for any official default of his. It is conceded by the state that unless the facts above referred to fix liability, no liability exists.

The general proposition that an officer is not liable for the defaults and misfeasances of his clerks or assistants, even though they are appointed by him and are under his control, in the absence of allegation and proof that the officer was negligent or at fault in failing to exercise proper care and prudence in selecting the assistant or clerk, or in failing to properly supervise and superintend the acts and services of such employee in the work for which he was so selected, the doing or failure to do which caused the loss or injury or damage, is well settled. In such cases, in the absence of a special statute or law to the contrary, the assistant or clerk, and his bondsmen, if any he have, are liable, but not the officer or his bondsmen. This has been repeatedly decided by this and most other courts. See the case of Raisler v. Oliver, 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238, where the authorities are collected and cited, and 31 Cyc. 980–984, and note, also collecting the authorities. Of course, for this rule to apply, the law must authorize the appointment of such clerk or assistant, so that by virtue of the law and of the appointment the clerk or assistant became in a sense an officer himself. If the superior officer, on his own account and without authority of law, should appoint or employ such aid, the former would be liable, the doctrine of respondeat superior applying. The reason for this rule was thus stated by this court in the case of Central R. & Bkg. Co. v. Lampley, 76 Ala. 365, 52 Am. Rep. 334: "It is well settled that public officers are exempt from liability for the acts and defaults of those employed under them to assist in the performance of their official duties. Notwithstanding the vigorous dissenting opinion of Lord Holt, since the decision in Lane v. Cotton, 1 Ld. Raym. 646, 91 Eng. Reprint, 1332, 12 Mod. 472, 88 Eng. Reprint, 1458, it has been generally held that neither the Postmaster General, nor an assistant or local postmaster, is responsible for the negligence or wilful wrongs of the persons em-

Office—liability of officer for act of assistant.

ployed in assisting him in the discharge of his public duties and functions. The rule rests on considerations of public policy, and on the ground that such persons are acting in the capacity of public agents, and not as the private agents of the officers. It is conceded that a public officer is liable for his own misconduct or negligence, and for the misconduct or negligence of his subordinates, where he is invested with their selection or appointment, and from carelessness or unfaithfulness appoints incompetent or untrustworthy persons."

It is true that these instances were of officers of the Postoffice Department of the Federal government; but the decisions were rested upon general principles, and not upon special statutes, state or Federal. Other courts have taken a different view of the question. See note in 38 Am. St. Rep. 216. We can see no reason why a different rule should be applied to other officers, unless the statute so provide. It is true that we have statutes making certain officers liable as for the acts of their assistants and clerks; in such cases the special statute, of course, controls. It is insisted by the state that there is a special statute which controls in this case, while the defendants contend, and the trial court holds, that there is no such special law which applies.

The two statutes above referred to were passed by legislatures of this state to regulate and control the manufacture, sale, etc., of feedstuffs in Alabama. Acts 1909, p. 269; Acts 1911, p. 104. Each act provides for a clerk, and that the commissioner of agriculture and industries shall appoint him, and each prescribes duties of the commissioner and of the clerk. Section 9 of the Act of October, 1909, expressly provides that the commissioner and his bondsmen shall be liable as for certain defaults of the clerk so provided for; and if it applied and was in force when the defaults of the clerk accused were committed, then the commissioner and his bondsman (appellees here) are liable. If it was not then of force, but was repealed by the subsequent Act of 1911, which contains no such or similar provision, then the appellees are not liable, as the trial court ruled.

So the question resolves itself into, or is reduced to, the inquiry whether or not the former act was repealed, or, at least, § 9 thereof, by the subsequent Act of 1911. The two acts deal with the same general subject. While the latter act does not directly refer to or mention the first, yet many of its provisions necessarily repeal or take the place of provisions of the first—even to the appointing of the clerk and the fixing of his duties, as well as the fixing of certain duties of the commissioner. It would be impossible for both acts to stand and be enforced, because their provisions are in conflict; and to that extent, of course, the latter must control. It is true that some provisions are common to both acts and identically expressed, and as to any such it would be immaterial which act is invoked. The question important to this decision is, Did the omission of any provision in the later act corresponding with or referring to the matter contained in § 9 of the former act work a repeal of the former section? It is very true that all the provisions of the later act (that of 1911) can be just as well enforced with § 9 of the former act standing as if it were repealed.

The question of importance, however, is, What was the legislative will? Did the legislature intend for the former act to remain the law, except in so far as it was changed by the subsequent act; or did they intend that the later act should be the whole law on the subject, and that it should take the place of the former? We are constrained to hold with the trial court that the intent of the legislature was that the later act should be complete in itself, and that it should not operate as a mere supplement of the

Statute—repeal—subsequent general statute.

first. Had it been intended as a mere amendment of the first, the title would have so styled it, as that is the usual way of amending such statutes, and the Constitution has provisions on this subject. See § 45 of the Constitution. If it was not intended as an amendment, nor as a mere supplement of the first act, but was intended as a whole, and to embrace the entire law on the subject, then the second enactment would undoubtedly have embraced § 9 of the former act had it been by the legislature thought proper or best. It is impossible to read the two acts without reaching the conclusion that the later expression was intended as a substitute for the former, and not as an amendment or a supplement thereof.

It appears to us that the legislature of 1911 intended, in passing the act above referred to, that it should be the only and exclusive rule or law governing the manufacture, sale, etc., of feedstuffs in this state. The rules to be applied in cases like this have been repeatedly stated, but the following, among them, may well be restated here: "Statutes may be repealed by implication, or by express legislative enactment; and it is well settled that a subsequent statute, which is clearly repugnant to and inconsistent with a former one, operates a repeal of the latter. Or, if the later statute is manifestly and plainly intended to prescribe the only rule that shall govern in reference to the particular matter, it necessarily repeals the prior statute. Sedgw. Stat. & Const. Law, 104. It is true the doctrine of the repeal of statutes by implication is not favored; and when two statutes are capable of a fair and just exposition, so that the two can stand, that exposition will be adopted, rather than a construction which will render the latter a repeal by implication of the former. Wyman v. Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677. But if they are not capable of such exposition without doing violence to the legislative intent,—if there is a manifest repugnancy of the one to the other,—the former statute must yield to the last expression of the legislative will. George v. Skeates, 19 Ala. 738." Riggs v. Brewer, 64 Ala. 285.

The statute (Acts 1903, p. 290) redistricting the public schools is a re-enactment of the entire law on the subject of district and public schools, and as to the management of the same, and was intended to set up a new system, and whatever power any school officer may have on this subject must be derived from this act; it was not an amendment of the old law, but was a substitution of this law for the old, and therefore repealed it. Gibson v. Mabry, 145 Ala. 112, 40 So. 297. A subsequent act appropriating money for the operation or maintenance of a state department, as that of archives and history, fixing the amount to be paid to such department, and naming the purposes for which it is to be paid, held to repeal a former statute appropriating a given amount for the maintenance of the department in excess of the salary of the director of the department. Owen v. Beale, 145 Ala. 108, 39 So. 907.

It follows that there is not yet shown any liability on the part of appellees as for the default of the clerk provided for by the Act of 1911.

Affirmed.

Anderson, Ch. J., and **Sommerville**, and **Thomas**, JJ., concur:

ANNOTATION.

Liability of public officer or his bond for the defaults and misfeasances of his clerks, assistants, or deputies.

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This note deals only with the liability of public officers or their sureties for acts conceded to constitute defaults or misfeasances on the part of their clerks, assistants, or deputies. It does not embrace cases such as Adams v. Jewett (1833) 10 **Me.** 426; Brown v. Sneed (1890) 77 **Tex.** 471, 14 S. W. 248; Palmer v. Hatch (1812) 9 Johns. (**N. Y.**) 329; Young v. Hosmer (1814) 11 **Mass.** 89; Dabney v. Smith (1834) 5 Leigh (**Va.**) 13, in which it is assumed that the officer or his surety is liable if the act complained of constitutes a default or misfeasance, or, in other words, if the act creates liability on the part of anyone; nor does it cover questions as to the authority of a deputy to bind his principal by contract; as to notice to a deputy as notice to his principal; or as to evidence of the relation between the officer and the alleged deputy.

I. In general.

As stated in the reported case (STATE v. KOLB, ante, 218), it is well settled as a general rule, subject, however, to a number of exceptions equally well settled, that, in the absence of a statute imposing liability, or of negligence on his part in appointing or supervising his assistants, neither an officer nor his bondsman is liable for the defaults and misfeasances of assistants appointed by him, providing the assistants, by virtue of the law and of the appointment, become in a sense officers themselves, or servants of the public, as distinguished from servants of the officer.

The rule as stated in Robertson v. Sichel (1888) 127 **U. S.** 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286, is that a public officer or agent is not responsible for the misfeasances or positive wrongs or for the nonfeasances or negligences or omissions of duty of the subagents or servants or other persons properly employed by or under him in the discharge of his official duty.

The rule is stated in similar language in Murphy v. Emigration Comrs. (1863) 28 **N. Y.** 134, and in United States v. Rogde (1914) 214 **Fed.** 283, and is also laid down or recognized in Central R. & Bkg. Co. v. Lampley (1884) 76 **Ala.** 365, 52 Am. Rep. 334; Barker v. Chicago, P. & St. L. R. Co. (1909) 243 **Ill.** 482, 26 L.R.A. (N.S.) 1058, 134 Am. St. Rep. 382, 90 N. E. 1057; Colby v. Portland (1917) 85 **Or.** 359, 166 Pac. 537; Bailey v. New York (1842) 3 Hill (**N. Y.**) 531, 38 Am. Dec. 669; Richmond v. Long (1867) 17 Gratt. (**Va.**) 375, 94 Am. Dec. 461; McKenna v. Kimball (1888) 145 **Mass.** 555, 14 N. E. 789; Cardot v. Barney (1875) 63 **N. Y.** 281, 20 Am. Rep. 533; Casey v. Scott (1907) 82 **Ark.** 362, 118 Am. St. Rep. 80, 101

S. W. 1152, 12 Ann. Cas. 184; Clough v. Worsham, 32 Tex. Civ. App. 187, 74 S. W. 350; Holliday v. St. Leonard (1861) 11 C. B. N. S. 192, 142 Eng. Reprint, 769, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694.

It is said, however, in Central R. & Bkg. Co. v. Lampley (1884) 76 Ala. 365, 52 Am. Rep. 334, that a public officer is liable for the misconduct or negligence of his subordinates where he is intrusted with their selection or appointment, and through carelessness or unfaithfulness appoints incompetent or untrustworthy persons; and public officers are also liable for their own failure to exercise proper and reasonable care in the choice of their agents (Richmond v. Long (1867) 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Colby v. Portland (1917) 85 Or. 359, 166 Pac. 537), or in the superintendence of them in the discharge of their allotted duties (Richmond v. Long (Va.) supra).

In Cardot v. Barney (1875) 63 N. Y. 281, 20 Am. Rep. 533, it is said that the rule of nonliability applies whether the officer is acting gratuitously or for a compensation; and that, when acting for a compensation, he is regarded as being paid for the services rendered, and not for taking the hazards of the acts of those necessarily employed by him.

In Bailey v. New York (1842) 3 Hill (N. Y.) 531, 38 Am. Dec. 669, it is held that if a public officer authorizes the doing of an act not within the scope of his authority, he will be held responsible.

In Raleigh v. Goschen [1898] 1 Ch. (Eng.) 73, 67 L. J. Ch. N. S. 59, 77 L. T. N. S. 429, 46 Week. Rep. 90, the court, while recognizing the rule that the head of a government department is not liable for the neglects or torts of officers in the department, adds that if it can be shown that the act complained of was substantially the act of the head of the department himself, he will be liable as an individual just as a stranger committing the same act would be, and that the injured person in such a case will not be confined to an action against those actually committing the wrong, who may be very humble persons.

In Robertson v. Sichel (U. S.) supra, the court held that a collector of customs was not liable for the wrong, if any, committed by his subordinates in detaining a steamship passenger's trunk for appraisement, the trunk having been destroyed by fire while still on the pier.

Where a state board of public works appointed the officers of the state fishery force which was charged with the enforcement of an oyster license law which was unconstitutional, the court in Booth v. Lloyd (1887) 33 Fed. 593, held that the members of such board were not liable for the act of a commander of a vessel in the employ of the board in seizing plaintiff's vessels and arresting their captains under such unconstitutional law, in the absence of any showing that they advised, directed, abetted, or aided such conduct.

In Mister v. Brown (1894) 59 Fed. 909, it was held that the commander in chief of a state fishery force and the members of the state board of public works, charged with the duty of supervising the commander in chief in his control and direction of the force, and of appointing the commander in chief and a deputy commander for each vessel, were not liable for a deputy commander's abuse of the discretion committed to him by statute in using the arms and ammunition furnished the vessel in attempting to arrest the commander of a fleeing sloop, because they left such discretion to the deputy commander, as the statute did, instead of instructing him not to use arms under the circumstances involved.

In Brissac v. Lawrence (1850) 2 Blatchf. 121, Fed. Cas. No. 1,888, a collector of customs was held not personally responsible for the negligence of his subordinates, resulting in the loss of goods deposited in a customhouse warehouse.

In Merritt v. McFarland (1906) 4 Cal. App. 390, 88 Pac. 369, it was held that city trustees who appointed a superintendent of streets (himself a

public officer, with duties prescribed by statute) did not stand in the relation of principal to the superintendent, and were not responsible for his negligence in leaving a street in defective condition.

In Huey v. Richardson (1837) 2 Harr. (Del.) 206, it was held that a road commissioner whose oath of office required him to execute the duties of the office to the best of his skill and judgment, and who did open a road according to his best skill and judgment, was not liable for an accidental deviation from the line of the road returned by freeholders to the court, caused by the mistake of a competent and faithful surveyor employed and directed by him to ascertain the route of the road in the absence of landmarks.

In Ketterer v. State Bd. of Control (1909) 131 Ky. 287, 20 L.R.A.(N.S.) 274, 115 S. W. 200, it was held that the superintendent of a state lunatic asylum was not, under the doctrine of respondeat superior responsible for injuries inflicted upon inmates of the asylum by employees whom he appointed. The court said that such officers were appointed to their positions for the purpose of administering a public benefit and necessity, and were directed and compelled by law to employ persons to assist in the proper performance of the functions of the office, and that to apply the rule that exists with reference to master and servant to such officers would do violence to the principles upon which the rule is based, and would have the effect of preventing persons of responsibility from accepting such positions. The court further said that inferior officers appointed by them did not act in the performance of their duties as their servants or for their benefit, but for the good of the public, and in the furtherance of a charity.

In McKenna v. Kimball (1888) 145 Mass. 555, 14 N. E. 789, where it appeared that a town school committee had authority to remove a tree from the lot on which a high school building was situated, the court held that they were not liable for the negligence of those employed to remove the tree.

Where emigration commissioners were authorized by statute to employ such agents, clerks, and servants as they should deem necessary, and to pay a reasonable compensation out of money received by the city from masters and commanders of ships and vessels carrying emigrants, and were public officers, not acting for their own benefit or employing agents, clerks, or servants for their own benefit, but for the benefit of the community at large, they were not liable for the negligence of some agent, clerk, or servant employed by them, whereby an emigrant's trunk was lost. Murphy v. Emigration Comrs. (1863) 28 N. Y. 134.

Where an engineer in a city department of public works in charge of one of the bureaus of that department had, with his assent, been given the duty of supervising engineer of the whole department, and had been designated as the engineer of the department in a contract for the construction of an arch supporting a roadway, but it was impossible for him to personally supervise all of the work, and the commissioner of public works appointed inspectors to inspect the work and materials used in performing the contract, and to report to the commissioner any violations of the contract, it was held in People ex rel. Campbell v. Campbell (1880) 82 N. Y. 247, that the engineer was not liable to removal from office because of the failure of the inspectors to discover bad work or poor materials. The court in this case laid some stress on the fact that the engineer had no power to select or appoint the inspectors, saying that if he had had such power, he might justly be held responsible.

In Donovan v. McAlpin (1881) 85 N. Y. 185, 39 Am. Rep. 649, affirming (1880) 14 Jones & S. 111, it was held that trustees of schools serving gratuitously, and charged with the safekeeping of school property, and authorized to make necessary repairs within certain limits and to employ workmen for this purpose, were not liable for the negligence of the workmen, where they employed competent men and exercised reasonable supervision over the work.

In Walsh v. New York & B. Bridge (1884) 96 N. Y. 427, it was held that the trustees of the New York and Brooklyn bridge, being mere representatives and agents of the two cities, were not the legal superiors of the inferiors employed by them in the construction of the bridge, and were not liable for the negligence of a laborer.

In Bieling v. Brooklyn (1890) 120 N. Y. 98, 24 N. E. 389, it appeared that a statute provided that a city should not be liable for any misfeasance or nonfeasance of the common council or of any officers of the city or appointees of the common council with respect to any duty imposed upon them by that act, or enjoined upon them as officers of the government, and other statutes gave the commissioner of the department of city work charge and control, subject to the direction of the common council, of repairing streets and keeping them clear of encroachments and obstructions, and created a bureau in such department in charge of a superintendent of streets, to have charge of such matters. The court held that the statute only exempted the city where the duty rested on the officers, and not on the city itself; that taking care of the streets was legitimately the duty of the corporation, and departments and officers charged with that duty were its instrumentalities; that, therefore, a statute exempting heads of departments and officers of the city from liability for the misfeasances or nonfeasances of any person appointed by or subordinate to them was constitutional; that the subordinates and employees of the commissioner were in the service of the corporation, and it was chargeable for their negligence, and the commissioner, in the absence of personal negligence, was not liable for injuries caused by the falling of an awning; also, that as the subordinates and employees in the bureau under the superintendent of streets were appointed by the commissioner, the doctrine of respondeat superior did not apply as between them and the superintendent.

In Bowden v. Derby (1903) 97 Me. 536, 63 L.R.A. 223, 94 Am. St. Rep. 516, 55 Atl. 417, 14 Am. Neg. Rep. 305, s. c. subsequent appeal (1904) 99 Me. 208, 58 Atl. 993, 17 Am. Neg. Rep. 239, the court held that a city street commissioner was not liable for the misconduct of those whom he was obliged to employ in performing the duties of his office, although he selected and discharged them; and that the rule of respondeat superior did not apply, the court saying that sound public policy forbade that such officers should be held responsible for the negligence of those whom they were obliged to employ in the discharge of their duty.

County commissioners who neither authorized nor ratified the act of a road supervisor in wrongfully procuring the arrest and imprisonment of one who refused to work on the roads were held not liable for his acts, in Carter v. Worcester County (1902) 94 Md. 621, 51 Atl. 830.

In Colby v. Portland (1917) 85 Or. 359, 166 Pac. 537, the court held that the mayor, city commissioners, and city engineers were not liable for defects in streets, due to the negligence of subordinates, if they used reasonable diligence to provide sufficient funds, to see that a system of inspection and repair was provided, and designated competent persons to make inspections and repairs.

In Clough v. Worsham (1903) 32 Tex. Civ. App. 187, 74 S. W. 350, the court held that the superintendent or members of the board of managers of a state lunatic asylum were not liable for the negligence of a physician in permitting an inmate to leave the asylum premises, or the negligence of the attendant who accompanied him, where they were not negligent in employing the physician or the attendant.

In Tracy v. Cloyd (1877) 10 W. Va. 19, a district commissary of the Confederate government, who, as such, was an officer and agent of that government, was held not liable for a conversion of cattle by a subagent.

In Casey v. Scott (1907) 82 Ark. 362, 118 Am. St. Rep. 80, 101 S. W. 1152, 12 Ann. Cas. 184, it was held that a chief of police was not responsible for the mistreatment of a dog by a dog catcher selected by him pursuant to an ordinance requiring

him to employ a dog catcher, the dog catcher himself being a public servant.

In Duncan v. Findlater (1839) 6 Clark & F. 894, 7 Eng. Reprint, 934, McLean & R. 911, 9 Eng. Reprint, 339, it was held that road trustees were not liable for injury to travelers from negligence or improper conduct of laborers or servants employed by them or their officers.

In Hall v. Smith (1824) 2 Bing. 156, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113, commissioners for lighting, paving, etc., acting gratuitously for the public, were held not liable for the misconduct of such persons as they were obliged to employ in the performance of their duties, as in opening a ditch.

In Pickering v. James (1873) L. R. 8 C. P. (Eng.) 489, 42 L. J. C. P. N. S. 217, 29 L. T. N. S. 210, 21 Week. Rep. 786, it was held that where the returning officer appoints a clerk to assist at a polling station in a municipal election, the presiding officer at such election is not liable for the clerk's act in delivering to a voter a ballot without the official mark, as the clerk is not appointed or paid by him, and the relation of master and servant does not exist.

In an action against public officers in charge of a dockyard, for injuries to a barge while moored at the place pointed out by the foreman of the dockyard, the court, in Wright v. Lethbridge (1890) 63 L. T. N. S. (Eng.) 572, 6 Asp. Mar. L. Cas. 558, held that the doctrine of respondeat superior did not apply.

In Holliday v. St. Leonard (1861) 11 C. B. N. S. 192, 142 Eng. Reprint, 769, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694, the court held that the vestry of a parish, vested with the powers and duties of surveyors of highways, and appointing a surveyor at a salary, were not liable for the act of a workman employed by him in negligently placing an obstruction in a street, not having exceeded the limits of their duty or been guilty of any negligence or personal wrongdoing. The court laid down the principle that persons intrusted with the performance of a public duty and discharging it gratuitously, and themselves taking no personal share in the mode of its performance, are exempt from liability for the negligent acts of persons employed by them.

There are a few cases apparently out of harmony with the general rule. Thus, in Butler v. Milwaukee (1903) 119 Wis. 526, 97 N. W. 185, the court, in determining whether a city clerk's bond covered the acts of his assistants so as to bring them within a civil service exemption clause, said: "The city clerk was by law required to give a bond for the faithful discharge of the duties of his office. That included in the administration of such office acts done by the deputies and assistants as well as those done by the clerk himself. In legal effect all the acts are those of the responsible head, the city clerk, and so are within the terms of the official bond. A principal officer is always liable for the official misconduct of one of his assistants, and cannot escape liability therefrom upon the ground that it was not a personal fault of his. . . . The place of a mere assistant to a superior officer is one of less dignity than that of a deputy . . . yet the latter, in the absence of some express provisions to the contrary, is regarded in law as the mere private agent of his superior. He is supposed to act only in the name of his superior and upon the latter's responsibility. The principal and his deputy or deputies are regarded as but one officer, and that officer the principal. . . . It is upon that principle that the official bond of an officer is generally regarded as covering all acts of his deputies and assistants within the scope of their authority the same as if performed by himself personally, though he may be entirely ignorant of their conduct." The only case cited by the court to support its holding is one dealing with deputy sheriffs, as to whom the rule is well settled that the principal is liable.

In Shepherd v. Lincoln (1837) 17 Wend. (N. Y.) 250, a superintendent of repairs of a section of a canal was held responsible for a dangerous condition created by his workmen, although he was not personally present and was guilty of no personal negli-

gence. The court said that the fact that he was an officer in the service of the state was no answer to the action, any more than it would be in favor of a sheriff sued for the negligence of his deputy; and that the fact that he was a mere agent intermediate the people and the canal commissioners and the workmen did not defeat his liability. This case possibly comes within the exception hereinafter discussed with respect to subordinates in the employ of the officer, and not in the employ of the government. See II. infra.

II. Personal employees of officer.

An administrative officer is liable for the misconduct or negligence in the scope of their employment of those employed by or under him voluntarily or privately, and paid by or responsible to him. Bassett v. Fish (1878) 75 N. Y. 303; Central R. & Bkg. Co. v. Lampley (1884) 76 Ala. 365, 42 Am. Rep. 334; Ely v. Parsons (1886) 55 Conn. 83, 10 Atl. 499; Schroyer v. Lynch (1839) 8 Watts (Pa.) 453.

In Coleman v. Frazier (1850) 4 Rich. L. (S. C.) 146, 53 Am. Dec. 727, it was held that under the postoffice regulations the postmaster's assistants were his employees, and not public officers, and that the postmaster was liable for an assistant's negligence in permitting an unsworn person to have access to the mail, contrary to the regulations.

In Bolan v. Williamson (1804) 2 Bay (S. C.) 551, 1 Brev. 181, the court held that a postmaster was liable for the loss of the contents of a letter through an assistant's negligence, unless the assistant was an officer of the department, recognized by law; in which case the postmaster would not be responsible.

In Christy v. Smith (1851) 23 Vt. 663, the court, in an action against a postmaster for the loss of a letter, approved a charge that persons employed by defendant, who had never been appointed or sworn as assistants, were to be regarded as his clerks or servants; and that if, through their neglect, money and letters were lost, the postmaster would be liable.

In Raisler v. Oliver (1893) 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238, the court held that it might be presumed, in support of the trial court's ruling, that the person who registered a letter was employed by the defendant postmaster independent of express authority, and paid by him out of his own salary or means; and that if such was the case, the postmaster was liable for his default or misfeasance as any private person would be for the acts of his agent or employee; saying that, to exempt the postmaster from liability, the clerks or subordinates must be appointed in pursuance of some law expressly authorizing it, so that, by virtue of the law and the appointment, they became in some sense public officers.

Where a selectman of a town directed one not a public officer to cut out obstructions to a road, leaving it to his discretion as to what to cut, the court in Ely v. Parsons (1886) 55 Conn. 83, 10 Atl. 499, held that he was liable for the employee's act in unnecessarily cutting trees and branches, as the employee was not an inferior public officer, but acting solely under the selectman.

In Robinson v. Rohr (1889) 73 Wis. 436, 2 L.R.A. 366, 9 Am. St. Rep. 810, 40 N. W. 668, where it appeared that city street commissioners advertised for bids for work on a bridge, but subsequently adopted a resolution to do the work themselves under the supervision of a committee, and that they were so doing the work when plaintiff was injured through the negligence of their servants, the court held them liable, saying that though as public officers they owed only a duty to the public, and were not liable to persons, yet, if they so acted as to owe a duty to individuals, then their negligence was an individual wrong which might be redressed by private action; that as public officers, acting for the public alone, they were exempt from personal liability and the doctrine of respondeat superior did not apply; but that, if they engaged in some special employment, and their duties were of a more private character, and concerned individuals as well as the public, they were amenable to private ac-

tions; and that, by personally and practically undertaking to do the work through servants of their own employment, they had assumed corresponding duties and obligations toward plaintiff.

In North's Case (1557) 2 Dyer, 161, 73 Eng. Reprint, 350, it was held that where the chancellor of augmentations delivered a bond taken by virtue of his office to his clerk or servant, to be taken to the clerk of the court, and the servant conspired with the obligor and canceled the bond the chancellor was liable.

III. Custodians of public funds or property.

Public officers having the custody of public funds or property are generally held liable for any losses, though due to the negligence or misconduct of their subordinates. As stated in United States v. Zabriskie (1898) 87 Fed. 714, the general rule is that officers with reference to public funds or property with which by law they are intrusted become virtually insurers of such funds and property, and are held accountable for any and all such funds and property, even though stolen from them without any fault, negligence, or carelessness upon their part; and no distinction is made as to the character of the person committing the theft or misdemeanor, whether he be the sworn deputy or assistant officer under bond, a subordinate clerk or employee of the principal, or a stranger.

In the Zabriskie Case (Fed.) supra, under the statutes which defined the duties of the melter and refiner of a United States mint, and provided that he should be responsible for all bullion delivered to him until it was returned to the superintendent of the mint and proper vouchers obtained, a statute which provided that bonds might be required of assistants and clerks, but that these should not relieve the superintendent or other officers from liability to the United States for acts, omissions, or negligence of their subordinates or employees, and the language of the bond of the melter and refiner, which was conditioned for the faithful and diligent performance of his duties, it was held that he and his sureties were liable for loss of bullion appropriated by the assistant melter and refiner, appointed on his recommendation, subject to the approval of the director of the mint.

In Duluth v. Ross (1918) — Minn. —, 167 N. W. 485, a clerk of a municipal court and his surety were held liable for the malfeasance of a deputy clerk in appropriating to his own use moneys coming into his hands in the performance of his official duties, though there was no statute making the clerk liable for the acts of his deputy, and no provision of the bond covering the acts of deputies.

In Potter v. United States (1883) 107 U. S. 126, 27 L. ed. 330, 1 Sup. Ct. Rep. 524, where money was paid during the absence of a land office receiver to the person left in charge of the office, and it did not appear that it was not money due the United States from pre-emption entries made by persons who had proved the settlement and improvement of land to the satisfaction of the register and receiver, the receiver's sureties were held liable, the court saying that a contrary holding would amount to a holding that a surety of the receiver would not be answerable for public moneys paid with its concurrence and assent to his assistant and cashier, and that if a public officer sees fit to allow the money of the government to be paid during his absence, the risk is with him and his sureties, and not with the government.

In Penrose v. United States (1906) 42 Ct. Cl. (Fed.) 29, an Army paymaster was denied relief from responsibility for money lost through the embezzlement of a clerk employed by his predecessor and retained by him without inquiry into his habits and character, it not appearing that the fund was necessarily under the control of the clerk, or that it was impossible for him to safely keep the money himself, instead of permitting the clerk to continue to keep the combination.

In Boggs v. United States (1909) 44 Ct. Cl. (Fed.) 367, a pay director in the Navy was denied relief from responsibility for embezzlement by his

chief clerk and cashier, though he took over the clerk from his predecessor, where he required no bond from the clerk and did not verify the monthly statement required to be made by him, or compare it with the cash on hand.

In United States v. Butterfield (1874) 7 Ben. 412, Fed. Cas. No. 14,703, an Assistant Treasurer of the United States and the sureties on his bond conditioned that he would faithfully keep all public money in his possession and custody until ordered to transfer or pay it out, and would faithfully and promptly make such transfer or payment and perform all other duties as fiscal agent of the government, imposed by law or departmental regulations, etc., were held liable for money lost from departments of his office in charge of subordinates appointed by his predecessor and retained in his office by him, he having the power to appoint, remove, and suspend his subordinates, subject to the approval of the Secretary of the Treasury.

In Bosbyshell v. United States (1896) 23 C. C. A. 581, 39 U. S. App. 474, 77 Fed. 944, writ of error dismissed in (1899) 43 L. ed. (U. S.) 1186, 19 Sup. Ct. Rep. 873, where the superintendent of a United States mint was by statute made keeper of all bullion or coin in the mint, except while it was legally in the hands of other officers, and was required to receive and safely keep until legally withdrawn all bullion for the use of the mint, and gave bond conditioned for the faithful performance of all duties of his office, he and his sureties were held liable for the loss of bullion probably stolen by a subordinate without any fault, neglect, lack of prudence or caution on his part.

In United States v. Bryan (1897) 82 Fed. 290, affirmed in (1898) 53 L.R.A. 218, 33 C. C. A. 617, 61 U. S. App. 259, 90 Fed. 473, a postmaster and his sureties were held liable to account for moneys coming into his official custody in connection with the money-order business of his office, though embezzled by a clerk in charge of the money-order funds, who was not appointed by the postmaster, but held his office under the civil service laws, rules, and regulations.

In State v. Newton (1878) 33 Ark. 276, where a state treasurer selected his own deputy and the state did not even pay his salary, it was held that his wrongful act in settling with county collectors by accepting checks on a bank which subsequently suspended was the act of the treasurer, and that the treasurer and his sureties were liable.

In United States v. Brodhead (1839) Fed. Cas. No. 14,654, which was an action against a Navy agent and his sureties for money purloined by a clerk in his employ, the court charged the jury in apparent opposition to the general rule, that public officers were exempted from the general rule of law making principals liable for the acts of their clerks if the embezzlement or misconduct was not attributable to their negligence, and that the question for the jury was whether the agent conducted the business as a prudent man of business would his own affairs, and whether he exercised that degree of care and attention which the importance and responsibility of the office required; and that if he did, he would not be liable for the clerk's fraudulent acts.

In District of Columbia v. Petty (1913) 229 U. S. 593, 57 L. ed. 1343, 33 Sup. Ct. Rep. 881, the sureties on the bond of an auditor of the District of Columbia were held not liable for embezzlement by the disbursing clerk in the auditor's office of moneys deposited by citizens with the collector of taxes for street improvements under the permit system, on the ground that such moneys were not public moneys in any legal sense, but funds of private citizens, held extraofficially by public officers.

In Scott County v. Fluke (1872) 34 Iowa, 317, the court held that whether or not a county treasurer was liable for the acts of his bookkeepers, assistant collectors, etc., he was not liable for defalcations where the board of supervisors appointed a committee to superintend and effect a new system of keeping accounts with the treasurer, and the defalcations were

committed by a person employed or continued in the treasurer's office as bookkeeper by authority and express direction of the committee, and paid by order of the board, there being no negligence on the part of the treasurer.

IV. Liability imposed by statute.

There are some cases holding officers liable for the acts of their subordinates in which the court refers to a statute which imposes such liability. There are probably other cases in which the liability is imposed by a statute, though this is not stated.

Where a statute authorized a probate judge to employ a clerk to do all the acts not judicial in their character, and made him responsible for such acts, the court in Wood v. Farnell (1874) 50 **Ala.** 546, held that he was liable for the act of a clerk employed by him to write in the probate office, and permitted by him to issue marriage licenses and sign the judge's name thereto, in issuing a license for the marriage of a minor without the parents' consent, though he had never taken the oath of office or given bond, the court saying that these were qualifications which the judge should exact.

In Van Schaick v. Sigel (1880) 58 How. Pr. (N. Y.) 211, it appears that a statute created the office of register of deeds, authorized him to appoint a deputy and an assistant deputy with the powers of deputy county clerks, required him to cause every written order or requisition for a search to be made and certified, and made him liable for all damages resulting from errors, inaccuracies, or omissions in his return so certified by him, and authorized him to employ all necessary searchers and copyists. The court, without determining his liability independent of the statute, held that he was liable for the omission of a mortgage from a search, though the certificate was signed by the assistant deputy, the court saying that the deputy and assistant deputy were his agents, and not public officers. It was also held that the designation by plaintiff of the searcher whom he would like to make the search did not make the searcher plaintiff's agent, or relieve the register from liability. In the same action it was subsequently held in (1880) 60 How. Pr. 122, that the mistake in the search made the register guilty of misconduct or neglect in office so far as his liability to arrest was concerned.

In Ramsey County v. Sullivan (1903) 89 **Minn.** 68, 93 N. W. 1056, the county auditor and his sheriffs were held liable for the act of his deputy in issuing fictitious orders on the county treasurer, the court saying that the acts of the deputy within the scope of his official duties were the acts of the auditor, that the duty of issuing valid orders was imposed on the auditor, and that the deputy's act was by virtue of and under color of his office. Though it does not appear in the report, it is stated in the recent case of Duluth v. Ross (1918) — **Minn.** —, 167 N. W. 485, that in the Sullivan Case the statute in terms made auditors responsible for the acts of their deputies, and that the statute was relied on as the basis of the claim of liability.

In Silver Bow County v. Davies (1910) 40 **Mont.** 418, 107 Pac. 81, a statute made the principal and sureties upon any official bond liable for the neglect, default, or misconduct in office of any deputy clerk or employee appointed or employed by the principal. It was one of the duties of the clerk of the district court to issue certificates for jury and witness fees, and the court held that the clerk and his sureties were liable for a deputy clerk's act in issuing fictitious certificates which were paid by the county treasurer, though they were not under seal and were therefore invalid, so that the deputy was not technically guilty of forgery. The court said that the deputy was able to issue them only by virtue of the fact that his connection with the office as deputy furnished the opportunity, that he issued them for the purpose of misappropriating the funds of the county, and that this was misconduct in office within the statute.

In Hilboldt v. Caraker (1891) 41 **Ill. App.** 595, where a statute made

county clerks responsible for the acts of their deputies, a clerk was held liable for a statutory penalty for issuing a license for the marriage of a minor without her parents' consent, though the license was issued by his deputy. The court said that a deputy had a right to issue a license where it could be rightfully done, and that its issuance was an official act of the principal.

V. Postmasters.

As to liability where assistants are postmasters' employees, and not public officers or servants, see Coleman v. Frazier (1850) 4 Rich. L. (S. C.) 146, 53 Am. Dec. 727; Bolan v. Williamson (1804) 2 Bay (S. C.) 551, 1 Brev. 181; Christy v. Smith (1851) 23 Vt. 663; Raisler v. Oliver (1893) 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238, cited under II. supra.

As to liability for public funds in custody of postmaster, see United States v. Bryan (1897) 82 Fed. 290, affirmed in (1898) 53 L.R.A. 218, 33 C. C. A. 617, 61 U. S. App. 259, 90 Fed. 473; cited under III. supra.

The general rule is that postmasters are not liable for the loss of mail matter, due to the negligence or omissions of inferior employees, officers, and clerks of the government. The rule is stated in Keenan v. Southworth (1872) 110 Mass. 474, 14 Am. Rep. 613, as follows: "The law is well settled in England and America that the postmaster-general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders." Accordingly in that case the postmaster was held not liable for the loss of a letter through the negligence of one of his clerks.

Dunlop v. Munroe (1809) 1 Cranch, C. C. 536, Fed. Cas. No. 4,167, was an action against a postmaster for the loss of mail. The circuit court expressed the opinion that defendant was civilly liable for the acts of his servants or clerks, as much as if the acts had been done by himself; but the Supreme Court (1812) 7 Cranch (U. S.) 243, 3 L. ed. 330), in affirming the judgment for defendant, held that if it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case, "and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office."

In United States v. Rogde (1914) 214 Fed. 283, the court held that there was no common-law liability on the part of a postmaster for the loss of a letter without negligence or wrongdoing on his part, and, after considering and discussing the applicable provisions of the postal laws and regulations, it reached the conclusion that they did not impose on a postmaster the liability of an absolute insurer with respect to registered mail, and that he and his sureties were not liable where a registered letter was received by a clerk employed under civil service regulations, and subsequently lost or stolen, though the court pointed out that the statutes make postmasters absolutely liable for the money or property of the United States.

In Wiggins v. Hathaway (1849) 6 Barb. (N. Y.) 632, the court held that a postmaster was not liable for malfeasance or embezzlement of his clerks or deputies, and said that it seemed he was not liable for their negligence; at least unless they were notoriously unfit for their positions, so as to charge him with negligence in making the appointments, the court saying that he was allowed and required to appoint subagents, who, by such appointment, became agents of the government. The case was brought for loss of a letter, and there being no proof of his own negligence, a new trial was denied.

In Schroyer v. Lynch (1839) 8 Watts (Pa.) 453, the court said that while the postmaster would be liable for the loss of mail through his failure to devote a proper portion of his time to the superintendence of his office, or to exercise the care and diligence of a person of common pru-

dence toward his assistants, and while he might be liable for the acts of his assistants if they were, strictly speaking, his servants, he was not liable for mail stolen by an assistant where his assistants were employed only with the approbation of the Postmaster-General, and could not be retained contrary to the wishes of the Postmaster-General, and were required to take an oath prescribed by law, and were paid for their services by the government, as in such case they were not his servants, but officers of the government.

In Raisler v. Oliver (1893) 97 **Ala.** 710, 38 Am. St. Rep. 213, 12 So. 238, tth court, while upholding a recovery on the ground that, so far as appeared, the person for whose negligence it was sought to hold the postmaster responsible was his personal employee, stated that it would seem that a postmaster was not responsible for the default or the misfeance of his clerks or assistants, although appointed by him and under his control, unless he was negligent in not exercising proper care and prudence in the selection of suitable and competent persons, or was negligent in the duty resting on him to properly superintend them in the performance of their duties.

In Lane v. Cotton (1702) 1 Ld. Raym. 646, 91 **Eng.** Reprint, 1332, it is held that postmasters-general, who were authorized to make deputies and appoint servants at their pleasure, and take security from them in the name and to the use of the government, were not liable where a letter delivered to the receiver of letters appointed by them was opened by someone in the office and bills taken out, the court saying that inferior officers were servants of the government, and not of the postmaster-general.

In Whitfield v. Le Despencer (1778) Cowp. pt. 2, p. 754, 98 **Eng.** Reprint, 1344, it was held that the postmasters-general were not liable for money stolen from the mail by a sorter appointed by them pursuant to authority granted to them to appoint and suspend their deputies, sorters, etc., as they should think fit, and take security for their discharge of their duties, and settle their salaries and allowances, to be paid out of the postal revenues.

In Maxwell v. M'Ilvoy (1810) 2 Bibb (Ky.) 211, the court said that as it was not to be expected that the Postmaster-General could have personal supervision over the several postoffices, he ought not to be answerable for the negligence and improper conduct of all persons employed in the whole of those departments.

In Bainbridge v. Postmaster-General [1906] 1 K. B. (**Eng.**) 178, 75 L. J. K. B. N. S. 366, 54 Week. Rep. 221, 94 L. T. N. S. 120, 22 Times L. R. 70, where the postmaster-general was empowered to work the telegraph in connection with the postoffice, it was held that he was not liable in his official capacity for the negligence of a subordinate employed in that department with respect to relaying a footway taken up for the purpose of repairing a telegraph cable, though the statute provided that wherever the word "company" appeared in a statute relating to telegraph companies, it should embrace the postmaster-general, the court placing its decision on the ground that the subordinate was not in the postmaster-general's employ, but was a subordinate officer of the Crown.

Where, however, a postmaster permitted an assistant to have the care of the office without being sworn, as required by law, it was held in Bishop v. Williamson (1834) 11 **Me.** 495, that he was liable for the failure or refusal of the assistant to deliver a letter.

VI. Naval officers.

As to liability of board of public works and commander in chief of state fishery force for acts of commander of vessel, see Booth v. Lloyd (1887) 33 **Fed.** 593; Mister v. Brown (1894) 59 **Fed.** 909, under I. supra.

As to liability of pay director in Navy for public funds in his custody, see Boggs v. United States (1909) 44 Ct. Cl. **(Fed.)** 367, cited under III. supra.

In The Eleanor (1817) 2 Wheat.

(U. S.) 345, 4 L. ed. 257, it was held that the commander of a squadron was liable to individuals for the trespass of those under his command in case of positive or permissive orders, or of actual presence and co-operation, and that the commander of a single ship was responsible for the acts of those under his command.

In Nicholson v. Mouncey (1812) 15 East, 384, 104 Eng. Reprint, 890, 13 Revised Rep. 501, it was held that a captain of a sloop of war, who was compellable to take such station when appointed to it, and who had no power to appoint or dismiss the other officers and members of the crew, was not liable for a collision with another ship while the first lieutenant was the commanding officer of the watch, and in actual direction and management of the steering and navigation of the sloop, and the captain was not on deck or called by his duty to be there.

VII. Deputies, generally.

As to deputy clerks, see infra, VIII. As to deputy sheriffs, see infra, IX.

As to liability of state treasurer for deputy's acceptance of checks for public revenues from collectors, see State v. Newton (1878) 33 Ark. 276, cited under III. supra.

As to liability for acts of deputy county auditor under statute imposing liability, see Ramsey County v. Sullivan (1903) 89 Minn. 68, 93 N. W. 1056, cited under IV. supra.

Certain classes of officers are generally held liable for the official acts of their deputies. Some authorities lay down the broad rule that the principal is liable civilly for the acts of his deputy in the performance of his official duties. This is undoubtedly true with respect to sheriffs and there are cases holding other officers liable for the acts of their deputies; but it is not perfectly clear whether the court in such cases recognizes a distinction between deputies and other subordinates, or whether they intend to except the particular office involved from the general rule of nonliability; and it is also possible that in some of the cases there may have been a statute imposing liability which the court neglected to mention. In discussing this question in Duluth v. Ross (1918) — Minn. —, 167 N. W. 485, the supreme court of Minnesota, after stating that the rule of nonliability was well settled as applied to public officers and agents of certain classes, said: "In short, we find no case that applies the rule of nonliability to municipal officers like a sheriff, register of deeds, treasurer, auditor, or clerk of the court. Counsel seem to have assumed that the rule was applicable to such officers, and cite no cases to the contrary; but we find that the authorities are unanimous in holding that such an officer is liable civilly to anyone injured by the misfeasance, malfeasance, or nonfeasance of his deputy in the performance of his official duties." The court, however, admits that most of the cases holding principals liable for the acts of deputies are cases dealing with deputy sheriffs.

In Case v. Hulsebush (1898) 122 Ala. 212, 26 So. 155, the court held in effect that a tax collector was liable for an assault by his deputy on a taxpayer as a result of an argument over a fee which the taxpayer refused to pay, if the deputy committed the act within the scope of his employment and in the accomplishment of objects within the line of his duties, or if it was committed in and about the business or duties assigned to him by his employer. A recovery was upheld.

In National Surety Co. v. State Sav. Bank (1907) 14 L.R.A.(N.S.) 155, 84 C. C. A. 187, 156 Fed. 21, 13 Ann. Cas. 421, a deputy county auditor issued fictitious orders on the county treasurer and assigned them to a bank, which received payment from the county. The county having recovered against the auditor's surety, the surety sued the bank, claiming to be subrogated to the rights of the county. The court decided that if the bank had not received payment, it would have had no recourse against the surety under statutes providing that official bonds should be security to all persons for official delinquencies, and that an action might be brought against the county auditor and his

sureties for the use of any person injured by the auditor's misconduct in office, basing its decision on the ground that the bank's loan would not have been the proximate result of the deputy's official misconduct, but of his personal misconduct in falsely representing to the bank that the orders were genuine and the payees actual persons, entitled to refunds represented by the orders, and his further misconduct in fraudulently signing the fictitious names to the assignment and obtaining the bank's money; also that, as the orders were non-negotiable, the bank could have no claim against the auditor, and therefore could have none against his surety.

In Fresno Nat. Bank v. Hawkins (1892) 93 Cal. 551, 27 Am. St. Rep. 221, 29 Pac. 233, where a deputy superintendent of schools forged so-called warrants purporting to be orders on the superintendent by trustees of the school districts for requisitions on the county auditor, indorsed them with the date of filing, and sold them to plaintiff, it was held that, in forging the orders and presenting and selling them, the deputy was not acting in the line of his official duty, and that the superintendent was not liable, as the deputy was not, by virtue of his appointment, clothed with any power to do such acts; and that while the indorsement of the orders was official, such indorsement was not a guaranty of genuineness, and created no liability.

In Gambill v. Cargo (1907) 151 Ala. 421, 43 So. 866, where an officer the nature of whose office is not stated gave his deputy authority to arrest persons selling milk without a license, in violation of an ordinance, it was held that the deputy, in arresting plaintiff without a warrant, though acting wrongfully, was acting within the scope of his authority, and the officer was liable.

VIII. Clerks of court; county clerks.

As to liability under statute imposing liability, see Silver Bow County v. Davies (1910) 40 Mont. 418, 107 Pac. 81; Hilboldt v. Caraker (1892) 41 Ill. App. 595, cited under IV. supra.

In Snedicor v. Davis (1850) 17 Ala. 472, a statute empowered deputy clerks of court to transact all business in the absence of the principal which the latter could do if present. A deputy clerk approved an insufficient writ of error bond in the name of his principal, and on his behalf as his deputy. A judgment was recovered against the clerk, who thereupon brought an action against the deputy. The court said that the deputy was liable to his principal, who alone, with his sureties, was liable to the injured party, and intimated that the same doctrine which applied to deputy sheriffs applied equally to deputy clerks, except possibly when the clerk assumed to act in his own name.

In Com. use of Green v. Johnson, (1906) 123 Ky. 437, 124 Am. St. Rep. 368, 96 S. W. 801, 13 Ann. Cas. 716, the clerk of court was held liable for the negligence and carelessness of his deputy in taking an acknowledgment. The court quoted with approval the statement in 9 Am. & Eng. Enc. Law, 2d ed. 390, that the principal is liable civilly for the misfeasance, malfeasance, or nonfeasance of his deputy in the performance of his official duty.

Where a law required clerks of court to furnish copies of pleadings on request, and such a request for copies of pleadings in an action against the clerk personally was ignored, the court, in Jeffers v. Taylor (1917) 178 Ky. 392, 198 S. W. 1160, said that the clerk could not hide behind the alleged shortcomings of his deputy, for whose acts he was responsible.

In Myers v. Colquitt (1915) — Tex. Civ. App. —, 173 S. W. 993, statutory provisions made the county clerk the clerk of the commissioners' court of the county, required him to attend each term of such court and issue all warrants required by the court, and to keep its records, books, etc., and required the clerk to give a bond conditioned for the faithful performance and discharge of all duties required by law as county clerk. The court held that the acts of his deputy in manufacturing and issuing fraudu-

lent and fictitious warrants without any previous authority from the commissioners' court were official acts for which the clerk and his sureties were liable to the county, and that such liability was not defeated by the fact that the warrants were not presented to the county treasurer by the deputy, but by persons to whom he sold them, and were presented long after the clerk's term expired.

In McNutt v. Livingston (1846) 15 Miss. 641, the court held that the taking of a bond on issuing writs of error and supersedeas was a ministerial act, and that the clerk of the circuit court and his sureties were responsible for the act of his deputy in granting the writs without taking such a bond. The court said that by law the clerk might appoint deputies, but that the deputy was responsible to the clerk alone, and the principal was liable to parties who might be injured by the acts of the deputy.

In Whyte v. Mills (1886) 64 Miss. 158, 8 So. 171, the court held that a clerk of the chancery court and board of supervisors was not liable for the act of his deputy, who had full charge and control of the office, in issuing false and fraudulent warrants on the county treasurer in the names of the clerk and the president of the board of supervisors, which the treasurer refused to pay to the holder to whom the deputy had sold them. The court said that in issuing forged warrants the deputy was not engaged in doing any act of his principal, but in a scheme of his own; and that the clerk, by selecting the deputy, stood as guarantor for the faithful discharge of his official duties, but not for all of his acts; and that the fact that the deputy used blanks committed to him for another purpose did not create such responsibility.

In Patons v. Lee (1826) 2 Cranch, C. C. 646, Fed. Cas. No. 10,800, which was an action against a clerk of court for misstating in an indorsement on an execution the amount on payment of which it was to be discharged, the court charged that if the jury believed that the deputy who issued the execution was a person of good standing and correct demeanor, and capable of performing the duties of such office, and that no instructions were furnished the clerk by the plaintiff at the time the short entry of judgment was made, and that such short entry and other docket entries and the bond on which the judgment was based were the guides by which the deputy issued the execution and made the indorsement, and that he exercised honestly his best judgment as to the nature and terms of the judgment which should have been entered, then his error in misunderstanding the inference at law which entitled plaintiff to interest on the bond until the time of payment was not such want of skill or negligence as would charge the clerk; also that if the deputy, at the time of issuing the execution, was competent to the correct discharge of the duties of the office, and if the clerk was guilty of no negligence in superintending him in the discharge of such duties in issuing such execution, then the clerk was not liable for the mistake of the deputy.

In Welddes v. Edsell (1841) 2 McLean, 366, Fed. Cas. No. 17,375, a judgment debtor procured a deputy clerk of court to accept an assignment of a judgment and paper money in satisfaction of the judgment against him by misrepresenting that plaintiff had agreed to receive it. The assigned judgment having been paid to plaintiff, the debtor moved for a rule on the clerk to pay over the money received by his deputy. The court, in denying the rule, said that whatever is done generally by a deputy clerk may be presumed to be done by the sanction of the clerk, and that no secret agreement or understanding could relieve the clerk from responsibility; but that where the thing is done out of the ordinary course of business, and especially where the deviation has been through the procurement or misrepresentation of the party or his agent, the liability of the clerk might be considered doubtful; and that if the act of the deputy was procured through defendant's fraud, the clerk could not be held liable.

In Hartwell v. Riley (1900) 47 App. Div. 154, 62 N. Y. Supp. 317, where a deputy county clerk failed to index a notice of the pendency of an action against a person who subsequently mortgaged the land to plaintiff's testator, whereby the testator lent money not knowing of the pendency of such action, the clerk was held liable, the court saying that the duty to be performed was ministerial and in the ordinary course of business in the office, and that in such a case liability attached to defendant for the act or omission of his deputy, who, under the statute, held his office at the pleasure of the clerk.

See also Butler v. Milwaukee (1903) 119 Wis. 526, 97 N. W. 185, under I. supra.

IX. Sheriffs, constables, and marshals.

a. Liability in general.

The general rule has long been settled that sheriffs and other officers performing similar duties are liable civilly but not criminally for the acts and omissions of their deputies when acting officially or under color of the office. This general rule, which is recognized in and constitutes the basis of most of the decisions dealing with this phase of the question, is expressly stated in Rogers v. Marshall (1863) 1 Wall. (U. S.) 644, 17 L. ed. 714; Servis v. Marsh (1889) 38 Fed. 794; Prewitt v. Neal (1824) Minor (Ala.) 386; Perkins v. Reed (1848) 14 Ala. 536; King v. Gray (1914) 189 Ala. 686, 66 So. 643; Foley v. Martin (1904) 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842; Matthis v. Pollard (1847) 3 Ga. 1; Com. for Davy v. Stockton (1827) 5 T. B. Mon. (Ky.) 192; Forsythe v. Ellis (1830) 4 J. J. Marsh. (Ky.) 298, 20 Am. Dec. 218; Smith v. Berry (1853) 37 Me. 298; Kittredge v. Frothingham (1916) 114 Me. 537, 96 Atl. 1063; Robinson v. Ensign (1856) 6 Gray (Mass.) 300; Albrecht v. Long (1878) 25 Minn. 163; State use of Russell v. Moore (1854) 19 Mo. 369, 61 Am. Dec. 563; Lucier v. Pierce (1880) 60 N. H. 13; Clough v. Monroe (1857) 34 N. H. 381; People ex rel. Budd v. Ten Eyck (1835) 13 Wend. (N. Y.) 448; Pond v. Leman (1865) 45 Barb. (N. Y.) 152; People ex rel. Kellogg v. Schuyler (1859) 4 N. Y. 173; Shea v. Conant (1912) 149 App. Div. 583, 134 N. Y. Supp. 315; Spencer v. Moore (1837) 19 N. C. (2 Dev. & B. L.) 264; Wilbur v. Strickland (1829) 1 Rawle (Pa.) 458; Heye v. Moody (1887) 67 Tex. 615, 4 S. W. 242; Smith v. Joiner (1797) 1 D. Chip. (Vt.) 62; Johnson v. Edson (1827) 2 Aik. (Vt.) 299; Mason v. Ide (1858) 30 Vt. 697; Sangster v. Com. (1866) 17 Gratt. (Va.) 131; Mosby v. Mosby (1852) 9 Gratt. (Va.) 584; Russell v. Lawton (1861) 14 Wis. 203, 80 Am. Dec. 769; Anonymous (1772) Lofft, 81, 98 Eng. Reprint, 543; Gregory v. Cottrell (1855) 5 El. & Bl. 571, 119 Eng. Reprint, 593, 25 L. J. Q. B. N. S. 33, 2 Jur. N. S. 16, 4 Week. Rep. 48; Woodgate v. Knatchbull (1787) 2 T. R. 148, 100 Eng. Reprint, 80, 1 Revised Rep. 449; Holden v. Williams (1896) 75 Fed. 798.

This liability is usually placed on the ground that the sheriff and the deputy are one officer, and that the acts of the deputy are the acts of the officer. See Rogers v. Carroll (1895) 111 Ala. 610, 20 So. 602; Albrecht v. Long (1878) 25 Minn. 163; Lucier v. Pierce (1880) 60 N. H. 13; Armstrong v. Garrow (1826) 6 Cow. (N. Y.) 465; Pond v. Leman (1865) 45 Barb. (N. Y.) 152; Heye v. Moody (1887) 67 Tex. 615, 4 S. W. 242; Johnson v. Edson (1827) 2 Aik. (Vt.) 299; Moore v. Dawney (1808) 3 Hen. & M. (Va.) 127.

In Foley v. Martin (1904) 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842, the court said that the deputy is not the agent or servant of the sheriff, but is his representative, and the sheriff is liable for his acts as if done by himself.

In Lyman v. Holmes (1915) 88 Vt. 431, 92 Atl. 829, the court, in holding that the seizure of property of one person under a writ against another was such an official malfeasance on the part of the deputy as rendered the sheriff liable, said that this was so, not on the theory of identity, as the sheriff was recognized as an independent officer; nor on that of principal and agent, as the deputy de-

rived his authority from the law; nor yet on that of master and servant, as the deputy acted independently of the sheriff, and not by his direction; but because of the official relation existing between them, and the statutory responsibility cast upon one for the acts of the other.

In some if not all of the states, this liability is now imposed by statute; but it is generally recognized that the statute is merely declaratory of the common law.

Where a statute made the sheriff of the county at the seat of the state government sheriff of the supreme court, and the other sheriffs in the state his deputies, the court held that such sheriff was not liable for the act of a sheriff to whom he forwarded a capias ad satisfaciendum, in permitting an escape, saying that the authority of the sheriffs of the respective counties was not conferred by the sheriff of the supreme court, and could not be revoked or abridged by him; and that he could not be liable for their conduct unless expressly made so by statute. McGruder v. Russell (1826) 2 Blackf. (Ind.) 18.

In Elyea v. Williamson (1877) 59 Ga. 432, the court said that an action for a deputy United States marshal's breach of duty should be brought against the marshal, and not against the deputy.

In Snell v. State (1873) 43 Ind. 359, which was an action on a sheriff's bond for collecting on an execution more than was due, the court held that what a sheriff does by his deputy, he does himself, and that he could not avoid responsibility because the money was paid to a deputy.

In Harlan v. Lumsden (1863) 1 Duv. (Ky.) 86, the court held that a stranger cannot sue a deputy sheriff for the breach or nonperformance of his official duties, but that the principal sheriff is liable to persons thus injured, and the deputy to his principal; and that the sheriff and his sureties were liable for public revenue collected by a deputy, and not paid into the treasury.

In Forsythe v. Ellis (1830) 4 J. J. Marsh (Ky.) 298, 20 Am. Dec. 218, the court said that whenever the sheriff is officially responsible for the act of his deputy, a suit may be brought against him and his sureties on his bond.

In People ex rel. Budd v. Ten Eyck (1835) 13 Wend. (N. Y.) 448, the court said that the official defaults and misconduct of a deputy were defaults of the sheriff, and were covered by his official bond.

In Flaherty v. Milliken (1908) 193 N. Y. 564, 86 N. E. 558, a proceeding involving the right of a salaried sheriff to appoint his assistants without regard to the civil service regulations, the court said that before the office was made a salaried one by statute the sheriff, and not his deputies or assistants, was responsible for negligence or misconduct, and that the nature of the relation between them had not been changed by the statute, especially in view of a constitutional provision that the county should never be made responsible for the acts of the sheriff.

In White v. Johnson (1793) 1 Wash. (Va.) 159, where a writ was returned executed by a deputy without mentioning the name of his principal, and no appearance having been entered, a common order was entered against the defendant and the deputy, and judgment later entered up against both, the judgment was reversed, the court holding that the remedy was against the sheriff, and not against the deputy.

In Arnold v. Hawkins (1916) 79 W. Va. 205, 90 S. E. 678, the court said that by statute the default or misfeasance of a deputy sheriff was the default of the sheriff, and a breach of the conditions of his official bond.

In Lambard v. Fowler (1845) 25 Me. 308, the court held that if a deputy sheriff has been guilty of negligence or misconduct in his office by which a debtor or creditor has been injured, an action therefor may be brought against the deputy or the sheriff.

In M'Intyre v. Trumbull (1810) 7 Johns. (N. Y.) 35, which was an action against the sheriff for the act of his deputy in extorting more fees on execution than were allowed by law,

the court, after saying that, under the return, the only question was whether such an action would lie in any case, said that a sheriff was liable civilly for the acts of his deputies, though a deputy might be answerable criminally, and that the better opinion was that it was not necessary for the sheriff to recognize the act of the deputy.

In Holroyd v. Breare (1819) 2 Barn. & Ald. 473, 106 Eng. Reprint, 439, 21 Revised Rep. 361, a steward of a court baron issuing his precept to a bailiff was held not liable for the seizure of the goods of a third person, the court holding that the steward was not a ministerial officer of the court, but a constituent and essential part of the court; that his mandate was more like a writ of the superior court to the sheriff than the warrant of the sheriff to a bailiff; and that the bailiff was the minister of the court, and not the servant of the steward.

But in Bradley v. Carr (1841) 3 Mann. & G. 221, 133 Eng. Reprint, 1123, 3 Scott, N. R. 523, where the steward issued the writ to special bailiffs nominated by the attorney for the party suing out the process, and took indemnity from the attorney to protect himself against the consequences of their misconduct, he was held liable.

In Tinsley v. Nassau (1827) 2 Car. & P. (Eng.) 582, Moody & M. 52, which was an action against a sheriff for the seizure of property belonging to plaintiff under a writ against another in an action brought in the county court, a nonsuit was granted because the sheriff in such court is a part of the court, and not a ministerial officer.

b. Levy on property of third person.

A sheriff, marshal, or constable is, in general, liable for the act of his deputy in levying an execution or attachment against one person on the property of another. Frankhouser v. Cannon (1893) 50 Kan. 621, 32 Pac. 379; Com. for Davy v. Stockton (1827) 5 T. B. Mon. (Ky.) 192; Archie v. Noble (1825) 3 Me. 418; Grinnell v. Phillips (1805) 1 Mass. 530; Kroll v. Moritz (1910) 112 Minn. 270, 127 N. W. 1120; Curtis v. Fay (1862) 37 Barb. (N. Y.) 64; Wilbur v. Strickland (1829) 1 Rawle (Pa.) 458; Jentry v. Hunt (1823) 2 M'Cord L. (S. C.) 410; Estes v. Williams (1813) Cooke (Tenn.) 413; Moore v. Dawney (1808) 3 Hen. & M. (Va.) 127; Sprague v. Brown (1876) 40 Wis. 612; Ackworth v. Kempe (1778) 1 Dougl. K. B. 40, 99 Eng. Reprint, 30; Sanderson v. Baker (1772) 3 Wils. 309, 95 Eng. Reprint, 1072, 2 W. Bl. 832, 96 Eng. Reprint, 490.

Where the condition of a sheriff's official bond was sufficiently comprehensive to embrace every official duty of the sheriff, he and the sureties on his bond were liable for the act of a deputy sheriff in taking property of one person under an execution against another. Com. for Davy v. Stockton (1827) 5 T. B. Mon. (Ky.) 192.

Under a statute providing that every sheriff should be responsible for every misconduct or default in office of his under sheriff, jailer, and deputies during the term of his office and after his death, resignation, or removal, as well as before, and that an action might be prosecuted against such sheriff and his sureties on his official bond, or against his executors and administrators, and, also independently of such statute, the court in Dishneau v. Newton (1895) 91 Wis. 199, 64 N. W. 879, held that a sheriff and his bondsmen were liable for the wrongful act of his deputy in levying on the property of one person under an attachment against the property of another, the court saying that the liability of the sureties was coextensive with that of the principal to the extent of the penalty of the bond.

In Satterwhite v. Carson (1843) 25 N. C. (3 Ired. L.) 549, a sheriff was held liable for the act of his deputy in levying on the property of an intestate under an execution against her administratrix pendente lite and her husband.

In King v. Orser (1855) 4 Duer (N. Y.) 431, where the goods of a third person were taken by a deputy sheriff under a writ of replevin, the sheriff was held liable as a trespasser.

Where a deputy sheriff drove plain-

tiff's horses on the land of another in order that he might levy a distress warrant thereon, and the district court reversed the judgment for plaintiff against the sheriff, the court of appeals in James v. M'Cubbin (1800) 2 Call (Va.) 273, reversed the judgment of the district court and affirmed that of the county court, thus holding in effect that the sheriff was liable for the deputy's act.

In Cotton v. Marsh (1854) 3 Wis. 221, it was held that the acts of a deputy United States marshal in levying on goods on which plaintiffs had a chattel mortgage, pursuant to a writ addressed to the marshal, were the acts of the marshal; and the deputy having acted in the name of the marshal and by virtue and color of his office, and the marshal having recognized his act by arranging for the sale of the goods and receiving part of the proceeds, the marshal was held liable to plaintiffs.

In Coite v. Lynes (1865) 33 Conn. 109, the court held that the sheriff and his sureties were not liable for a levy by a deputy on property not owned by the execution debtor. This holding was based on statutes making the deputy substantially an independent officer, but imposing on the sheriff liability for his neglect or default, and providing that default and misfeasance of the deputy after the sheriff's death should be a breach of the sheriff's bond, the court holding that a wilful or mistaken trespass of this kind was not a "neglect or default."

c. Liability for money received or collected by deputy.

Under statutes authorizing the attachment and imprisonment of the sheriff for failing to pay over money collected on execution, it was held in Re Stephens (1846) 1 Ga. 584, that a sheriff was so liable though the money was collected by a deputy and was never received by the sheriff, the court saying that it was the duty of the sheriff to bring the execution into court; that if money had been collected, he must account for it; and that if he had appointed incapable or dishonest deputies, it was his misfortune, as it was his own voluntary act, and he was clothed with authority to indemnify himself against loss by taking security from the deputy.

In Brayton v. Town (1861) 12 Iowa, 346, where a statute made sheriffs responsible for the acts of their deputies, the court held that the remedy for a deputy's refusal or neglect to pay over money collected on execution was on the bond of the sheriff, and not against the deputy and his sureties.

In Norton v. Nye (1868) 56 Me. 211, it was held that the refusal of a deputy sheriff to pay over to the owner money taken on a search warrant was not only an act of nonfeasance but of misfeasance, and the sheriff was liable therefor.

In Esty v. Chandler (1811) 7 Mass. 464, a sheriff was held liable for the penalty imposed by statute for neglecting or refusing to pay over money received on execution, if his deputy so refused; and in State ex rel. Horne v. Allen (1844) 27 N. C. (5 Ired. L.) 36, he was held liable for the statutory damages for a deputy's failure to pay over money on claims collected by him.

Where a deputy sheriff receipted for the amount of a judgment on the extinguishment of a debt due from him to the judgment debtor, the court in Draper v. State (1858) 1 Head (Tenn.) 262, held that the sheriff was bound by his act and liable to the execution creditor, but that the sureties of the sheriff, being only bound for his acts in his office, might show that the act complained of was outside his office, and on such showing were not liable.

In Tyree v. Donnally (1852) 9 Gratt. (Va.) 64, it was held that a sheriff's liability for money made on execution was not altered by the fact that the levy on the fieri facias was made by one deputy, and another deputy returned on a venditione exponas the receipt for the money.

A constable who turns over an execution issued to him to another constable, who collects it, is liable for the amount collected. Downs v. McGlynn (1858) 2 Hilt. (N. Y.) 14.

In People v. Otto (1888) 77 Cal. 45,

18 Pac. 869, under the stautes applicable it was held that an under sheriff had authority to collect taxes, the sheriff being ex officio tax collector, and that the sheriff was liable for his act in collecting taxes and not accounting therefor, and that, being liable, the sureties on his official bond as tax collector were equally liable.

d. Neglect to make levy or return writ.

Where a deputy sheriff neglected to levy an execution on attached property until after the death of the execution debtor, and then returned it unsatisfied, the sheriff was held liable, in Barnard v. Ward (1812) 9 Mass. 269.

In Green v. Lowell (1825) 3 Me. 373, the court said that when a writ with directions to attach property is delivered to a deputy sheriff, he is liable if the deputy neglects to make diligent search for property or to attach it when found, or otherwise abuses his official trust. And where a deputy who was directed not to make service unless he could attach property, on receiving the amount of the debt from the debtor mutilated the writ by tearing off the account annexed instead of attaching the money received, and did not return the writ, the sheriff was liable.

In Haley v. Thurston (1880) 60 N. H. 204, a sheriff was held liable for his deputy's neglect in failing to levy an execution received by him on attached property.

In United States v. Moore (1828) 2 Brock. 317, Fed. Cas. No. 15,802, it was held that a United States marshal was liable on his bond for neglect of duty of his deputy in not serving process coming into his hands.

e. Escapes.

In Servis v. Marsh (1889) 38 Fed. 794, a United States marshal was held liable for the amount of a judgment, where prisoners held on final process were voluntarily permitted by a deputy marshal to go at large.

In Crawford v. Howard (1851) 9 Ga. 314, it was held that where a deputy sheriff permitted an escape, the sureties on the sheriff's bond were liable though they did not in the bond stipulate for the acts or omissions of deputies, as the sheriff was liable, and their liability was measured by that of their principal unless they stipulated for a less liability.

In Wheeler v. Hambright (1823) 9 Serg. & R. (Pa.) 390, a sheriff was held liable as for an escape, where his deputy, having a prisoner in custody under a capias, permitted him to go at large in ignorance that the sheriff was holding another capias for the same prisoner, which he returned non est inventus, without knowing of the deputy's arrest. The court said that the prisoner was, in legal contemplation, in the sheriff's custody, and by operation of law in custody on every writ lodged against him in the sheriff's office.

A sheriff may intrust the execution of writs and the custody of persons taken thereon to official assistants, being responsible for their conduct as if it were his own. Gebhardt v. Holmes (1911) 149 Wis. 428, 135 N. W. 860.

In Howard v. Crawford (1854) 15 Ga. 423, the sureties on a sheriff's bond were held not liable for the misconduct of a jailer in permitting a voluntary escape, or for his negligence in permitting an escape, where the statute provided that the bond might be sued for the satisfaction of persons aggrieved by the misconduct of the sheriff or his deputy. The court said that the deputy intended was the deputy proper, and not any other subagent, as a jailer, constable, or bailiff, especially as the sheriff could not remove a prisoner because of the insufficiency of the jail, and had nothing to do with its erection and repair.

f. False return.

In Blunt v. Sheppard (1822) 1 Mo. 219, a constable was held liable for a false return by his deputy.

Where a deputy's false return of an attachment on a writ of one creditor prevented another creditor from making an effectual and valid levy, the sheriff was held liable in Clough v. Monroe (1857) 34 N. H. 381.

In Houser v. Hampton (1847) 29 N. C. (7 Ired. L.) 333, where a deputy

returned a writ of capias "not found," in ignorance that another deputy, from whom he received the writ, had had a conversation with the debtor and attempted to arrest him, the court held that while this might excuse the deputy for the false return, it did not excuse the sheriff; that as between him and plaintiffs the return was his own; and that, as he was liable for the acts and omissions of his deputies, the return was considered to have been made by himself with all the knowledge of the facts possessed by every deputy.

Under a statute providing that the official acts of a deputy sheriff shall be deemed to be those of the sheriff himself, the sheriff alone, and not the deputy, is liable for a deputy's failure to take bail from a person arrested on civil process, or for his false return that he has taken bail. Ordway v. Bacon (1842) 14 Vt. 378 (in this case, however, a judgment for defendant was affirmed on the ground that the plaintiff had directed the deputy not to take bail).

Where a statute in one section made sheriffs liable for the acts of their deputies and for money collected by them on executions, and in the following section provided that if any sheriff, deputy, or other officer should make a false return, such sheriff, deputy, etc., should be liable to pay the sum of $500, to be recovered on motion, the court held that while the sheriff might be liable for the act of his deputy in making a false return, the remedy by motion to recover the statutory penalty was not available. State v. Nichols (1860) 39 Miss. 318.

g. False imprisonment.

A sheriff and his sureties are liable on his official bond for the act of a deputy in arresting and imprisoning a person without a warrant and without probable cause, or under a warrant for the arrest of another. Hays v. Creary (1883) 60 Tex. 445; Deason v. Gray (1914) 189 Ala. 672, 66 So. 646.

A sheriff is liable for false imprisonment by his jailer though he does not know of the arrest and imprisonment until after the discharge of the arrested person (Boaz v. Tate (1873) 43 Ind. 60); and for a false arrest by his deputy under a void warrant (Elwell v. Reynolds (1897) 6 Kan. App. 545, 51 Pac. 578).

Where a superintendent of police directed a police officer who arrested plaintiff without a warrant to lock him up, instead of directing that he be taken before a magistrate, as required by law, he was liable for what the officer did, and could not escape liability on the ground that the officer violated his duty in following his directions. Green v. Kennedy (1866) 46 Barb. (N. Y.) 16, affirmed in (1872) 48 N. Y. 653.

If a general deputy, as distinguished from one deputized for a particular purpose, is guilty of an illegal arrest and false imprisonment, for which he would be liable, the sheriff is also liable in the same degree and to the same extent civilly as the deputy. Hereford v. Brentz (1915) 192 Ala. 465, 68 So. 350. The sheriff was therefore held liable in this case for punitive damages if the arrest was wrongful or malicious.

h. Administration of estates.

Where a will conferred on an administrator c. t. a. power to sell and convey, and to hold and rent out the land in the meantime, the sheriff, who was appointed committee administrator on the removal of the surviving executor, was held liable in Mosby v. Mosby (1853) 9 Gratt. (Va.) 584, for rents collected by his deputies.

In Scarce v. Page (1851) 12 B. Mon. (Ky.) 311, under a statute construed as authorizing the county court to commit estates to the sheriff for administration upon the removal of the administrator, a sheriff and his sureties were held liable for delinquencies of a deputy to whom the assets of an estate were delivered by the clerk of the court, under an order directing that they be delivered to the sheriff for administration.

i. Miscellaneous acts.

In an action for the death of a person at the hands of a mob while in the custody of a deputy marshal, it was held in effect that while, under the wrongful-death statute, the marshal

was not liable for his deputy's neglect, he was liable for knowingly intrusting the custody of the prisoner to an unfit and improper person, and for directing and permitting him to remove the prisoner without taking measures to protect him. Asher v. Cabell (1892) 1 C. C. A. 693, 2 U. S. App. 158, 50 Fed. 818.

In Clute v. Goodell (1840) 2 McLean, 193, Fed. Cas. No. 2,911, a sheriff was held liable for the act of his deputy, who levied on sufficient goods to satisfy an execution, but made an arrangement with the execution debtor under which the goods were sold and only a small part of the proceeds applied on the execution.

A sheriff is responsible for an insufficient levy by his deputy. Clarke v. Gary (1847) 11 Ala. 98. In this case a levy was made on a slave, but by mistake of a deputy, an inferior slave was substituted in the warrant and replevin bond, and the sheriff was held liable for the substitution.

In Rogers v. Carroll (1895) 111 Ala. 610, 20 So. 602, a sheriff was held liable for his deputy's failure to serve a summons delivered to him, though the sheriff had attempted to limit the deputy's powers to the execution of process placed in his hands by himself or another deputy, the court saying that third persons may require the deputy to exercise all the powers incident to the office, and may hold the sheriff civilly liable for his default, and that the sheriff cannot cast off this responsibility by limiting the deputy's powers. The court also held that the sheriff was not relieved of liability by the fact that the failure to serve was due to the deputy's mistaken belief that service could not be made within twenty days of the return term.

Where a deputy constable levied on goods in a rented house, took possession of the house by agreement with the attachment debtor, and retained possession for some time after receiving notice from the landlord to vacate, the court, in Frizzell v. Duffer (1894) 58 Ark. 612, 25 S. W. 1111, held that the deputy's act was that of the constable, and that the constable was responsible for the trespass.

The act of a deputy sheriff in breaking into a house for the purpose of serving civil process is that of the sheriff (Foley v. Martin (1904) 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 465, 75 Pac. 842) but for such a trespass punitive damages may not be recovered from the sheriff (Foley v. Martin (Cal.) supra; Nixon v. Rauer (1898) 6 Cal. Unrep. 788, 66 Pac. 221).

In Palmer v. King (1914) 41 App. D. C. 419, L.R.A.1916D, 278, Ann. Cas. 1915C, 1139, a United States marshal was held liable on his bond for an assault committed by his deputy in forcing his way through an open window in spite of the active resistance of the occupants of the premises, in order to execute a writ of replevin.

An action cannot be maintained against a deputy sheriff for so negligently keeping property taken under execution that it is lost. The action being founded upon a breach of the duty of the office of sheriff, it must be brought against the sheriff, and not the deputy, though for the deputy's default. Owens v. Gatewood (1817) 4 Bibb. (Ky.) 494.

In Com. use of Stevens v. Stevens (1825) 2 T. B. Mon. (Ky.) 147, and in Stevens v. Stevens (1827) 4 T. B. Mon. (Ky.) 525, a sheriff and his sureties were held liable for the act of a deputy in instantly selling property levied on without advertising it. In the case in 4 T. B. Mon. 525, it appeared that the property sold at a sacrifice.

In Grabenheimer v. Budd (1888) 40 La. Ann. 107, 3 So. 724, where a deputy sheriff, on learning that papers were being prepared for an attachment to be placed in the sheriff's hands, informed another creditor and assisted him in suing out an attachment and levying it in advance of the one placed in the sheriff's hands, the sheriff and his deputies were held responsible to the creditor whose attachment was thus defeated. But in State ex rel. Atty. Gen. v. Budd (1887) 39 La. Ann. 232, 1 So. 453, a case arising out of the same act of such deputy, the court held that the sheriff would not be removed from office be-

cause of the act of the deputy, unless he encouraged or sanctioned the misconduct.

Though principals or heads of office were liable to impeachment for the acts of their deputies, done while in the discharge of their official duties, the court in State ex rel. Moore v. Reid (1911) 129 La. 158, 55 So. 748, Ann. Cas. 1912D, 1081, held that where a sheriff had taken proper measures to prevent a deputy from committing a crime and for bringing him to justice for having committed it, he would not be removed from office for such crime, or for misconduct of the deputy of which he was in ignorance up to the time of the filing of the suit for removal.

Where a deputy sheriff levied an execution on property which had been attached by another deputy, the court held the sheriff answerable to the attaching deputy for the wrongful act of the other deputy. Walker v. Foxcroft (1823) 2 Me. 270.

Under a statute making a sheriff answerable for the misconduct and negligence of his deputies while in office, the court in Kendrick v. Smith (1849) 31 Me. 162, held that the acts and omissions for which the sheriff was answerable were tortious in character, and that the omission of a deputy to pay one employed by him to take charge of attached property was not an omission contemplated by the statute, and that the sheriff was not responsible for such person's compensation.

The duties of a deputy attaching property to keep it for thirty days after judgment and deliver it on demand, pertain to his office, and if he fails in the performance of such duty the sheriff is answerable. Lawrence v. Rice (1847) 12 Met. (Mass.) 527. In this case it was held, however, that if there was any demand on the deputy for the property, it was complied with, and that the sheriff was therefore not liable.

In Prosser v. Coots (1883) 50 Mich. 262, 15 N. W. 448, it was held that the fault of a deputy sheriff in prematurely returning a writ of attachment was the fault of the sheriff, and rendered him liable to the plaintiff injured thereby.

Where a deputy sheriff misinformed plaintiff's attorney as to the place of a sale under an execution, and in the absence of the attorney, caused by such misinformation, the property was sold at a sacrifice, the court held that though the sheriff and the deputy were under no obligation in the first instance to inform the attorney as to the place of sale, the sheriff was liable for the deputy's failure to correct his mistake after learning that the sale was not to take place at the place stated to the attorney. State ex rel. Central Type Foundry v. Moore (1880) 72 Mo. 285.

An attachment is an official act of a deputy sheriff for which the sheriff is responsible (Rider v. Chick (1879) 59 N. H. 50); and a sheriff is liable for the default of his deputy in not safely keeping attached property (Eastman v. Judkins (1880) 59 N. H. 576).

Under statutes relative to the collection of claims by sheriffs and constables, and a statute providing that warrants from a justice of the peace might be directed to the sheriff as well as to a constable, it was held in State use of Quin v. Roane (1841) 24 N. C. (2 Ired. L.) 144, that a sheriff was liable for the misconduct of his deputy in suing the principal debtor, and not the sureties on a note placed in his hands for collection, though the claim was subject to the jurisdiction of a justice of the peace.

In Hazard v. Israel (1806) 1 Binn. (Pa.) 240, 2 Am. Dec. 438, where, on a judgment against administrators c. t. a., a fi. fa. issued for the debt, to be levied on the testator's goods, and the costs to be so levied if goods were found, and otherwise on the goods of the administrators, and, though the costs were settled, a deputy went to the home of one of the administrators and in a rude and insolent manner levied on his furniture between 10 and 11 o'clock at night, the court held that the sheriff was liable, and also upheld a recovery of exemplary damages. Though saying that the distinction between such dam-

ages and compensatory damages was worthy of great consideration by a jury, when a principal who was in no way to blame was sued for the conduct of his deputy, the court observed that, in point of law, if the sheriff was answerable at all, he must be answerable for such damages as the jury, on the whole circumstances, should think proper.

A sheriff was liable for money paid to a clerk in his office, not authorized to receive it, and who embezzled it. Abercrombie v. Marshall (1796) 2 Bay (S. C.) 90; Carlin v. Kerr (1796) 2 Bay (S. C.) 112.

Where a deputy took insufficient bail, and it appeared probable that he tampered with the surety and induced him to act as bail when there was nothing to furnish any reasonable grounds for believing that he would be able to pay, the sheriff was held liable. Teasdale v. Hart (1798) 2 Bay (S. C.) 173.

In Tucker v. Bingham (1883) 12 Lea (Tenn.) 653, where a statute required county trustees to deliver a certified statement of unpaid taxes to the constable of each ward or civil district, and provided that if there was no constable the statement should be addressed to and put into the hands of the sheriff, who was vested with the same powers, in person or by deputy, to collect the taxes, as were conferred on constables, the sheriff was held not liable for the default of the deputy to whom the statement was delivered, the court saying that, to charge him with liability, it was necessary that the statement should be put into his hands, so that he might select his own deputy.

In Hendrick v. Walton (1887) 69 Tex. 192, 6 S. W. 749, where a statute gave a right of action for death caused by the neglect of carriers or the gross neglect of their servants or agents, and also gave a right of action for death caused by the wrongful act, neglect, unskilfulness, or default of another, the court held that liability for acts of agents was limited to carriers, and hence that a sheriff and his sureties were not liable for the act of a deputy in shooting a prisoner attempting to escape, without deciding whether this was an official act for which the sheriff could otherwise be held liable.

In Johnson v. Edson (1827) 2 Aik. (Vt.) 299, it was held that a sheriff was liable for a deputy's failure to return attached goods upon judgment being rendered in favor of the defendant.

In Stimpson v. Pierce (1869) 42 Vt. 334, it was said that a sheriff was liable for damages sustained by attached property while in the possession of the attaching deputy.

In Kusah v. McCorkle (1918) 100 Wash. 318, L.R.A.1918C, 1158, 170 Pac. 1023, a sheriff and his sureties were held responsible for the negligence of a deputy in placing an insane suspect in the same room in the jail with other prisoners, and in failing to search him and take away a knife with which he injured another prisoner. While there was a statute making sheriffs responsible on their bonds for the default or misconduct in office of their deputies, the court said that this was declaratory of the common law.

In Cameron v. Reynolds (1776) Cowp. pt. 1, p. 403, 98 Eng. Reprint, 1154, it was held that where an under sheriff refused to execute a bill of sale for goods taken under a fi. fa. to the nominee of the execution creditors, and executed a bill of sale to another, the action should have been brought against the high sheriff, and not against the under sheriff, as the action was brought for a breach of duty in the office of sheriff.

In Bagge v. Whitehead (1892) 61 L. J. Q. B. N. S. (Eng.) 778, while the sheriff's liability for actual damages was not denied, the sheriff was held not liable for a statutory penalty imposed for seizing the whole of the debtor's goods under a fi. fa. without leaving wearing apparel, bedding, et cetera, the seizure having been made by the sheriff's bailiff.

In Jons v. Perchard (1798) 2 Esp. (Eng.) 507, a sheriff was held liable where his officer took more than the legal fees on admitting a person to bail, though the money never came into his hands, and in Woodgate v.

Knatchbull (1787) 2 T. R. 148, 100 **Eng.** Reprint, 80, 1 Revised Rep. 449, the sheriff was held liable for the treble damages given by statute where his officer took greater fees for executing a fi. fa. than were allowed by statute.

Where the officer to whom a warrant was directed by the sheriff arrested a person under a bailable writ and took him to the house of another sheriff's officer, who kept a lockup house, and who took a greater sum for taking a bail bond than the statute allowed, it was held in George v. Perring (1803) 4 Esp. (**Eng.**) 63, that the sheriff was not liable, because the warrant was not directed to him, and to make the sheriff liable it must appear that he has intrusted the officer with his authority in the particular case in which the officer abuses it.

In Raphael v. Goodman (1838) 8 Ad. & El. 565, 112 **Eng.** Reprint, 952, 3 Nev. & P. 547, 1 W. W. & H. 363, 7 L. J. Q. B. N. S. 220, a recovery by a sheriff on an indemnity bond taken by his officer was denied, where it appeared that it was obtained by the officer's misrepresentations, one of the judges saying that in all matters relating to the execution, the sheriff's officer was the same as the sheriff, and another that the fraud was committed by the officer, but the sheriff was the person to whom the law looked.

In Gregory v. Cotterell (1855) 5 El. & Bl. 571, 119 **Eng.** Reprint, 593, 25 L. J. Q. B. N. S. 33, 2 Jur. N. S. 16, where the bailiff to whom a warrant to execute a fi. fa. was given, gave it to his head clerk and assistant, who, in his absence, made a levy, it was held that the sheriff was liable for such levy, and that a payment to such head clerk at the bailiff's office was a satisfaction of the execution as against the sheriff.

j. Who is deputy within rule.

The sheriff is liable for the act of one who acts as deputy sheriff by his direction or with his knowledge and consent, though he has not been regularly appointed or has not regularly qualified. Bosley v. Farquar (1826) 2 Blackf. (**Ind.**) 61; Mathis v. Carpenter (1891) 95 **Ala.** 156, 36 Am. St. Rep. 187, 10 So. 341; Pickens v. McNutt (1849) 12 Smedes & M. (**Miss.**) 651; Mann v. Martin (1884) 82 **Ky.** 242; State use of Montrey v. Muir (1855) 20 **Mo.** 303.

In Bosley v. Farquar (1826) 2 Blackf. (**Ind.**) 61, the deputy had acted as such, with the sheriff's knowledge and consent, but had never been given express authority.

In Mathis v. Carpenter (1891) 95 **Ala.** 156, 36 Am. St. Rep. 187, 10 So. 341, supra, he had represented himself as deputy, with the knowledge, consent, and approbation of the sheriff, but had filed his oath of office with the clerk of the court instead of in the probate court.

In Pickens v. McNutt (1849) 12 Smedes & M. (**Miss.**) 651, supra, the appointment of the deputy was not in writing and under seal, as required by statute, but the sheriff had recognized and held him out as his deputy.

In Mann v. Martin (1884) 82 **Ky.** 242, the alleged deputy was neither a legal deputy nor a special bailiff, but he had been in the habit of receiving and executing process with the knowledge of the sheriff and by his authority and direction, and had general authority from the sheriff to do so.

In State use of Montrey v. Muir (1855) 20 **Mo.** 303, the appointment of a deputy constable, who was appointed by a constable, and acted with his consent, was not filed with the clerk of the county court, as required by statute.

In Mathis v. Carpenter (**Ala.**) Pickens v. McNutt (**Miss.**) and State use of Montrey v. Muir (**Mo.**) supra, the officer's sureties were also held liable.

In Mann v. Martin (**Ky.**) supra, a judgment for the sheriff's sureties was upheld because the petition did not set out the covenants of the bond or any breach, or show or allege that the sureties aided, abetted, or approved the wrongful act.

In Todd v. Jackson (1842) 3 Humph. (**Tenn.**) 398, where an outgoing sheriff having in his hands an execution on which no action had been taken pro-

cured a special deputation from the incoming sheriff, the incoming sheriff and his sureties were held liable for his failure to return it. The court held that, under the statute, the outgoing sheriff had no authority to serve process after the expiration of his term, but, even though he had such authority, he could surrender it to the incoming sheriff, and having done so, the incoming sheriff was liable.

In Com. v. Boles (1914) 160 Ky. 775, 170 S. W. 170, the court held that, under the statute governing cities of the fifth class, there was no right of action on the city marshal's bond for a false arrest by a policeman appointed for one day only.

Where a jailer was in attendance at court when a writ of habeas corpus was served, and the sheriff addressed his warrant for the removal of the prisoner to the jailer and his turnkey "for this time only, by me thereto specially appointed," it was held in Ryland v. Lavender (1824) 9 J. B. Moore, 71, 2 Bing. 65, 130 Eng. Reprint, 229, 2 L. J. C. P. 116, that the jailer and the sureties on his bond were not liable to the sheriff for the prisoner's escape from the turnkey, as he was not acting as the jailer's deputy, but under the special authority given him by the warrant.

k. Bailees and special deputies.

Sheriffs and constables are generally held liable for the acts of bailees or receiptors to whom they or their deputies intrust property levied on by them. Thus, in Johnson v. Edson (1827) 2 Aik. (Vt.) 299, the sheriff was held responsible for the conversion of attached goods by a receiptor with whom his deputy had placed them.

In Briggs v. Gleason (1856) 29 Vt. 78, a sheriff attaching a horse was held liable for its abuse by his bailee to whom he had intrusted its custody, the court saying that the act of the bailee was that of the officer.

In State ex rel. Bennet v. Nelson (1849) 1 Ind. 522, where a constable left a boat levied on under execution in the care of the defendant and it was carried away by high water, the court held that officers leaving property levied on in the care of servants or the execution defendant are liable for their negligence. The court, however, held that in this case there was no negligence.

In Watkins v. Cawthon (1881) 33 La. Ann. 1194, where the plaintiffs in an execution attached money in their hands due the defendant, and the sheriff left it in the hands of one of the plaintiffs, taking his receipt, and he thereafter became insolvent, the sheriff, after dissolution of the attachment, was held liable to respond to defendant's assignee precisely as if he was in personal possession of the fund. The court said that the case was the common one of loss by reason of default or failure of one's agent, to the risk of which the sheriff subjected himself every time he employed a keeper.

In Parrott v. Dearborn (1870) 104 Mass. 104, instructions assuming that a sheriff attaching a horse was only required to act as a prudent man in selecting a proper stable in which to put the horse, and that if he did so the treatment of the horse by the stabler was immaterial, were held erroneous, the court saying that an attaching officer is responsible for the safety of the attached property while in the custody of his agents intrusted with the care of the property by him, and is responsible for their negligence, mismanagement, or bad faith.

In Burns v. Taylor (1836) 3 Port. (Ala.) 187, where attached property was left in the custody of the person having possession as bailee, and he brought it to the place where it was sold under execution, an instruction that this was not a trespass if the property came into the possession of the deputy sheriff without any active agency on his part, he being quiescent, was held erroneous, as the act of the bailee was the act of the sheriff.

In Price v. Stone (1873) 49 Ala. 543, under statutes providing that when a sheriff seized a boat or vessel to enforce a lien, he must, as far as practicable, secure it against loss or injury, which might be done by appointing a suitable person or persons to

take charge of the boat, the court held that it was the sheriff's duty to see that the person in charge of the boat discharged his duty, but that the sheriff was not an insurer of the vessel against destruction by fire.

Under a statute authorizing the sheriff to appoint a special deputy on plaintiff's application and at his risk and also in other cases for his own convenience, the court in Barrett v. Seward (1849) 22 Vt. 176, held that the sheriff is liable for the acts of a special deputy appointed for his own convenience, and is also liable to the defendant in the writ and third persons, though not to plaintiff, for the act of a special deputy appointed at plaintiff's risk, and that the statute requiring actions for defaults of deputies to be brought against the sheriff included such special deputies as well as general deputies.

In Hawkins v. Thomas (1891) 3 Ind. App. 399, 29 N. E. 157, it was held that a United States marshal was not liable for the misconduct of special deputies appointed to serve at elections. The court said: "The marshal receives no fee or reward for their services. . . . Their duties are special and public, and are imposed upon them directly by the law. The statute making the marshal liable for the conduct of his deputies applies only to the general deputies, and there is not a single reason for holding him responsible for the conduct of special deputies except the bare fact that they are appointed by him."

In Miller v. Heck (1840) 9 Watts (Pa.) 439, where a person selected by plaintiff or a justice of the peace to levy an execution received it from the justice, wrote a deputation thereon, and procured a deputy constable to sign it, the court, though saying that if the execution had been delivered to the deputy constable to be executed, the constable would be liable for the consequences of a delegation by the deputy, held that the constable was not liable for the special deputy's failure to return the execution, as the special deputy was the agent either of plaintiff or the justice.

l. Liability as dependent on official character of act.

A sheriff, marshal, or constable, though liable for the official acts of his deputy, is not liable for the personal or private acts of the deputy. Knowlton v. Bartlett (1822) 1 Pick. (Mass.) 271; Jones v. Van Bever (1915) 164 Ky. 80, L.R.A.1915E, 172, 174 S. W. 795; James v. Gurley (1871) 48 N. Y. 163; Dysart v. Lurty (1895) 3 Okla. 601, 41 Pac. 724; Bagley v. Yates (1844) 3 McLean, 465, Fed. Cas. No. 725; Robertson v. Smith (1913) 16 Ga. App. 760, 85 S. E. 988; Walden v. Davison (1836) 15 Wend. (N. Y.) 575.

While this rule is well settled, there is some difficulty in determining when an act is official and when it is personal or private. A few of the cases deny liability where the act was merely done under color of the office, and not by virtue of the office, but the weight of opinion is that the sheriff is liable for acts of the deputy, done under color of the office. See Knowlton v. Bartlett (1822) 1 Pick. (Mass.) 271; James v. Gurley (1871) 48 N. Y. 163; Robertson v. Smith (1913) 16 Ga. App. 760, 85 S. E. 988; Harrington v. Fuller (1841) 18 Me. 277, 36 Am. Dec. 719; Walden v. Davison (1836) 15 Wend. (N. Y.) 575; Lucas v. Locke (1877) 11 W. Va. 81.

In Knowlton v. Bartlett (Mass.) supra, the court, after stating that the sheriff was answerable for official acts, but not for personal acts, said that an official act did not mean what the deputy might lawfully do in the execution of his office, as, if this were so, no action would ever lie against the sheriff for the misconduct of his deputy; but that it meant whatever was done under color of or by virtue of his office. This statement of the rule has been repeatedly cited in later cases.

In Jones v. Van Bever (1915) 164 Ky. 80, L.R.A.1915E, 172, 174 S. W. 795, the court, from an examination of many authorities, reached the conclusion that to render the sheriff liable, the act of the deputy must be done by virtue of his office as deputy; that for the deputy's act to have that

character it must be done in an attempt to serve or execute a writ or process, and as a means to that end, or in acting under a statute giving him the right to arrest without a warrant; and that when a deputy sheriff, although he assumes to act as such, commits a wrong under circumstances where the law does not impose a duty on him to act at all, the wrong is not a violation of any official duty, and the principal is not responsible.

A sheriff is not answerable for any default of his deputies unless it be a default in executing powers lawfully derived from the authority of the sheriff; and where the deputy undertakes any business not resulting from the duties of his office, the sheriff is not responsible. Bond v. Ward (1810) 7 Mass. 123, 5 Am. Dec. 28; Moulton v. Norton (1848) 5 Barb. (N. Y.) 286.

In Chandler v. Rutherford (1899) 2 Ind. Terr. 379, 51 S. W. 981, it was said that a United States marshal could not be held responsible for the illegal acts of his deputy, or of posse men acting under a deputy, unless such acts were performed at his instance or direction.

In Jones v. Van Bever (Ky.) supra, it was held that a deputy's unlawful act in arresting one without a warrant was not an official act for which the sheriff would be liable.

In Robertson v. Smith (1913) 16 Ga. App. 760, 85 S. E. 988, the statute made the sheriff liable on his bond to anyone injured by any wrongful act committed under color of his office, or by his failure to perform or improper or neglectful performance of the duties imposed by law. The action was against the sheriff and his surety, and the court held a petition insufficient which alleged facts showing that a deputy was sent to make an arrest, and at the scene of the alleged crime wrongfully and unjustifiably killed plaintiff's husband, but not alleging facts showing that when the homicide took place he was doing any act under color of his office, that he was attempting to apprehend plaintiff's husband, or had any reason to suspect him guilty of the crime, or that the homicide was in any way connected with the performance of any official duty; but on a subsequent hearing in the same case (1913) 16 Ga. App. 767, 85 S. E. 991, it appeared by an amended petition that the sheriff received information that certain negroes had shot at a child, and sent certain deputies, including one who was intoxicated, to arrest the parties without a warrant, though, so far as he knew, they were not endeavoring to escape; that after the deputies arrested certain negroes, plaintiff's husband and others were pointed out to them as the "rest of them," whereupon the intoxicated deputy pursued plaintiff's husband and shot him in attempting to arrest him, and conveyed him to jail, and declined to enlarge him for the treatment of his wounds, from which he thereafter died. It was also alleged that in so doing he thought or pretended to think that plaintiff's husband was one of the persons who committed the offense. The court held that the shooting was under color of his office, and that the sheriff and his sureties were liable.

Where a statute authorized an arrest without a warrant only for offenses committed in the officer's presence, or where he had reasonable ground for believing that the person arrested had committed a felony, it was held in Chandler v. Rutherford (1900) 43 C. C. A. 218, 101 Fed. 774, affirming (1899) 2 Ind. Terr. 379, 51 S. W. 981, that a deputy United States marshal was not acting under color of his office, so as to render the marshal and his surety liable, in shooting a person he was seeking to arrest, where his knowledge that a felony had been committed was derived from hearsay, and he had no knowledge or information justifying him in believing that the person sought to be arrested was the one who had committed the felony.

In Jordan v. Neer (1912) 34 Okla. 400, 125 Pac. 1117, it was held that if deputies, in making a raid, assaulted persons who were proceeding quietly along the highway and violating no law, and for whose arrest the deputies had no warrant, the sheriff's sureties were not liable, because what was done was not done in the exercise of

any authority conferred on the deputies by law, or necessary or proper to be done under authority of their office.

Under a statute making sheriffs responsible for the official acts of their deputies, it was held in Maddox v. Hudgeons (1903) 31 Tex. Civ. App. 291, 72 S. W. 414, that a deputy sheriff was not acting officially in directing the constable to assist in apprehending and arresting persons committing a burglary, and in directing him to lock up persons arrested by him on suspicion, without a warrant, the facts not authorizing an arrest without a warrant, and the statute requiring persons so arrested to be immediately taken before the magistrate. The court observed that the statute only authorized the deputy to summon assistance when resistance was expected, which was not the case, and that the legislature, in using the word "official," must be presumed to have had knowledge of the distinction between official acts and acts done under color of office.

Under a statute authorizing peace officers to arrest without a warrant for offenses against the public peace, committed in their presence, where deputy sheriffs saw a party riding along the road, and heard shooting by members of the party, it was held in King v. Brown (1906) 100 Tex. 109, 94 S. W. 328, reversing (1906) 41 Tex. Civ. App. 588, 93 S. W. 1017, that their arrest of the members of the party was an official act, so as to render the sheriff liable for their acts in shooting one of the members of such party, under a statute making him liable for his deputies' official acts, though the person shot was not carrying a pistol and was guilty of no offense. The court said that in all that they did they acted as deputy sheriffs, and that the character of the act did not depend upon its lawfulness, but upon the fact that the persons who performed it were in fact officers and purported to act as such, and did act by virtue of the authority conferred by law; but in the companion case of Brown v. Wallis (1906) — Tex. Civ. App. —, 101 S. W. 1068, where the court of civil appeals decided that the offense was not committed in the presence of the deputy, it held the sheriff not liable, saying that the sheriff conferred on him authority only to make arrests when the law authorized arrests to be made, and that when acting without authority, the act of the deputy was not the act of the sheriff, though the deputy erroneously assumed that he had power to act.

In State ex rel. Gehring v. Claudius (1876) 1 Mo. App. 551, there was evidence that a deputy called at plaintiff's house to serve a subpœna on his wife; that, without stating his business or showing any authority, he started through the house, and that when plaintiff took hold of him, he arrested plaintiff. The court said that the constable was answerable for the wrongful doing of any act of the deputy which might have been lawfully done had the deputy been armed with proper process. It approved instructions that the sheriff and his sureties were liable for the deputy's act under color of his position as a deputy constable, and answerable for any trespass committed by him under pretense of his authority as such, and also approved the refusal of instructions that if the deputy was outside of the line of his duties in making the arrest, defendants were not liable; that if the acts complained of were committed without the knowledge or consent of defendants, and not in the scope of or in pursuance of his duty as deputy, plaintiff could not recover; and that if plaintiff had a private difficulty with the deputy, and the deputy committed the act complained of on his own motion, and without any command or order of the constable, and without his knowledge, plaintiff could not recover.

In an action against a constable and his bondsman, based on the use of excessive force by the constable and a deputy in arresting plaintiff, where, though the court found that the deputy "wilfully" shot plaintiff, this evidently meant that the shooting was intentional, and not that it was malicious, the contention that the act was extraofficial, and did not render

the constable liable, was rejected. Towle v. Matheus (1900) 130 Cal. 574, 62 Pac. 1064.

In People use of Tamplin v. Beach (1911) 49 Colo. 516, 37 L.R.A.(N.S.) 873, 113 Pac. 513, where a deputy sheriff in charge of a prisoner dropped a loaded revolver which he had taken from the prisoner, causing it to explode and injure plaintiff, the court, after pointing out the cases in which a sheriff had authority to search prisoners, held a complaint insufficient which did not allege that the deputy ever arrested the prisoner, or allege the charge on which he was arrested, or facts showing that the arrest was lawful, and that the deputy was authorized to take the revolver from the prisoner.

In Shields v. Pflanz (1897) 101 Ky. 407, 41 S. W. 267, where a deputy sheriff, in taking a prisoner to another county, in obedience to the warrant of arrest, maliciously, unnecessarily, and for the purpose of degrading him, handcuffed him and led him through the street handcuffed, it was held that the sheriff was liable under a statute making him liable on his bond for any misconduct or default of such deputy. The sheriff contended that he was not liable because the acts were illegal and tortious; but the court held that they were inflicted by the sheriff under color of his office and while in the discharge of an official act.

In Johnson v. Williams (1901) 111 Ky. 289, 54 L.R.A. 220, 28 Am. St. Rep. 416, 63 S. W. 759, where deputies shot an innocent person riding in a buggy, under the belief that an offender for whom they were seeking was in the buggy and attempting to escape, the court, though holding the killing unlawful, held that the deputies were, notwithstanding, acting in their official capacity, and that the sheriff and his sureties were liable, saying that they had authority as deputy sheriffs to arrest the offender, and that they were guilty of misconduct in office for which the principal and his sureties were liable under a statute making the sheriff liable on his bond for the misconduct or default of his deputies. In this case, however, defendants not only did not deny that the act was by virtue of the office, but claimed that it was a lawful act.

In an action against a sheriff and his sureties for a wrongful killing by a deputy, a petition was held insufficient where it did not allege that the deputy was acting by virtue of his office in the execution of a process, or doing anything in his official capacity, or that the killing was done in an attempt to discharge an official duty. Com. v. Hunt (1901) 23 Ky. L. Rep. 1171, 64 S. W. 911, 65 S. W. 610.

In Stephens v. Wilson (1903) 115 Ky. 27, 72 S. W. 336, where a fiscal court, without authority, issued a warrant for the arrest of one of its members, and thereunder the deputy sheriff arrested such member, the sheriff was held liable on the ground that he was liable for the acts of his deputy under color of his office, and on the further ground that he advised, requested, and caused the illegal arrest.

A petition alleging that a deputy sheriff, while acting as deputy, agent, servant, and employee of the sheriff, maliciously and recklessly assaulted and shot a prisoner, without cause or provocation, does not state a cause of action against the sheriff or the surety on his bond; the sheriff and his sureties are not liable for a wrongful act of the deputy unless done in violation of, or in an unfaithful or improper performance of, an official duty; and, ignoring the conclusion of the pleader, the petition does not show whether the act in question was so done. Sanders v. Humphries (1918) — La. —, 78 So. 168.

Under a statute making the sheriff and his surety liable for any misconduct of his deputy, they were held liable for his act in killing one arrested under a warrant for a misdemeanor and attempting to escape, such a killing being unlawful. Though the deputy's idea that he had a right to shoot was erroneous, he was acting by virtue of his office, and what he did was done as an official act. Brown v. Weaver (1898) 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388.

In Dysart v. Lurty (1895) 3 Okla.

601, 41 Pac. 724, where a deputy United States marshal, in arresting a saloon keeper for violations of the revenue laws, seized liquors and other goods without authority of law or color of process, and without any instructions from the marshal, the court held that it was his personal act, and not an act in the discharge of any official duty, and that the marshal and his sureties were not liable for his negligent handling of such goods.

Where a deputy sheriff fired through the door of a room, believing the occupant of the room to be the person he had been directed by the sheriff to arrest or bring in dead, it was held in Crose v. John (1917) 96 Wash. 216, 164 Pac. 941, that he acted under color of his office and within the scope of his authority, so as to render the sheriff and his surety liable under a statute making them liable for the deputy's default or misconduct in office.

Where plaintiff's husband committed a public offense in a deputy's presence, and the deputy attempted to arrest him, but, owing to his resistance, released him and started away, and then walked back, saying he would arrest him anyhow, and thereupon shot him, it was held in Meek v. Tilghman (1916) — Okla. —, 154 Pac. 1190, that the deputy was acting in his official capacity and in the discharge of his official duties, though the parties were quarreling and calling each other hard names at the time he started back to arrest plaintiff's husband, and that the sheriff and his sureties were liable under a statute making them liable for the acts and omissions of deputies. It was held, however, that they were not liable for punitive damages.

Under a statute providing that if any officer of any court held thereunder should be assaulted while in the execution of his duty it should be lawful for the bailiff of the court or any peace officer to take the offender into custody and bring him before the court, it was held that the high bailiff of a court was not liable for an arrest by his under bailiffs of a person claimed to have assaulted them in executing process. The act was not done under color of the warrant, but under color of an authority conferred by the statute on the particular officer executing the warrant, and not on the high bailiff. Smith v. Pritchard (1849) 8 C. B. 565, 137 Eng. Reprint, 629, 19 L. J. C. P. N. S. 53, 14 Jur. 224.

In Knowlton v. Bartlett (1822) 1 Pick. (Mass.) 271, where a deputy directed to attach real estate did so, and thereafter received money from the debtor, which he undertook to attach, the sheriff was held liable to the debtor for such money, though, after the attachment of the real estate, the writ was functus officio, and though the money was not attachable property.

The seizure of the property of one person under an execution or other process against the property of another is an official or quasi official act, done under color of office, for which the sheriff is liable. Pond v. Leman (1865) 45 Barb. (N. Y.) 152; Lyman v. Holmes (1915) 88 Vt. 431, 92 Atl. 829; Sangster v. Com. (1866) 17 Gratt. (Va.) 131.

For such an act the sheriff and his sureties are liable on his official bond. Sangster v. Com. (Va.) supra.

Nor is it necessary that the sheriff should know that the deputy has the process, or that he should sanction the act. Pond v. Leman (N. Y.) supra.

In Lawrence v. Sherman (1841) 2 McLean, 488, Fed. Cas. No. 8,144, where property of one person was levied on under an execution against another, it was held that the sheriff was liable for the deputy's act, it having been done under color of authority, and having been sanctioned by the sheriff, though the execution was not sealed.

In Harrington v. Fuller (1841) 18 Me. 277, 36 Am. Dec. 719, a deputy levied on plaintiff's property under an execution against another, and plaintiff sued the deputy and recovered a judgment which the deputy partially satisfied. The sheriff's liability for the original taking being barred by limitation, plaintiff sought to hold him liable for the deputy's failure to pay the balance of the judgment, but the court held that such failure

was not an act for which the sheriff was liable; that while the deputy originally held the property and its proceeds in his official capacity, plaintiff, by recovering judgment and taking out execution, transferred the absolute title to him in his private capacity, and his failure to apply the property in satisfaction of the judgment was therefore not official neglect.

Where a deputy could not attach green hides in vats because they could not have been restored in the plight in which they were taken, the sheriff was held not liable for the deputy's failure to take a lease of the vats until the hides should be tanned, as offered by the debtor, because in so doing he would have acted by authority derived from the debtor, and not from the sheriff. Bond v. Ward (1810) 7 **Mass.** 123, 5 Am. Dec. 28.

Where an attaching deputy sheriff waived demand on him for the goods within thirty days after judgment, his principal was held answerable for his subsequent neglect to deliver the goods, in Morton v. White (1839) 16 **Me.** 53, it being the neglect of an official duty.

In Buck v. Kimball (1883) 75 **Me.** 440, it was held that an unauthorized sale by a deputy sheriff of property legally attached, whereby he became a trespasser ab initio, was an official act for which the sheriff was answerable, though the deputy's term of office had expired.

In Marshall v. Hosmer (1808) 4 **Mass.** 60, where a creditor verbally directed the deputy to attach certain chattels, and, instead of so doing, he served the writ by arresting the debtor, the sheriff was held liable, the court saying that the sheriff was not liable for a breach of contract made with plaintiff, obliging the deputy to do what by law he was not required to do, but that the default charged was in not making an attachment of chattels, which the deputy was by law bound to do.

In Lawrence v. Rice (1846) 12 Met. (**Mass.**) 535, plaintiff sent an execution to an attaching deputy who had gone out of office, and who delivered the execution to M., another deputy. The two deputies demanded the goods from a receiptor, but they had been sold. M. then accepted the receipt from the attaching deputy, and it was claimed that he thereby exonerated the attaching deputy from liability. The court held that M., before accepting the receipt, had done his official duty; that nothing remained to be done by him except return the execution unsatisfied; and if the acceptance of the receipt was contrary to plaintiff's interests, it was not an official act for which the sheriff would be liable.

Where a sheriff issued an attachment to compel an appearance in the county court, but the debtor having appeared, the sheriff issued a supersedeas, commanding the bailiffs, who had seized the goods under the attachment, to return them, but they failed to do so, it was held that the sheriff was not liable, as the supersedeas terminated the authority of the bailiffs under the attachment, and they were not thereafter acting as the sheriff's servants. Brown v. Copley (1844) 2 Dowl. & L. 332, 8 Jur. 577, 13 L. J. C. P. N. S. 164, 7 Mann. & G. 558, 135 **Eng.** Reprint, 224, 8 Scott N. R. 350.

In Bagley v. Yates (1844) 3 McLean, 465, **Fed.** Cas. No. 725, where a deputy marshal received money after the return of an execution, and failed to pay to the execution creditor, the marshal was held not liable.

But in an action by a sheriff against his deputy's sureties to recover an amount collected on an execution and not paid over, the court held, in James v. Yates (1860) 60 **Ky.** 343, that, under a statute providing that any payment made on an execution after the return day, and while the execution was in the officer's hands, should be deemed a satisfaction, and the officer and his sureties should be responsible, the sheriff was liable to the plaintiff in the execution though the money was paid to the deputy after the return day, but while the execution was still in his hands; and that therefore the deputy's sureties were liable to the sheriff.

A sheriff is not responsible for money paid to his deputy by a debtor before an execution is lodged with the sheriff, as the sheriff has no authority to receive any money except that derived from the execution. Chiles v. Holloway (1827) 4 M'Cord L. (S. C.) 164.

Money received by a deputy sheriff on an execution which is irregular and erroneous, but not void, is received by color of his office, and his sureties are liable to the sheriff, and the sheriff to the plaintiff, therefor. People v. Dunning (1828) 1 Wend. (N. Y.) 16.

But no action will lie against a sheriff for a deputy's failure to pay over money collected on an attachment void, because, being for less than $50, it is made returnable to the circuit court. The process being void, the deputy must be considered as holding it for the use of the plaintiff as a private individual, and not in his official capacity. Hawkins v. Com. (1824) 1 T. B. Mon. (Ky.) 144.

In Stephens v. Head (1903) 138 Ala. 455, 35 So. 565, it was held that a deputy's act in taking property under an execution for costs, void because witness fees were not itemized, was the act of the sheriff, though he was not present, and was in no way connected with the taking.

In United States v. Moore (1828) 2 Brock. 317, Fed. Cas. No. 15,802, where a deputy United States marshal receiving a capias ad respondendum arrested the debtor, who thereupon paid the full amount of the debt, whereupon the deputy discharged him from arrest, the court held that the receipt of the money was not an official act, and that the marshal was not chargeable, since it was the deputy's duty to obey the mandate and arrest the debtor and bring him into court, and that he was not authorized to adjust the debts and receive the money. The discharge of the debtor was, however, misfeasance in office, making the marshal liable on his official bond, though not necessarily to the amount of the debt.

But in Woodman v. Gist (1837) 8 Car. & P. (Eng.) 213, it was held that while it was not in the regular discharge of his duty for a sheriff's officer who arrested a party on a bailable capias to receive the debt and costs, where he did receive it, he received it for the sheriff, and the sheriff was answerable therefor to the plaintiff.

In Woods v. Finnis (1852) 7 Exch. 363, 155 Eng. Reprint, 988, it was held that where a debtor arrested on a ca. sa. paid the amount of the debt and costs to the bailiff, and the bailiff failed to pay it over to the execution creditor, resulting in the debtor being again arrested, the sheriff was not liable for the bailiff's default because it was no part of his duty in the execution of the writ to receive payment of the debt, and the sheriff could therefore be liable only by force of a contract, and the bailiff could not bind the sheriff by contract.

In Smart v. Hutton (1833) 8 Ad. & El. 568, note, 112 Eng. Reprint, 954, note, 2 Nev. & M. 426, a sheriff was held liable for the act of his officers in taking the debtor's person under a fi. fa., notwithstanding the excess of authority by the officers.

In Odom v. Gill (1877) 59 Ga. 180, it was held that if the deputy sheriff paid money collected on a fi. fa. to the plaintiff's attorney, and then borrowed the money from the attorney for his personal use, the sheriff was not liable for the money, the transaction being one between the attorney and the deputy as men, and not as officers.

In Reynolds v. Dale (1863) 33 Ga. 585, a sheriff was held not liable as for money collected on a fi. fa. where his deputy took the notes of third persons, as this was not a good payment, and the sheriff was liable only for the deputy's act or omission done in the ordinary course of duty in the business of the office.

In Lewark v. Carter (1889) 117 Ind. 206, 3 L.R.A. 440, 10 Am. St. Rep. 40, 20 N. E. 119, a sheriff was held not liable for false representations by a deputy as to the title of property sold on execution, the court saying that it was no part of the duty of a deputy sheriff to make such representations, and that his statements in

this respect were not within the scope of his authority.

Where a deputy sheriff after returning an execution, by consent of the plaintiff's attorney and the county clerk, obtained it from the clerk's office, erased the return, and made a levy, the court held in James v. Gurley (1871) 48 N. Y. 163, that the execution was not absolutely void but merely irregular, and that the sheriff therefore was liable for the deputy's nonpayment of money collected, the court saying that upon application the court could have authorized the withdrawal of the execution and cancelation of the return, and could even do this nunc pro tunc after the second return.

Under statutes imposing on the United States marshal for the Indian Territory the duties and powers of sheriffs, the marshal was held liable in Sanders v. Cline (1908) 22 Okla. 154, 101 Pac. 267, for the act of his deputy in forcibly, unlawfully, and maliciously evicting plaintiff and his family from his residence on section 18 under a writ of possession in forcible entry and detainer, describing land in section 7, all that was done having been done by virtue of the fact that he was armed with a writ, and because of the fact that he was a deputy marshal and had such writ. It was further held that the marshal's surety would be liable in a proper action, but that the action against it on the bond could not be joined with the action against the officer for the tort.

In Luck v. Zapp (1892) 1 Tex. Civ. App. 528, 21 S. W. 418, where the evidence showed that a deputy sheriff evicted plaintiff from her homestead and levied on the homestead under an execution of some kind from a justice of the peace, and that in so doing he asserted that he was doing so by virtue of his authority as deputy sheriff, and that the sheriff, when appealed to, refused to release the levy, stating that the other side intended to fight it and would protect him, and the deputy testified in an action against the sheriff and his sureties that he acted in his official capacity of deputy sheriff, it was held that the evidence showed that the deputy was acting officially, so as to charge the sheriff and his sureties with liability.

A count in an action against a sheriff for his deputy's failure to levy an execution on certain personal property, alleging that plaintiff offered to turn out to the deputy certain property, with directions to the deputy to hold the property and dispose of it and satisfy the execution with the avails, and that the deputy, with no further offer or attempt on plaintiff's part to turn out the property, agreed to take and hold and dispose of the property agreeably to plaintiff's directions, was held good in Weatherbee v. Foster (1832) 5 Vt. 136. The court said that while the sheriff was liable only for the deputy's official neglect, and not for his breaches of contract, the substance of the charge was the neglect to levy on and dispose of the property, and the agreement was of no consequence except as a waiver of any further turning out of property by the creditor.

Where, by agreement with plaintiff, goods were not sold by a deputy sheriff during the life of an execution, but he undertook to procure an alias execution, it was held that this was no part of his duty as deputy sheriff, and that whatever obligation he assumed by undertaking this service was personal, and not official, and that the sheriff was not liable for his neglect. Cowdery v. Smith (1877) 50 Vt. 235.

In Hamilton v. Carter (1895) 12 Wash. 510, 41 Pac. 911, it was held that where a deputy sheriff sold under execution chattels on which there was a mortgage which had been foreclosed, any representation by him to the purchasers that the proceeds would be applied in satisfaction of the foreclosure decree was not a part of his official acts or duties, but amounted to a personal engagement on his part for which the sheriff was in no way responsible.

Where a warrant issued out of a county court and delivered to its

high bailiff was sent to the clerks of another county court within whose jurisdiction the debtor was residing, and was by them sealed and delivered to the high bailiff of that court, whose under bailiff accompanied the under bailiff of the court issuing the warrant, the high bailiff of the court issuing the warrant was held not liable for their trespass in attempting to execute the warrant, on the ground that his under bailiff was acting out of his jurisdiction, and not under his order or subject to his control, but merely as the assistant of the other under bailiff. Smith v. Pritchard (1849) 8 C. B. 565, 137 Eng. Reprint, 629, 19 L. J. C. P. N. S. 53, 14 Jur. 224.

In Holden v. Williams (1896) 75 Fed. 798, the court rejected the contention that, in serving process of commissioners' courts in Alaska, deputy United States marshals were not acting as such, but as constables; holding that though they were given the power of constables, they could, as deputy marshals, execute any process of any court in the district.

In Murrell v. Smith (1835) 3 Dana (Ky.) 463, the court said that a principal sheriff was responsible for all the official acts of his deputy, however tortious, and that a deputy's official nonfeasance or unintentional misfeasance, as in taking insufficient security on a replevin bond, was an official, and not a personal, wrong, and in judgment of law was deemed the act of the sheriff alone, and gave no right of action against the deputy in favor of third persons.

In an action for the act of a deputy in taking a replevin bond with insufficient sureties, in which it was contended that the taking was a trespass, the court held that in serving the writ and taking the bond the deputy was acting officially; that the plaintiff in the replevin could not be a trespasser if he offered sureties satisfactory to the officer; and that if the officer took a bond with insufficient sureties, he was guilty of official misconduct for which the sheriff was liable. Harriman v. Wilkins (1841) 20 Me. 93.

In First Ward Nat. Bank v. Thomas (1878) 125 Mass. 273, it was held that where an action was terminated by the entry "neither party," it being a deputy's official duty to deliver the proceeds of attached property sold by him to the defendant, the sheriff would be liable for his failure to perform it; that if, by an assignment from the defendant to plaintiff, it became his official duty to deliver such proceeds to plaintiff, the sheriff was liable for the deputy's refusal to perform it; but if it was not his official duty, though it might be his personal duty, to do so, the sheriff would not be liable. The court further held that by such an assignment the property or its proceeds, on dissolution of the attachment, passed to the assignee, and that it was therefore the deputy's official duty to deliver it to him, and that for his neglect to do so the sheriff was liable.

Where in a partition suit, the under sheriff permitted plaintiff's attorney to sell the land and receive the proceeds, and ratified and confirmed his act by executing a conveyance and signing a report of sale, it was held in Van Tassel v. Van Tassel (1860) 31 Barb. (N. Y.) 439, that the sheriff would have been liable if relief had not been barred by limitation, the court saying that the sale and conveyance was an official act, and that whatever a deputy does under color of his office is deemed to be done by the sheriff himself.

Where a debtor was admitted to the jail liberties on giving a bond, and at the expiration of thirty days left such liberties with the permission of the deputy sheriff, who was also jailer, and who mistakenly supposed that the prisoner was entitled to be discharged after thirty days, it was held in Wemble v. Glavin (1877) 57 How. Pr. (N. Y.) 109, that such permission was a defense to an action by the sheriff on the bond; that as the deputy did not arrest the debtor and held no process against him, and was given no special direction by the sheriff to take charge of him, the sheriff was not responsible for his act as deputy sheriff; but that, under a stat-

ute authorizing the sheriff to appoint a jailer, and making him responsible for the jailer's act, the deputy's act as jailer were binding on the sheriff, since the jail liberties were merely an extension of the jail walls, and the jailer was the keeper of the prisoner, and the sheriff's representative in giving permission to leave the liberties.

In Spencer v. Moore (1837) 19 N. C. (2 Dev. & B. L.) 264, where a deputy having a ca. sa. returnable in another county voluntarily suffered the prisoner to escape, and thereafter illegally arrested him a second time on the same writ, the sheriff was held liable though the second arrest was in the county to which the writ was returnable, the court saying that he was acting by color of his office in going into such county to return the writ.

Where, by order of the county court, the sheriff was directed to take possession of and administer an estate, and in obedience thereto the estate, including land, was delivered to a deputy, and for several years the land and slaves were rented out by deputies, who received the rent, it was held that the deputies rented the land and received the rent under color of their office, and the sheriff was bound therefor, whether they were authorized as deputies to rent the land and receive the rent or not. Mosby v. Mosby (1853) 9 Gratt. (Va.) 584.

In Edwards v. Taylor (1816) 7 Ky. 353, the court held that as a sheriff was not legally bound to receive fee bills, taxes, and fines from his predecessor for collection, if his deputy received them, he was not liable for the deputy's failure to collect and account therefor.

In Moulton v. Norton (1848) 5 Barb. (N. Y.) 286, under the statute then in force it was held that, in distraining for rent, an officer acted merely as bailiff of the landlord, and not as a public officer in the execution of legal process, and that therefore the sheriff was not responsible for his acts.

In Davis v. Smith (1881) 130 Mass. 113, it was held that as an order of a justice of the peace for the removal of obstructions from a highway was not in the nature of a judicial warrant, precept, or process, the sheriff or his deputy was not required in his official capacity to serve it, and that any acts done by the deputy in the execution of such an order were not done by virtue of or under color of his office, but were his personal acts, for which the sheriff was not responsible.

In Dorr v. Mickley (1870) 16 Minn. 20, Gil. 8, it was held that as the taking of property covered by a chattel mortgage from the possession of the mortgagor, on request of the mortgagee, was not an official duty of the sheriff, he was not liable for such taking by the deputy, though he approved the taking, under the mistaken belief that it was his official duty.

m. Expiration of term or giving of new bond.

Where a deputy sheriff attaches goods during the term of office of his principal, the sheriff is generally held liable for his acts under the attachment after the expiration of his own term; and where the deputy is reappointed by the new sheriff, the former sheriff, and not the new sheriff, is generally held liable for such act; and the general rule is the same with respect to acts after the expiration of the term, under executions received during the term; at least where some act thereunder has been done during the term. Thus, in Lambard v. Fowler (1845) 25 Me. 308, a sheriff was held liable for the neglect of his deputy to keep attached goods until thirty days after judgment, though his term of office expired before that time.

In Barden v. Douglas (1880) 71 Me. 400, where a deputy of defendant's predecessor attached plaintiff's property in an action against another, and left it in plaintiff's possession on her giving a receipt, and after defendant became sheriff and reappointed the deputy, he took the property from plaintiff before judgment and surrendered the receipt, defendant was held not liable to plain-

tiff, as the deputy was simply taking care of the responsibilities incurred as the deputy of defendant's predecessor.

Where a deputy attached goods which he failed to deliver on demand after the rendition of a judgment, the sheriff was held liable though he had gone out of office before the judgment was rendered. Morse v. Betton (1820) 2 N. H. 184. The court said that the duty must be imposed while the relation of sheriff and deputy exists, and otherwise the sheriff is not answerable; but that if the duty be thus imposed, the sheriff will be answerable although there be no neglect of duty until the relation has ceased to exist.

In Pillsbury v. Small (1841) 19 Me. 435, where defendant's deputy, while the deputy of his predecessor, attached goods and returned them to the debtors, taking their receipt, and the debtors sold the goods before defendant's election and reappointment of the deputy, defendant was held not liable for the deputy's failure to satisfy from such goods an execution subsequently issued, as the deputy had no constructive possession of the goods after returning them to the debtors, and if he did have such possession, it ceased when the debtors sold the goods, and his misconduct, therefore, did not occur while he was defendant's deputy.

Where, after a deputy sheriff's delivery of property attached in a number of suits to a receiptor, and after the expiration of the sheriff's term and his reappointment as deputy by the new sheriff, some of the creditors having obtained judgment and taken out execution, he received property from the receiptor and sold it, and after satisfying the execution had a surplus in his hands, he held it as attaching deputy and in his capacity as deputy of the former sheriff, and the former sheriff was liable therefor to an attaching creditor. Stimpson v. Pierce (1869) 42 Vt. 334.

Where a deputy delivered attached property to a receiptor, who sold some of the property and paid its value in money to the deputy after the sheriff's term had expired and he had been reappointed by the new sheriff, the deputy received the money as deputy of the former sheriff, and the former sheriff was liable therefor. Ibid.

But where the deputy of a former sheriff attached goods, his refusal to levy an execution thereon after the expiration of such sheriff's term and his appointment as deputy of the new sheriff did not render the former sheriff liable. Blake v. Shaw (1811) 7 Mass. 505.

In Tyree v. Wilson (1852) 9 Gratt. (Va.) 59, 58 Am. Dec. 213, where a deputy, during his principal's first term of office, levied on personal property and made return that the property was not sold for want of bidders, and, after his principal had served a second term and gone out of office, the deputy received a venditioni exponas which he returned "satisfied," his principal and the surety for the principal's first term were held liable for his acts.

In Hamilton v. Vail (1859) 2 Met. (Ky.) 511, a statute provided that when a sheriff should die or vacate his office, his deputies should complete the execution of any process in their hands, and that their acts or omissions should be considered as embraced in his official bond. The deputy had an execution in his hands when the sheriff died, and after his appointment as deputy by the new sheriff he levied on land which the debtor did not own, and which was subsequently sold to the creditor, who thereby acquired no title. It was held that the creditor's remedy, if any, was against the representatives of the sheriff in office when the deputy received the execution. The court said that placing the execution in his hands created a lien on the debtor's property, and that he had thus commenced its execution.

In Matthis v. Pollard (1847) 3 Ga. 1, the court reached a somewhat different conclusion, but on the ground that when a new sheriff was commissioned, the former sheriff's official functions ceased. The deputy was also the sheriff's predecessor as such, and received an execution while sher-

iff, on which he collected money after the expiration of his term and his appointment as deputy. The court held the present sheriff liable though the former sheriff did not turn the execution over to his successor by inventory and schedule, as required by statute, and though he did not receive the execution through the present sheriff, the court saying that the sheriff was liable no matter how the execution came into his deputy's hands. The court also said that the former sheriff as sheriff, and his sureties as such, would not be liable.

In State use of Moutrey v. Muir (1855) 20 Mo. 303, it was held that a constable's sureties were not relieved from liability for the act of a deputy during the term for which the constable was elected by the fact that the constable had previously become a nonresident, thereby forfeiting or vacating his office, the court saying that the constable could not make such a defense, and that the surety was bound to the same extent as the principal.

Where a deputy sheriff neglected to advertise and sell property levied on, and thereafter, and after the renewal of the sheriff's bond, it was advertised and sold under another execution, and the proceeds paid to the plaintiff in such execution, the sureties on the first bond were held liable on the ground that the default was in not advertising and selling the property on the first execution, and not the application of the proceeds to the later execution. People ex rel. Budd v. Ten Eyck (1835) 13 Wend. (N. Y.) 448.

Where, after a sheriff went out of office, a former deputy was his agent in all business relating to the office, with full authority to pay out or refuse to pay out money, the sheriff was held liable for his refusal to pay over money collected on an execution. Alexander v. Hancock (1844) 2 Rich. L. (S. C.) 100.

In Wilton Mfg. Co. v. Butler (1852) 34 Me. 431, it was held that if, as claimed, a deputy sheriff levying executions was guilty of fraud in connection with the serving of the original writ while deputy of the former sheriff, this did not make the levy a trespass as against the present sheriff, as the liability for the fraud would be upon the deputy and the former sheriff.

In Canterberry v. Kouns (1823) 3 Litt. (Ky.) 449, a sheriff was held not liable for his deputy's refusal to pay a balance of the county levies in his hands on an order drawn on the deputy after the sheriff had gone out of office and the deputy had ceased to be his deputy, the court saying that to render him liable the order should have been drawn on the sheriff himself.

In Arnold v. Hawkins (1916) 79 W. Va. 205, 90 S. E. 678, it was held that though his term of office had expired and he had made final settlement with his deputy, a sheriff was liable for the default of such deputy, deputed by him to collect and disburse the public taxes on lawful orders drawn on him, in withdrawing from the bank where deposited and misappropriating a sum of public money necessary to meet and pay his checks given to holders of orders.

In Douglass v. Stumps (1834) 5 Leigh (Va.) 392, it was held that a sheriff was liable for his deputy's act in administering a decedent's estate, though he had received no commission during the second year of his term as sheriff, and that he was liable for the deputy's act in this respect after his own term expired.

n. Nonliability by reason of party's special directions to deputy.

Where a party such as the plaintiff in an execution interferes with the deputy, and directs him to proceed in some way other than that prescribed by law, the deputy then becomes the agent of such party as between him and the sheriff, and the sheriff is no longer answerable to such party for his acts. Samuel v. Com. (1827) 6 T. B. Mon. (Ky.) 174; Dyer v. Tilton (1880) 71 Me. 413; New Hampshire Sav. Bank v. Varnum (1840) 1 Met. (Mass.) 34; Mansfield v. Sumner (1843) 6 Met. (Mass.) 94; Lawrence v. Rice (1847) 12 Met. (Mass.) 527; Stevens v. Colby (1865) 46 N. H. 163;

Mickles v. Hart (1845) 1 Denio (N. Y.) 548; Walden v. Davison (1836) 15 Wend. (N. Y.) 575; Acker v. Ledyard (1850) 8 Barb. (N. Y.) 514.

But to discharge the sheriff, it must be shown not only that the plaintiff directed the deputy to depart from the line of duty imposed by law, but that the deputy followed or at least undertook to follow the directions given; and he cannot otherwise be regarded in any respect as plaintiff's agent. Sheldon v. Paine (1852) 10 N. Y. 398.

The party must do some act which releases the deputy from doing his legal duty. Mason v. Ide (1858) 30 Vt. 697.

In Samuels v. Com. (1827) 6 T. B. Mon. (Ky.) 174, where a creditor assigned an execution to a deputy who held a number of executions against him, on the deputy's agreement to give him credit on such other executions, the sheriff and his sureties were held not liable for the deputy's nonperformance of the special agreement.

Where a creditor directed a deputy to take a note from the execution debtor, the sheriff was held not liable in Dyer v. Tilton (1880) 71 Me. 413, for the deputy's neglect to obtain a note according to his repeated promises. In any such proceeding for fixing up the execution the deputy would be acting not in his official capacity, but as plaintiff's agent.

In New Hampshire Sav. Bank v. Varnum (1840) 1 Met. (Mass.) 34, where attached goods were, by agreement of the interested parties, sold at private sale instead of public sale, as required by statute, the court held that the deputy who made the sale was acting as the agent of the parties in so doing, and not in his official character, and that if any loss had resulted therefrom the sheriff would not have been liable; but that, after the proceeds were received by the deputy, to be held instead of the attached goods, they were in his hands as an officer, and he was bound by his official duty to apply them in satisfaction of an execution, and his failure to do so was a default for which the sheriff was liable.

Where an attorney gave an execution to a deputy sheriff, and directed the deputy to be governed by his directions, and said he would tell him what to do and how to do it, and it would be all right, and a sale was made under the attorney's directions, and a return prepared by him and signed by the deputy, it was held in Stevens v. Colby (1865) 46 N. H. 163, that the sheriff was not liable for any defect in the return.

Where plaintiff's attorney positively directed the deputy sheriff making a levy under an execution to do nothing further, it was held that the sheriff was not thereafter answerable for the deputy's default, and that his liability was not revived by the attorney's direction to the deputy to sell the goods, but that nothing short of notice to the sheriff himself could revive his liability, if even that would be sufficient. Mickles v. Hart (1845) 1 Denio (N. Y.) 548.

In Walden v. Davison (1836) 15 Wend. (N. Y.) 575, where an execution sent to a deputy sheriff was by mistake addressed to the sheriff of the wrong county, and the plaintiff's attorney sent him another execution, saying that he could either amend the execution or lay it aside and make use of the second, and the deputy collected money under the first writ, it was held that he was not, in so doing, the agent of the party, so as to relieve the sheriff from liability, the process being such that the officer might proceed under it if he saw proper, though if he had followed a different course, he might have been acting as the party's agent.

Though plaintiff authorized a deputy sheriff to sell goods under execution on a credit of three or four months on good indorsed notes, the sheriff was not relieved of liability for the deputy's default, where the deputy, though giving no credit by the terms of sale or by agreement at the time of sale, permitted purchasers to take goods without paying for them or giving indorsed notes. Sheldon v. Paine (1851) 10 N. Y. 398. The deputy having done nothing in conformity with his instructions, plain-

tiff was not answerable for having made him his agent.

In Gwinn v. Buchanan (1846) 4 How. (U. S.) 1, 11 L. ed. 849, where plaintiff's attorney authorized a deputy United States marshal to receive funds other than gold or silver on an execution, it was held that the deputy, in receiving such funds, was not acting under the authority of the marshal as his deputy, but as plaintiff's agent; and if, in so doing, he disobeyed his instructions, the marshal, who knew nothing of such instructions, was not liable.

In Rogers v. Marshal (U. S. use of Rogers v. Conklin) (1364) 1 Wall. (U. S.) 644, 17 L. ed. 714, the attorney for the plaintiff in a replevin suit objected to the redelivery bond tendered by defendant, saying to the deputy marshal that he did not want defendant's name on the bond, and that he would be satisfied with the sureties if a named person were obtained as surety. Defendant obtained such person as surety and again presented the bond to the deputy, who, believing that this would be satisfactory to the attorney, erased the defendant's name, thereby discharging the sureties. The marshal was held not liable, as the attorney's statements were calculated to mislead the officer. The court also held that if the deputy departed from the line of his duty, and the attorney, after being informed of the circumstances, took the bond and assented to it, the marshal was not responsible.

If a creditor authorizes a deputy sheriff to take the notes of third persons in settlement of a fi. fa., he must look to the deputy for the money, and not to the sheriff, as the transaction not being within the sphere of his duties as deputy, the deputy cannot bind the sheriff, but acts as the agent of the creditor. Reynolds v. Dale (1863) 33 Ga. 585.

But where a deputy holding an execution asked a creditor whether he would take a third person's note, and the creditor answered that the deputy might take a negotiable note of such third person or any good man for the damages, but that the costs must be paid, and the deputy took such person's non-negotiable note for the amount of the damages and costs, which the creditor refused to accept, the court held that this was a violation of the deputy's official duty, and that the sheriff was liable for the deputy's failure to collect the execution. Mason v. Ide (1858) 30 Vt. 697. While recognizing that if a discretion is intrusted to the deputy by the creditor, the sheriff is not liable for his act or omission within the range of such discretion, the court held that the deputy was given no discretion except to decide who was a good man within the meaning of the instructions; that having decided to take the note of the specified third person, he had no discretion; that the creditor's instructions did not suspend the collection of the execution by legal process, but was a consent to such suspension upon the performance of a specified act by the debtor, and that the deputy was not the agent of the creditor, but was rather acting for the benefit of the debtor.

In McKinley v. Tucker (1870) 59 Barb. (N. Y.) 93, after a deputy sheriff was already in default with respect to the return of an execution, the creditor, though refusing to take the debtor's notes or have anything to do with them, or do anything that would impair his claim against the sheriff, finally was prevailed on to write the deputy that he might take the notes and hold them until they were due, and that in the meantime he would not hurry the deputy on the execution; meaning that, in the meantime, he would not pursue his remedy against the sheriff. The court, although recognizing that almost any interference with the duties of the deputy by a party will relieve the sheriff from liability, held that the sheriff was liable, saying that this agreement was not prejudicial to the sheriff, that the deputy had no further duty except to return the execution, and that plaintiff merely consented to forbear his remedy against the sheriff to give the debtor an opportunity to pay the execution.

In Blair v. Flack (1891) 62 Hun,

509, 17 N. Y. Supp. 64, where a deputy, pursuant to an arrangement between plaintiff and a claimant of attached property, accepted the claimant's check in lieu of the property, it was held that the sheriff, having ratified his act and received the money on the check, could not justify its misapplication by invoking the principle that a deputy departing from his duty under the instructions of a party ceases to be the sheriff's agent and becomes the agent of such party.

Parties who direct a deputy sheriff to sell goods under execution on credit cannot hold the sheriff liable for the deputy's act in so selling (Bellows v. Allen (1851) 23 Vt. 169), or for his default in collecting the money and returning the execution (Kimball v. Perry (1843) 15 Vt. 414).

In Gorham v. Gale (1826) 6 Cow. (N. Y.) 467, note, s. c. on second trial (1827) 7 Cow. 739, 17 Am. Dec. 549, where plaintiff's attorney authorized a deputy holding a fi. fa. to sell on credit for part of the price, but directed him not to credit the amount paid until the whole was paid, it was held that the deputy became plaintiff's agent, and that the sheriff was not liable for his default in not paying over the money received, this being a departure from the duties of a sheriff, and the sheriff being only answerable for the acts of his deputy in the duties enjoined on him by law.

But in Seaver v. Pearce (1869) 42 Vt. 325, where attached goods were sold under a statute providing for the sale of perishable goods, it was held that the mere fact that the sale was on credit by direction or assent of the parties did not relieve the sheriff of liability for his deputy's default with respect to moneys received on such sale during the pendency of the suit, or before the attachment lien was discharged by a judgment in favor of the defendant, but that, to charge the sheriff, the money must have been so received.

A direction to a deputy sheriff by an execution debtor's sureties to sell goods on credit did not affect the sheriff's liability to the debtor, who did not consent to such a sale. Bellows v. Allen (1851) 23 Vt. 169.

In Cain v. Sheriff (1819) 1 Chitty (Eng.) 613, where time was given a debtor by an officer in which to pay the debt, and plaintiff or his attorney acquiesced and received a part of the debt, it was held that the sheriff could not be held responsible for the officer's act.

Where a deputy levying an execution on land received from plaintiff the fee for recording the execution and levy or return in the registry of deeds, his engagement to procure the registry of the execution and levy was a personal contract, and his breach thereof was not a violation of official duty for which the sheriff would be answerable. Tobey v. Leonard (1818) 15 Mass. 200; Waterhouse v. Waite (1814) 11 Mass. 207.

A mere suggestion by a party that a matter be put in the hands of a particular deputy does not generally make the deputy the agent of the party, so as to relieve the sheriff of liability for his acts. Thus, in Martin v. Martin (1855) 47 N. C. (2 Jones, L.) 285, a sheriff was held liable for the act of his deputy in failing to keep and sell goods taken under execution, though plaintiff suggested the appointment of the depty to execute the writ, and the sheriff appointed him at the special request and nomination of plaintiff.

In State v. Dalton (1891) 69 Miss. 611, 10 So. 578, it was held that where a sheriff levying on a stock of goods was unable to make an inventory because of other duties, it was not an unreasonable intervention for plaintiff or his agent to urge the appointment of a particular deputy who was familiar with and competent for such work, and that this would not have relieved the sheriff from liability on his bond for the default of such deputy had there been any default.

In Balson v. Meggat (1836) 4 Dowl. P. C. (Eng.) 557, and Corbet v. Brown (1838) 6 Dowl. P. C. (Eng.) 794, it was held that a mere request that a particular officer should be employed by the sheriff to execute a writ did not constitute him a special deputy

for plaintiff, so as to relieve the sheriff of liability for his acts.

But where the plaintiff delivered an execution to a sheriff seven days before the return day, and on his refusal to execute it asked him to specially deputize a person named, saying that he would deliver the execution to such person and that the sheriff would have no trouble and run no risk and incur no liability by appointing such person, the court held that in Skinner v. Wilson (1883) 61 **Miss.** 90, that the special deputy was plaintiff's agent, and the sheriff was not responsible for his default; and where the special deputy did not sign the return, a judgment for the sheriff in an action for a statutory penalty for failure to return the execution was upheld on the ground that the default of plaintiff's agent misled the sheriff, and that plaintiff's assurances were well calculated to cause him to regard the process as practically taken out of his hands.

In Donham v. Wild (1837) 19 Pick. (**Mass.**) 520, 31 Am. Dec. 161, it was held that where a constable attaching goods asked plaintiff to name a bailee whom he could trust, and the bailee named by plaintiff permitted the goods to be taken by other creditors, the constable was not liable.

In Porter v. Viner (1815) 1 Chitty (**Eng.**) 613, note, it was held that where plaintiff appointed a special bailiff and agent to manage a sale under a fi. fa., the sheriff was discharged, though on being ruled to return the writ, the bailiff returned that he had sold and had made certain deductions which he had no right under the law to make.

Where plaintiff, in sending writs to the sheriff, asked him to grant warrants directed to two officers named, and stated that he would write one of such officers in a day or two, and the warrants thereupon were made out as desired, and thereafter one of the officers named arrested the debtor in another suit and discharged him on bail, it was held in Ford v. Leche (1837) 6 Ad. & El. 699, 112 **Eng.** Reprint, 269, 1 Nev. & P. 737, 6 L. J. K. B. N. S. 150, that the sheriff was not liable as for an escape, the court placing its decision on the ground that plaintiff had made the officers named his special bailiffs, and had superseded the sheriff's authority.

In Doe v. Tyre (1839) 5 Bing. N. C. 573, 132 **Eng.** Reprint, 1220, 7 Dowl. P. C. 636, 7 Scott, 704, 8 L. J. C. P. N. S. 346, where plaintiff's attorney not only requested the appointment of a particular officer to make an arrest, but took him in his carriage to the house where the debtor was staying, and, when the officer expressed a doubt as to the legality of thrusting his hand through a piece of paper, taking the place of a broken pane of glass, for the purpose of unlocking the door, the attorney assured him that it was not illegal, and threatened to rule the sheriff if the arrest was not made, it was held that the sheriff was not liable for an escape from the officer, as plaintiff had made him her special bailiff.

In De Moranda v. Dunkin (1790) 4 T. R. 119, 100 **Eng.** Reprint, 927, it was held that where plaintiff's agent applied to the sheriff for a warrant on a ca. sa. directed to his own clerk, stating that the under sheriff was concerned as attorney for one of the parties, the sheriff was not liable for the clerk's act in permitting an escape.

But in Taylor v. Richardson (1800) 8 T. R. 505, 101 **Eng.** Reprint, 1514, it was held that though a debtor was arrested by special bailiffs appointed on plaintiff's nomination, where, after giving bail, he was in the sheriff's custody in another suit, and the sureties on the bail bond gave notice to the sheriff to detain him, the sheriff was liable for discharging him.

Where an attorney gives a deputy sheriff special authority to hold a fi. fa. over the return day, the sheriff's responsibility ceases, and the deputy becomes the agent of the party for whom the attorney acted. And though a deputy held the execution without authority from the attorney, yet if the attorney subsequently adopted the act, the sheriff was not responsible; but where the attorney's assent was on a condition as to taking

an indorsed note from the debtor, which was never complied with by the deputy, the sheriff remained liable. Corning v. Southland (1842) 3 Hill (N. Y.) 552.

In Ross v. Campbell (1880) 19 Hun (N. Y.) 615, it was held that the fact that an execution was held by a deputy after the return day, with the knowledge and consent of the creditor, did not relieve the sheriff from liability for money subsequently collected on the execution by the deputy, where the sheriff also consented that the deputy might retain the execution.

In Fletcher v. Bradley (1840) 12 Vt. 22, 36 Am. Dec. 324, it was held that where a deputy sheriff was given a discretion in managing an execution, and he delayed committing the debtor to jail until the return day, and did not then have sufficient time to return the execution within the statutory period, the sheriff was not responsible for the delay.

In Strong v. Bradley (1841) 13 Vt. 9, where a creditor's attorney wrote a deputy sheriff to whom an execution was sent, a letter which the court held was calculated to induce the deputy to believe that some discretionary power was committed to him, the court held that the jury should have been charged that if the deputy neglected to arrest the debtor in consequence of this letter, the action against the sheriff could not be maintained.

Where attached property was sold and the proceeds held in its place, and, several actions having been brought, the parties entered into an agreement as to the disposition of such proceeds and the attachment suit was dismissed, it was held in Mansfield v. Sumner (1843) 6 Met. (Mass.) 94, that the sheriff was liable for a balance not paid over by the deputy, the court saying that the deputy was not a party to the agreement, that it did not alter or affect his obligations in any respect, but apparently stood on the same footing as a power of attorney from the attachment debtor to the person to whom the money was to be paid under the agreement, to collect it, and that even though the deputy paid part, as directed, his obligation to pay over the money remained unchanged, and was a legal obligation arising from his official relation and authority.

In Clingman v. Barrett (1845) 6 Humph. (Tenn.) 20, it was held that though plaintiffs took a receipt from a deputy for a note left with him for collection, thereby making him their agent in suing on the note and taking out execution, this did not relieve the sheriff from liability for the deputy's failure to return the execution within the time required by law, as he did not thereby cease to be an officer, liable to perform all the duties and subject to all the responsibilities for his official acts that would have devolved upon him had he not been plaintiff's agent.

In Pallister v. Pallister (1816) 1 Chitty (Eng.) 613, it was held that where the agent for the execution plaintiff wrote the bailiff holding the execution to arrest the debtor and pay the amount when recovered to him, the bailiff, in receiving the money, was plaintiff's agent, and the sheriff was discharged and could not be held liable for a false return that the money had been paid over to plaintiff.

Where a sheriff's officer, having levied on goods more than sufficient to satisfy an execution, was authorized by agreement of the parties to sell the whole of the goods for a specified sum, it was held that the sheriff was not liable for the surplus in the officer's hands after satisfying the execution, because the officer's authority to sell to a greater extent than was necessary to satisfy the execution was not derived from the sheriff, but from the agreement of the parties, who thereby made the officer their agent as to that part of the transaction. Cook v. Palmer (1827) 6 Barn. & C. 739, 108 Eng. Reprint, 623, 9 Dowl. & R. 723, 5 L. J. Q. B. 234.

Where an execution debtor requested the officer making a levy not to issue advertising bills, and interfered to prevent their circulation, and made ineffectual requests that the sale be postponed, and on the morning of the sale procured a postponement until a

later hour, and then authorized the officer to sell the goods under all writs in his hands, including one of which no notice had been given, it was held in Wright v. Child (1866) L. R. 1 Exch. (Eng.) 358, 4 Hurlst. & C. 529, 35 L. J. Exch. N. S. 209, 15 L. T. N. S. 141, that while these acts possibly modified the officer's authority with respect to advertising, etc., they did not discharge the sheriff from liability for the officer's negligence in improperly lotting the goods.

Where an execution creditor authorized the sheriff's officer levying under an execution to give up possession, and subsequently directed him to retake possession and sell the goods, which was done, and the sheriff having returned another execution nulla bona, a judgment was recovered against him for a false return, whereupon he sued the first execution creditor to recover the amount paid him under the execution sale, it was held in Crowder v. Long (1828) 8 Barn. & C. 598, 108 Eng. Reprint, 1164, 3 Man. & R. 17, 7 L. J. K. B. 86, that as between such creditor and the sheriff, the misconduct of the officer was not the misconduct of the sheriff.

In Alderson v. Davenport (1844) 13 Mees. & W. 42, 153 Eng. Reprint, 17, 1 Dowl. & L. 966, 13 L. J. Exch. N. S. 352, 8 Jur. 650, it was held that where plaintiff's attorney, in sending ca sa's to a sheriff's officer, told him where the defendant could be found, and after the officer sent them back, the sheriff sent them to the under sheriff, and asked that warrants be sent to the officer in question, stating that he had instructed such officer as to their execution, this was not such appointment of the officer as plaintiff's special bailiff as relieved the sheriff of liability for his acts. A. McT.

CORBIN YOUNG MEN'S CHRISTIAN ASSOCIATION, Appt.,
v.
COMMONWEALTH OF KENTUCKY.

Kentucky Court of Appeals—September 24, 1918.

(181 Ky. 384, 205 S. W. 388.)

License — restaurant — exemption of Y. M. C. A.

A constitutional provision exempting public charitable institutions from taxation applies to exempt a Young Men's Christian Association from payment of a license fee for maintaining a restaurant in its building, for the accommodation of members and those occupying rooms in the building.

[See note on this question beginning on page 268.]

APPEAL by defendant from a judgment of the Circuit Court for Whitley County convicting it of operating a restaurant without having procured a license. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **R. L. Pope** for appellant.

Messrs. **Charles H. Morris**, Attorney General, **Henry F. Turner**, Assistant Attorney General, and **J. B. Snyder**, for the Commonwealth:

The exemption from taxation means exemption of taxes, only, on property owned by the institution.

Kilgus v. Orphanage of Good Shepherd, 94 Ky. 439, 22 S. W. 750; Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 13 L.R.A. 668, 17 S. W. 212; Com. v. Y. M. C. A. 116 Ky. 711, 105 Am. St. Rep. 234, 76 S. W. 522; Calvary Baptist Church v. Milliken, 148 Ky. 580, 147 S. W. 12; Com. v. Board of Education, 166 Ky. 610, 179 S. W. 596; Brown-Foreman Co. v. Com. 30

Ky. L. Rep. 793, 101 S. W. 321; Shugars v. Hamilton, 122 Ky. 606, 92 S. W. 564.

Clarke, J., delivered the opinion of the court:

By indictment the appellant was accused of operating a restaurant in Corbin, Kentucky, without having procured a license so to do, as provided by § 4224 of Kentucky Statutes, and, upon trial on an agreed statement of facts, was convicted and fined $60 and costs, from which judgment this appeal is prosecuted.

It was held by this court in Com. v. Y. M. C. A. 116 Ky. 717, 105 Am. St. Rep. 234, 76 S. W. 522, that a similar local branch of the state organization, located at Owensboro, was entitled to exemption from taxation under § 170 of the Constitution, both as a religious society and as a public charitable institution. We shall in this opinion, however, consider appellant only as a public charitable institution, because it is given that status in the agreed statement upon which the trial was had. It is insisted for the commonwealth, and this seems to have been the opinion of the trial court, that the exemption granted to institutions of purely public charity is an exemption from ad valorem or property taxes, and that such institutions are not entitled to exemption from the payment of occupational license fees, such as are imposed by § 4224 of the statutes. Whether or not this is true is the only question for decision in this case.

That an occupational tax usually, and especially in this case, is not a property tax, is agreed by both parties to this controversy; and it is further agreed, as has been decided by this court in Hager v. Walker, 128 Ky. 7, 15 L.R.A.(N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254, that § 4224 of the statutes is a revenue measure, and not a police regulation; nor does the commonwealth contend that under the exemption provision of our Constitution (§ 170), which, as uniformly construed by this court, is much more liberal, especially toward institutions of purely public charity, than the similar provision in the constitutions of other states, does not exempt from taxation all of the property of such institutions, the use or income from which is confined to their authorized activities, as was expressly held by this court in Com. v. Y. M. C. A. supra, but insists that it is only the property of such institutions, when so employed, that is exempted. Section 170 of the Constitution very plainly, by its terms, places quite different limitations upon the extent of exemption from taxation extended to different classes of organizations. It exempts all public "property" used for public purposes. It exempts "places," limited in size, actually used for religious worship. It exempts "places" of burial, not held for private or corporate profit. It exempts "institutions" of education, not used for gain, and the income of which is devoted solely to the cause of education. But it exempts "institutions of purely public charity" without limitations of any kind, except as is implied by the descriptive terms employed; "purely public charity" implying, of course, that the institution could not be used for gain, and that whatever income it enjoyed must be used solely for the cause of charity. It will thus be noticed that the very language employed exempts "property" used for public purposes, religious worship, or for cemeteries, but that it exempts not the property, but the institutions themselves, which are engaged purely in public charity or education, if not used for gain by any person or corporation.

The difference in the language employed, with reference to the several classes, necessarily grants immunity from taxation in varying degrees, and explains the different conclusions reached by this court with reference to the different classes, and renders largely inapplicable, in cases such as this, involving charitable institutions, the decisions of this court with reference to

religious organizations largely relied upon by the commonwealth; for in such cases it is clearly the property actually used for religious worship, and in a limited amount, that is exempted, while with reference to institutions engaged in purely public charity, it is the institution itself, and not the property owned, that is exempted. This difference in the extent of the exemption accorded is clearly pointed out in the case of Com. v. Y. M. C. A. supra, and in the case of Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 40 L.R.A. 119, 36 S. W. 921; in the latter case it being stated: "Upon the whole it would seem that when the statute exempts the 'institution' from taxation, and no qualifying words are used showing or tending to show that only the property 'used' by the institution, or 'connected' with the institution, is to be exempt, then the associated entity, the corporate being, with its estate as an entirety, is embraced by the word 'institution.' "

This quotation was cited and approved in Com. v. Y. M. C. A. supra, and cases from this court relating to religious, fraternal, educational, organizations and cemetery companies were distinguished, and the different conclusions reached by two other courts, under differently worded constitutional provisions, with reference to the exemptions allowed to the Young Men's Christian Association, were explained. So that whatever may be the extent of the exemption accorded to Young Men's Christian Associations in other jurisdictions, which is not by any means uniform, as will be seen by reference to the annotations found in 50 L.R.A.(N.S.) 1197, L.R.A. 1916D, 272, and L.R.A.1918C, 898, by the decisions in the case of Com. v. Y. M. C. A. and Kentucky Female Orphan School v. Louisville, supra, and the many more recent cases that have cited them with approval, the exemption granted to such institutions of purely public charity, under the peculiar verbiage of our constitutional provision, includes everything that is embraced by the word "institution;" and this, we are convinced includes not only their property, but also necessarily all of their activities which are consistent with the furtherance of the purposes for which they were organized.

It therefore results that our present inquiry is narrowed to the determination of whether or not the operation of a restaurant by a local branch of the Young Men's Christian Association, in its building, which contains some ninety-odd sleeping rooms, for the accommodation and entertainment, not only of its members, but of whoever may apply, is consistent with the purposes and legitimate activities of such organization, and reasonably tends toward the attainment of its charitable aims. The fact that for the meals, lunches, and soft drinks that are served in the restaurant charges are made, to both members and nonmembers of the organization, although the charges to the latter are possibly slightly in excess of those to the former, but without profit, merely emphasizes the purely public character of this branch of the service, and does not, in any wise, alter its charitable quality, as has been frequently decided in this and other states. If such institutions as this are liable to the payment of the license tax for operating a restaurant, then they are also liable, under the same section of our statutes, for maintaining bowling alleys, billiard rooms, and sleeping rooms, if more than twenty-five rooms are provided.

It is a significant fact that no case is found from this or any other court where an attempt has been made to enforce the collection of any such fee against such an institution, although it is a matter of common knowledge that such institutions frequently, if not usually, provide billiard rooms, bowling alleys, and other forms of recreation and amusement, in addition to a gymnasium, and that, in their "endeavor to seek out young men and bring them under moral and religious in-

fluences," it has of late years become almost a universal practice to provide sleeping apartments for members, and nonmembers as well, which practice, under § 4224 of our statutes, and similar statutes of other states, would render them liable for a hotel license fee, unless they are exempt under a constitutional provision such as we are considering. Yet, so far as we are informed, no attempt has ever been made to collect such a fee from such an organization. As stated in Com. v. Y. M. C. A. 116 Ky. 717, 105 Am. St. Rep. 234, 76 S. W. 522: "The endeavor [of such institutions] is to reach the boys and young men before they need alms, and before they are reduced to beggary, and, by training the minds, and teaching them how to use and preserve their bodies, and how to live useful and honest lives, to save them from the lower grades of misfortune, so familiar in the utter helplessness of abject poverty and disease and want. This is accomplished by institutions keeping open attractive quarters, where libraries of useful books, current magazines and newspapers, innocent games of amusement, a gymnasium for the exercise and development of the body, and night schools, affording additional opportunities to such as have not had sufficient advantages in education, are all accessible to whomsoever will avail himself of them, without regard to creed or nationality. Lists of decent boarding houses are kept, to which strangers are directed. Proper acquaintances and associations are formed, and useful and moral instruction imparted."

When this was written in September, 1903, it will be noticed it is stated that these associations kept lists of decent boarding houses to which strangers were directed, but now we find such institutions ordinarily equipped to house strangers overnight, which certainly is but a reasonable development, or extension, of the same endeavor to afford, not only to the stranger, but to the members of the organization, proper surroundings, formerly attempted by keeping lists of decent boarding houses, but which, experience no doubt has taught, may be better accomplished by providing sleeping quarters within the association building; and to our minds it seems quite possible that, in some communities at least, the same experience has taught those in charge of such institutions that the endeavor to surround those whom it seeks to serve with wholesome, healthful, and moral surroundings may be improved by furnishing not only clean rooms, but wholesome meals and nonintoxicating beverages as well. Both of these developments seem to us, the one as much as the other, but natural, and entirely consistent with and tending toward the accomplishment of the well-known purposes for which these institutions were devised and organized, and we are quite unwilling to hold that the operation of a restaurant in connection with the Young Men's Christian Association building is an activity inconsistent with the purposes and objects of this organization.

We have not overlooked the fact, called to our attention in appellee's brief, that exemptions are of grace, and to be strictly construed. Nor are we unmindful of the exception from exempting provisions, of assessments for street and sidewalk construction, recognized as an exception, not only in this state, but universally, so far as we are informed, because of the fact that, while an exercise of the taxing power, these assessments are not levied for general governmental purposes, but for a particular purpose of peculiar and special advantage to the abutting property. The tax attempted here is not special in such or any other sense, but is, as we have seen, primarily for revenue purposes, and to help defray ordinary governmental expenses, and as such, under whatever name given it, it is subject to constitutional exemptions and limitations; but the con-

stitutional provision of uniformity does not, of course, include or refer to the property and institutions specifically exempted from taxation by the Constitution.

Being of the opinion that an institution of purely public charity, as it is agreed that appellant is, is by our Constitution exempt, not only from the payment of ad valorem or property taxes, but also from the operation of any and every revenue-producing measure upon such of its activities as are confined to, done in the furtherance of, and not inconsistent with the charitable purposes for which it was organized, it results that appellant is not liable to the payment of a restaurant license tax under § 4224, and the judgment is therefore reversed.

License—restaurant—exemption of Y. M. C. A.

ANNOTATION.

Necessity that charitable or social organization procure license for its special activities.

Cases relating to license for sale of intoxicating liquors are excluded, as they constitute a somewhat distinctive class.

No other case dealing with this precise question considered in the reported case (CORBIN Y. M. C. A. v. COM. ante, 264) has been found; but it is held in Booth v. Ferrett (1890) 59 L. J. Mag. Cas. N. S. (Eng.) 136, L. R. 25 Q. B. Div. 87, 63 L. T. N. S. 346, 38 Week. Rep. 718, 55 J. P. 7, that a statute, prohibiting the keeping of a lodging house until the house had been inspected and approved and registered, did not apply to a lodging house maintained as a charitable institution, and not for purposes of gain, and open only to such persons as the keeper of it chose to admit, and under such conditions and at such times as he prescribed.

In Mobile v. Kiernan (1911) 170 Ala. 449, 54 So. 102, where a camp of the U. C. V. contracted with an amusement company to hold a street fair, the camp to receive a share of the net receipts, and to furnish all necessary licenses, it was held that the fair was not exempt from the license tax imposed on amusements and exhibitions of the character conducted and carried on, though, so far as the camp was concerned the enterprise was purely charitable, the court saying that the state had not exempted charities, or empowered the municipality to do so, and that, moreover, so far as the amusement company was concerned, it carried on the business for gain and profit. There had been an ineffectual attempt by the city council to exempt the fair, but it is not stated whether or not the camp had any exemption from general taxation.

Aside from these cases, the only cases which have been found dealing with the necessity of procuring a license or paying a license tax, as modified by the character of the institution, are those dealing with social and other clubs.

In The Germania v. State (1854) 7 Md. 1, a social and literary club having a billiard table, on which its members and persons introduced by them were permitted to play, was held liable to pay a license tax imposed on any person keeping or exhibiting for use a billiard table.

But in Union League v. Ransley (1909) 39 Pa. Super. Ct. 514, it was held that a social club, furnishing its members food, drink, and amusement, did not need a license required of persons vending or dealing in cigars, carrying on a restaurant, café or quick-lunch business, or keeping a billiard or pool room for profit.

And in Rex v. Dominion Bowling & Athletic Club (1909) 19 Ont. L. Rep. 107, 15 Can. Crim. Cas. 105, it was held, under a municipal by-law requiring a license to be taken out by every person owning or keeping a bowling alley or billiard table for hire or profit, or, in the case of a billiard table, in a house or place of public entertainment or resort, that a club having bowling alleys and billiard tables on

which only members were allowed to play was not required to have a license, though the members paid for the use of the alleys and tables.

In State v. Country Club (1914) — Tex. Civ. App. —, 173 S. W. 570, it was held that a golf club, having billiard and pool tables for the use of which no charge was made, was not subject to an occupation tax imposed on every billiard or pool table used for profit, by a statute which further provided that any table used in connection with any drinking saloon, or other place of business where intoxicating liquors, cigars or other things of value were sold or given away, should be regarded as used for profit, the court saying that, though intoxicating liquors were sold in the club, it was nevertheless not a saloon nor a place of business.

Where a social club was not a proprietary club, or a club with a share capital, but what was known as a members' class club, and was not maintained for the purpose of gain or profit, it was held, in Rideau Club v. Ottawa (1907) 15 Ont. L. Rep. 118, that it was not subject to a business assessment imposed on every person carrying on the business of a club in which meals or lunches were sold or furnished, because it was not carrying on a business within the statute.

In Chicago v. Logan Square Motor Club (1914) 189 Ill. App. 142, a so-called motor club, having a garage in which its members were permitted to keep their cars, was held liable for operating and maintaining a garage without a license. It was contended that the club was a mere subterfuge to evade the ordinance, and that, even though it were a bona fide club, it was required to procure a license; but the case is not reported in full, and it is not apparent on which ground the court placed its decision.

On the general question of whether an exemption from property taxation includes an exemption from license taxation, see New Orleans v. State Nat. Bank, 34 La. Ann. 892; Trenton v. Humel (1908) 134 Mo. App. 595, 114 S. W. 1131; Harkreader v. Lebanon & N. Turnp. Co. (1898) 101 Tenn. 680, 49 S. W. 751 (holding that it does not include such an exemption), and Citizens' Bank v. Parker (1903) 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181, reversing (1900) 52 La. Ann. 1086, 27 So. 709, and holding that the exemption in that case included such exemption. The citations on this point are not, however, intended to be exhaustive. A. McT.

JOHN F. SAWYER, Admr., etc., of Sarah R. Spalding, Deceased,
v.
OLD LOWELL NATIONAL BANK.

Massachusetts Supreme Judicial Court—May 25, 1918.

(230 Mass. 342, 119 N. E. 825.)

Bailment — box — will — want of knowledge.

1. A bank accepting from a customer a box for safe-keeping, without knowledge of its contents, is not liable in damages for failure to produce and deliver a will contained in the box, upon decease of the customer.

[See note on this question beginning on page 272.]

Pleading — failure to produce will — receptacle.

2. Failure to produce a box containing a will, of which fact defendant was ignorant, cannot be made a ground for liability under a complaint to hold it liable for failure to produce the will.

REPORT by the Superior Court for Middlesex County for determination by the Supreme Judicial Court of an action brought to recover damages for failure of defendant to produce a box containing the will of testatrix, which resulted in a verdict for defendant. *Judgment entered on the verdict.*

The facts are stated in the opinion of the court.

Messrs. **F. E. Dunbar** and **A. C. Spalding**, for plaintiff:

Defendant's delay in producing the box after due demand therefor subjected testatrix's estate to great loss and damage, and the court erred in directing a verdict for it.

5 Cyc. 199; Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Cass v. Boston & L. R. Co. 14 Allen, 448; First Nat. Bank v. Zent, 39 Ohio St. 105; Sherwood v. Home Sav. Bank, 131 Iowa, 528, 109 N. W. 9; Hall v. Boston & W. R. Corp. 14 Allen, 439, 92 Am. Dec. 783; Murray v. Postal Teleg. Cable Co. 210 Mass. 188, 96 N. E. 316, Ann. Cas. 1912C, 1183; Jenkins v. Bacon, 111 Mass. 373, 15 Am. Rep. 33, 1 Am. Neg. Cas. 781; Morse, Banks & Bkg. 5th ed. § 215; Newhall v. Paige, 10 Gray, 366; Coe v. Ricker, 214 Mass. 212, 45 L.R.A. (N.S.) 30, 101 N. E. 76, Ann. Cas. 1914B, 1178; Serry v. Knepper, 101 Iowa, 372, 70 N. W. 601; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; American Nat. Bank v. E. W. Adams & Co. 44 Okla. 129, L.R.A. 1915B, 542, 143 Pac. 508.

Messrs. **James J. Kerwin** and **James C. Reilly**, for defendant:

A national bank cannot be the legal custodian of a will, and cannot become liable for the failure to properly discharge a duty with respect thereto.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborne v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306; Shaw v. National German American Bank, 65 C. C. A. 620, 132 Fed. 658; Farmers' & M. Nat. Bank v. Smith, 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129; Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 582; Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925; Dresser v. Traders' Nat. Bank, 165 Mass. 120, 42 N. E. 567; Wiley v. First Nat. Bank, 47 Vt. 546, 19 Am. Rep. 122; Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895, 72 Sup. Ct. Rep. 826; Lloyd v. West Branch Bank, 15 Pa. 172, 53 Am. Dec. 581, 1 Am. Neg. Cas. 574; Meyers v. Exchange Nat. Bank, 96 Wash. 244, L.R.A.1918A, 67, 164 Pac. 951.

Defendant never became custodian of the will of Sarah R. Spalding, and in order for the plaintiff to sustain this action he must prove affirmatively that the defendant held the will as a bailee.

Com. v. Williams, 6 Gray, 1; Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554; Scollans v. E. H. Rollins & Sons, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983; Belknap v. National Bank, 100 Mass. 376, 97 Am. Dec. 105.

Assuming that defendant was bailee of said will, the record discloses no facts which, as a matter of law, would impose a liability upon it.

Childs v. American Exp. Co. 197 Mass. 337, 84 N. E. 128; Woodall v. Boston Elev. R. Co. 192 Mass. 308, 78 N. E. 446; United States v. City Bank, 21 How. 356, 16 L. ed. 130; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Whitney v. Lee, 8 Met. 91, 1 Am. Neg. Cas. 789; Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523.

De Courcy, J., delivered the opinion of the court:

Sarah R. Spalding died on shipboard on April 6, 1902, while returning from Jamacia. Shortly thereafter a search was begun for a will which it was known she had at one time executed. One Charles H. Coburn called at the banking rooms of the defendant, where Miss Spalding had hired a safe-deposit box and kept a deposit account. He had the key of the safe-deposit box,

and its contents were examined in his presence, but no will was found therein.

Mr. Coburn was duly appointed administrator of Miss Spalding's estate on May 27, 1902. He administered the estate, had his final account allowed on May 25, 1905, and distributed the personal estate among the next of kin in pursuance of a decree issued by the probate court on June 7, 1905.

In February, 1910, two clerks in the employ of the defendant were engaged in removing from the bank vault certain old books and records, preparatory to installing new steel shelving. On the floor, under one of the old shelves, they found a rectangular tin box, about 12 inches long, 7 inches wide, and 6 or 7 inches deep. The name "Sarah R. Spalding" was scratched thereon in two or three places; and when the box was opened there was found therein the will of Miss Spalding, and some other papers and family "keepsakes" of no intrinsic value. The president of the bank filed the will in the probate office, and notified the attorney who had acted for Mr. Coburn. This will was duly allowed March 14, 1910, and the plaintiff was appointed administrator with the will annexed. He brought this action of tort or contract to recover damages, claiming, among other elements, the expenses incident to the administration, and the value of the real estate which had been sold by the heirs of Miss Spalding prior to the finding of her will.

The case declared on, and tried in the superior court, was the alleged breach of duty by the defendant, as bailee, in failing to produce or deliver the box containing the last will of Sarah R. Spalding. We assume, for the purposes of this case, that the plaintiff is a proper party to sue in the right of the testatrix for some of the elements of alleged damage, and that the remedy provided by Rev. Laws, chap. 135, § 14, in favor of persons aggrieved by the unreasonable neglect of the possessor of a will to deliver it into the probate court, is not exclusive. Nevertheless, the plaintiff has failed to establish the essential fact, that the defendant never became the bailee of the will. Presumably it could be inferred from the evidence that the tin box was left at the bank for safe-keeping; but there is nothing in the record to indicate that the defendant knew or reasonably ought to have known that Miss Spalding's will was contained in it. Acceptance of the box would not make the bank responsible for its contents. As was said in Scollans v. E. H. Rollins & Sons, 179 Mass. 346, 354, 88 Am. St. Rep. 386, 60 N. E. 985, where a sealed envelop containing bonds was delivered: "If the certificates had been handed to him in a sealed envelop, they would not have been intrusted to him, and opening the envelop would have been like a carrier's breaking bulk. The modern decisions have followed the ancient suggestion that in such cases there is no delivery of the contents of the inclosure."

Bailment—box—will—want of knowledge.

See also Belknap v. National Bank, 100 Mass. 376, 381, 97 Am. Dec. 105.

As the defendant never became custodian of the will of Miss Spalding, it is unnecessary to consider whether it would be authorized, under the National Bank Act (Act Cong. June 3, 1864, chap. 106, 13 Stat. at L. 99), to accept a will for safe-keeping, and would be legally liable for the consequences due to its failure to deliver the will according to directions. See Myers v. Exchange Nat. Bank, 96 Wash. 244, L.R.A.1918A, 67, 164 Pac. 951; Dresser v. Traders' Nat. Bank, 165 Mass. 120, 42 N. E. 567. And see now Federal Reserve Act Dec. 23, 1913, chap. 6, § 11k, 38 Stat. at L. 262, Comp. Stat. 1916, § 9794; First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 1233, L.R.A.1918C, 283, 37 Sup. Ct. Rep. 734.

The plaintiff, in his supplemental brief, argues that the defendant

bank was bailee of the tin box, as distinguished from its contents. It is apparent from the record, however, that the bailment claimed in the pleadings and at the trial was that of the will, and the damages contended for could not arise from the loss of the box itself. Even if the question were now open to the plaintiff, it is difficult to see how an empty tin box, gratuitously stored in the bank vault for the accommodation of the owner, could be regarded as a "special deposit," the handling of which would come within the regular line of banking business, like money, stocks, bonds, and other securities. American Nat. Bank v. E. W. Adams & Co. 44 Okla. 129, 143 Pac. 508, L.R.A.1915B, 542, note; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502.

Pleading—failure to produce will—receptacle.

The plea in abatement and demurrer have not been argued by the defendant, and the issues raised thereby are disposed of by what we have said. The exclusion of evidence offered by the plaintiff on the question of damages has become immaterial in view of our decision on the issue of liability. Millen v. Gulesian, 229 Mass. 27, 118 N. E. 267. The trial judge rightly directed a verdict for the defendant, and, in accordance with the report, judgment is to be entered on the verdict.

So ordered.

ANNOTATION.

Acceptance of receptacle as charging one as bailee of contents.

There seems to be a difference of judicial opinion as to whether or not the acceptance of a receptacle such as a box, chest, package, or envelop charges the depositary as a bailee of the contents. However, but very few cases have passed directly upon the question, and therefore it cannot be said that there is any well-settled rule upon the point.

Upon the one hand are the holdings that a depository of a receptacle is not a bailee of the contents thereof. This was the rule adopted in the reported case (SAWYER v. OLD LOWELL NAT. BANK, ante, 269), the court adhering to the theory that there is no delivery of the contents; at least, where the depositary is not informed and does not have full knowledge of such contents.

And in Scollans v. E. H. Rollins & Sons (1901) 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983, quoted in SAWYER v. OLD LOWELL NAT. BANK, it was ruled that the depositing of a sealed envelop with a brokerage firm for safe-keeping was a bailment of the envelop, and not of the contents, the court adopting the theory that in such a case there is no delivery of the contents of the inclosure. In this case the depositary knew the contents of the envelop, but no point was made of the fact. But, in connection with this case, see Foster v. Essex Bank (1821) 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502, wherein a bank which accepted the custody or safe-keeping of a cask or chest of gold, the contents and amount of which the officer knew, was held to be a gratuitous bailee of the contents, but not liable for the theft of the coin by an officer of the bank. The court denied liability for the loss of the gold upon the ground that, since the bank had taken as much care of the deposit as it had of its own property, and the officers, in stealing it, had acted outside the scope of their duty, the bank was not liable for their acts.

And, as further supporting the rule laid down in SAWYER v. OLD LOWELL NAT. BANK, see Giblin v. McMullen (1868) L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 16 Eng. Reprint, 578, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445, wherein it is shown that the Supreme Court of Victoria was of opinion that where a box was gratuitously kept in the strong room of a bank for security, and the owner retained the key to

the box, the contents of which were unknown to the bank officials, except as they knew that securities and valuable papers were kept therein, the bank was merely depositary of the box, and not of the contents. But see the decision of the Privy Council on appeal of the case as set out infra.

And that there is not delivery of the contents of a chest left with the bailee for safe-keeping where the bailor retains the key, see Southcote's Case (1601) 4 Coke, 83b, 76 Eng. Reprint, 1061, citing as authority 8 Edw. II. title Detinue 59. And according to Coggs v. Bernard (1703) 2 Ld. Raym. 914, 92 Eng. Reprint, 110, per Holt, Ch. J., it was so held in the latter case. However, he also said that he could not see why a bailee should not be charged "with goods in a chest, as well as with goods out of a chest," his powers as to either class being the same as regards benefits and defense.

On the other hand, several courts have seemingly regarded one who accepts a receptacle for safe-keeping as a bailee of the contents, even though he had no knowledge of such contents. However, in the majority of such cases this inference is drawn principally from the fact that liability for the value of the contents of the receptacles was denied upon the ground that the defendants had not failed to use the slight degree of care required of gratuitous bailees, rather than upon the ground that they were not bailees of the contents. But some of the courts have used language clearly indicating a belief that the depositary was a gratuitous bailee of the contents as well as of the receptacle itself.

Thus, in Horton v. Terminal Hotel & Arcade Co. (1905) 114 Mo. App. 357, 89 S. W. 363, where a guest of a hotel handed a box to the clerk to keep for him, but did not disclose its contents or request that it be put in the safe, it was held that the hotel company was a gratuitous bailee of a valuable gold locket contained in the box, and bound to use only the slightest degree of care, and was not liable for a loss of the locket if it took such care thereof as the most inattentive and thoughtless person would take of his own property, a failure to take such care being the Missouri definition of the "gross negligence" which is essential to the liability of a gratuitous bailee for loss of the bailed article or articles. And see Coggs v. Bernard (Eng.), as set out supra.

And in White v. Commonwealth Nat. Bank (1866) 4 Brewst. 234, Fed. Cas. No. 17,544, where a bank received a box containing valuable securities for safe-keeping without any valuable compensation for the custody other than that the depositor had an account with the bank, the court charged the jury that recovery could be had for the value of the contents, which were unknown to the defendants except when the box was occasionally opened, if the box and contents were lost, through the gross negligence of the bank, which was said to include the omission of any care which was indispensable to that proper security of the box and contents which might be reasonably required according to the usages of men of business and not exceeding such security as the course of business between the depositor and the bank shows to have been mutually intended and expected between them.

So, in Giblin v. McMullen (Eng.) supra, which was a suit to recover from a bank for negligence in not having safely kept certain debentures contained in a box which had been deposited with it for safety, and kept without consideration or knowledge of or access to the contents, except as the owner occasionally opened it in the presence of an officer or employee of the bank, the court affirmed a judgment of nonsuit upon the ground that there was no negligence sufficient to warrant a holding that the bank, as a gratuitous bailee, was liable for its breach of duty as such.

And in Levy v. Pike (1873) 25 La. Ann. 630, 1 Am. Neg. Cas. 497, an action to recover the contents of a box deposited with defendant for safe-keeping, it was held that the deposit being a gratuitous one, the depositary would be liable only if he failed to use the same diligence in preserving the box that he used in preserving his own property, or if the loss occurred

from gross or inexcusable neglect. In this case the court seems to have assumed that the defendant bank was a gratuitous bailee of the contents of the box, and it clearly appears, although no point is made of the fact, that the bank did not know the contents beyond the fact that it was supposed to contain money and valuable securities. And see also Pattison v. Syracuse Nat. Bank (1874) 1 Hun (N. Y.) 606.

And in Gerrish v. Muskegon Sav. Bank (1904) 138 Mich. 46, 100 N. W. 1000, 4 Ann. Cas. 1083, 17 Am. Neg. Rep. 81, where a box containing jewelry and gold coins was left with a bank for safe-keeping, it was held that the bank was a gratuitous bailee, but liability for loss of the box and contents by theft was denied upon the ground that no such degree of negligence was shown on the part of the bank as is necessary in order to render a gratuitous bailee liable for loss of property bailed. This action was for the value of the jewelry and coins, and the inference is that recovery therefor would have been allowed had the bailee failed to use the proper degree of care.

And see Dawson v. Real Estate Bank (1843) 5 Ark. 283, wherein it was said that if a deposit be made of anything sealed or locked up, or otherwise covered or secured in a package, cask, box, bag, or chest, or anything of the like kind of or belonging to the depositor, the law regards it as a pure or special deposit, and the depositary as having the custody thereof only for safe-keeping and the accommodation of the depositor.

G. J. C.

STATE OF WASHINGTON EX REL. JOHN W. GREB
v.
DAVID W. HURN, Judge of the Superior Court for the County of Spokane.

Washington Supreme Court (Dept. No. 1)—May 9, 1918.

(— Wash. —, 172 Pac. 1147.)

Officer — per diem compensation — fraction of day.

Under a statute fixing a per diem compensation for every day that an official court reporter is in actual attendance upon the court, he is entitled to the compensation named for every day on which he performs substantial service, although the time actually consumed is merely a fraction of the day.

[See note on this question beginning on page 276.]

APPLICATION for a writ of mandamus directing respondent to certify as correct petitioner's statement for one day's attendance as official reporter for the court presided over by the respondent. *Writ granted.*

The facts are stated in the opinion of the court.

Mr. **Henry L. Kennan,** for petitioner:

In general, the law disregards fractions of a day. Only when the actual point of time is important and material, that justice may be done, is the rule that a day is an indivisible period of time disregarded.

Robinson v. Dunn, 77 Cal. 473, 11 Am. St. Rep. 297, 19 Pac. 878; Smith v. Jefferson County, 10 Colo. 17, 13 Pac. 917; Pressley v. Marion County, 80 Ind. 45; Monroe v. State, 157 Ind. 45, 60 N. E. 708; Mason v. Culbert, 108 Cal. 247, 41 Pac. 464; Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167; State ex rel. Hastie v. Lamping, 25 Wash. 278, 65 Pac. 537; Jones v. Newton, 33 N. Y. S. R. 823, 11 N. Y. Supp. 510; Blanck v. Spies, 31 Misc. 19, 62 N. Y. Supp. 1039, affirmed in 31 Misc. 764, 64 N. Y. Supp. 1132; Re Bieber, 36 Misc. 341, 73 N.

Y. Supp. 552; Goldzier v. Rosebault, 84 N. Y. Supp. 240; Landstroth v. J. C. Turner Cypress Lumber Co. 145 N. Y. Supp. 858; Coale v. Suckert, 18 Misc. 76, 41 N. Y. Supp. 583; United States v. Pitman, 147 U. S. 669, 37 L. ed. 324, 13 Sup. Ct. Rep. 425; United States v. McCabe, 122 Fed. 653, 64 C. C. A. 236, 129 Fed. 708; United States v. Nix, 189 U. S. 199, 47 L. ed. 775, 23 Sup. Ct. Rep. 495; McIntosh County v. Whitaker, — Okla. —, 158 Pac. 1136; White v. Dallas County, 87 Iowa, 563, 54 N. W. 368; Ferguson v. Pottawattamie County, 126 Iowa, 108, 101 N. W. 733; Wood v. Chickasaw County, 85 Miss. 120, 37 So. 642; Pipher v. Superior Ct. 3 Cal. App. 626, 86 Pac. 904.

Mr. **Joseph B. Lindsley** for respondent.

Main, J., delivered the opinion of the court:

This is an application for a writ of mandamus. The petitioner is the official reporter in the department of the superior court of Spokane county, the presiding judge of which is the Honorable David W. Hurn, the respondent.

On the 1st day of November, 1917, the petitioner was directed by the respondent to be in attendance as official court reporter. Responding to this request the petitioner was in attendance, and reported certain testimony and proceedings in the court during the morning session, or forenoon, of the day mentioned. He was not directed by the presiding judge to be in attendance during the afternoon session of that day. The statement subsequently prepared by the petitioner called for the payment of $10 for the 1st day of November, 1917. This statement the presiding judge declined to certify, claiming that the petitioner was only entitled to one half of the per diem fixed by the statute.

This case calls for a construction of the statute authorizing official court reporters. Laws of 1913, chap. 126. Section 1 of this statute, among other things, provides that, when an official court reporter shall be appointed, "such stenographer shall thereupon become an officer of the court. . . ." By § 2 it is made the duty of the official reporter to be in attendance upon the court, "at such times as the judge presiding may direct. . . ." By § 3 it is provided that: "Each official reporter so appointed shall be paid a compensation at the rate of ten dollars ($10) per diem for every day that he is actually in attendance upon said court pursuant to the direction of the court. . . ."

The question then is: If the official reporter is only in attendance a portion of the day, shall his per diem, fixed by the statute, be split or prorated? In this state there is no statute which fixes the length of time that the court shall be in session each day. The session of the court may consist of any number of hours, within the limit of twenty-four, between two successive midnights. In Smith v. Jefferson County, 10 Colo. 17, 13 Pac. 917, the supreme court of Colorado had before it a statute which provided for the compensation of the county superintendent of schools as follows: "For the time necessarily spent in the discharge of his duty he shall receive five dollars per day. . . ."

The question there was: Under this statute, what would constitute a day's service for the superintendent? Answering this question it was said: "We answer, the law does not recognize fractions of days; and, when it provides a per diem compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance."

In White v. Dallas County, 87 Iowa, 563, 54 N. W. 368, the supreme court of the state of Iowa construed a statute which fixed the compensation of commissioners of insanity "at the rate of $3 per day, each, for all the time actually employed in the duties of their office." It was there held that the commis-

sioners, when employed in the duties of their office on a given day, were each entitled to $3 per diem, fixed by the statute, regardless of the number of hours of such employment on a particular day. See also McIntosh County v. Whitaker — Okla. —, 158 Pac. 1136, and Robinson v. Dunn, 77 Cal. 473, 11 Am. St. Rep. 297, 19 Pac. 878.

Other authorities might be cited, but it is useless to multiply citations, where all of the authorities, so far as we are advised, support the view that, where the statute fixes an officer's compensation at a certain sum per day, such officer, performing any substantial service on a particular day, has a right to the per diem for that day.

Officer—per diem compensation—fraction of day.

In the present case we think that, under the statute, the official court reporter is entitled to the per diem named in the statute, for every day that he is directed by the presiding judge to be in attendance upon the court, and he is, in fact, in attendance, regardless of the period of time which such attendance for a particular day may cover. In fixing salaries and fees for the performance of public services at so much per day the law does not consider fractions of such day.

Let the writ issue.

Ellis, Ch. J., and **Parker** and **Fullerton**, JJ., concur.

Webster, J., took no part.

ANNOTATION.

Per diem compensation of public officer.

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I. In general.

This note excludes cases of persons engaged at a contract rate, cases of laborers, watchmen, etc., cases of boarding or victualing prisoners, etc., and cases as to the pay of jurors. It also excludes cases where a per diem is plainly not allowed by the statutes, and those where the question was, which of two municipalities should pay the per diem, or whether a per diem was exclusive of other pay. It is not intended to include cases which, while involving no particular legal principle, depend upon the effect of one statute upon another, or upon the question whether a statute has been repealed.

It has been held that a per diem is not a "fee." Seiler v. State (1902) 160 **Ind.** 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448 (infra, IV. j.); State ex rel. Tippecanoe County v. Flynn (1893) 161 **Ind.** 554, 69 N. E. 159, (infra, IV. h.); Comer v. Morgan County (1904) 32 **Ind.** App. 477, 70 N. E. 179 (infra, IV. h.)

A per diem is not a fee, nor within a provision of a Constitution, declaring that all fees established by special laws shall cease. Jefferson County v. Johnson (1872) 64 **Ill.** 149; Knox County v. Christianer (1873) 68 **Ill.** 453.

But, if the legislature clearly classifies per diems under "fees," the legislative intent must be carried out, even if a per diem is improperly called fee.

Henderson v. Pueblo County (1894) 4 Colo. App. 301, 35 Pac. 880.

A statute in relation to "a per diem fee," stating which municipality shall pay it, where the amount of the per diem fee is not changed by the statute, is not repugnant to that provision of the Constitution which prohibits the increase or diminution of the fees, salary, or compensation of municipal officers, during their term of office. Granite City v. Ritchie (1913) 179 Ill. App. 589.

A per diem has been held to be "a stated salary," within a provision of a Constitution, stating how county officers receiving stated salaries shall be paid; that is, from the funds of their respective counties. State ex rel. Murphy v. Barnes (1888) 24 Fla. 29, 3 So. 433.

But it has also been held that a per diem is not a salary, within a constitutional provision that no change in the compensation of officers shall affect the salary of any officer during his existing term. Gorbrecht v. Cincinnati (1894) 51 Ohio St. 68, 23 L.R.A. 609, 36 N. E. 782.

A de jure officer is not entitled to a per diem for time when his office was administered by a usurper. Reilly v. Cochise County (1898) 5 Ariz. 380, 53 Pac. 205; Stephens v. Old Town (1906) 102 Me. 21, 65 Atl. 115.

II. Length of time.

No length of time of occupation on a day is necessary, to entitle an officer to his per diem. United States v. Erwin (1893) 147 U. S. 685, 37 L. ed. 331, 13 Sup. Ct. Rep. 443; United States v. McMahon (1896) 164 U. S. 81, 41 L. ed. 357, 17 Sup. Ct. Rep. 28; Saunders v. United States (1896) 73 Fed. 792; Puleston v. United States (1898) 88 Fed. 970, modified in other respects in (1901) 45 C. C. A. 297, 106 Fed. 294; United States v. Dill (1898) 29 C. C. A. 586, 57 U. S. App. 261, 86 Fed. 79; Lovering v. United States (1902) 117 Fed. 565; Smith v. Jefferson County (1887) 10 Colo. 17, 13 Pac. 917; Garfield County v. White (1901) 16 Colo. App. 516, 66 Pac. 682; Ferguson v. Pottawattamie County (1904) 126 Iowa, 108, 101 N. W. 733; White v. Dallas County (1893) 87 Iowa, 563, 54 N. W. 368; Washoe County v. Humboldt County (1879) 14 Nev. 123 (obiter); STATE EX REL. GREB v. HURN (reported herewith) ante, 274.

Thus, a few minutes' necessary attendance in court will entitle a United States district attorney to his per diem. United States v. Erwin (U. S.) supra.

A county superintendent of schools, who has very broad powers by the statute, and is entitled to a per diem for time necessarily spent in discharge of his duty, and who must, as far as possible, render an itemized bill of his services every six months or quarter, is to be allowed a certain discretion, under the power requiring him to exercise careful consideration over the schools of his county, as to what services are necessary to be rendered; and he is entitled to a per diem for the whole of each day on which he did any necessary duty. Smith v. Jefferson County (1887) 10 Colo. 17, 13 Pac. 917, holding, where such superintendent testified that the average number of letters necessary to be written per day was from three to four, and his practice was to make no per diem charge for official correspondence, unless it occupied at least one hour, that there was no cause for complaint. This case was followed in Garfield County v. White (1901) 16 Colo. App. 516, 66 Pac. 682, the court finding nothing different in the statute, providing for a certain sum "per day" "actually and necessarily employed for the county," from the old statute, providing for a per diem "for the time necessarily spent in the discharge of his duty." Both the cases held that the accounts of the county superintendents of schools, made out and verified as the law required, constituted a prima facie case, and that, to allow a per diem, it was not necessary that the entire day had been spent.

Where the statute provides that the judge of each superior court may appoint a shorthand reporter and that "all provisions relating to shorthand reporters and their duties in the district court, in so far as applicable in

every respect, shall govern, except the compensation shall not exceed $5 a day for the time actually employed," and the statute as to district court reporters fixed their compensation "for all time actually in attendance under the order of the judge," it was held that the reporter of the superior court was entitled to a per diem for every day's actual attendance upon the court, during its session, although he was not engaged in writing shorthand all of this time. Ferguson v. Pottawattamie County (1904) 126 **Iowa,** 108, 101 N. W. 733.

On the other hand, an officer cannot be entitled to receive more than one per diem, no matter how many hours of the calendar day he works. Washoe County v. Humboldt County (1879) 14 **Nev.** 123; State v. Richardson (1906) 16 **N. D.** 1, 109 N. W. 1026; McIntosh County v. Whitaker (1916) — **Okla.** —, 158 Pac. 1136; Northern Trust Co. v. Snyder (1902) 113 **Wis.** 516, 90 Am. St. Rep. 867, 89 N. W. 460.

While beyond the scope of this note, it may be stated that it was held in Robinson v. Dunn (1888) 77 **Cal.** 473, 11 Am. St. Rep. 297, 19 Pac. 878, that a porter of the senate, whose compensation by law is fixed at $4 a day, is limited to that sum, no matter how "long hours" he works.

An eight-hour law, entitled "An Act Making Eight Hours a Legal Day's Work," and providing that eight hours of labor between the rising and setting of the sun, in all mechanical trades, arts, and employments and other cases of labor and service by the day, except in farm employment, shall be and constitute a legal day's work, where there is no special contract or payment to the contrary, has no relation to the employment of a special deputy sheriff during a strike among workmen, who, during a number of days, served day and night, and, other days, served either a full day or night of twelve hours; and he is entitled only to his per diem for each twenty-four hours. Phillips v. Christian County (1899) 87 **Ill.** App. 481; Christian County v. Merrigan (1901) 191 **Ill.** 484, 61 N. E. 479.

III. Holidays, recesses, etc.

Where a member or officer of a house of the legislature is entitled to a per diem "for each day's attendance," he is not entitled to a per diem for a recess of three weeks, which the legislature takes at Christmas time. See infra, IV. f.

Similarly, it was held that a member of the legislature was not entitled to his per diem, during an adjournment of the legislature from the 20th day of December to the 8th day of the following January, under a statute providing that members "shall receive as compensation for their services the sum of $5 per day, for each and every day they may serve as such" (infra, IV. f.).

And a constitutional provision that each member of the legislature shall receive for his services, so much for each day's attendance during the session, and mileage, does not permit a member to receive his per diem when the legislature adjourns, or when the legislature takes a recess for nearly two months. State ex rel. Boyd v. Hastings (1863) 16 **Wis.** 337.

But, in Smith v. Auditor General (1911) 165 **Mich.** 140, 130 N. W. 557, Ann. Cas. 1912C, 801, it was held that an assistant secretary of a senate was entitled to be paid a per diem for Sundays, during the session of the legislature, where the statute provided, "From and after the first day of January, 1901, the compensation of the president and members of the senate, and the speaker and members of the house of representatives, shall be three dollars per day each, for actual attendance, and when absent on account of sickness during the session of the legislature. . . . The per diem compensation of the secretary of the senate shall be ten dollars; of the first assistant secretary, six dollars, . . . which compensation shall be in full for all services performed during any regular or special session for which they are elected by the senate or appointed by a superior officer."

A United States marshal is not entitled to a per diem for attendance in court for a day in the term when the court, by its own order, is not open

(see infra, IV. d), nor for Sundays during the term (ibid.; see also as to United States district attorneys, United States v. Perry (1892) 1 C. C. A. 648, 4 U. S. App. 386, 50 Fed. 743, infra, V. c.) But it is otherwise if the court was actually open on Sunday (infra, IV. d). So the marshal will be entitled to a per diem, when in charge of a jury on Sunday (ibid).

It has been held that a constable, appointed to attend upon the grand jury, is entitled to a per diem for serving subpœnas for it, during its temporary adjournment. Thus, in a case where the statute does not appear, it was held that a constable, appointed by the county court to wait upon the grand jury, is entitled to a per diem not only for days when the grand jury is actually sitting, but that his per diem should include and cover each day on which he performs any bona fide service for the grand jury, from the date of his appointment to serve that body until its discharge, regardless of the fact that the grand jury sits only two days in the week; and the service of subpœnas placed in his hands for the grand jury falls within the scope of the duties he becomes compensated for by the per diem allowance, and he cannot be deprived of his compensation by the temporary adjournments of the grand jury, when he actually performs bona fide service during the intervals created by such adjournment, and, in serving subpœnas during such intervals, he is serving the grand jury. Connors v. Shelby County (1904) 113 Tenn. 177, 81 S. W. 598.

IV. Various officers.

a. United States commissioners.

A United States commissioner, under the statute allowing him "for hearing and deciding on criminal charges $5 a day for the time necessarily employed," is entitled to his per diem for attending for the arraignment of a person (Stafford v. United States, (1890) 25 Ct. Cl. (Fed.) 280); for hearing and deciding a motion on bail (United States v. Jones (1890) 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615; Harper v. United States (1886) 21 Ct. Cl. (Fed.) 56; Faucett v. United States (1891) 26 Ct. Cl. (Fed.) 154; Ives v. United States (1889) 24 Ct. Cl. (Fed.) 363); or hearing and deciding a motion for a continuance by either party (Marvin v. United States (1890) 44 Fed. 405; Harper v. United States (1886) 21 Ct. Cl. (Fed.) 56; Ives v. United States (1889) 24 Ct. Cl. (Fed.) 363).

A United States Commissioner is entitled to a per diem for continuances, granted at the request of the defendants in criminal cases. United States v. Jones (1890) 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615; United States v. Ewing (1891) 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743. These cases, in effect, overrule the contrary decision in McKinistry v. United States (1888) 34 Fed. 211.

Indeed, the per diems to a commissioner for hearing and deciding are not limited to hearings on the merits, but can be allowed for any acts upon which counsel ought to be heard at the trial. Rand v. United States (1888) 36 Fed. 671.

A commissioner's examination of a poor convict on his application for discharge under Revised Statutes, § 1042, Comp. Stat. 1916, § 1706, is a proceeding in a criminal case. So decided in case of the marshal's fee, in Harmon v. United States (1890) 43 Fed. 560, affirmed on other grounds in (1893) 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327.

But services of a judicial nature, performed by a commissioner before the filing of the formal written complaint for an arrest, do not entitle the commissioner to a per diem, notwithstanding what is necessary to the procedure, under the statute of the state in question. United States v. Patterson (1893) 150 U. S. 65, 37 L. ed. 999, 14 Sup. Ct. Rep. 20.

The United States statute, allowing the commissioner a per diem for hearing and deciding on criminal charges, for the time necessarily employed, does not permit a per diem for examining a complaining witness prior to issuing warrant, as required by state statute. Ives v. United States (1889) 24 Ct. Cl. (Fed.) 363.

Where the United States statute

provided a certain specific fee to a commissioner in election cases, the law of a state would not justify compensation for preliminary proceedings not resulting in cases, so as to enable the commissioner to charge a per diem. Allen v. United States (1905) 40 Ct. Cl. (Fed.) 170.

So, also, it has been held that a commissioner is not entitled to a per diem for examining a complaint and issuing a warrant. McCafferty v. United States (1890) 26 Ct. Cl. (Fed.) 1, where the court said: "By the law, subject to certain regulations, it is the duty of the commissioner to issue a warrant when a sufficient affidavit or complaint is made, and before he performs that duty he must necessarily pass upon the sufficiency of the allegations on which the party is to be arrested; but the performance of that duty cannot, by any fair reasoning, be construed to be 'hearing and deciding on criminal charges,' within the meaning of the statute. Hearing a criminal charge implies a judicial hearing, and deciding a criminal charge implies a judicial determination after a hearing. After the defendant is arrested and brought before the commissioner, if a motion is made to dismiss the prosecution, because of the insufficiency of the complaint, hearing and deciding that motion would, in its nature, be judicial; but an examination of the complaint antecedent to the issuing of the warrant is not hearing and deciding a criminal charge, within the meaning of the statute."

A commissioner is not entitled to a per diem for hearing two cases on the same day; he can only have one per diem for hearing on each day (ibid); but he is entitled to a double per diem charge where he acts in a double capacity,—first, as clerk of the court, and, second, as commissioner of the circuit court,—one of the charges being for attendance on court when in session, and the other for hearing and deciding on criminal charges. United States v. McCandless (1893) 147 U. S. 692, 37 L. ed. 334, 13 Sup. Ct. Rep. 465; Goodrich v. United States (1890) 42 Fed. 392.

Where the statute allowed a commissioner, for hearing and deciding on criminal charges, so much a day for the time necessarily employed, and he charged for two days, the court observed that, nothing else appearing, the presumption would be in his favor; but, when requested by the treasury official to explain why so much time was required, he made no answer whatever, and it was held that his silence rebutted any favorable presumption that might otherwise arise. Davies v. United States (1888) 23 Ct. Cl. (Fed.) 468.

A United States commissioner, who is appointed by the court to perform the duties of a referee in an admiralty case, is limited to $3 a day for attending to the reference, but it seems that he is entitled, beyond that, to the fees of a master in chancery for performance of similar services. Crosby v. The Prince Albert (1859) Fed. Cas. No. 3,424b, which is obscurely reported.

b. United States court clerks.

The clerk of the United States circuit and district courts is entitled to a per diem for attendance on court while actually in session, although the court actually transacted no business on that day. Goodrich v. United States (1888) 35 Fed. 193; Jones v. United States (1885) 21 Ct. Cl. (Fed.) 1; Bill v. United States (1888) 23 Ct. Cl. (Fed.) 142.

A clerk is entitled, under a statute allowing him a per diem for attendance on court while actually in session during the term, with the judge presiding and judicial business actually transacted in court, to per diems, where the business transacted was bankruptcy business and admiralty business, and was actually done by the court sitting in chambers. Owen v. United States (1906) 41 Ct. Cl. (Fed.) 69.

Where a statute provides that every judge of the United States circuit court, when informed by two or more citizens that a supervision of a registration for election of a member of Congress is desired, shall cause the courts to be opened ten days before the registration, or, if no registration

be required, within not less than ten days prior to the election, and that the courts so open shall, therefrom and thereafter, be always open for the transaction of business up to and including the day following the election, and that there shall be a fee to the clerk of $5 a day for attendance on the court while actually in session, when the court is opened, the clerk is entitled to his per diem for his attendance and his record of the proceedings. Pleasants v. United States (1888) 35 Fed. 270.

So, the clerk is entitled to charge for attendance on court, at a day when the session was appointed to be held by the judge, although the court was then adjourned, in the absence of the judge, by a written order, to a further date. United States v. Pitman (1893) 147 U. S. 669, 37 L. ed. 324, 13 Sup. Ct. Rep. 425, followed in United States v. Aldrich (1893) 7 C. C. A. 431, 5 U. S. App. 496, 58 Fed. 688; Kinney v. United States (1894) 60 Fed. 883; Dart v. United States (1897) 32 Ct. Cl. (Fed.) 267.

A clerk of a district and circuit court of the United States was held entitled to the per diem compensation, given "when the court is open for business or business is actually transacted in court," for those days on which, in the absence of any judge, he entered on the journal certain orders, decress, and other proceedings, transmitted to him for that purpose by the different judges composing the courts of such district, since to have decided otherwise would have been to overrule a uniform construction given to the statute by the Treasury Department, which was not obviously or clearly wrong, but, at the most, subject to a doubt of its soundness. United States v. Finnell (1902) 185 U. S. 237, 46 L. ed. 890, 22 Sup. Ct. Rep. 633.

Under a statute allowing a clerk a per diem for an attendance on court while actually in session during the terms, or when business is transacted in court upon order of the judge, it was held that a clerk of a Federal district and circuit court is entitled to his statutory per diem compensation for days on which he refers to the referee in bankruptcy, voluntary petitions in bankruptcy filed during the absence of the judge from the district, though without written orders to open the court for that or any other purpose. United States v. Marvin (1909) 212 U. S. 275, 53 L. ed. 510, 29 Sup. Ct. Rep. 297. Followed in Keatley v. United States (1909) 45 Ct. Cl. (Fed.) 36.

But where a clerk of the United States district court has received his maximum salary allowed by law for the period, he is not entitled besides to a per diem for receiving and referring petitions to referees, in involuntary bankruptcy cases. Johnson v. United States (1915) 50 Ct. Cl. (Fed.) 126, holding it would be otherwise if he had not received his maximum.

Where a statute provided that no part of the money appropriated by the act was to be used in the payment of a per diem compensation to a clerk (or marshal) for attendance at court, except for days when business was actually transacted in court, the burden of showing that business in court was actually transacted on those days is on the clerk. Marvin v. United States (1890) 44 Fed. 405.

Where the statute provides: "Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court except for days when the court is open by the judge for business or business is actually transacted in court," and another statute declares that the court shall be always open for certain purposes, a clerk, who is required to attend, and attends, on the transaction of such business by a judge or judges of the court, but upon days that are not within or any part of regular terms, is entitled to attendance fees. Butler v. United States (1898) 87 Fed. 655, where the court disapproved Converse v. United States (1890) 26 Ct. Cl. (Fed.) 6.

In Marvin v. United States (1910) 45 Ct. Cl. (Fed.) 528, where the statute provided that petitions in naturalization cases might be made and filed during term or vacation of the court, and should be docketed the same day as filed, it was held that the clerk was

entitled to a per diem for attendance on a day when he docketed the petition, as he must open the docket of the court for such purpose; but the judge certified that the court was opened by the judge for business, and the judge was present and presiding, and business was actually transacted in court on order of court.

The theory of the Marvin Case was disapproved in Jaynes v. United States (1912) 47 Ct. Cl. (**Fed.**) 523, holding that the Marvin Case might be sustained on the ground that the judge was certified to be actually present, but that, if he was not present, the clerk was not entitled to a per diem for docketing naturalization petitions (and the court pointed out that there was filing and docketing fees of which the clerk was entitled to one half).

Under a United States statute providing a per diem for the clerk for his attendance upon the court "while actually in session," and providing also that, "when the circuit and district courts sit at the same time, no greater per diem or other allowance shall be made to any such officer for an attendance on one court," the latter clause only applies when the same judge holds both courts at the same time; and, when courts are held in two places at the same time, the clerk may be allowed a per diem for attendance at each court, one for himself and one for his deputy, respectively. United States v. Erwin (1893) 147 **U. S.** 686, 37 L. ed. 332, 13 Sup. Ct. Rep. 443.

Where the statute further provides that a clerk shall not be paid, for his fees and emoluments, more than a certain sum, the clerk, having attended where the circuit and district courts sit at the same time, may make the per diem charge to such court as he sees fit. Goodrich v. United States (1888) 35 **Fed.** 193; Clough v. United States (1893) 55 **Fed.** 921; Erwin v. United States (1889) 2 L.R.A. 229, 37 **Fed.** 270.

A clerk who is also a commissioner may charge a per diem for his attendance on court, and a per diem for hearing a cause as commissioner, on the same day. Goodrich v. United States (1894) 42 **Fed.** 392; Marvin v. United States (1890) 44 **Fed.** 405, appeal dismissed in (1893) 149 **U. S.** 789, 37 L. ed. 961, 13 Sup. Ct. Rep. 1053.

A clerk, being a jury commissioner ex officio, comes within the provisions of the statute which give compensation to jury commissioners. Marvin v. United States (**Fed.**) supra.

Where a clerk was required to appoint a deputy for the court at a certain place, and the deputy at that place acted as a jury commissioner in drawing juries, he was entitled to charge per diem the same as a jury commissioner, for services; the court was not in session, and he drew no per diem for attendance on it, while performing the service. Goodrich v. United States (**Fed.**) supra.

Where a statute directed that jurors were to be selected by the clerk, and a jury commissioner to be appointed by the judge, and a statue of appropriations allowed $5 a day for the jury commissioner, it was held that the clerk ought to be allowed $5 a day, because he was virtually a jury commissioner, to be paid out of the appropriation, or out of the regular appropriations for fees of clerks. Erwin v. United States (**Fed.**) supra.

c. United States district attorneys.

The United Sates district attorney is entitled to a per diem for attendance before commissioners, on days when recognizance was taken and hearing was continued. (Bird v. United States (1891) 45 **Fed.** 110); but he is not entitled to a per diem for attendance before a commissioner for necessary examination, preliminary to the issuance of warrants, as the statute does not apply to such preliminary examinations, where no formal accusation has been made and witnesses are not examined. United States v. Colman (1896) 22 C. C. A. 135, 46 U. S. App. 133, 76 **Fed.** 214, writ of error dismissed in (1898) 42 L. ed. (**U. S.**) 1215, 18 Sup. Ct. Rep. 948.

But where the statute provides that the United States attorney shall receive, "for examination before a judge or commissioner of prisoners charged

with crime, $5 a day for the time necessarily employed," it seems that a district attorney would be entitled to a per diem for time spent in an investigation of the case, provided there was actually a formal accusation of crime. United States v. Stanton (1895) 17 C. C. A. 475, 35 U. S. App. 799, 70 Fed. 890.

The United States district attorney is not allowed a per diem for the attendance, before a commissioner, of his counsel, when he was away on vacation. Ibid.

The district attorney is entitled to a per diem for attendance on examination of poor convicts applying for discharge to a commissioner. (Bird v. United States (1891) 45 Fed. 110); but he is not entitled to a per diem for attendance before commissioners in internal revenue compromise cases, in order to discontinue them, on the order of the commissioner of internal revenue, as the peremptory order of the commissioner of internal revenue is practically a withdrawal of the charge. United States v. Stanton (1895) 17 C. C. A. 475, 35 U. S. App. 799, 70 Fed. 890.

While the district attorney is not entitled to charge a per diem for more than one attendance before the same commissioner on the same day (United States v. Colman (1896) 22 C. C. A. 135, 46 U. S. App. 133, 76 Fed. 214), where, by the statute, a district attorney of the United States is allowed so much for each day of his necessary attendance in the courts of the United States, on the business of the United States, and is also allowed, for examination before a judge or commissioner of the persons charged wih crime, the same amount a day for the time necessarily employed, such district attorney is entitled to charge a per diem for attendance upon a commissioner, upon the same day that he is allowed a per diem for attendance upon the court; if his attendance before the court be necessary, he is entitled to his per diem, although it may only be necessary to remain a few minutes; and, if he attend before the commissioner, and the case be disposed of without requiring his presence the entire day, there is no reason why he is not as much entitled to his fees as the commissioner. United States v. Erwin (1893) 147 U. S. 685, 37 L. ed. 331, 13 Sup. Ct. Rep. 443. This case, in effect, overrules the contrary decision in Baxter v. United States (1892) 2 C. C. A. 411, 10 U. S. App. 243, 51 Fed. 671.

The per diem of the district attorney for attendance in court at the place of his abode is not allowed as a reimbursement for expenses, but as compensation, and therefore must be reckoned in computing the total amount which his fees and salary together is not to exceed. United States v. Smith (1895) 158 U. S. 346, 39 L. ed. 1011, 15 Sup. Ct. Rep. 846.

The district attorney is not entitled to a per diem for Sundays passed away from his abode, where the statute limits per diems for attendance to days when court is opened, or business actually transacted. United States v. Perry (1892) 1 C. C. A. 648, 4 U. S. App. 386, 50 Fed. 743.

d. United States marshals.

A United States marshal is entitled to his per diem for attendance in court on a day appointed by the judge, although the judge does not actually attend on that day, or no business is transacted. (United States v. Nix (1903) 189 U. S. 199, 47 L. ed. 775, 23 Sup. Ct. Rep. 495); but he is not entitled to pay as for attendance during a part of the term, when the court, by its own order, was not sitting (McMullen v. United States (1892) 146 U. S. 360, 36 L. ed. 1007, 13 Sup. Ct. Rep. 127); nor for Sundays when the court was not open for business (Campbell v. United States (1895) 13 C. C. A. 128, 27 U. S. App. 666, 65 Fed. 777; Dubois v. United States (1890) 25 Ct. Cl. (Fed.) 195). But a marshal is entitled to a per diem for attendance upon the court on Sunday, when the court was actually open on that day. Puleston v. United States (1898) 85 Fed. 570, modified in other respects in (1901) 45 C. C. A. 297, 106 Fed. 294. So, he is entitled to a per diem as for actual attendance in court, when he was in charge of a jury on

Sunday, although the court was not open on that day. United States v. Dill (1898) 29 C. C. A. 586, 57 U. S. App. 261, 86 Fed. 79.

A marshal is entitled to a per diem for attendance before a commissioner, on application to give bail. (Donahower v. United States (1896) 77 Fed. 153; Kinney v. United States (1893) 54 Fed. 313), on a motion to adjourn, or an arraignment or commitment (Kinney v. United States (Fed.) supra), and for attending court and guarding a defendant, who was put in his custody that day by order of the commissioner, until sufficient bail was given for the appearance at court to answer an indictment. United States v. Ebbs (1881) 4 Hughes, 473, 10 Fed. 369.

Where the statute allows the marshal, for attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, $2 a day, and for each deputy, not exceeding two, necessarily attending, $2 a day, the question how many officers were necessary to preserve order was a matter to be decided by the commissioner, in the honest exercise of his discretion, and according to the existing exigencies. The marshal has a right to obey the commissioner, and to recover the per diem for himself and his two deputies, accordingly. Harmon v. United States (1890) 43 Fed. 560, affirmed on other grounds in (1893) 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327.

The marshal also is entitled to a per diem for attendance, in bringing in a poor convict applying for his discharge under the statute (Harmon v. United States (1890) 43 Fed. 560, affirmed on other grounds in (1893) 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327; Hitch v. United States (1895) 66 Fed. 937; Lovering v. United States (1902) 117 Fed. 565), but only for one deputy, and only for one day (Donahower v. United States (Fed.) supra).

A marshal is also entitled to a per diem for the attendance of his deputy before a commissioner, as for a hearing, when the case was set for trial on that day, but the defendant failed to appear, and his bond was estreated and an attachment issued. Puleston v. United States (1898) 88 Fed. 970, modified in other respects in (1901) 45 C. C. A. 297, 106 Fed. 294.

A marshal is not entitled to more than one per diem before a commissioner, although he attends more than one separate and distinct case on the same day; that is, he is entitled to only one per diem on that day for attendance. Nixon v. United States (1897) 82 Fed. 23.

The marshal, under a statute allowing him "for attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, $2 a day," is not entitled to two examinations on the same day before the same commissioner, although they are different cases. United States v. McMahon (1896) 164 U. S. 81, 41 L. ed. 357, 17 Sup. Ct. Rep. 28.

But he is entitled to two per diems, where he attends for examination before two different commissioners on the same day. Ibid.

And he may have a per diem for attendance before a commissioner, and another per diem for attendance before the court on the same day. Puleston v. United States (1898) 88 Fed. 970, modified in other respects in (1901) 45 C. C. A. 297, 106 Fed. 294.

So, a marshal is entitled to a per diem for the attendance of his deputy before a commissioner, although the deputy attended, and charged for attendance, on the court on the same day. United States v. Dill (1898) 29 C. C. A. 586, 57 U. S. App. 261, 86 Fed. 79; Lovering v. United States (1902) 117 Fed. 565.

A United States marshal is entitled to a per diem for attendance of himself and deputies before United States commissioners, on the same day that he charged a per diem for attendance on the circuit or district courts. Saunders v. United States (1886) 73 Fed. 792.

But a marshal cannot be allowed a per diem for his deputy as bailiff, where the deputy earned, at the same time, a per diem for services in at-

tendance on the court, as representing the marshal. Swift v. United States (1904) 128 Fed. 763, affirmed on other grounds in (1905) 71 C. C. A. 351, 139 Fed. 225.

A marshal may appoint a special bailiff and authorize him to perform a particular duty, and he then becomes the deputy of the marshal, and the marshal may charge a per diem for him, under the statute allowing the marshal "for attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime, two dollars a day, and for each deputy, not exceeding two, necessarily attending, two dollars a day." Re Crittenden (1878) 2 Flipp. 216, Fed. Cas. No. 3,393.

But where a marshal charged for expenses of his deputy for eight days, in endeavoring to arrest a prisoner who resided only 30 miles from the place where the process was issued, and the marshal charged a per diem for expenses, the affidavit of the general deputy, that the eight days were actually employed "in endeavoring to arrest," was not sufficient, as it is not shown by the oath or affidavit of the bailiff in question, who should explain the length of time taken. Re Crittenden (1878) 2 Flipp. 212, Fed. Cas. No. 3,393.

A bailiff appointed by the marshal is not entitled to a per diem for a laborer's services, such as sweeping out court walks, and running errands, as the duties of a janitor or messenger are not those contemplated by the statute, which provided that the marshals may appoint persons to "attend upon the grand or other juries, and for other necessary purposes," and that the compensation should be paid only for actual attendance. McLean v. United States (1888) 23 Ct. Cl. (Fed.) 401.

The compensation of special deputy marshals to aid and assist the supervisors of election is a matter of special statute, which awards them $5 a day; and, as it appears by the statutes that the attendance of such a special deputy marshal before a commissioner on election day is incidental to his services, it is covered by the per diem provided by the special statute, and the marshal is not allowed to charge a per diem for his attendance before the commissioner. United States v. McMahon (1896) 164 U. S. 81, 41 L. ed. 357, 17 Sup. Ct. Rep. 28.

Where the statute provided that the marshals may appoint such number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, and, when the circuit and district courts were sitting together at the same time and presided over by the same judge, the marshal, by direction of the court, appointed five bailiffs, the court held that the bailiffs were entitled to their per diem, and that the marshal was entitled to at least three bailiffs to each court, under a Statute of Appropriations, making an appropriation for pay of bailiffs and criers, "not exceeding three bailiffs and one crier in each court;" but it is not very clear whether the Statute of Appropriations in question was intended to appropriate monies out of which the marshal was claiming. Puleston v. United States (1898) 88 Fed. 970, modified in other respects in (1901) 45 C. C. A. 297, 106 Fed. 294.

A marshal is entitled to six bailiffs, that is, three for each court, where the circuit and district courts sit together at the same time. Swift v. United States (Fed.) supra.

The marshal is not entitled to a charge for keeping prisoners, when their board is paid for by the government, and they are imprisoned, and the court not in session, although a state statute provided, "for the officer attending court and keeping prisoners in criminal cases, 75 cents for every twelve hours, and in that proportion for a greater or less time," as that law applied only to the keeping of prisoners during the session of the court. Ex parte Paris (1847) 3 Woodb. & M. 227, Fed. Cas. No. 10,714.

A marshal's expenses for the hire of hacks to transport prisoners to and from court is not covered by the per diem fee of $5 for attending court

and bringing in and committing prisoners and witnesses. United States v. Harmon (1892) 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327, affirming (1890) 43 Fed. 560.

e. United States criers and bailiffs.

Criers and bailiffs are entitled to per diems for attendance on a day to which the court is adjourned on written order, under a statute providing that "such persons shall be deemed to be in actual attendance when they attend upon the order of the court." United States v. McCabe (1904) 129 Fed. 708.

f. Members and officers of legislature.

Where a member of the legislature is entitled to a per diem "for each day's attendance," he is not entitled to a per diem for a recess of three weeks which the legislature takes at Christmas time. Ex parte Pickett (1894) 24 Ala. 91. The same was held as to an officer of the senate who was "allowed $8 a day" in the statute, and it was held that he was not entitled to a per diem during two Christmas time recesses, of thirty-three days and twenty-one days, respectively. Moren v. Blue (1872) 47 Ala. 709; Reynolds v. Blue (1872) 47 Ala. 711.

But for a case holding a senate officer entitled to a per diem for Sundays, see Smith v. Auditor General (1911) 165 Mich. 140, 130 N. W. 557, Ann. Cas. 1912C, 801 (supra, III.).

A member of the legislature is not entitled to his per diem during an adjournment of the legislature from the 20th day of December to the 8th day of the following January, under a statute providing that members "shall receive as compensation for their services, the sum of $5 per day for each and every day they may serve as such." State ex rel. McMurtry v. Thompson (1866) 37 Mo. 176.

And a constitutional provision that each member of the legislature shall receive for his services so much for each day's attendance during the session, and mileage, does not permit a member to receive his per diem when the legislature adjourns, or takes a recess for nearly two months. State ex rel. Boyd v. Hastings (1863) 16 Wis. 337.

Where the legislature took a recess for some ten months, it being what was known as a revising session, in order that a committee might revise the laws, it was held that a member was not entitled to compensation during such recess, under a Constitution providing that "the members of the general assembly shall receive a compensation for their services not to exceed three dollars per day for the first sixty days, and after that time not to exceed one dollar per day for the remainder of the session, except at a revising session, they may receive a compensation not to exceed three dollars per day for the first one hundred days and one dollar per day for the remainder of the session." Morgan v. Buffington (1855) 21 Mo. 549.

In Norman v. Keller (1891) 13 Ky. L. Rep. 240, where a statute provided: "To the clerks and assistant clerks of the senate and house of representatives $10 per day each, including the second assistant clerks in both house and senate from the date of their appointment. To the chief clerks and assistant clerks of the house of representatives and senate $10 per day each for ten days after adjournment to complete the work of editing acts and preparing them for publication," it was held that this act was not intended to restrict the compensation to be paid for the services, for the ten days succeeding adjournment, to the clerk and first assistant, but was intended to include such assistants as it was necessary to employ, to complete the work within the time assigned.

Where a Constitution provides that "the legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor," the legislature cannot grant a per diem to a clerk of a committee, for time before he was appointed such clerk. People ex rel. Kene v. Olcott (1877) 11 Hun (N. Y.) 610.

Where the assembly passed a resolution instructing a certain standing committee to perform certain duties,

and authorizing them to employ some competent clerk to assist them in the discharge of their duties, it was held that a lawyer employed by the committee as clerk could not recover on the basis of the value of the legal services, but was limited to $4 per day; the statute fixing the per diem of a clerk of a standing committee at that sum. Tenney v. State (1871) 27 Wis. 387.

It may be noted that in Goodnight v. Moody (1891) 3 Idaho, 7, 26 Pac. 121, the court construed the Constitution of the state, limiting the per diem allowances to members for any one session to a certain amount, as applying to the ordinary biennial sessions of the legislature, and not to the first session after the Constitution was enacted.

g. County boards and commissioners.

Where the statute provided that county commissioners should receive a per diem for each day actually engaged in transacting county business, it was held that they were only engaged in transacting county business when acting as a board. Rankin v. Jauman (1895) 4 Idaho, 394, 36 Pac. 1111.

Where the Constitution provided that the county board should fix the compensation of all county officers, before the regular election of the officers whose compensation was to be fixed; and the county board fixed the compensation of a county commissioner at $5 a day for actual service, it was held that he could not draw anything from the county, over and above such fixed compensation, for traveling expenses in visiting a county institution; that, if the entire board was compelled to travel, its expenses would be the expenses of the board as a whole, but that the per diem must be considered to include all the individual expenses of the commissioners. Cook County v. Wren (1891) 43 Ill. App. 388.

A board of equalization which is to sit from June, but not after the 1st of August, may not have a per diem for its special session after the 1st of August, although the statute further provides that the board may sit in special session, and that its failure to complete its duties within the time specified shall not invalidate any assessment or any act of the board, made after the expiration of the time specified. Espalla v. Mobile County (1917) — Ala. —, 76 So. 2, reversing (1917) — Ala. App. —, 73 So. 761.

Where the statute provided that the boards of commissioners might make an allowance at their discretion, etc., and that the county commissioner's fee should be a certain sum for each day's attendance as a member of the county board, or board of equalization, the board had no authority to allow a commissioner a per diem for one day's services in inspecting and examining a bridge. Waymire v. Powell (1885) 105 Ind. 328, 4 N. E. 886.

So, a county commissioner, who is entitled to a certain sum per day, and mileage, for each meeting of the board, whether it be a regular or special meeting, called by the chairman, and which should be full compensation of said board for all services whatever, is not entitled to a per diem for inspecting a bridge and making a report on it. Davidson v. Guilford County (1910) 152 N. C. 436, 67 S. E. 918.

A commissioner who is entitled to a per diem for attending meetings of the board cannot receive a per diem for a meeting of a committee when the board is not in session. Van Sicklen v. Queens County (1884) 32 Hun (N. Y.) 62.

So, a supervisor is not entitled to a per diem for attendance upon committees, and other alleged beneficial services rendered by him to the county, where the statute provides that he shall receive a per diem for the time he shall actually attend, and mileage in going to or returning from the place of meeting, but that he shall not draw pay for more than ten days' attendance in any one year. Johnson v. Black (1895) 103 Va. 477, 68 L.R.A. 264, 106 Am. St. Rep. 890, 49 S. E. 633.

So, it was held that a member of a board of supervisors is not entitled to a per diem for attending a meeting of the committee when the board is

not in session, where the statute provided: "Each member of such board of supervisors shall be allowed a compensation of three dollars per day for his services and expenses in attending the meetings of said board, and six cents a mile for each mile necessarily traveled in going to and returning from the place of such meeting, to be audited by the board and paid by the county; which compensation of three dollars per day shall extend to and be allowed for the first twelve days only of any continuous regular session, and six days only for an adjourned session of said board, and for the first three days only of any special session of said board, of which special session there shall be no more than two in any one official year; which said amount shall be in full for all services rendered and expenses in attending the meetings of such board of supervisors, and for all services and expenses incurred while acting upon any committee of said board of supervisors during the session of said board; and any supervisor receiving further or other compensation for such services shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars." Ewing v. Ainger (1893) 97 **Mich.** 381, 56 N. W. 767.

Where the statute provided that supervisors should each receive compensation at so much per day for each calendar day's actual attendance at the sessions of their respective boards, and might also receive compensation at the rate of so much per day while actually engaged in any investigation or other duty which might be lawfully committed to them by the board, except for services rendered when the board is in session, it was held that supervisors were not entitled to a per diem for work called by them committee work, done pursuant to a general understanding that each supervisor should look after roads and other business in his own town, and report from time to time to the board. Wallace v. Jones (1907) 122 App. Div. 497, 107 N. Y. Supp. 288, affirmed in (1909) 195 N. Y. 511, 88 N. E. 1134.

But, under a statute entitling a county commissioner to a per diem for each and every day actually and necessarily employed in the discharge of the duties of his office, he is entitled to a per diem when he was in actual attendance at his office on each day, and there was a meeting of the board which he attended each day, and on most days business requiring the action of the board was transacted. Mansel v. Nicely (1896) 175 **Pa.** 367, 34 Atl. 793.

A board of supervisors cannot claim per diems under the statute allowing them for each day's actual attendance at the meeting of the board, where it appears that, at the time, the board was excluded from office by usurpers. Reilly v. Cochise County (1898) 5 **Ariz.** 380, 53 Pac. 205.

It has been held that a statute allowing members of the fiscal court a per diem for services on a new committee did not increase the pay of the members of the fiscal court, within the meaning of the prohibition in the Constitution, that "the compensation of any state, county, town, or municipal officer shall not be changed after his election or appointment or during his term of office. Thomas v. O'Brien (1910) 138 **Ky.** 770, 129 S. W. 103, where the court stated that the same had been held as to members of the fiscal court, generally,—that is, the statute did not have the effect to raise their compensation, within the meaning of the Constitution,—in Flowers v. Logan County (1910) 138 **Ky.** 59, 137 Am. St. Rep. 347, 127 S. W. 512; but that question does not seem to have been discussed, to any extent, in that case, by the court, the court in effect stating in that case that the matter was not prohibited by the Constitution.

A county commissioner is entitled to a per diem for the time consumed in going from his home to the county seat, to attend the regular and special meetings of the board, and in returning to his home from such meetings, where he is entitled to a certain salary and, in addition thereto, a per

diem for each day actually employed in the discharge of the duties of his office, and his actual traveling expenses for each mile actually and necessarily traveled in going to and returning from the meetings of the board, and no other compensation whatever. Weston County v. Blakely (1912) 20 Wyo. 259, 123 Pac. 72, Ann. Cas. 1915B, 584.

See also, as to a trustee of a public institution, State ex rel. Van Horn v. Briggs (1895) 5 N. D. 70, 63 N. W. 206 (infra, I.); and, as to a railroad commissioner, State v. Howard (1909) 83 Vt. 6, 74 Atl. 392 (infra I.).

But a like claim was denied in another jurisdiction, under a similar statute. Thus, it was held in State v. Richardson (1906) 16 N. D. 1, 109 N. W. 1026, that county commissioners were not entitled to charge a per diem for the time spent in traveling to and from the meetings of the county commissioners, where the statute provided that "county commissioners shall each be allowed for the time they are necessarily employed in the duties of their office the sum of four dollars per day, and five cents per mile for the distance actually traveled in attending the meeting of the board, and when engaged in other official duties."

Where county commissioners are also overseers of the poor, a commissioner acting as such overseer is entitled to the per diem for that business, and not to a per diem for acting as commissioner. State v. Borstad (1914) 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014.

In Ellis v. Tulare County (1886) 5 Cal. Unrep. 327, 44 Pac. 575, where a supervisor was ex officio road commissioner, it was held that he was entitled to a per diem for services not only as supervisor, but also for the services which he performed as road commissioner, where the statute provided that "the county officers shall receive as compensation for the services required of them by law or by virtue of their office, the following salaries, to wit: . . . supervisors each [so much] per day for actual service, and [so much] per mile while traveling from his place of residence to the county seat," as it must be assumed that the services were required of him by law, or by virtue of his office.

In Albright v. Bedford County (1884) 106 Pa. 582, it was held that county commissioners were not entitled to receive, beyond their per diem, any sum for traveling expenses, where the statutes did not refer to it.

Where the statute allowed county commissioners a per diem compensation for the time "actually and necessarily employed in the discharge of the duties of their office," with a proviso that this "shall be in lieu of all other compensation and charges for the individual services and expenses of said commissioners," and the latter act provided that, in the absence of any local law on the subject, commissioners "shall be allowed their traveling expenses necessarily incurred in the discharge of their official duties," it was held that county commissioners should be allowed per diems for certain days of attendance on a state convention of county commissioners (while certain other days were disallowed, the reason not appearing); they were not, however, allowed their hotel bills while engaged in this business, as that was not included under the statutory items of traveling expenses. McKean County v. Young (1889) 11 Pa. Super. Ct. 481.

A county judge, in acting as a member of the commissioners' court, is entitled to receive a per diem for each day he is engaged in holding a term of such court, provided he shall receive no pay for holding more than one special term for a month, although he receives a salary for ex officio services, where the statute provides that each county commissioner and the county judge, when acting as such, shall receive $3 for each day he is engaged in holding a term in the commissioners' court, but such commissioners shall receive no pay for holding more than one special term of their court per month, and also authorizes the commissioners' court to allow the county judge a salary for ex officio services, as follows: "For presiding

over the commissioners' court, ordering elections and making returns thereof, hearing and determining civil causes, and transacting all other official business not otherwise provided for, the county judge shall receive such salary from the county treasury as may be allowed him by order of the commissioners' court." Farmer v. Shaw (1900) — **Tex.** Civ. App. —, 54 S. W. 772.

A complaint alleging that a board of county commissioners, in their official capacity, conspired together during a certain year, to cheat and defraud the county by auditing and allowing themselves compensation in the way of a per diem and mileage, and continued the sessions of said board at divers times during the year, from time to time and day to day, and were wrongfully and illegally in session for the purposes aforesaid, is bad for indefiniteness, for not stating at what terms of court or at what time the alleged illegal sessions were held, and for not alleging what was the number of days necessary to enable the commissioners to transact the business of the county. State ex rel. Whitney v. Friars (1894) 10 **Wash.** 348, 39 Pac. 104.

h. County and court clerks.

It has been held, in the construction of a statute, that a per diem was not a fee, but an emolument, and that therefore the clerk was entitled to retain it. State ex rel. Tippecanoe County v. Flynn (1893) 161 **Ind.** 554, 69 N. E. 159 (following Seiler v. State (1902) 160 **Ind.** 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448, infra, j) followed in Comer v. Morgan County (1904) 32 **Ind.** App. 477, 70 N. E. 179.

A clerk entitled to a per diem for attendance in court while actually in session shall be allowed it, whether or not the court transacts any business that day. United States v. Warren (1903) 12 **Okla.** 350, 71 Pac. 685.

But the statutory right to a per diem for attendance must be clear as to the particular court. Thus, where, by statute, a clerk was granted a per diem allowance for his services in the courts, generally, and, by a later substituted statute, it was provided that, for attending the criminal and superior courts, he should receive a per diem, it was held that the statute did not include a per diem for attendance on the circuit court created by the Constitution, which had general common-law jurisdiction both in civil and criminal cases, while the criminal and superior courts were established by the legislature. Taylor v. Washington County (1879) 67 **Ind.** 383.

The county authorities are not bound to allow the clerk a per diem allowance for attendance on the court during probate business, where the statute provided "that the county clerks shall charge no fees for services to the county, but that the courts shall allow the clerks such reasonable compensation as they may think right as an ex officio fee, not exceeding $100 per annum, exclusive of a per diem allowance not exceeding $3 per day, for their attendance on the courts in term time during county or probate business." Kane County v. Pierce (1871) 60 **Ill.** 481. The court pointed out that there were other fees attached to probate business, making the office coveted.

A clerk, entitled to a per diem for attendance at court, is not entitled to a per diem for the period of time he and his deputies were employed in copying the lost of delinquent taxes upon real estate, and in entering judgment against each parcel mentioned in such list, as by law required. Davenport v. Hennepin County (1889) 40 **Minn.** 335, 42 N. W. 20.

Where a county clerk was entitled to retain a certain sum as salary and deputy hire for that year, out of his receipts, and he was made a member of the board of equalization, the members of which were entitled to a per diem, it was held that he was entitled to retain the per diem, over and above the sum to which he was limited as county clerk. State ex rel. Linn County v. Adams (1903) 172 **Mo.** 1, 72 S. W. 655.

In Ex parte McKee (1867) 28 **Ind.** 100, the court construed the statute giving a per diem for attending court as applying not to the clerk, but to

the sheriff, and this decision was followed in Rudisill v. Edsall (1873) 43 **Ind.** 377, and in Kerr v. Fountain County (1874) 47 **Ind.** 63.

The county board have no power to allow a clerk of the district court a per diem, as they are not authorized so to do by law, and can exercise only such powers as are specially granted, or are incidentally necessary. Grant County v. Ernest (1915) 45 **Okla.** 725, 147 Pac. 222. This case was followed in Harper v. Oklahoma County (1915) — **Okla.** —, 149 Pac. 1102, modified on other grounds in (1916) — **Okla.** —, 154 Pac. 529; Hughes v. Oklahoma County (1915) 50 **Okla.** 410, 150 Pac. 1029.

Where the county board of equalization met every year in September to equalize assessments, and the county clerk was clerk of the board, and the statute provided that he should receive a per diem for each day the board was in session, and the board was required to attend before the county court in October, in case any persons appeared to show cause why the valuation of their property should not have been raised, it was held that the clerk was not entitled to a per diem for attending, with the board, on the county court in October. Hempstead County v. Goodlett (1905) 73 **Ark.** 596, 84 S. W. 787.

The clerk is not included, under the statute authorizing the court to allow sums to persons serving as assistants to the sheriff in preparing the courthouse for the reception of such court, and in preservation of order, and in attendance upon juries, and to persons performing any services under the order of the court. Rudisill v. Edsall (1873) 43 **Ind.** 377, where it was also held that no reference was intended to services of the clerk in attending upon the court in the statute providing that whenever there should appear a claim for official services rendered by any officer of a court of justice, and there did not appear to be any fees fixed by law as compensation therefor, the court, etc., should make an order, specifically making the allowance for such claim.

i. Sheriffs.

A sheriff cannot receive any per diem for attendance upon the court, when the statute does not provide for a compensation, although it required him to attend the court. Eakin v. Nez Perces County (1894) 4 **Idaho,** 131, 36 Pac. 702.

Where the statutes provided that, for any services which may be rendered by a constable, the sheriff shall have the same fees as the constable, and the constable is entitled to a per diem for attending court, pursuant to a notice of the sheriff, a sheriff is not entitled to a per diem for attending court. Ex parte Minier (1842) 2 Hill (N. Y.) 411.

A sheriff is not entitled to a per diem for attendance upon the commissioners' court of each county, that being a political body, and its duties largely legislative and ministerial; and it is not included within the per diem allowed for attendance upon the district and county courts, where the statute provides that, "for every day the sheriff or his deputy shall attend the district or county court, he shall receive" a per diem, "to be paid by the county." Robinson v. Smith County (1903) 33 **Tex.** Civ. App. 251, 76 S. W. 584.

In Daviess County v. Fitzgerald (1906) 40 **Ind.** App. 24, 79 N. E. 393, it was held that a sheriff was entitled to a per diem, for attendance upon the sessions of the circuit and commissioners' courts, besides his salary. The court does not refer to the statute in question, but gives, as authority for the proposition, Morgan County v. Crone (1905) 36 **Ind.** App. 283, 75 N. E. 826. In that case, the right of the sheriff seems to have been conceded, and the matter discussed by the court was another question.

A sheriff who is entitled to a per diem for attendance on courts of record is not entitled to a per diem for attendance before a justice of the peace. Sargent v. La Plata County (1895) 21 **Colo.** 158, 40 Pac. 366.

In People ex rel. Caldwell v. Saratoga County (1899) 45 App. Div. 42, 60 N. Y. Supp. 1122, where the statute provided that the sheriff should be en-

titled, for attending a term of court which he is required by law to attend, for each day a certain sum, the sheriff was held not entitled to a per diem for attendance at the surrogate's court, there appearing to be no provision of law requiring him to attend the sessions of that court.

And it has been held that a sheriff is not entitled to a per diem for attending upon the probate court, when not expressly requested by the probate judge so to do, and when it is not necessary for him to attend, although the statute provides that the sheriff shall attend upon the several courts of record held in his county, and that he shall receive, for attending any court of record, a certain per diem. Robson v. Dickinson County (1898) 8 Kan. App. 374, 55 Pac. 520.

The sheriff was held not entitled to a per diem for attending the county court on Saturdays on which the judge designated the court to be held in his chamber, for days when the judge was not present, where no adjournment of these courts was made by the sheriff, and he performed no service in regard thereto. People ex rel. Gray v. Livington County (1903) 89 App. Div. 152, 85 N. Y. Supp. 284.

Where the statute provided that sheriffs should be entitled to a per diem for attendance on the superior court, not to exceed twenty days per annum, and a later statute established a city court, and provided that the sheriff and his deputies "shall receive for their services the same fees as they are entitled to receive for similar services in the superior court," it was held that the sheriff was entitled to a per diem for not more than twenty days per annum, for attendance on the city court, independently of what services he might, during the same year, have rendered in the superior court, and of the compensation he received therefor. Floyd County v. Foster (1900) 112 Ga. 131, 37 S. E. 120.

A sheriff cannot be allowed a compensation on a mileage basis, when the statute makes his compensation on a per diem basis. Northern Trust Co. v. Snyder (1902) 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460; and his work done in a calendar day is only one day's work (Northern Trust Co. v. Snyder (1902) 113 Wis. 516, 89 N. W. 460).

See also Washoe County v. Humboldt County (1879) 14 Nev. 123 (supra, II.), and Philips v. Christian County (1899) 87 Ill. App. 481 (supra, II.).

A sheriff is entitled to a per diem for attendance upon a court, and also to another per diem for, on the same day, attending with prisoners, where the statute provides that the sheriff shall have a per diem of $3 for attendance upon the circuit or county or municipal court, and $1.50 per day, besides actual necessary expenses, for attending any court or officer with a prisoner. Holzhauer v. Milwaukee County (1877) 41 Wis. 639.

Where the statute provided that the sheriff should be allowed, in civil cases, "for attending each court, per day" a certain sum, it was held that the sheriff could not charge for the attendance of both himself and his deputy, on the same court. Crouch v. Plummer (1853) 17 Mo. 420.

When the judge of the superior court requires the sheriff and all his deputies to attend upon the sessions of that court, and the sheriff has been paid for such service the per diem fixed by the statute, the deputies have no claim, either in their own name or the name of the sheriff, against the county, for the services thus rendered. Floyd County v. Foster (1900) 112 Ga. 133, 37 S. E. 90.

A statute providing, "For attending court, bringing into and removing therefrom prisoners for arraignment trial and sentence, the sum of $3 per day for the sheriff or each deputy for each and every day of criminal court where the sheriff or deputy is actually present," contemplates the continuous service of either the sheriff or deputy in the criminal court. It does not contemplate an alternating service between the officer and his deputy, or deputies, during the same day, so as to entitle each to a per diem, where only one officer at any given time is required; but, if the service requires a concurrent attendance of more than

one officer, then the per diem would attach for each officer so serving. Caldwell v. Butler County (1901) 21 Pa. Dist. R. 20.

The county is only liable for the per diem for the attendance of the sheriff or his deputy upon the criminal district court; he may not charge for the attendance of two deputies, the statutes providing that each sheriff shall attend upon the court, and that he shall receive a per diem for each day the sheriff, by himself or a deputy, shall attend such court. Ledbetter v. Dallas County (1908) 51 Tex. Civ. App. 140, 111 S. W. 193.

In Sargent v. La Plata County (1895) 21 Colo. 158, 40 Pac. 366, it was held that a sheriff was not entitled to a per diem for services of a bailiff for the petit jury in a court of record, as the bailiff is but a deputy sheriff.

But in La Salle County v. Milligan (1892) 143 Ill. 321, 32 N. E. 196, the court said, as to the attendance of bailiffs upon courts: "We know of no law by which the sheriff may draw the per diem of bailiffs. They are individually, and independently of the salary and expenses allowed the sheriff, to be paid $2.50 per day for performing the duty. While they are the sheriff's underofficers, they are not deputy sheriffs, and the fees of bailiffs in no sense belong to or are part of the earnings of the office of the sheriff."

In La Salle County v. Milligan (Ill.) supra, the court said, as to sheriffs: "By law a per diem was to be allowed by the county for attendance upon the courts, and which, with other fees earned, formed a fund from which the salary, etc., might be paid. Moreover, if, as is frequently the case, two judges should be holding court in the same county at the same time, it is the duty of the sheriff to attend upon each, by himself or deputy. A reasonable construction of the statute would make it the duty of the county to make an allowance of the per diem in each court."

j. Other county officers.

In Seiler v. State (1902) 160 Ind. 605, 65 N. E. 922, it was held that the county auditor was entitled to a per diem for acting as a member of the county board of review, where the statute provided that the board of review should be "composed of the county assessor, county auditor and county treasurer, and two freeholders to be appointed by the judge of the circuit court, who shall each be paid out of the county treasury, the sum of $3 for each and every day while they are acting as members of said board." It was held that the auditor was not deprived of these fees by reason of a statute passed ten days later than the statute above quoted, and which fixed the compensation and prescribed the duties of certain officers; which later act provided that county officers named should receive the compensation specified in the act, and no other compensation whatever, and that, "where the auditor is required by law to perform any service not specially mentioned in this act, for which services the auditor shall be entitled, under the law existing before the taking effect of this act, to tax, charge, or receive any fee or compensation in his own favor for such service, he shall hereafter tax the amount on account of such service in favor of the county, and the same shall be collected and paid into the county treasury as elsewhere provided in this act." The court held that the word "fee" did not include a per diem, and that the word "compensation" referred to salaries.

In Hickman County v. Jackson (1913) 153 Ky. 551, 156 S. W. 391, where the statute provided that "the fees of the jailer shall be as follows: For attending county and quarterly courts, to be paid for out of the county levy, per day, not exceeding $2. For furnishing fuel and lights to county and quarterly courts, a reasonable compensation not exceeding two dollars a day, to be paid out of the county levy," the court said: "Our conclusions therefore may be summed up as follows: (1) Where the county judge holds a special term of the county court or the quarterly court in his office or in the clerk's office, the jailer is not entitled to any pay for attend-

ing the court. (2) If the county judge holds a regular or a special term of his court in the court room, the jailer should be paid for his attendance, if he in fact attends. (3) The jailer is entitled to pay for attending the regular terms of the county and quarterly court, no matter where held, if he in fact attends. (4) The trials of misdemeanor cases before the county judge, as judge of the county or quarterly court, stand as any other trial in the county or quarterly court, as to the jailer's right to compensation for attendance." And it was also held that the jailer was not entitled to any compensation for services in attending upon "examining trials" held before the county judge, but that he was entitled to compensation for attending an inquest of lunacy, if held in the court room; but, if not held in the court room, he was not so entitled.

Where, by the statute, a county surveyor is to receive a per diem for each day actually engaged in his duties as such officer, and the complaint alleges that he was entitled to his per diem for each day of his term not a holiday, it does not state a cause of action. Sayles v. Walla Walla County (1902) 30 **Wash.** 194, 70 Pac. 256.

For cases as to superintendents of schools, see supra, I.

k. Town officers.

In general, double per diems are not favored.

Thus, the supervisor of a town is not entitled to charge a per diem as for each day actually and necessarily spent in the service of the town, where he also charges for the same day, a per diem for attending meetings of the boards of the town of which he is, by law, a member, or which he is required to attend as supervisor, where the statute provides that the compensation of supervisors is a certain per diem, for each day actually and necessarily spent in the service of the town, in the duties of their respective offices. Wilson v. Bleloch (1908) 125 App. Div. 191, 109 **N. Y.** Supp. 340, affirmed in (1909) 195 N. Y. 592, 89 N. E. 1115.

So, a supervisor, who is ex officio overseer of the poor, is not entitled to any per diem from the town for services as overseer, where the business in that county is a county charge, and not a town charge. Bruner v. Madison County (1884) 111 **Ill.** 11.

A township trustee, who is ex officio overseer of the poor, can receive but one per diem for a day's service; that is, he cannot charge the same day both against the town, as trustee, for the services to the town, and also against the county, for services as overseer of the poor, the statute providing that "the per diem of township trustees shall be as follows: For each actual day's service they shall be allowed, to be paid out of the township fund, two dollars: Provided, that for all services as overseer of the poor, said township trustee shall be paid out of any funds in the county treasury not otherwise appropriated, on the order of the board of county commissioners." Montgomery County v. Bromley (1886) 108 **Ind.** 158, 8 N. E. 923.

Where the assessors are entitled to a per diem for each day actually and necessarily devoted by them to the service of the town, in the duties of their respective offices, when no fee is allowed by law for the services, they are not allowed to charge more than one per diem for the same day; that is to say, they are not entitled to charge their regular per diem for a day, and also another per diem for the same day, spent in making up a list of trial jurors, in conjunction with the supervisor and town clerk, as required by the Code. Wilson v. Bleloch (1908) 125 App. Div. 191, 109 **N. Y.** Supp. 340.

A statutory per diem for each day's services as assessors cannot be retained by three individuals who were, at the same time, the selectmen, overseers of the poor, assessors, and board of health, where the town has voted "that the salaries of the selectmen, overseers of the poor, assessors, and board of health, be $1,200 per annum, or $400 for each individual." Welch v. Emerson (1910) 206 **Mass.** 129, 91 N. E. 1021.

In this connection, it may be noted that it was held in Chapin v. Wilcox (1896) 114 Cal. 498, 46 Pac. 457, that the total that may be received by a supervisor for per diem and mileage cannot exceed $400 per annum, where the statute provides that "supervisors shall receive seven dollars per diem, and twenty-five cents per mile in traveling to and from their respective residences to the county seat. All of which compensation in the aggregate shall not exceed four hundred dollars per annum each."

Members of a committee, chosen by towns to sell by public vendue the privilege of taking certain kinds of fish in certain rivers, authorized by statute to regulate the time and manner of fishing and to remove obstructions to the passage of the fish, and entitled to receive, out of the proceeds of the fishery, so much for every day in which they may be actually engaged in performing the duties required of them, are not entitled to recover per diems for time spent in watching and inspecting the rivers, in order to prevent the violation of the statute, as those services were not specified or enjoined as a duty. Robinson v. Wareham (1854) 2 Gray (Mass.) 315.

Where a town clerk is entitled to certain fees for filing papers, etc., and also to $2 for each day actually and necessarily devoted to the service of the town and the duties of his office, when no fee is allowed by law for such service, he is not entitled to $2 per day, as a custodian of the papers required to be filed with him. Re Hempstead (1899) 36 App. Div. 321, 55 N. Y. Supp. 345, affirmed in (1899) 160 N. Y. 685, 55 N. E. 1101.

A town clerk is entitled to a per diem for making tax lists for the town, by the direction of commissioners of highways, to do which work it is necessary for him to go to the office of the county clerk at the county seat outside the town, where the statute provided that the town clerk should receive for his services, a per diem when attending the town business out of town, and a per diem for town business in town, provided he should receive fees and not a per diem for serving notices, for filing any paper, for posting up notices, for recording any order or copying any record in his office, and for copying by-laws, or for posting a publication; as the making of the tax list did not fall within any of the services described in the proviso of the statute. Ross v. Collins (1902) 106 Ill. App. 396.

Where the statute provided that the town clerk of a certain town "shall be entitled to receive the same compensation for attending all meetings of town boards in his town as each other member of such board, in addition to all compensation, salary and fees to which he is now entitled by law for the performance of all other duties of said office," the town clerk is not entitled to a per diem for attending any other boards in the town except the town board, as there is but one town board in a town, and the plural in the statute was a mistake. The statute does not relate to boards of assessors, boards of auditors, and boards of highway commissioners. Wilson v. Bleloch (1908) 125 App. Div. 191, 109 N. Y. Supp. 340. This case seems contrary to a part of the opinion in Re Hempstead (1899) 36 App. Div. 321, 55 N. Y. Supp. 345, affirmed in (1899) 160 N. Y. 685, 55 N. E. 1101, where the court said: "So far as the town clerk is required to attend upon the town board of his town (Laws 1893, § 3, chap. 344), he is entitled to receive the same compensation as any other member of the town board, in addition to his other compensation allowed by law. It is quite clear that he would not be authorized to charge for more than one day for a meeting of the town board, where the duties to be performed for that day related to a particular function. But in those instances where the town board, acting through different members, have meetings, as there would be different members of each board, it would be an entirely different meeting, and for each of such meetings we are of opinion that he became entitled to charge per diem compensation for each board. But in those cases where the board is composed of the same individuals performing service for the

town, although under different names, we think there can be but one per diem compensation for such service, and to the extent that the town clerk or other members of such board have charged and received compensation for separate meetings of the same persons under different names, such charge is not authorized by law, and is, therefore, illegal."

l. Miscellaneous.

The officers for registration of voters, under the statute allowing a per diem for days of appionted service, are entitled to a per diem not only for the days occupied by their actual sittings for registration, but for days occupied in making and publishing, in handbill form, a complete list of all persons registered at such several sittings. Ryninger v. Keating (1883) 60 **Md.** 334.

Where the trustees of public institutions were entitled "to receive the sum of three ($3) dollars per day for each day employed in attendance upon said sessions, and all traveling expenses necessarily incurred therein," it was held that a trustee was entitled to charge as attendance, the necessary time spent in traveling to and from the meetings of the board. State ex rel. Van Horn v. Briggs (1895) 5 **N. D.** 70, 63 N. W. 206.

Where the statute authorized a per diem for each day's necessary attendance of a justice of the peace upon the hearing or examination of accused, it was held that the justice was entitled to charge the per diem for each day he necessarily attended; for instance, when the arraignment of the defendant was had, if there was a hearing; if the case was necessarily adjourned, and he again attended, he became entitled to his statutory fees for such second attendance, if necessary; "and it would matter not whether evidence was taken or not, the fee is for the necessary attendance, and the magistrate is entitled to charge therefor." Re Hempstead (1899) 36 App. Div. 321, 55 N. Y. Supp. 345, affirmed in (1899) 160 N. Y. 685, 55 N. E. 1101.

Where the statute allows a railroad commissioner a fixed sum per day for his services, and his necessary expenses when away from home, the time necessarily spent by him traveling to and from the place of his appointment is time spent in the service of the state, and the law allows for this service and expenses, if they are necessary. State v. Howard (1909) 83 Vt. 6, 74 Atl. 392.

In Hilton v. Saline County (1897) 5 **Kan.** App. 429, 49 Pac. 323, it was held that a city assessor was not prima facie entitled to collect in his own name a per diem for all the assistants he might employ in making and returning the assessment of the city, where the statute provided that "township or city assessors shall receive three dollars per day for each day actually and necessarily employed in assessing the property of their township or city, and in making the return thereof, to be paid by the respective county. The account for such services shall be verified by the affidavit of the assessor; but the board of county commissioners may have the power to make the aggregate amount less than charged: Provided, It shall appear to them that full time was not made by the assessor for which he has charged; and any such assessor shall have authority to appoint a deputy, whose compensation shall be the same as the principal."

Where the statute provided: "Each member of the general council shall receive three dollars for any stated or called meeting of said board; but each absentee shall forfeit double his pay, unless he be absent from the city, or too sick to attend. . . . And the attendance of members may be enforced by rules or ordinances with appropriate fines, not exceeding two dollars," it was held that each member was to receive as pay for all his services, $3 for each day his board might be in session, whether he was present or not; if absent without the statutory excuse, he was liable to forfeit double his pay, if the council imposed it. If however, he should be too sick to attend, or be out of the city, then he forfeited nothing because of such ab-

sence. Barron v. Kaufman (1909) 131 Ky. 642, 115 S. W. 787.

A commissioner of estimate and assessment, on a matter of acquisition of property by the city, is not entitled to a per diem for attending a meeting of the commissioners, where more does not appear than that a meeting was held and commissioners were present, where the statute provided that "each of the commissioners of estimate and assessment shall receive ten dollars for each day upon which he attends a meeting of the said commissioners and is actually and necessarily employed in the performance of the duties imposed upon them by this act, at the offices provided for said commissioners by the bureau of street openings in the law department, or at a meeting of the commissioners to view the premises." Re New York (1903) 78 App. Div. 87, 79 N. Y. Supp. 793, where it also was held that a commissioner was entitled to a per diem for attending a stated meeting, when nothing could be done on account of the absence of the other commissioner, and that the commisioners should be entitled to per diems for adjournments, on good cause shown, either by the corporation counsel or the property owner.

In Re New York (1902) 77 App. Div. 433, 79 N. Y. Supp. 192, it was held that like commissioners are not entitled to a per diem for unnecessary adjournments, although granted on the motion of the corporation counsel.

For bailiffs, see McIntosh County v. Whitaker (1916) — **Okla.** —, 158 Pac. 1136 (supra, II.), and LaSalle County v. Milligan (1892) 143 **Ill.** 321, 32 N. E. 196 (supra, V. i.). For constable, see Connors v. Shelby County (1904) 113 **Tenn.** 177, 81 S. W. 598 (supra, III.). For short hand reporters, see Ferguson v. Pottawattamie County (1904) 126 **Iowa**, 108, 101 N. W. 733 (supra, II.) and STATE EX REL. GREB v. HURN, ante, 274.

It may be noted that a stenographer, entitled to pay for "each week of part of a week in which the court shall be held," was held entitled to a week's pay, where the court, after organization, on the petition of citizens, adjourned the term. Wood v. Chickasaw County (1904) 85 **Miss.** 120, 37 So. 642.

B. B. B.

ANTON STRYK, Respt.,

v.

ALFONSE MNICHOWICZ, Appt.

Wisconsin Supreme Court—April 3, 1918.

(167 Wis. 265, 167 N. W. 246.)

Fraud — false representations as to age — liability.

1. One induced to employ a minor under statutory age by false representations of the minor's father that he had attained the prescribed age may hold the father liable for the expenses to which he is subjected by a recovery against him by the minor because employed in violation of the statute, for injuries received in the employment.

[See note on this question beginning on page 302.]

Evidence — employment of minor.

2. In an action to hold a man liable for the expenses to which an employer was put for employing his son under false representations as to his age, evidence is not admissible that plaintiff knowingly employed boys under the statutory age, if there is nothing to show that he employed them at prohibited occupations or without a permit.

Same — absence of knowledge of employer.

3. In an action to hold a man liable

for the expenses to which an employer was put for employing his son under false representations as to his age, evidence is not admissible that witness worked for plaintiff when under age, if there is nothing to show that plaintiff knew or ought to have known that the witness was under age.

Costs — failure to perfect judgment.

4. A statute requiring the successful party in an action to perfect his judgment within a specified time after filing of findings or rendition of verdict, or lose his right to costs, does not apply to a case where a mere special verdict finding the facts alone is rendered.

(Owen and Eschweiler, JJ., dissent.)

APPEAL by defendant from a judgment of the Circuit Court for Taylor County in favor of plaintiff in an action brought to recover the damages that plaintiff was compelled to pay to defendant's son for injuries sustained by him while in plaintiff's employ under alleged false representations by defendant as to his age. *Affirmed.*

Statement by **Winslow**, Ch. J.:

Action for damages for deceit. The plaintiff operates a box factory. The defendant's son, Alfonse, Jr., was employed by the plaintiff in his factory October 14, 1914, and injured in the course of that employment December 11, 1914. The boy was but fourteen years of age at the time of his employment, but the plaintiff claims that the defendant, for the purpose of securing the employment of his son, represented that the son was over sixteen years of age at the time, and that the son was employed on the faith of that representation. The making of any such representation is denied by the defendant. The son's leg was broken while working about some of the machinery of the mill. The plaintiff provided medical care, and offered compensation at the rate provided by the Workmen's Compensation Law, but it was refused by the boy's parents, and action was brought by the boy against the plaintiff for damages on the ground that he was under sixteen years of age and had been put at work at machinery dangerous to life and limb, in violation of § 1728a, subd. 2, Stat. 1915, which forbids the employment of minors under sixteen years of age at any employment dangerous to life or limb. This action was tried, and resulted in a special verdict, finding that the boy was under sixteen years of age when injured; that the machine at which he was employed was dangerous to the life and limb of a person under that age, and assessing the damages at $250. The plaintiff was insured against liability under the Workmen's Compensation Law, but the policy did not cover damages suffered by reason of injuries or death of a minor employed contrary to law. The plaintiff therefore was obliged to pay the judgment in favor of the boy and also defray the expenses of the litigation. In this action he seeks to recover those sums. The jury returned the following special verdict:

"Question No. 1. Did Alfonse Mnichowicz, in October, 1914, and before his son Alfonse entered the employ of Anton Stryk and Malim Stryk, represent to said Malim Stryk that the boy was then sixteen years old? Answer. Yes.

"Question No. 2. If your answer to the first question is "Yes," then did the defendant, Alfonse Mnichowicz, Sr., make such representation for the purpose of inducing the plaintiff and Malim Stryk to employ the defendant's son Alfonse? Answer. Yes.

"Question No. 3. If your answer to the first question is 'Yes,' then did the plaintiff rely upon such representation at all of the time the boy was employed by the plaintiff up to the time of his injury? Answer. Yes.

"Question No. 4. If your answer to the first question is 'Yes,' and your answer to the third question is 'Yes,' then did the plaintiff, up to

the time of the boy's injury, exercise ordinary care in relying upon the representation so made by the defendant? Answer. Yes.

"Question No. 5. What sum did the plaintiff reasonably expend in addition to the payment of the judgment of $362.62 as a result of the employment of the boy Alfonse? Answer. $200."

The defendant appeals from judgment on the verdict in plaintiff's favor.

Mr. **A. L. Smongeski**, for appellant:

Admitting that the defendant misrepresented the age of his son for the purpose of inducing the copartners to hire his son, yet, after the dissolution of the partnership, there was no privity of contract or otherwise between plaintiff and defendant. The dissolution of a firm operates to terminate the contract of employment.

Meysenburg v. Littlefield, 135 Fed. 184; Holmes v. Caldwell, 8 Rich. L. 247; Hurlbut v. Post, 1 Bosw. 28; Holbert v. Keller, 161 Iowa, 723, 142 N. W. 962; Crossman v. Gibney, 164 Wis. 395, 160 N. W. 172; Hobson v. Cowley, 27 L. J. Exch. N. S. 205, 6 Week. Rep. 334; Brace v. Calder [1895] 2 Q. B. 253, 64 L. J. Q. B. N. S. 582, 14 Reports, 473, 72 L. T. N. S. 829, 59 J. P. 693; Labatt, Mast. & S. § 217, p. 678; Puffer v. Welch, 144 Wis. 506, 129 N. W. 525, Ann. Cas. 1912A, 1120.

To support an action of deceit, the misrepresentations must have been made to the plaintiff, or to the third person, with the intention that they be communicated to the plaintiff, or so made to a class of which the plaintiff is a member, or so made to the public generally,—in each case with the intention on the part of the person making such misrepresentations that the plaintiff should rely and act thereon; and plaintiff must have so relied and acted.

Greene v. Mercantile Trust Co. 128 App. Div. 914, 112 N. Y. Supp. 1131; Lembeck v. Gerken, 88 N. J. L. 329, 96 Atl. 577; Western U. Teleg. Co. v. Schriver, 4 L.R.A.(N.S.) 678, 72 C. C. A. 596, 141 Fed. 538; Nash v. Minnesota Title Ins. & T. Co. 159 Mass. 437, 34 N. E. 625; Comstock v. Ames, 3 Keyes, 357, 1 Abb. App. Dec. 411; McCracken v. West, 17 Ohio, 16; Wells v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436; Nickerson v. Russell, 172 Mass. 584, 53 N. E. 141.

Plaintiff cannot recover if the parties are in pari delicto.

Miller v. Larson, 19 Wis. 463; Sauerhering v. Rueping, 137 Wis. 407, 119 N. W. 184; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520; Pinoza v. Northern Chair Co. 152 Wis. 473, 140 N. W. 84; Stetz v. F. Mayer Boot & Shoe Co. 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675; State v. Sasse, 6 S. D. 212, 55 Am. St. Rep. 834, 60 N. W. 853; State v. Gulley, 41 Or. 318, 70 Pac. 385; Com. v. Joslin, 158 Mass. 482, 21 L.R.A. 449, 33 N. E. 653; People v. Curtis, 129 Mich. 1, 95 Am. St. Rep. 404, 87 N. W. 1040; People v. Werner, 174 N. Y. 132, 66 N. E. 667; State v. Cain, 9 W. Va. 559; Olson v. State, 143 Wis. 413, 127 N. W. 975; Reismier v. State, 148 Wis. 593, 135 N. W. 153; Nelson v. State, 111 Wis. 394, 87 Am. St. Rep. 881, 87 N. W. 235; Martachowski v. Orawitz, 14 Pa. Super. Ct. 175; McLendon v. Harrell, 67 Ga. 440.

Fraud is not actionable unless the deceived party suffers damage.

20 Cyc. 42; Potter v. Necedah Lumber Co. 105 Wis. 25, 80 N. W. 88, 81 N. W. 118; Castleman v. Griffin, 13 Wis. 535; Shaw v. Gilbert, 111 Wis. 191, 86 N. W. 188; Haueter v. Marty, 156 Wis. 208, 145 N. W. 777.

Mr. **Herman Leicht**, for respondent:

Plaintiff was entitled to recover the damages sustained by reason of defendant's deceit.

20 Cyc. 80; Wartemberg v. Spiegel, 31 Mich. 400; Barnes v. Brown, 32 Mich. 146; Hess v. Culver, 77 Mich. 598, 6 L.R.A. 498, 18 Am. St. Rep. 421, 43 N. W. 994.

Where a statement is a positive assertion, not improbable or unreasonable, it may be relied upon without investigation.

20 Cyc. 33; Woteshek v. Neuman, 151 Wis. 365, 138 N. W. 1000; Jacobsen v. Whitely, 138 Wis. 434, 120 N. W. 285; Hall v. Bank of Baldwin, 143 Wis. 303, 127 N. W. 969; Rogers v. Rosenfeld, 158 Wis. 285, 149 N. W. 33.

Assuming that the statements relied on were not the sole ground for the employment, the law does not require proof that the deceit alone brought about the action of the injured party.

20 Cyc. 41; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188; Darlington v. J. L. Gates Land Co. 151 Wis. 461, 138 N. W. 72, 139 N. W. 447; Davis v. Nuzum,

72 Wis. 439, 1 L.R.A. 774, 40 N. W. 497; Beetle v. Anderson, 98 Wis. 5, 73 N. W. 560; Krause v. Busacker, 105 Wis. 350, 81 N. W. 406; Benolkin v. Guthrie, 111 Wis. 554, 87 N. W. 466; Hurlbert v. T. D. Kellogg Lumber & Mfg. Co. 115 Wis. 225, 91 N. W. 673; J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505; Post v. Roberts, 127 Wis. 605, 106 N. W. 1099; Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

Winslow, Ch. J., delivered the opinion of the court:

The following propositions are decided in this case:

I. Where a person is induced by the false representation of another to do an act which, in consequence of such misrepresentations, he, without negligence on his part, believes to be neither illegal nor immoral, and which would not be illegal or immoral if the representation were true, but which is in fact a criminal offense, he may recover from the maker of the representation any damages sustained by him proximately resulting from the act. Burrows v. Rhodes [1899] 1 Q. B. 816, 68 L. J. Q. B. N. S. 545, 63 J. P. 532, 48 Week Rep. 13, 80 L. T. N. S. 591, 15 Times L. R. 286; Morrill v. Palmer, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829; Hess v. Culver, 77 Mich. 598, 6 L.R.A. 498, 18 Am. St. Rep. 421, 43 N. W. 994.

Fraud—false representations as to age—liability.

II. The rule that a minor, suffering an injury while engaged in an employment which the law forbids him to be engaged in on account of his age, cannot be barred of his recovery nor subjected to an action or counterclaim for damages because he misrepresented his age when he was employed (Stetz v. F. Mayer Boot & Shoe Co. 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675) does not apply to the father or other third person upon the faith of whose false representations the minor was employed. The law prohibiting the employment of children of tender years at dangerous occupations is for the protection of the children themselves, and public policy forbids that they should be capable of dispensing with its provisions. The same consideration, however, does not apply to the act of the parent. No good reason is perceived why he should not answer for his wrong.

III. The findings of the jury in the present case are supported by sufficient evidence, and, when taken in connection with admitted facts, sustain the judgment.

IV. The plaintiff was asked on cross-examination if he knowingly had in his employ, working at the factory, boys under sixteen years of age at the time he hired the defendant's son, and an objection to the question was sustained. There was no offer to show that such boys, if employed, were employed in violation of law; i. e., at any prohibited occupation or without a permit such as the law requires. There may be other reasons justifying the ruling, but this seems sufficient.

Evidence—employment of minor.

V. Witnesses were called to testify that they worked for the plaintiff on prohibited machinery several years ago, when they were under sixteen years of age, and objection to such testimony was sustained. This ruling was correct, for the reason that there was no offer to show that the plaintiff either knew, or ought to have known, that the witnesses were under the required age.

Same—absence of knowledge of employer.

VI. Section 2894a, Wis. Stat. requiring the successful party to perfect the judgment within sixty days after the filing of findings or rendition of a verdict, or forfeit his right to costs, plainly does not apply to a case in which a special verdict finding the facts alone is rendered. Colle v. Kewaunee, G. B. & W. R. Co. 149 Wis. 96, 135 N. W. 536. No one can tell in such case which party is successful until the court makes a decision or

Costs — failure to perfect judgment.

finding on the question. Necessarily the sixty days does not begin to run until that decision is made.

Other questions are raised, but they are not deemed of sufficient merit to require discussion.

Judgment affirmed.

Owen, J., dissenting:

The statutes of this state prohibit the employment of minors under specified ages in certain occupations dangerous to life and safety, and prescribe criminal penalties for their violation. In Pinoza v. Northern Chair Co. 152 Wis. 473, 140 N. W. 84, it was held that one who employed minors in violation of such statutes was guilty of gross negligence, and was practically defenseless in an action brought for damages for personal injuries sustained by a minor while so employed. In Stetz v. F. Mayer Boot & Shoe Co. 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675, it was held that neither the misrepresentation of the minor so employed, nor that of his father, with reference to his age at the time of his employment, could be shown in defense to an action by the minor to recover for personal injuries sustained in such employment. These cases were grounded on considerations of sound public policy, and have been accorded distinct legislative and general public approval. They have compelled respect for our Child Labor Laws, and have been more potent in restraining their violation than criminal penalties and all other agencies tending to that accomplishment.

It is now decided by this court that where a father misrepresents to an employer of labor that his son is of employable age, and such son is employed pursuant to such representation, and sustains injuries while in such employment, and a recovery is had of such employer for injuries sustained by the minor while so employed, the employer may sue the father in an action for deceit because of the false representations concerning the age of the child, and recoup himself for damages to which he was subjected in the personal-injury suit of the son. The practical effect of this decision cannot be doubtful. It is as certain as the instincts of human nature. The Pinoza and Stetz Cases are devitalized. They have lost their potency as a restraining influence upon those who would employ children in defiance of our statutes.

There are just two classes interested in the employment of child labor: First, the parents, desirous of converting their children into wage earners; and, second, those who may profitably use such labor. The lawmakers have recognized this, and in order to compel observance of child labor restrictions, have visited penalties upon the parents, and upon the employers of such labor. The two interested in the employment of such labor, under the decision in this case, may now connive to this end without fear of the consequences arising from the doctrine of the Pinoza and Stetz Cases. The father may take his son to an employer of labor, give assurance that he is of employable age, and the employer may rely solely upon such assurance and set the child at work. It is true that if injured while so employed, the representation made by the father will not avail the employer in an action brought in the name of the minor for a recovery for personal injuries. But we may rest assured that such action will not be brought. From the very nature of things, such action is under the practical control of the father; and he has but to be reminded that, if such action be brought, the employer will proceed to recoup himself in a tort action against the father. Right here it is said that this weapon in the hands of the employer will not be effective, because the father, as a rule, is irresponsible, and the cause of action which this decision gives to the employer will not restrain the father from insisting upon the action in favor of the son. To this suggestion there are two answers:

First, that the effect of this decision should be tested upon the hypothesis that the father is responsible, in which case it must be conceded that the cause of action given by the Pinoza and Stetz Cases in favor of the minor results in no harm to the employer. The second answer is that the employer may so picture the dire consequences of a tort judgment to the father that, rather than invite their visitation, he will permit the son's action to lie dormant. This, it seems to me, is the inevitable, practical result of the decision in this case.

The right of action here sanctioned may well be denied upon grounds of public policy, the promotion of the general welfare, and in the interests of the enforcement of our Child Labor Laws. It may also be firmly grounded upon another consideration, and that is, that the employer of labor has no right to rely upon the representation of the father who is so keen to convert his children into revenue producers that legislative restraint in the form of criminal penalties is deemed necessary.

By § 1728j, Statutes, it is provided that when there is any doubt in a court proceeding as to the age of any child, a verified baptismal certificate or a duly attested birth certificate shall be produced and filed with the court. In case such certificate cannot be secured, upon proof of such fact, the record of age stated in the first school enrolment of such child shall be admissible as evidence thereof. It requires no argument that in this state, at this time, the employment of children of unsuitable age in dangerous employments is of great public concern. Our comprehensive statutes upon the subject disclose indubitable evidence of legislative recognition of that fact, and the decisions in the Pinoza and Stetz Cases indicate a commendable judicial concurrence. When the importance of this matter is so generally conceded, I hold that an employer of labor should not be permitted to rely upon the representations made by the father concerning the age of his child whom he proffers for employment. His responsibility should be less shifting and evasive. He should be required to satisfy himself in some of the methods mentioned in § 1728j, Statutes, or by some other reliable evidence, that the minor is of employable age. For these reasons I think the judgment in this case should be reversed, with instructions to dismiss plaintiff's complaint. I therefore most respectfully dissent.

Eschweiler, J.:

I concur in the foregoing dissenting opinion of Justice Owen.

ANNOTATION.

Liability for misrepresenting age of child to one who, having employed a child below employable age, has incurred liability for injury to him.

The decision in the reported case (STRYK v. MNICHOWICZ) ante, 297, upholding the contention that one induced to employ a minor who is under the statutory age, by false representations of the minor's father that he had reached the statutory age, may recover from the father the outlay to which he has been subjected by a recovery against him by the minor for injuries sustained while so employed in violation of statute, is a novel one; at least, an extended search has revealed no similar case. In this connection it should be remembered that the court points out that the rule applies to the father or other third person, and that the fraud may be made the basis either of an independent action to recoup the outlay or of a counterclaim for damages. This, of course, means a counterclaim in an action by the father for the damages sustained by him because of the injury.

G. J. C.

FLORIDA EAST COAST RAILWAY COMPANY, Appt.,
v.
CITY OF MIAMI.

Florida Supreme Court—August 13, 1918.

(— Fla. —, 79 So. 682.)

Municipal corporation — way over railroad.

1. A city has the right to purchase a right of way over the lands of a railroad company. It may pay for the same in cash, or it may, in consideration of the benefits which the city derives from the opening of a street over the railroad company's land, take upon itself the expense of affording protection to persons and property using the street.

[See note on this question beginning on page 316.]

Contract — construction.

2. In construing a contract, no word contained in it is to be treated as a redundancy if any meaning reasonable and consistent with other parts can be given to it.

Same — "put in" — "operated" — "maintained."

3. In a contract in which the terms "put in," "operated," and "maintained" are used, each describes a separate and distinct act or class of acts, and neither means exactly the same as the other, and no one of them can be rejected as surplusage.

Municipal corporation — guards at crossing.

4. Where a city receives from a railroad valuable property rights which it could not have taken without just compensation, and also received other and greater benefits in the removal of switching operations from the heart of the city to several miles distant, for which the only consideration on the part of the city was that it would bear the expense of operating police and mechanical guards at the crossing, such obligation on the part of the city is not a contract to barter away its police power.

Same — contract for street crossing.

5. A contract between a city and a railway company whereby the latter, in consideration of the city bearing the expense to put in, operate, and maintain a street crossing, grants to the city a right of way over its property for such street, is not a bartering or contracting away of the police power of the city.

Headnotes by BROWNE, Ch. J.

(Whitfield and West, JJ., dissent.)

APPEAL by complainant from a decree of the Circuit Court for Dade County sustaining a demurrer to and dismissing a bill filed to enjoin defendant from taking any action to enforce an ordinance providing for safety gates at crossings. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Armstead Brown** and **Shutts, Smith, & Bowen,** for appellant:

An ordinance of this character which has become a contract accepted and acted upon cannot be repealed by the city, nor can its obligation be avoided by the railroad.

Turner v. Cruzon, 70 Iowa, 202, 30 N. W. 483; Washington Female Seminary v. Washington, 18 Pa. Super. Ct. 555; 3 McQuillin, Mun. Corp. ¶ 1277.

Each of the terms used in the ordinance in question described a separate and distinct act.

McChesney v. Hyde Park, 151 Ill. 634, 37 N. E. 858; Nagel v. Missouri P. R. Co. 75 Mo. 653, 42 Am. Rep. 418; Brenn v. Troy, 60 Barb. 417; Swanson v. Chicago, M. & St. P. R. Co. 79 Minn. 398, 49 L.R.A. 625, 82 N. W. 670.

When the contract between the city and the railway company was made, the railroad right of way at or opposite

the end of Eleventh street was the private property of the railway company, owned by it in fee simple, and being used for railroad purposes, to wit, station facilities, which could not be condemned by the city.

Elliott, Railroads, §§ 632, 966, 1104; Ft. Wayne v. Lake Shore & M. S. R. Co. 18 L.R.A. 367, note; Dill. Mun. Corp. § 1020; McQuillin, Mun. Corp. § 1500.

The city could not extend the street over plaintiff's right of way without making compensation.

Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155; McQuillin, Mun. Corp. § 1513.

Under the peculiar circumstances and conditions of the case the city had the right to make the contract; as to it it was an eminently fair contract that in nowise prevents it from doing anything it wants to make the crossing safe for public use, and hence does not impair its police power.

Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; Barber Asphalt Paving Co. v. Louisville, 123 Ky. 687, 9 L.R.A. (N.S.) 154, 97 S. W. 31; Albia v. Chicago, B. & Q. R. Co. 102 Iowa, 624, 71 N. W. 541; Minneapolis, St. P. R. & D. Electric Traction Co. v. Minneapolis, 50 L.R.A.(N.S.) 143, note; Detroit v. Detroit United R. Co. 133 Mich. 608, 95 N. W. 736, 134 Mich. 11, 104 Am. St. Rep. 600, 95 N. W. 922, 99 N. W. 411; Dill. Mun. Corp. 5th ed. p. 1616.

Messrs. **Hudson, Wolfe, & Cason,** for appellee:

A true construction of the contract will lead to the rejection of the word "operate" altogether as mere surplusage.

Rhodes v. Matthew, 67 Ind. 131; McChesney v. Hyde Park, 151 Ill. 634, 37 N. E. 858; Cummings v. Brooklyn City R. Co. 104 N. Y. 669, 10 N. E. 855.

A municipality, as a governmental agency acting and bound always as a trustee of the powers delegated to it, may not, by contract, license, or by law, surrender or restrict any portion of the public power conferred upon it.

Jacksonville v. Ledwith, 26 Fla. 163, 9 L.R.A. 69, 23 Am. St. Rep. 558, 7 So. 885; 28 Cyc. 696; Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 Pac. 747, Ann. Cas. 1913D, 646; Tiedeman, Pol. Power, § 189; Platte & D. Canal & Mill Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; 8 Cyc. 974; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; 3 McQuillin, Mun. Corp. § 1169; New Albany v. New Albany Street R. Co. 172 Ind. 487, 87 N. E. 1084; Brenham v. Brenham Water Co. 67 Tex. 542, 4 S. W. 143; State ex rel. Minneapolis v. St. Paul M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; New Orleans Gaslight Co. v. Louisiana Light & P. H. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748.

Even in condemnation proceedings for the taking of a right of way for a street over railroad property, the cost of maintaining gates and watchmen required by the city in the exercise of its police power, and the increased cost of operation and interruption in traffic, are not elements of damages in fixing the compensation to be paid the railroad company.

Chicago & N. W. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Morris & E. R. Co. v. Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363; Portland & R. R. Co. v. Deering, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670; 2 Lewis, Em. Dom. § 733; New York C. & St. L. R. Co. v. Rhodes, 171 Ind. 521, 24 L.R.A.(N.S.) 1225, 86 N. E. 840; Boston & M. R. Co. v. York County, 79 Me. 386, 10 Atl. 113; Lake Shore & M. S. R. Co. v. Chicago, 148 Ill. 509, 37 N. E. 88; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109.

Where the use by the railroad company will not be materially impaired or destroyed by the taking for street purposes, such taking is proper.

McQuillin, Mun. Corp. § 1500; Louisville & N. R. Co. v. Louisville, 131 Ky. 108, 24 L.R.A.(N.S.) 1213, 114 S. W. 743; Re Folts Street, 18 App. Div. 568, 46 N. Y. Supp. 43; Lake Erie & W. R. Co. v. Kokomo, 130 Ind. 224, 29 N. E. 780; Poulon v. Atlantic Coast Line R. Co. 123 Ga. 605, 51 S. E. 657; Cicero v. Lake Erie & W. R. Co. 52 Ind. App. 298, 97 N. E. 389; Battle Creek & S. R. Co. v. Tiffany, 99 Mich. 471, 58 N. W. 617; Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423; Chicago & N. W. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Chicago G. W. R. Co. v. Mason City, 155 Iowa, 99, 135 N. W. 9; Delaware & H. Canal Co. v. Whitehall, 90 N. Y. 21; Chi-

cago, M. & St. P. R. Co. v. Starkweather, 97 Iowa, 159, 31 L.R.A. 183, 59 Am. St. Rep. 404, 66 N. W. 87.

Browne, Ch. J., delivered the opinion of the court:

This is a suit brought by the Florida East Coast Railway Company against the city of Miami to have an ordinance of the city, which required all railway companies operating any line of railway along and over certain streets in the city of Miami to provide and maintain and properly operate safety gates for the protection of persons from trains and locomotives approaching the crossings of said streets, declared null and void, in so far as it requires the complainant to provide, maintain, and operate safety gates at the crossing on Eleventh street, and for an injunction restraining the defendant, its officers, agents, and servants, from taking any action to enforce the ordinance in so far as it applies to the complainant, and to restrain the defendant from taking any action to compel it to provide, maintain, and operate safety gates at the crossing at Eleventh street.

A demurrer to the bill was sustained, and the bill dismissed, and the complainant brings the cause to this court on appeal.

The bill alleges that for many years prior to the 3d of September, 1914, the complainant was the owner in fee simple of a right of way 100 feet wide in the city of Miami at a point where, if extended, the street known as Eleventh street would cross its right of way—"on which right of way there was located at and in close proximity to said point certain railroad tracks, yards, and station facilities, for the movement of locomotives and trains, both freight and passenger, for the switching of cars, etc., one of said tracks thereon located being the main line of your orator's railway between Jacksonville, Florida, and Key West, Florida, and the platform of orator's passenger station extended across where said Eleventh street, if extended, would intersect said right of way; that this and adjoining portions of complainant's right of way were utilized for certain of orator's railroad operations, and on account of these operations being carried on in such close proximity to the business portion of the city of Miami, the city council of said city desired the removal of certain of its operations from this portion of said right of way, and was desirous of securing the opening of said Eleventh street as an important public thoroughfare of said city, across what was at that time private railway property, free from any easement for public use as a street or highway, and which was being put to such use for station and railroad purposes as to make it very doubtful whether said city could, by condemnation proceedings or other legal process, compel your orator to submit to the opening and extension of said Eleventh street across the same."

"That to remove its through freight operations, its coaling facilities, and the said portion of its passenger station platform from their then location, described in the preceding paragraph, and to relocate and establish the same, with its yards and other facilities, so as to comply with the desire of said city council, and to make practicable the opening up of said Eleventh street through said right of way, would require the expenditure of large sums of money by the railway company."

The bill in substance further alleges that after some negotiations between the authorities of the city of Miami and the officers of the complainant company, an ordinance was adopted by the city council of September 3, 1914, in which it was stated that, in consideration of a deed of dedication by the railway company over its right of way necessary to the extension of Eleventh street across the same, and other considerations therein mentioned, it was provided that the crossing to be put in at Eleventh street should be "put in, operated, and maintained with-

out expense" to the railway company; that within thirty days from the passage of the ordinance the complainant filed its written acceptance of it, and that by thus accepting the ordinance it became a binding contract between complainant and the city of Miami.

That within fifteen months after the adoption of the ordinance the complainant, in fulfilment of its contract with the city, executed and delivered to the city of Miami a deed of dedication for street purposes in the extension of Eleventh street, a right of way of the width of Eleventh street as then established across complainant's property, being 50 feet north and south, and 100 feet east and west. The deed provided that, in accordance with the ordinance, the crossing should be "put in, operated, and maintained without expense" to the railway company, and subject to its unrestricted use for tracks and railway purposes, which deed of dedication was delivered to and accepted by the city, and Eleventh street opened up by the city across the railway's right of way, and, in recognition of the obligation resting upon the city under the ordinance and deed of dedication, "to put in, operate, and maintain without expense" to the railway company the crossing at Eleventh street, the city, after opening Eleventh street across the right of way and constructing the crossing, employed a watchman at the crossing at the expense of the city.

That the city is now seeking to compel the railway company to put in, maintain, and operate safety gates at the crossing of Eleventh street which has been dedicated by the railway for street purposes.

Then follow averments to show the complainant's right to invoke the aid of a court of equity, and wherein the ordinance, the operation of which the bill seeks to enjoin, is illegal and void.

All phases of the case have been elaborately discussed by counsel on both sides, but the case hangs on two propositions: the meaning of the word "operate" as used in the contract, and the power of the city to enter into a contract to pay the expenses of operating the appliances and safeguards which are usually operated at crossings on much used streets in thickly populated cities.

The bill and exhibits, which by apt words were made a part of the bill, show that the city desired to extend Eleventh street over and across the railway's right of way, and that to do this it not only had to cross its tracks and yards, but a part of the platform of the passenger station, and that the city was also desirous for the removal of the operations of the railway and the movement of the locomotives and trains and the switching of its cars from such close proximity to the business portion of the city, and in order to secure these very substantial advantages, and acquire the right to open Eleventh street over the railway's right of way, it enacted an ordinance, which, when accepted by the railway, became a contract between the railway and the city; and, while there were certain mutual concessions, the principal one, and the one now under consideration, was that such crossing was "to be put in, operated, and maintained without expense" to the railway company.

It appears from the bill that the city put in, maintained, and also operated the crossing for a time without expense to the railway, but in March, 1916, it sought by ordinance to require the railway company to bear the expense by providing, maintaining, and operating safety gates.

The city contends that in construing the contract, the word "operate" should be rejected as mere surplusage. If a vital word upon which a contractual obligation rests may be treated by the courts as surplusage, there would be an end to the dignity and solemnity of contracts. Against the contention of the city, however, is the well-settled rule of construction that no word in a con-

tract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it. 9 Cyc. 583; Randel v. Chesapeake & D. Canal Co. 1 Harr. (Del.) 151; World's Fair Hotel & B. Bureau v. Courtright, 57 Ill. App. 281; Rolland v. McCarty, 19 La. 77; Heywood v. Heywood, 42 Me. 229, 66 Am. Dec. 277.

Contract—construction.

The first question presented is the construction of the word "operate" as used in the ordinance of September 3, 1914. The city advances the argument that the word "operate" is an active verb, and has no meaning in connection with a street crossing, or a street, and that a "street is not a machine or anything tangible which can be operated, and that it is a mere passable space over which things in operation move, and that a street or a street crossing cannot move or operate or be operated, and that the word 'operate' in the ordinance is without effective meaning, and does not put upon the city of Miami the burden of maintaining at the crossing gates or watchmen which may be necessary for the protection of the public from the dangers incident to the operation of railway trains over the street."

We find, on investigation, that the word "operate" has been used by the courts with regard to streets and roads in the very sense which the appellee contends it cannot be used, and such use is common in connection with toll roads and turnpike roads to express the meaning which the railway contends should be given to the words "put in, maintain, and operate" in the contract. A reference to a few of the cases will show its use in this sense. In Snell v. Chicago, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532, the court says there was no contract that "different owners should maintain and operate different parts of the road." Again:

"Therefore upon the assumption that the whole road had been completed and was in operation on August 5, 1870."

"The prayer is that defendant be restrained from operating its turnpike, and not from building it." Board of Internal Improvement v. Stanford & L. Creek Turnp. Road Co. 91 Ky. 291, 15 S. W. 782.

"The petitioner constructed said toll road under the provisions of our statute, and since that time has continuously operated the same." Southern Development Co. v. Douglass, 26 Nev. 230, 66 Pac. 66.

"The authority of the police juries with respect to the construction and management of toll roads is as broad as that which concerns the establishment of such roads, and they may build, maintain, and operate such roads directly, or they may contract with others, whether corporations or individuals, for their construction, maintenance and operation."

Again: "There can be no doubt that the plank road is a vital necessity, and it is not denied that it has been maintained and operated, with occasional intervals, as a toll road."

In the ordinance which the court was considering in that case we find this language: "And said company is hereby authorized to operate, maintain, and control a plank road," etc. St. Joseph Pl. Road Co. v. Kline, 106 La. 325, 30 So. 854.

The ordinances, legislative enactments, or contracts by which toll roads are established use language of the same import as that used in the ordinance under consideration. The toll roads are to be built, maintained, and operated, as the crossing at Eleventh street was to be "put in, maintained, and operated." To put in or build a road or crossing means to construct it; to maintain it means to keep it up; to operate it means to put in and use such appliances and employ such persons as are necessary to the purposes for which the road or crossing is to be used.

To operate a turnpike or toll road means to put in gates or bars, if necessary, and to employ the serv-

ices of someone to open and close the same, and collect the tolls from parties using the road. To operate a crossing means to put in safety gates or bars with the necessary help to operate them, or the stationing of a watchman to warn persons when it is unsafe to use the crossing, and inform them when they may do so with safety.

Each of the terms used in the ordinance under consideration describes a separate and distinct act or class of acts, and neither means the same as the other. In McChesney v. Hyde Park, 151 Ill. 634, 37 N. E. 858, the court says: "The word 'operate' does not mean the same thing as either the word 'construct,' the word 'maintain,' or the expression 'keep in repair' and is not included in the significations of either."

Same—"put in"—"operated"—"maintained."

In the contract between the city of Miami and the Florida East Coast Railway the word "operate" had a distinct meaning, and was used for a definite purpose, and imposed upon the city an obligation to do everything with regard to the crossing necessary for the public safety, without expense to the railway company. The use of gates or the employment of watchmen is essential to the safety of the public at a railway crossing on a much-traveled street, and their use constitutes the operation of the crossing. The officials of the railroad company knew that if they permitted the city to open Eleventh street, its right of way, it would entail certain expenses, such as the original cost of construction, which they covered by the term "put in;" the upkeep, which they covered by the word "maintain;" and the expense of opening and closing gates, or employing a watchman, which they covered by the word "operate." It is difficult to find a word better suited to include all expenses that might be incurred by means of the use of the crossing. If the city had stipulated to pay the expense of opening and closing the gates, or for the employment of a watchman, it might not have covered improved methods for the protection of persons and property using the crossing, which it might from time to time have desired to substitute for those in use when the contract was made; so the word "operate" was used to cover all present or future methods, appliances, or adjuncts which experience might demonstrate to be expedient or proper to be used at a street and railway crossing.

We are next confronted with the question whether the city, in contracting to operate the crossing without expense to the railway company, was abdicating the police power of the municipality and its act was illegal and void. The protection of public health, public morals, and public safety is a duty which the state owes to its inhabitants, and they have authorized it to do such things as are necessary for the performance of this duty; it is a sacred trust, and the police power is derived from the necessities of its execution. It is well settled that the state cannot devest itself, by contract or otherwise, of its police power, but we do not think the case presented here has that aspect. The fallacy in the contention of appellee grows out of its conception of the police power, as the means of paying for protection, rather than protection itself, thus making the payment the main purpose and public health, morals, and safety, mere incidents.

We think there is a clear distinction between a contract by the state in reference to a matter within reach of the police power and a contract to suspend or devest itself thereof.

The Supreme Court of the United States has indicated that it recognizes the distinction in this language: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced,

it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to devest itself of the power to enact laws for the preservation of health and the repression of crime." Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

It is worthy of note that Mr. Justice Miller drew a distinction between contracts affecting "public health and public morals" and those affecting public safety," and that, while he condemned contracts which limited the exercise of the power to protect public health and public morals, to the prejudice of the general welfare, the question of a state obligating itself for a valuable and sufficient consideration to pay certain expenses which might be incident to the preservation of the public morals and the protection of the public health was not involved.

Can it be said that by the contract between the city of Miami and the Florida East Coast Railway the city has limited the exercise of its police power to the prejudice of the general welfare? We do not think so. The city has in no wise limited the exercise of its police power, but, on the contrary, is exercising it; and, if it performs its duty to the public, will continue to do so. There is nothing in the contract whereby the city devests itself of its duty to insure the safety of persons using the crossing. The contention of the appellee that, because the city relieved the railway of the expense of operating the crossing, in consideration of a grant from the railroad by which the city acquired the right to extend Eleventh street over the railroad's right of way, it devested itself of its power to protect the public, is not sound.

Municipal corporation—way over railroad.

We fail to see wherein there is any surrender of its police power by the city by putting in, operating, and maintaining the crossing; on the contrary, it is exercising its police power when it does this. The question of who pays the expense does not determine whether or not it is a surrender or bartering away of such power.

Traffic on the streets in large cities is controlled by virtue of the state. In handling it appliances are used at street crossings to indicate when all traffic movement must cease and when it may proceed. Employees of the city operate these appliances and regulate the traffic. On some streets, surface cars and auto bus lines are operated, which bear none of the expense of handling the traffic except as is borne by all taxpayers. Can it be said that a city is not exercising its police powers for the protection of persons and property in thus regulating traffic merely because it bears the expense, instead of placing it directly on those using the streets? A city, under its police power, could enact a toll from every person, street car, or bus using a street crossing, where it was necessary to maintain appliances and station employees for the public safety, but it may also, in lieu of collecting such tolls from street cars and busses, contract for a valuable consideration, to relieve them from paying tolls for each trip. Such a contract would not be bargaining away the city's right to exercise its police power, although it would be in relation to a matter in which the city, in the performance of its duty to the public, has ample police power.

In the instant case the city of Miami received from the railway valuable property rights which it could not have taken from it without just compensation. It also received other and greater benefits by the removal of the switching operations, the station and tracks from within the heart of the city, to 4 or 5 miles distant. The city, when it entered into this con-

Same—guards at crossing.

tract with the railway, was no doubt satisfied that it had received ample consideration from the railway for what it agreed to give in return,—the expense of operating the crossing.

Numerous illustrations suggest themselves to show that a contract such as this is not one by which the city devests itself of its police power. Thus, where there was a tract of land within the corporate limits of a city, on which were mosquito-breeding ponds, marshes, and heavy undergrowth, the city, under its police power, could require the owners to keep the ponds and marshes drained and the undergrowth kept down; but if the owner were to convey this property to the city for use as a public park, and the city, in consideration thereof, should contract to keep the ponds drained and marshes drained and undergrowth kept down, without expense to the owner, it would be clearly within its powers, and such a contract would not be a surrender or bartering away of its police power or its rights to exercise the same. Nor would the city be permitted, after taking possession of the property and converting it into a public park, to repudiate its part of the contract to keep the property drained, and, while retaining possession of the property and enjoying the benefits therefrom, require the owner to bear that expense. If the city should subsequently abandon the park and restore the property, it might afterwards require him to bear the expense of keeping it drained, but that question is not presented here, as the city of Miami does not propose to return the street, and from the nature of the acts which have been performed by the railway in accordance with the obligation of its contract, the parties cannot now be restored to the situation in which they were before the contract was entered into.

Same—contract for street crossing.

It does not appear that the facts in the case of State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, relied on by the appellee, were the same as those in the instant case, and cannot therefore be taken by this court as conclusive on this subject. In that case if the railroad company had owned all the land over which new streets were to be opened, and had granted the lands to the city for street purposes on consideration that the city should bear the expense of constructing and maintaining all crossings and approaches, a conclusion in accord with the decision in this case would probably have been reached.

A later case, and one in accord with justice and good conscience, Chicago v. Chicago & W. I. R. Co. 174 Ill. App. 452, is in harmony with the conclusion reached by us. In that case, the court said:

"And while it is true that a municipal government 'as a representative of the state' cannot, by a contract, 'surrender or alienate a strictly governmental function, which it is required to continue in existence for the welfare of the public' (Chicago v. Chicago Union Traction Co. 199 Ill. 259, p. 270, 59 L.R.A. 666, 65 N. E. 243), it is equally true that a municipal corporation may be equitably estopped, not indeed by mere lapse of time, but by circumstances which make it unconformable to right and justice, from exercising a power over the use and management of some particular highway which would otherwise fall within its police powers, considered in their broadest aspect.

"This is the doctrine adopted by our supreme court in cases like Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 26; Chicago & N. W. R. Co. v. People, 91 Ill. 251; Martel v. East St. Louis, 94 Ill. 67; and Chicago v. Sawyer, 166 Ill. 290, 46 N. E. 759; and these decisions are in harmony with the general course of decisions in other jurisdictions."

The Northern P. R. Co. v. Minnesota ex rel. Duluth, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341, is

much relied on by the appellee. In that case the obligation of the railroad company existed before the contract or compromise agreement was entered into. The obligation to construct viaducts over its tracks and keep them in repair was a pre-existing one.

The distinction between the Duluth Case and the one at bar is a vital one. In the former there was an existing obligation on the part of the railroad at the time the contract was made, whereby the city surrendered its power to compel the railroad to fulfil its obligation. In the instant case no such obligation existed prior to the making of the contract. As long as the railroad owned the land and there was no street over it, it owed no duty, and the city had no rights, to be surrendered by the contract.

In the Duluth Case, Lake avenue had been dedicated for street purposes, when in 1869 the railroad laid its first tracks across it. The city did not get its right to extend the street over and across the railroad tracks from the railroad. The police power over the street existed before the railroad was built over it, and before the contract was entered into. In the instant case the railroad was built and was in operation for a number of years before it granted to the city for a valuable consideration the right to open a street over its property, and until the railroad granted to the city a right of way there was no traffic to regulate.

When the city of Duluth made the contract to pay part of the expense of building the viaduct and to maintain for fifteen years the part of the bridge over the railway's right of way, and perpetually maintain the approaches, it already had the power to require the railroad to bear all this expense, and it contracted away an existing power and obligation to the public. On the contrary, as long as the property through which Eleventh street was extended by the city of Miami remained private property, the city had no police power over it, and none existed to be contracted away.

The Duluth Case can only be regarded as analogous to the instant case by confusing the facts in the two cases; the Duluth Case deals with and is confined to the question of laying out streets over lands which the city had the right to use for street purposes independent of its contract with the railroad; and in the instant case the city had no right to extend Eleventh street, except as it acquired that right by its contract with the railroad. In the Duluth Case, the contract was entered into after the city had acquired its right; in the instant case, the city had no right, until after the making of the contract.

None of the Minnesota cases discussed in the Duluth Case deal with a situation like this, where the power of the city to extend Eleventh street was acquired by the contract with the railroad. In the Minnesota cases the city's right to open or extend the streets existed prior to and independent of the contract, which contracts were not, as in this case, for the acquisition of property, but for the protection of the public in the use of streets over which the city already had rights, or which it acquired subsequently from a source other than the railroad.

The fallacy in applying the Duluth Case and others along the same lines to the facts in the instant case arises from a failure to distinguish between a contract by a city to acquire property and property rights and to enter into an obligation in consideration thereof and a contract to barter away an existing power.

In the Duluth Case, the court said "the right to exercise the police power is a continuing one," and a thing to be "continuing" must be pre-existent. The city of Miami did not have the police power now sought to be exercised over this property as long as the railroad owned it, and until the railroad conveyed to the city the right to open

a street across its property there was no police power to be continued.

In most if not all the cases on this subject there has been a question about what was the contract between the city and the railway, or there was a direct surrender of its right to exercise its police power for the protection of public morals, public health, and public safety. In the instant case there is no dispute about the contract, except what was meant by the word "operate," and there is nothing in the contract by which the city surrenders its power to protect public health, morals, or safety, but, on the contrary, the contract requires the city at its expense, for a valuable consideration, to exercise its police power in protecting the public safety at a dangerous point.

While the contract requires the city to meet the current expenses of operating the crossing, the railroad gave to the city what the latter regarded at the time, and which we think was, a good and valuable consideration for its subsequent outlay.

The city makes no contention that the contract was unfair, unjust, or inequitable. It makes no charge that the railroad has not fully, fairly, and promptly performed its part of the contract. It merely says that, notwithstanding what we obligated ourselves to do, notwithstanding the benefits which we have received from the railroad in return for our solemn promise, we ask the court to extend the doctrine which prevents the surrender of the exercise of the police power beyond the purpose of the doctrine, and relieve us of our obligation. A city council in the aggregate sometimes does things which the persons who compose it would not do in their individual capacity, thus trying to maintain a double consciousness which divides the man and the official. A higher civic ideal will be reached, and better civic righteousness established, if this distinction is not accepted or approved.

We think the chancellor erred in sustaining the demurrer and dismissing the bill and dissolving the temporary injunction, and the decree is therefore reversed.

Taylor and **Ellis, JJ.**, concur.

Whitfield, J., dissenting:

By contract stipulations the railroad company "dedicated" to the city for street purposes a right of way "over and across the right of way and property" of the railroad company, for the extension of a street of the city, one of the provisions being, "such crossing to be put in, operated, and maintained without expense to the railway company, and subject to the unrestricted use thereof by the railway company, for its tracks and railroad purposes." Subsequently the city adopted an ordinance which requires the railroad company to "maintain and properly operate safety gates of a design mechanism suitable for the protection of persons riding, driving, or on foot, from the trains and locomotives approaching said crossing." A bill brought to enjoin the city from enforcing the latter ordinance was dismissed, and the railroad company appealed.

The question presented is whether the "dedication" provisions unlawfully abrogate the police power of the city.

Municipalities cannot in general barter away their police powers involving the public safety and welfare, and contracts made by municipalities should not be construed to abrogate the right of a city to exercise its police powers unless they were clearly so intended. The subject-matter of the contract provisions was the "dedication" for street purposes of a right of way across the right of way and tracks of the railroad company, and not police protection of the public at the crossing; and the provision that "such crossing to be put in, operated, and maintained without expense to the railway company" was apparently not intended to enlarge the subject-matter of the stipulations. As used, the word "operated" does not pre-

clude the city, in the exercise of its police power and duty to protect the public from risks of injury at a crossing of a railroad track by a city street, from requiring the railroad company to "maintain and properly operate safety gates . . . suitable for the protection of persons . . . approaching said crossing." Gates are required to protect those using the street from injury by trains, the use of the streets, not the moving of trains, being impeded by using the gates. The operation of the railroad is subject to reasonable municipal regulations required by the growth of the city; and the police power and duty of the city to make and enforce lawful regulations cannot be abrogated by contract.

West, J., dissenting:

If the ordinance by which the city of Miami undertook to put in, operate, and maintain a crossing over the right of way and tracks of the appellant railway company was intended to perpetually bind the city to put in and maintain safety gates or such safety appliances as are necessary to protect the public from the dangers incident to the use of such crossing, without expense of such railway company, it was, in my opinion, beyond the power of the city to adopt, and is therefore not binding upon it.

The opinion holds that "in the contract between the city of Miami and the Florida East Coast Railway, the word 'operate' had a distinct meaning and was used for a definite purpose, and imposed upon the city an obligation to do everything, with regard to the crossing, necessary for the public safety, without expense of the railway company. The use of gates or the employment of watchmen are essential to the safety of the public at a railway crossing on a much-traveled street, and their use constitutes the operation of the crossing."

If this duty was legally "imposed upon the city," then necessarily the city was perpetually bound to withhold the exercise of the power, commonly called the police power, which it clearly possesses, to require the railway company at its own expense and without expense to the city to put in, operate, and maintain such safety appliances.

It is well settled that under its police power the state may establish all regulations that are reasonably necessary to secure the health, safety, good order, or general welfare of the community; that this power cannot be abdicated nor bargained away, and that all contracts and property rights are held subject to its proper exercise. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Now the maintenance of proper safety appliances at the crossing is a duty which the city may, in the exercise of its police power, in the interest of the public safty, require the railway company to perform without compensation (State ex rel. Clara City v. Great Northern R. Co. 130 Minn. 480, L.R.A.1918A, 1153, 153 N. W. 879; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206); and when the city obligates itself to withhold the exercise of this power, with respect to such duties, and itself assumes the obligations and burdens of "operating" the crossing, it has to that extent abdicated the power possessed by it to require such railway company, without compensation, to put in and maintain such "safety gates" as public necessity and convenience may require.

In case of Great Northern R. Co. v. Minnesota, 246 U. S. 434, 62 L. ed. 817, 38 Sup. Ct. Rep. 346, April 15, 1918, the court said: "It is too well settled by former decisions of this court to require extended dis-

cussion here that railroad companies may be required by the states, in the exercise of the police power, to make streets and highways crossed by the tracks of such companies reasonably safe and convenient for public use, and this at their own expense. Such companies accept their franchises from the state subject to their duties to conform to regulations, not of an arbitrary nature, as to the opening and use of the public streets for the purpose of promoting the public safety and convenience."

The case under consideration is squarely within the rule announced by the Supreme Court of the United States in the case of Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

That was a case in which the railway company was required by mandamus, pursuant to the provisions of a resolution of the governing body of the city of Duluth, in which the avenue was located, to repair a certain viaduct carrying the railway company's tracks over a certain avenue. The city and the predecessor of the railway company had entered into an agreement by which the railroad was to contribute to the expense of the construction of the viaduct the sum of $50,000, and the city agreed to maintain for fifteen years the part of the viaduct over the railroad's right of way and to perpetually maintain the approaches. The city constructed the viaduct, and in addition to the $50,000 contributed by the railroad the city expended $23,000 in its construction.

Before the expiration of the fifteen-year period the city, upon the theory that the railroad should maintain the viaduct at its own expense, repudiated the agreement, and brought mandamus proceedings to require the railroad to repair it. In an elaborate opinion in which many authorities are referred to the supreme court of Minnesota (State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047) upheld the contentions of the city. This judgment was affirmed by the Supreme Court of the United States in an opinion prepared by Mr. Justice Day, and because of the peculiar aptness of the language employed and the striking similarity of the questions considered to the questions involved here, I quote at length from that opinion:

"As the supreme court of Minnesota points out in the opinion in 98 Minn. 380, above referred to, the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right. See cases cited in 98 Minn. 380.

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

" 'It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights

granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. Rep. 468.'

"The principle was recognized and enforced in Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the state, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In Detroit, Ft. W. & B. Q. R. Co. v. Osborne, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540, it was held that the state of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471, where it was held that, although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company, and that uncompensated obedience to regulations for public safety under the police power of the state was not a taking of property without due process of law.

"The same principles were recognized and the previous cases cited in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, and again in Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

"In this case the supreme court of Minnesota has held that the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy, and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the au-

thority of the state or the municipality to abrogate this power so necessary to the public safety. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513."

This holding has been expressly reaffirmed in the following cases: St. Paul, M. & M. R. Co. v. State, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; Great Northern Railway Co. v. Minnesota, 246 U. S. 434, 62 L. ed. 817, 38 Sup. Ct. Rep. 346.

The police power is one of the inherent powers of government; and it cannot be abdicated nor contracted away. As we have seen, "it is beyond the authority of the state or municipality to abrogate this power so necessary to the public safety." This being true, it cannot be said that because the railway company in this case paid to the city, in the way of a "dedicated" right of way across its tracks, a consideration for said ordinance and the obligations assumed by the city thereunder, the city is bound by the contract, and cannot now question its validity. The city, by the ordinance requiring railroad companies to put in safety gates at crossings, the enforcement of which the appellant seeks to enjoin, simply denies the validity and binding force of the provision of the former ordinance imposing this duty upon the city, as the crossing under consideration.

Besides, it is well settled that one who contracts with a municipal corporation must inquire into the power of the corporation to make a contract; and the railroad company in this case was therefore chargeable with notice of the absence of power in the city to make the contract which it now insists shall be enforced.

It may be that, since the consideration recited in the deed of "dedication" is not such as the city was authorized to give for the easement therein granted and conveyed, that the city may, by appropriate proceeding, be required to pay for such easement; but that is an altogether different proposition from asserting that, because of such recited consideration, the city shall not be permitted by ordinance, in the exercise of its inherent governmental powers, to require the railway company to maintain at such crossing such safety appliances as are necessary to secure the public safety.

The provision here considered of the ordinance referred to as a contract being outside the powers of the city to legally adopt, and therefore of no validity and binding force, it was perfectly competent for the city to adopt and enforce the latter ordinance.

There is no question of civic righteousness involved here, but with the construction given by the majority opinion to the city ordinance under consideration, the vital principle of whether or not a municipality in this state may bind itself by contract to withhold the exercise of inherent governmental powers which it possesses and should exercise to secure the safety and general welfare of its citizens, in my opinion, is involved.

ANNOTATION.

Power of municipality to assume the duty of providing and maintaining railroad crossings.

It will be seen that in the reported case (FLORIDA EAST COAST R. Co. v. MIAMI, ante, 303) it was held that a city for a consideration might contract to operate and maintain a railroad crossing without expense to the railroad company. It would seem that this decision is contrary to the weight of authority. As is pointed out in the dissenting opinion of West, J., the city, as a result of breaking its contract, might have to pay for the easement.

Northern P. R. Co. v. Minnesota (1908) 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341, is sufficiently set out in the opinions in FLORIDA EAST COAST R. Co. v. MIAMI.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. (1906) 98 **Minn.** 380, 28 L.R.A.(N.S.) 398, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, arose on facts similar to Northern P. R. Co. v. Minnesota, and was similarly decided. On a further appeal (1907) 101 **Minn.** 545, 112 N. W. 1142, it was further held that a statute providing in substance that a municipality and a railroad company might agree upon the manner in which and the terms and conditions on which a street or highway might be used or occupied by the company did not change the situation nor the legal rights of the parties in the least. This case was affirmed in (1909) 214 **U. S.** 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698.

In State ex rel. St. Paul v. Great Northern R. Co. (1916) 134 **Minn.** 249, 158 N. W. 972, it was held that a city might compel the railroad company to rebuild a span of a bridge which carried a street over the tracks, although the city had made a contract with the company's predecessor which provided that whenever the city directed that a street be carried over the tracks of the company by a bridge, the company should build the abutments for the bridge and the superstructure over its tracks, and that the city should build the approaches thereto, and should maintain the bridge and keep it in repair, as this contract clearly attempted to take from the city a part of its police power and was void. Nor could a judgment in regard to the matter, entered upon a stipulation by the city, estop the city.

The foregoing case was followed on similar facts in St. Paul v. Chicago, St. P. M. & O. R. Co. (1918) — **Minn.** —, 166 N. W. 335.

In Chicago, B. & Q. R. Co. v. Nebraska (1898) 170 **U. S.** 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513, affirming (1896) 47 **Neb.** 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, it was held that the maintenance of a safe viaduct over railroad tracks at an important street crossing in a populous city cannot be taken out of the police power of the legislature by contract between the city and the railroad company.

In Chicago v. Pennsylvania Co. (1911) 252 **Ill.** 185, 36 L.R.A.(N.S.) 1081, 96 N. E. 833, Ann. Cas. 1912D, 400, the court stated that if the city had the power to require a railway company to light a subway passing under its elevated tracks, it could not devest itself of the power by contract; but it was held that the city had not the right.

In Chicago v. Chicago & W. I. R. Co. (1912) 174 **Ill.** App. 452, quoted in the reported case (FLORIDA EAST COAST R. Co. v. MIAMI, ante, 303) it was held that the city was estopped from requiring a railway company to repair or repave a roadway on an approach to a viaduct crossing. This case may be supported on the theory that the police power does not extend to requiring the repairing or repaving of a roadway on an approach to a viaduct crossing. If anything in the Illinois Appeals case is contrary to the earlier decision by the supreme court of the state, it may, of course, be disregarded.

Where there is a statutory duty as to crossings resting upon a railroad company, a city's contract to bear part of the expense is without consideration. Newton v. Chicago, R. I. & P. R. Co. (1885) 66 **Iowa**, 422. B. B. B.

UNITED STATES OF AMERICA, Appt.,
v.
JACOB DAVID GERSTEIN.

Illinois Supreme Court—June 20, 1918.

(284 Ill. 174, 119 N. E. 922.)

Alien — violation of law — refusal of citizenship.

A saloon keeper who habitually violated the Sunday Law will be denied naturalization, although the law was not enforced, and it was necessary to keep his place of business open to retain his trade.

[See note on this question beginning on page 321.]

APPEAL by the United States from an order of the Superior Court for Cook County directing that a certificate of naturalization be issued to petitioner, upon a hearing of his petition for admission to citizenship. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Merton A. Sturges** and **W. H. Wagner**, for the United States:

Petitioner was not qualified to be admitted as a citizen of the United States.

United States v. Hrasky, 240 Ill. 560, 130 Am. St. Rep. 288, 88 N. E. 1031, 16 Ann. Cas. 279; Re Centi, 211 Fed. 559, 217 Fed. 833; Re Trum, 199 Fed. 361; Whissen v. Furth, 73 Ark. 366, 68 L.R.A. 161, 84 S. W. 500; Re Spenser, 5 Sawy. 195, Fed. Cas. No. 13,234; Wieman v. Mabee, 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71; Groscop v. Rainier, 111 Ind. 361, 12 N. E. 694; Re Di Clerico, 158 Fed. 905.

Mr. **Samuel Blair** for appellee.

Farmer, J., delivered the opinion of the court:

This is an appeal by the United States from an order and decree of the superior court of Cook county, directing that a certificate of naturalization be issued to Jacob David Gerstein appellee. Gerstein filed his petition for admission to citizenship, January 25, 1916. A hearing was had on the petition December 14, 1917, and a certificate of naturalization ordered issued to petitioner, from which order and decree the government has appealed to this court.

It was stipulated that the appellee is a saloon keeper, and had been continuously engaged during the last eight years in that business; that, from the time he engaged in the business until October 10, 1915, he kept his saloon open and sold intoxicating liquors on each Sunday; that during the time he kept his saloon open on Sunday he was familiar with the fact that a state law of Illinois required saloons to be closed on Sunday, but, with knowledge of the law forbidding it, he kept his saloon open on Sunday until October 10, 1915, when he was advised by the municipal authorities of the city of Chicago that they intended from that date to enforce the law, and, because of that intention of the municipal authorities, appellee has, since that time, kept his saloon closed on Sunday, and sold no liquor on that day. It was also stipulated that previous to October 10, 1915, saloons in the city of Chicago were kept open on Sunday without concealment, and neither the state nor municipal authorities molested them, or made any effort to enforce the Sunday Closing Law. It was further agreed that since October 10, 1915, appellee has kept his saloon closed on Sundays, and that he has complied with the requirements of the Natu-

ralization Laws, qualifying him for admission to citizenship, except in so far as his qualification may be affected by the violation of the Sunday Closing Law as above stated. Such violation of the Sunday Closing Law is the basis of the government's objection to appellee's admission to citizenship.

The Federal statute requires proof, by at least two witnesses, that the applicant for citizenship is a person of good moral character, and in every way qualified to be admitted as a citizen of the United States. It must be made to appear to the satisfaction of the court that the applicant, during his five years' residence in the United States before applying for admission to citizenship, "has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." [34 Stat. at L. 598, chap. 3592, § 4.] We held in United States v. Hrasky, 240 Ill. 560, 130 Am. St. Rep. 288, 88 N. E. 1031, 16 Ann. Cas. 279, that a person who habitually, knowingly, and wilfully violates the Sunday Closing Law has not behaved as a man of good moral character, well disposed to the good order of the country. This view is not based on the theory or belief that it is any more or any less immoral to knowingly and intentionally violate the Sunday Closing Law than any other law, and this view is supported by the decisions of most all the courts of this country.

The case of Re Hopp (D. C.) 179 Fed. 561, relied on by appellee, involved the question whether an applicant for admission to citizenship who was a saloon keeper in Milwaukee, and kept his saloon open on Sunday in known violation of law, was of good moral character, and entitled to be made a citizen. The court said for many years the statute known as the Sunday Closing Law had been on the statute books, but had not been obeyed; that neither the state nor municipal authorities had made any effort to enforce it, and that the saloons had been kept open on Sunday, without any attempt at concealment. The court said the preponderance of public sentiment in the city of Milwaukee was in harmony with the custom of keeping saloons open on Sunday; that the law was satisfied with the behavior of a citizen whose behavior is up to the level of the average citizen, and that the applicant should not be denied citizenship because he had fallen in with the general public sentiment of the community in which he lives. That case, so far as the decisions have been called to our attention, stands alone. In opposition to it, directly or in principle, are Re Spenser, 5 Sawy. 195, Fed. Cas. No. 13,234; Groscop v. Rainier, 111 Ind. 361, 12 N. E. 694; Whissen v. Furth, 73 Ark. 366, 68 L.R.A. 161, 84 S. W. 500, and a number of other cases. The authorities are practically unanimous that a person who habitually violates the law, whether the act is malum prohibitum or malum in se, is not, within the meaning of the statute, a person of good moral character, notwithstanding he may be honest in business dealings and of clean private life. However many other virtues he may possess, if he is a wilful and knowing violator of the law, he is not a person of good moral character, within the meaning of the statute.

Alien—violation of law—refusal of citizenship.

It is said by appellee that in keeping his saloon open on Sunday he only did what 7,000 others did, in Chicago, prior to October 10, 1915; that he was compelled to keep his saloon open on Sunday to satisfy his customers, who, if he did not keep open on Sunday, would go to other saloons, and appellee would lose their patronage and be deprived of the means of earning a livelihood. We are not impressed by that argument. He may have been unfortunate in engaging in a business where he had to violate the law to make a success of the

enterprise, but that cannot relieve him from the resultant effects upon his character of his lawless acts. This is in accordance with the great weight of judicial decisions. If the law were otherwise, and a rule should be laid down that it is immoral to knowingly and wilfully violate the law in a community where public sentiment approved the law, but such violation would not be immoral in a community where public sentiment does not approve the law, it would be most disastrous to the good order and well-being of society. It must be assumed public sentiment of the state favored the Sunday Closing Law, for the law requiring saloons to close on Sunday, and making a violation of the requirement a criminal offense, was enacted by the legislature more than half a century ago, has never been repealed, but has been continuously on our statute books since it was first enacted. It being a general rule of law as well as of morals, that wilfully doing anything forbidden by the law of the land is immoral, it must follow that a person who so disregards and violates the law is not "well disposed to the good order and happiness" of the country.

It is contended that, as the stipulation shows appellee had ceased violating the law by keeping his saloon open on Sundays, October 10, 1915, which was three months before he filed his petition for naturalization and more than two years before the hearing, he was entitled, under the law, to admission to citizenship. The stipulation shows that the reason for appellee not opening his saloon on Sundays, after October 10, 1915, was that on that date he was notified that the municipal authorities would, after that date, enforce the law forbidding open saloons on Sundays. As appellee had, during all the years he had been engaged in the business, kept his saloon open on Sundays until notified the public authorities would enforce the law, it appears his ceasing to violate the law was not due to any reformation in him, but to reformation in the authorities charged with enforcement of the law. The requirement of the Federal statute is that an alien applying for admission to citizenship shall show that, for five years previous, he "has behaved as a man of good moral character, and "well disposed to the good order and happiness" of the country. How can it be said that appellee placed himself within these requirements, when it is admitted that, for a period of several years, he had knowingly violated the law, and had only ceased doing so three months before filing his petition, when notified the public authorities would enforce the law thereafter? It is immaterial that a large public sentiment did not favor obeying the law. It was enacted by the legislature, by virtue of its constitutional powers, and whether it was approved by public sentiment as a good law, or whether it was considered a bad law, affords no criterion for determination by citizens and residents whether it should be obeyed. Whatever may influence persons to whom a law applies to violate and disregard it, courts are bound to enforce a valid law, though the law be disapproved by public sentiment. It must be apparent to everyone that the binding force and effect of a law, and the duty of persons to obey it and of courts to enforce it, cannot be made to depend upon the public sentiment as to its wisdom or unwisdom, or on the opinion of a court whether it is a good or bad law. If it is a law, persons are bound to obey it and courts to enforce it. If public opinion disapproves a law, the legislature may be applied to to repeal it, but, until repealed, it is binding on the people, and must be obeyed. That public officers charged with enforcement of the law do not do so cannot change the effect upon the moral character of a man who wilfully and habitually violates it. Aliens asking admission to citizenship in the United

States are asking a favor—the greatest within the gift of the government. It ought to be appreciated by the recipient, and Congress has thought wise to prescribe certain qualifications, which must be possessed by the applicant for the priceless boon of citizen of the United States of America. It is required the applicant shall be worthy of the great privilege of citizenship, and one of the elements required to show worthiness is that he has been, for five years, a man of good moral character, and well disposed to the good order and happiness of the country. The court said in Re Centi (D. C.) 211 Fed. 559: "The alien who seeks the privileges and blessings which citizenship in this country brings, should make it appear to the court not only that he believes in our form of government, but that, during his five years of probation, he has made his conduct substantially conform to its laws, as well."

It should be understood that admission of aliens to the blessings of citizenship in this country is not a mere matter of form, but that the great privilege, with all the benefits that flow from it, will be conferred only on those who show themselves to possess the qualifications required by our Naturalization Laws.

The order and decree of naturalization of the superior court is reversed, and the application of appellee for citizenship denied, without prejudice to his right to file another application when time has removed the disqualification.

ANNOTATION.

Refusal of naturalization for violation of law.

Under the Federal Naturalization Act, which requires that the applicant shall have resided five years in the United States and one year in the state, and that, during that time, he shall have behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and been well disposed to the good order and happiness of the same, the holding of the courts is practically universal that the commission of a crime by an applicant, at least during a five-year period preceding his application, is sufficient reason for denying him citizenship, on the ground that he has not behaved as a man of good moral character, attached to the principles of the Constitution of the United States.

The only difference of opinion seems to be upon the question raised in the reported case (UNITED STATES v. GERSTEIN, ante, 318) as to the effect of the commission of a purely statutory offense, when such statute is habitually violated, and no attempt has been made to enforce it in the community in which the applicant resides.

Thus, in Re Hopp (1910) 179 Fed. 561, which UNITED STATES v. GERSTEIN discusses and refuses to follow, the court held that the fact that an applicant for citizenship had habitually violated the Sunday Closing Law was not sufficient reason for denying his application for citizenship, on the ground of his failure to show a good moral character, where the statute had been upon the books for forty years, and during that time no attempt had been made to enforce it in the city, and applicant testified that, he would much prefer to close his saloon on Sundays, but, as his 2,000 competitors kept open, he was obliged to do likewise, or lose his patronage, and that, if any efforts were to be made on behalf of the municipality or public to enforce the Sunday Closing Law, he would gladly acquiesce and close his place, distinguishing United States v. Hrasky (Ill.) infra, on the ground that in that case it appeared that the applicant kept the front door of his saloon closed, indicating a knowledge of the law and a pretended desire for its enforcement, while the open back door indicated stealth and a deliberate purpose to circumvent the law; and

this was coupled with an express determination on his part to continue in his lawless course at all hazards.

In United States v. Hrasky (1909) 240 Ill. 560, 130 Am. St. Rep. 288, 88 N. E. 1031, 16 Ann. Cas. 279, referred to in the preceding paragraph, an application for citizenship was denied, on the ground that the applicant had habitually violated the Sunday Closing Law, and had stated that he intended to continue keeping the back door of his saloon open on Sunday, though such violation was a common practice in the community.

UNITED STATES v. GERSTEIN also is supported in principle, upon this point, by cases cited therein which, while not involving the right to naturalization, did involve the effect of violation of the Liquor Law, under statutes requiring applicants for license to be of good moral character.

A somewhat similar question is raised in Re Spenser (1878) 5 Sawy. 195, Fed. Cas. No. 13,234, in which, in refusing an applicant admission to citizenship on the ground that he was not a person of good moral character, having been convicted two years previously of perjury in swearing falsely as a witness in a case in which he was a party, the court, in answer to a contention that an alien, who has otherwise behaved as a man of good character during a residence in the country of at least five years, ought not to be denied admission to citizenship on account of the commission, in that time, of a single illegal or immoral act, suggests a possible distinction, in this regard, between acts, the criminality of which consists in being prohibited by statute merely, and those which are deemed to be intrinsically wrong, suggesting, as examples of the former, gaming or the unlicensed sale of spirituous liquors, and says: "Now, if an applicant for naturalization, whose behavior during a period of five or more years was otherwise good, was shown to have committed during that time either of those or similar crimes, I am not prepared to say that his application ought to be denied on account of his behavior. And yet it is clear that anything like habitual gaming or vending of liquors, under such circumstances, would constitute bad behavior—immoral behavior—and be a bar, under the statute, to admission to citizenship. But in the case of murder, robbery, theft, bribery, or perjury, it seems to me that a single instance of the commission of either of them is enough to prevent the admission."

Where it appeared that, a little less than five years preceding an application for citizenship, the applicant had been arrested and convicted of drunkenness, but it also appeared that since that time he had reformed, and for at least more than four and one-half years had been a reformed man, and in other respects nothing was proved against his character, and evidence concerning his general respectability was considerable and uncontradicted, it was held that he was entitled to citizenship. United States v. Dwyer (1909) 170 Fed. 686.

One who, within five years, had been guilty of violation of the Liquor Law and of an injunction restraining the sale of liquor in a certain building, and exhibited a wilful disregard not only of the laws of the state, but of the orders of the court, was not entitled to admission as a citizen, and the fact that, subsequent to his conviction, he was paroled, would not affect the matter, as a parole, like a subsequent pardon, does not obliterate the offense, but merely abates the penalty imposed under the law that has been violated. Re Trum (1912) 199 Fed. 361.

In Re Spenser (Fed.) supra, the court, in discussing the effect of a pardon for the crime of perjury upon the right of the person pardoned to be admitted to citizenship, held that, while the pardon had absolved him from the guilt of the act and relieved him from the legal disabilities consequent thereupon, it had not done away with the fact of his conviction, and did not operate retrospectively, and that the fact remained that, notwithstanding the pardon, the applicant was guilty of the crime of perjury during the period of his residence in the country, and therefore did behave

otherwise than as a man of good moral character.

Where one engaged in running a saloon and letting tenements for immoral purposes, in violation of the statutory and common law, procured a certificate of citizenship, such certificate was fraudulently procured, and should be canceled, even though he told the court his business and its location, and answered all questions truthfully, and concealed nothing; and the result would be the same if the court received no evidence in relation to his character, but, in a nonadversary proceeding, perfunctorily decreed admission. United States v. Raverat (1915) 222 **Fed.** 1018. To the same effect is United States v. Leles (1916) 236 **Fed.** 784.

One who made a false statement, under oath, before the naturalization examiner, who is charged with the duty of examining applicants for naturalization, under oath, preparatory to their appearance in court for a hearing upon a petition, cannot be said to have behaved himself as a man of good moral character for a period of five years before the hearing of his application, and his petition for citizenship should be refused. Re Talarico (1912) 197 **Fed.** 1019.

Where an applicant for citizenship obtained a certificate of naturalization, without complying with the required five years' residence, but under such circumstances, because of his ignorance and illiteracy, that his act should perhaps not be looked upon in the same light as a false oath, which would justify prosecution, yet, upon learning of the illegality of his certificate, he continued to use it until it was canceled, he could not be said to have behaved as a person of good moral character, with respect to the rights of citizenship, in knowingly and wilfully making a fraudulent or criminal use of his citizen papers, and the statutory period of five years could not begin until such fraudulent and criminal use has entirely ceased, and repentance at least can be observed; so the applicant could not claim a return to a proper moral status until five years had elapsed after the cancelation of his certificate. Re Di Clerico (1908) 158 **Fed.** 905.

In Re Centi (1904) 211 **Fed.** 559, where it was held that one who had exercised the right of franchise for twelve or fifteen years, with the knowledge for several years that he was not a qualified voter and had no right to vote, could not be truthfully said to be well disposed to the good order and happiness of the government whose laws he habitually and knowingly violated, and was not entitled to be admitted as a citizen. The court said: "Unhappily, too great a percentage of those who are citizens by right entertain very little respect for the law, and certainly this number should not be increased, by admitting aliens to citizenship who are shown to have been habitual violators of the laws of the country during their five years of probation. In the very nature of things, such a new-made citizen could entertain but slight respect for the laws and institutions of his adopted country. The alien who seeks the privileges and blessings which citizenship in this country brings should make it appear to the court not only that he believes in our form of government, but that, during his five years of probation, he has made his conduct substantially conform to its laws as well."

In Re Argento (1908) 159 **Fed.** 498, the court did not regard the facts that an alien, who was ignorant of the English language, had once procured a naturalization certificate upon an untrue statement that he was less than eighteen years of age when he arrived in this country, which certificate he had voluntarily surrendered, and that he had recently filed a verified petition in the court, which did not set forth the fact that he had previously been in possession of a certificate, were not, under the circumstances, so inconsistent with good moral character as to prevent him from making a new application, setting forth the exact facts.

In Re Douglas (1871; **Utah**) 5 West. Jur. 171, applications for citizenship were denied because the applicants were living in bigamy, or polygamy,

although their plural marriages were contracted prior to the passage of the act of Congress, fixing penalties for such offenses, the court basing its decision upon the fact that a plurality of spouses was unlawful, by both the civil and common law, one or the other of which must be considered to have been carried into the territory by the settlers, so that the plural marriages of the applicants were illegal when made; and also because they continued to maintain their illegal relations after the passage of the act.

Apparently the five-year period is not strictly binding upon the court, as the term within which a crime may be shown, which will bar an applicant from admission to citizenship. Thus, in Re Ross (1911) 188 **Fed.** 685, the court refused admission to citizenship to one who had pleaded guilty of murder in the second degree, and had served his sentence and been released more than five years before making his application for citizenship, although it appeared that before the commission of the offense, and since, the conduct of petitioner revealed no cause for censure, the court saying: "If his personal welfare alone was entitled to consideration, the conferring of the rights of citizenship might be considered as proper aid and encouragement. This matter, however, is not to be determined along such narrow lines. The evil resulting from such practice would immeasurably exceed the personal benefits conferred from such attempts at dispensing charity. Citizenship is not to be debauched by conferring on the criminal class its sacred privileges. The crime of which the petitioner admitted his guilt is so abhorrent to human nature and society, that this court will not bestow on him the rights of an American citizen, notwithstanding the great liberality of our Federal government."

Where an application for naturalization was denied because, two and one half years prior thereto, the applicant had pleaded guilty to a serious offense, such applicant cannot show that the cause for denial has been cured until, at least, he has behaved himself as a man of good moral character for five years after his plea of guilty. Re Guliano (1907) 156 **Fed.** 420.

R. L. S.

GEORGE J. GNAU et al., Appts.,

v.

PATRICK FITZPATRICK et al.

Michigan Supreme Court—September 27, 1918.

(— Mich. —, 168 N. W. 1007.)

Covenant — restrictive — dividing original lots.

A covenant forbidding the erection of more than one dwelling on a lot in a certain subdivision, which must not be nearer than 10 feet to the west side of the lot, does not make the original lot the unit so as to prevent a purchaser of two thirds of a lot, together with a portion of the lot adjoining on the east, from placing a dwelling on his property, although such course might result in the creation of lots of less size than originally platted.

[See note on this question beginning on page 329.]

(Brooke, Kuhn, and Bird, JJ., dissent.)

APPEAL by plaintiffs from a decree of the Circuit Court for Wayne County, in Chancery, dismissing a bill filed to enjoin defendants from

proceeding with the construction of two private dwellings on certain property, in alleged violation of building restrictions. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Monaghan, Monaghan, O'Brien, & Crowley**, for appellants:

The purpose of the covenant, when known, is to govern.

Orr v. Greiner, 254 Pa. 308, 98 Atl. 951; Godley v. Weisman, 133 Minn. 6, L.R.A.1917A, 333, 157 N. W. 711, 158 N. W. 333; Siebert v. Ware, 158 N. Y. Supp. 229; Chapman v. Richey, 188 Ill. App. 551; Allen v. Detroit, 167 Mich. 466, 36 L.R.A.(N.S.) 890, 133 N. W. 317; 14 Cyc. 1142, 10 Am. & Eng. Enc. Law 405.

The practical construction of a restrictive building covenant by the uniform and unquestioned acts of the parties themselves, continued for a long time, is entitled to great if not controlling weight in interpreting the true meaning of it.

Porter v. Denny, 170 App. Div. 546, 156 N. Y. Supp. 1016.

Mere doubt as to the intent and meaning of a building restriction in a deed does not prevent its enforcement, but it must be construed according to the intention of the parties. These restrictions are not to be frustrated by a strained construction of the language.

Orr v. Greiner, 254 Pa. 308, 98 Atl. 951; Godley v. Weisman, 133 Minn. 6, L.R.A.1917A, 333, 157 N. W. 711, 158 N. W. 333; Siebert v. Ware, 158 N. Y. Supp. 229; Porter v. Denny, 170 App. Div. 546, 156 N. Y. Supp. 1016; Chapman v. Richey, 188 Ill. App. 551; Atlanta, K. & N. R. Co. v. McKinney, 124 Ga. 929, 6 L.R.A.(N.S.) 436, 110 Am. St. Rep. 215, 53 S. E. 701; Berry, Restrictions, § 34; Clark v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275; Empire Bridge Co. v. Larkin Soap Co. 59 Misc. 46, 109 N. Y. Supp. 1062; Harris v. Rorabeck, 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391; Voorhies v. Anthon, 5 Duer, 178; Hartman v. Wells, 257 Ill. 167, 100 N. E. 500, Ann. Cas. 1914A, 901.

Mr. **Hinton E. Spalding** also for appellants.

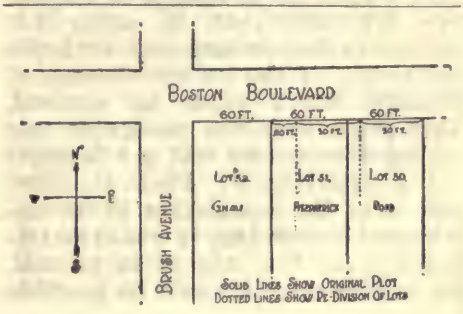
Messrs. **McNamara & Scallen** for appellees.

Moore, J., delivered the opinion of the court:

The trial judge stated the questions involved in this litigation as follows:

"George J. Gnau and others, plaintiffs, all of whom are residents on Boston Boulevard East, filed their bill to enjoin defendants from proceeding with the construction of two private dwellings on property situated on the southeast corner of Boston Boulevard East and Brush streets, alleging that the erection of said homes were to be in violation of building restrictions imposed upon defendants' property. This property is platted as part of McLaughlin & Owen subdivision, one-quarter section 37, 10,000-acre tract, Detroit. The subdivision was platted in 1893, and in 1898 the Park Hill Land Company, Limited, a Michigan partnership association, became possessed of the property. Thereafter the lots were sold by said Park Hill Land Company, and in each instance restrictions were incorporated, excepting that lot 11, which was conveyed by the Park Hill Land Company on January 6, 1899, did not contain the restriction. Subsequently, however, on March 25, 1905, when this lot was again conveyed, the restriction was included. Consequently, although there is not a general restriction in its entirety, there is, at the present time, a restriction on each lot, not due to a general restriction against the entire street, but imposed at different times by different grantors. The terms of said restriction are fully set forth in plaintiff's bill.

"Defendants Patrick Fitzpatrick



and William J. Ross acquired their property on the 19th day of July, 1917, from a common grantor, Earl I. Heenan; defendant Ross receiving a deed to the easterly 50 feet of lot 50, and defendant Fitzpatrick receiving a deed to the westerly 10 feet of lot 50 and the easterly 40 feet of lot 51. The remaining 20 feet of lot 51, or the westerly 20 feet of said lot, is owned by plaintiff Gnau, together with lot 52, which joins lot 51 on the west. The plaintiffs claim that by reason of the fact that defendants each own 50 feet of ground, instead of an entire lot, as originally subdivided, the erection of their homes is in violation of the spirit and letter of the restrictions. The existence of the restriction and its terms is not disputed.

"Plaintiffs contend that the words of the restriction, 'There shall be nothing but a single private dwelling with the necessary outbuildings erected on each lot,' are to be construed to mean that an entire lot as originally subdivided comprises one building site only. It is my opinion that the above wording of restriction is merely to limit the number of structures that may be placed on a single lot; to distort the language of the restriction to conform with plaintiffs' contention, it would be necessary to state it thus: 'Nothing but a single lot shall be used for the erection of a private dwelling,' etc. It is very apparent that this is an entirely different proposition.

"Plaintiffs further contend that plaintiff Gnau, by the purchase of 20 feet of lot 51, became the dominant owner, so to speak, of the entire lot, and that in order for anyone to deal in any way with the remainder of the lot the consent of plaintiff Gnau must be secured. This court does not recognize any such doctrine, and will not lend its aid in enforcing it. From the very nature of the restriction in its unmistakable wording, it would be impossible for this theory to prevail, for in this case it would be possible for plaintiff Gnau, by the purchasing of a minor portion of this valuable lot, to arbitrarily enjoin defendant Fitzpatrick, owning the entire balance of said lot, from the free use of its possession. This theory is not only unjustified in law, but contrary to public policy, as it would permit persons to dictate to the owner of large tracts of land by the purchase of a few feet or even less.

"It does not appear to me that there is any question as to the intent of the parties as to the meaning of the restrictive covenant. It was, as has been before stated, to limit the number of structures that an owner may place upon one lot. The clear and unmistakable language of the restriction controverts the possibility of any other intent. There are no limitations in the restriction as to the number of feet necessary to build a residence on, nor does it say, as plaintiff's contend, that a full lot must be owned in its original state as subdivided by anyone contemplating building. The language seems to me explicit, and nothing can be written into a restriction or implied from the fact that plaintiff Gnau claims to have created one building site by procuring an additional 20 feet of lot 51 to add to his holdings. The testimony does not show that defendants' plans will violate any of the restrictions in this property. . . . There will be, after the defendants complete their private homes, but one single private dwelling on lot 51, and there will be but a single private dwelling on lot 50, which is strictly in accord with the terms and provisions of the restrictions. . . .

Covenant—restrictive—dividing original lots.

"A decree may be entered, dismissing the bill of complaint, for the foregoing reasons, with costs to be taxed."

A decree was entered in accordance with the opinion. The case is brought here by appeal.

The restrictions applicable to the lots in the instant case read: "In

the block between John R and Brush streets, the building line shall be 45 feet back from the front lot line, and no dwelling shall be nearer the front lot line than these limitations prescribe, and no dwelling or other structure shall be set nearer than 10 feet to the west lot line of any lot. . . . There shall be nothing but a single private dwelling with the necessary outbuildings erected upon each lot. . . . No residences less than two stories in height are permitted. The cost of residences to be erected on said lots shall be as follows: . . . For those between John R and Brush streets, $6,500 or more: . . . Provided, that more than one lot is purchased for a single homestead, the purchaser will not be required to erect more than one residence on said lots."

We quote from the brief of the appellants: "The plaintiffs contend that the defendants are violating both the letter and spirit of the restrictions imposed upon their land. They are attempting to create two 50-foot lots. The plaintiffs urge that the defendants have attempted by this to create a subdivision of the original plat, so far as it concerns their property, and thus create two building sites from what had originally been one building site and a fraction of another. If they are permitted to continue with their present plans, an effectual subversion of the original plan of improvement on the streets will necessarily result. . . . It is apparent, from the building restrictions imposed upon this subdivision, that the original owners of it planned to create a high-class residential district. They imposed the same restriction upon every lot on the street. We are stating an obvious fact when we say that uniformity is the first essential in creating a district of this type. The covenant contained in the various deeds requires uniformity in the front building line, prescribes in a uniform way the nearest distance that the buildings can be placed from the west lot lines on the various lots, and prescribes uniformity in the general quality and minimum cost of the residences to be erected. The entire purpose of the restriction is obvious from a mere reading of it. The meaning of the restriction is likewise free from doubt or ambiguity. The restriction provides that nothing but a single private dwelling with the necessary outbuildings can be erected upon each lot. The exact language of that part of the restriction to which we refer is as follows: 'There shall be nothing but a single private dwelling with the necessary outbuildings erected upon each lot.' This can have but one meaning, namely, that an entire lot as shown upon the plat comprises one building site. A fraction of a lot of itself, therefore, would not constitute a building site. It is necessary, therefore, for a person who desires to possess a building site, to acquire and own one full lot at least."

In his oral argument it was the claim of counsel for the plaintiff that, if the owner of the middle lot of three lots acquired a small strip from the lots on each side of him, the owners of the remaining portions of those two lots could not build on their lots without his consent, thus resulting in but one residence on three lots. If an observance of the spirit of the restrictions would bring out such a result, we think it would prevent the owner of a residence from buying a fractional part of a lot, and that, if he wanted more than one lot, he should buy, not a fraction of a lot, but a full lot. When defendants have done what they propose to do, there will be but one residence on lot 50 and but one on lot 51. Neither residence will be within 10 feet of the west line of the lot and will comply with the other restrictions. The plaintiffs are in a court of equity. It does not appeal to our sense of the province of that court to give them the relief they ask.

The decree of the lower court is affirmed, with costs.

Ostrander, Ch. J., and **Steere**, **Fellows**, and **Stone**, JJ., concurred with **Moore**, J.

Brooke, J., dissenting:

I am unable to agree with the conclusions reached by my Brother Moore in this case. The essential provisions of the restrictions are that "no dwelling or other structure shall be set nearer than 10 feet to the west lot line of any lot,"—and that "there shall be nothing but a single private dwelling, with the necessary outbuildings, erected upon each lot." The defendant Fitzpatrick proposes to erect a dwelling house on a piece of ground made up of the easterly 40 feet of lot 51 and the westerly 10 feet of lot 50. Lots 50 and 51 are each platted 60 feet in width. There can be no doubt that it was the intention of those who created the restrictive covenant to provide that not less than 60 feet should be occupied for each dwelling and its appurtenant structures.

The fallacy of my Brother's argument is apparent if we assume that Mr. Fitzpatrick had purchased none of lot 50, and only the easterly 30 feet of lot 51, and had attempted to erect upon that 30 feet his residence. In such case, as now, he would have satisfied the exact language of the restriction, according to the reasoning of my Brother, because his residence would be the only residence on lot 51 and would be more than 10 feet east of the westerly line of lot 51. It seems to me quite apparent that in such a case any court clothed with equitable jurisdiction would enjoin the defendant Fitzpatrick from proceeding. What he proposes to do now is, in principle, exactly what he would propose to do in the case supposed. He now proposes to use 50 feet for his residence, instead of 30 feet in the supposed case, while the platted lot is 60 feet wide.

The paramount rule for the construction of restrictive covenants is that effect shall be given to the actual intent of the parties, if that be possible without doing violence to the language used. A restrictive covenant which recites that "there shall be nothing but a single private dwelling, with the necessary outbuildings, erected upon each lot," certainly cannot mean that a single private dwelling can be erected upon a strip of ground less than a lot as platted. The record contains abundant testimony to the effect that wide lots, affording opportunity for proper landscaping about residences, tend to increase the value of residential property, and that narrow lots, where the houses are built close together, tend to reduce such value. It is defendant Fitzpatrick's intention to erect a structure within 5 feet of his westerly lot line, whereas the restrictive covenant is that "no dwelling or other structure shall be set nearer than 10 feet to the west lot line of any lot." According to the reasoning of my Brother Moore, Mr. Fitzpatrick satisfied this restriction by asserting that the westerly 20 feet of lot 50, which he does not own, but which is owned by the complainant Gnau, may be used by him in the computation. This, it seems to me, is manifestly inequitable.

Again, suppose that Mr. Fitzpatrick was the owner of the westerly 30 feet of lot 50 and the easterly 30 feet of lot 51, and desired to erect a building thereon. Construing the restrictive covenant that "no dwelling or other structure shall be set nearer than 10 feet to the west lot line of any lot," as my Brother does, Mr. Fitzpatrick would be obliged to erect his dwelling 10 feet east of the center line of the plot owned by him upon the easterly 20 feet of the lot, leaving 40 feet to the west unoccupied. The word "lot," in the restrictive covenant quoted, should be held to mean the building site or premises about to be improved. Given this construction in the case at bar, Mr. Fitzpatrick would be obliged to erect

his house 10 feet from the westerly line of the property owned by him. This he cannot do, because his structure as at present planned reaches to the very easterly limit of the lot he owns.

The construction placed upon the restrictions by the other owners upon this street, none of whom have attempted to replat the lots and place residences on less than a single lot, has been uniform. While this construction may not be absolutely controlling, it should receive great weight in determining the true meaning of the covenant in question. I am of the opinion that the injunction should issue as prayed.

Kuhn and **Bird**, JJ., concurred with **Brooke**, J.

ANNOTATION.

Covenants prohibiting erection of building within stated distance of side line of lot.

The reported decision (GNAU v. FITZPATRICK, ante, 324) appears to be the only case to pass upon the question whether covenants prohibiting the erection of buildings within a stated distance of the side line of the lot apply, where the lots as originally platted have been redivided.

A conveyance by the owner of two adjoining lots, one of them "with the restriction or reservation that no building shall be hereafter erected on the above lot within 10 feet of the easterly line of" the grantor's remaining lot, whether technically a good reservation or not, creates a right in the nature of a servitude or easement for the benefit of the grantor's remaining property which is appurtenant to the premises, and passes with them to subsequent grantees. Herrick v. Marshall (1877) 66 Me. 435.

A covenant that the main north wall of the dwelling to be erected on the lot shall stand 5 feet from the north line thereof does not permit the location of a house anywhere on the lot so long as it is not less than 5 feet from the north line. Thompson v. Diller (1914) 161 App. Div. 98, 146 N. Y. Supp. 438.

The term "building," as used in a covenant that no building shall be erected upon a lot nearer than 3 feet from the party line, is not limited to the main body of the building, but includes overhanging bay windows or eaves. Supplee v. Cohen (1912) 80 N. J. Eq. 83, 83 Atl. 373, affirmed in (1913) 81 N. J. Eq. 500, 86 Atl. 366.

A covenant that the building to be erected upon the granted premises shall be set at least 2 feet from the side line thereof is violated by the construction of bay windows running to the height of two stories and extending 8 and 9 inches over the forbidden space. Forsee v. Jackson (1916) 192 Mo. App. 408, 182 S. W. 783.

And a restrictive covenant by which the owners of adjoining lots are bound to build within 10 feet of the boundary line is materially violated by a bay window one story high and about 20 feet long, extending over the restricted space about 15 inches. Smith v. Spencer (1913) 81 N. J. Eq. 389, 87 Atl. 158.

A covenant not to erect "any house within 13 feet of the northerly line of the property hereby conveyed" is violated by the building of a house the gable end of the second story of which projects from the main portion of the house 13 inches over the restricted strip. Skinner v. Allison (1900) 54 App. Div. 47, 66 N. Y. Supp. 288.

The spirit and general intention of a restrictive covenant by which the owners of adjoining lots are bound not to build within 10 feet of the boundary line are not violated by the construction of houses the eaves of which respectively overhang the restricted space 2 feet and 2 inches, or by a cellarway extending about 3 feet further into the restricted space, covered with inclined doors, and not ex-

tending upwards beyond the level of the foundation. Smith v. Spencer (1913) 81 N. J. Eq. 389, 87 Atl. 158.

A restriction in a deed providing that on the grantor's remaining land no building, or any part thereof, or projection therefrom, shall be built within 15 feet of a side line of the premises conveyed, applies only to the house to be built upon the land, and not to a wall erected as a screen, even if the wall extends from the house into the restricted space, the words "any part of, or projection" evidently referring to bay windows or porches, or things of that nature. Clark v. Lee (1904) 185 Mass. 223, 70 N. E. 47.

But a covenant not to erect any building within 15 feet of the lot line may, in the light of the circumstances under which the restriction was imposed, showing that it was the grantor's manifest intention that the space should be left open to afford light and air upon that side to the building on the rear of her adjoining lot, be held to preclude the covenantor from erecting a fence 20 feet high, which would have the same effect in respect to shutting off light and air. Wright v. Evans (1867) 2 Abb. Pr. N. S. (N. Y.) 308.

A covenant that the buildings to be erected upon the granted premises shall be "set at least 2 feet from" a side line is not violated by covering the 2-foot space with concrete, or by constructing an areaway encroaching on this 2 feet for light to the basement. Forsee v. Jackson (1916) 192 Mo. App. 408, 182 S. W. 783.

But a covenant by a grantor of premises the surface of which, being the bottom of the cellar of a building formerly standing thereon, was 6 or 8 feet below the level of the sidewalk, never to build any "structure or building" on the portion of the premises retained by him adjacent to the premises conveyed, within 4 feet of the west line thereof, precludes him and his grantees from filling the 4-foot space with earth to the level of the sidewalk, in order to protect their basement wall from injury by the elements and to make the space look better. Clement v. Putnam (1896) 68 Vt. 285, 35 Atl. 181.

Circumstances affecting right to equitable relief.

A violation of a covenant not to build within 2 feet of a lot line, by encroaching upon the restricted space to the extent of about 1¼ inches, is too trivial to warrant the granting of equitable relief. Forsee v. Jackson (Mo.) supra.

A mandatory injunction will not be awarded to compel the removal of a projection of the second story of a house for a distance of 13 inches over a restricted strip of 13 feet, where such overhang is entirely over a porch which the defendant was permitted by the terms of his deed to construct. Skinner v. Allison (1900) 54 App. Div. 47, 66 N. Y. Supp. 288.

Equity will not enforce the observance of a restriction against the location of a dwelling nearer than 4 feet from either side line of the lot, where the violation complained of consisted in placing the house within 3 feet and 8 inches of a side line, with a chimney 4 feet in width, projecting 1 foot further, and it appears that the restriction has been violated by the owners of seven of the twenty-eight lots, subject to it, and the enforcement of the restriction against the defendant will not tend materially to restore to the neighborhood the character impressed upon it by the scheme, and the infraction complained of does not diminish the value of the other estates. Bryant v. Whitney (1918) — Cal. —, 174 Pac. 32.

The fact that the complainants suffer no present material inconvenience by reason of the encroachment complained of will not warrant the refusal of equitable relief where, in case the complainants should desire at some future time to utilize that part of their lot between their present building and the boundary line, the encroachment of the defendant's building over the restricted space would clearly be operative to materially lessen the enjoyment by complainants of the light, air, and view to which the covenant entitles them, and the continued occupancy by defendant

of the restricted space will in time ripen into an adverse right unless complainants bring successive suits at law for damages essentially nominal in amount. Supplee v. Cohen (1912) 80 N. J. Eq. 83, 83 Atl. 373, affirmed in (1913) 81 N. J. Eq. 500, 86 Atl. 366. E. S. O.

STATE OF MINNESOTA
v.
MATT MOILEN et al.

Minnesota Supreme Court—April 19, 1918.

(— Minn. —, 167 N. W. 345.)

Constitutional law — criminal syndicalism.

1. Chapter 215, General Laws 1917, declaring and defining the crime of criminal syndicalism, and prohibiting the advocacy or teaching of sabotage or other methods of terrorism as a means of accomplishing industrial or political ends, is not obnoxious to either the state or Federal Constitution, and no rights thereby secured or protected are in any way impaired or abridged.

[See note on this question beginning on page 336.]

Courts — power — interference with legislature.

2. It is the exclusive province of the legislature to declare what acts, deemed inimical to the public welfare, shall constitute a crime, to prohibit the same, and impose appropriate punishments for a violation thereof. Judicial consideration of such enactments is limited to the inquiry whether the constitutional rights of the citizens are thereby violated or impaired.

Constitutional law — excessive fines.

3. The penalties imposed by the statute for a violation thereof do not come within the constitutional prohibition against excessive fines, or cruel and unusual punishments.

Statute — basis — relation of employer and employee.

4. The relation of employer and employee may properly be made the basis of legislation involving rights and duties arising therefrom.

Trial — jury question.

5. On the facts presented by the indictment and certified case, it is held that the question whether defendant intended, by the distribution of the posters referred to in the opinion, to advocate the form of sabotage condemned by the statute, was one of fact for the jury.

Headnotes by BROWN, Ch. J.

CERTIFICATION by the District Court for St. Louis County for the determination by the Supreme Court of questions arising upon conviction of one of the defendants of criminal syndicalism on separate trial. *Questions answered in the affirmative.*

The facts are stated in the opinion of the court.

Messrs. **Clifford L. Hilton**, Attorney General, **James E. Markham**, Assistant Attorney General, **Warren E. Greene**, and **Edward L. Boyle**, for the State:

The statute defining criminal syndicalism is constitutional.

Mathison v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; State v. Harris, 134 Minn. 35, 158 N. W. 829; State v. Elliott, 135 Minn. 89, 160 N. W. 204; State v. Durnam, 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179; Franklin v. Brown, L.R.A.1915C, 558, note; State ex rel. Garvey v. Whitaker, 35 L.R.A. 561, note; State v. Poole, 93 Minn. 148, 100 N. W. 647, 3 Ann. Cas. 12.

The facts alleged in the indictment

and proven on the trial are sufficient to constitute the crime of criminal syndicalism.

State v. Holm, — Minn. —, L.R.A. 1918C, 304, 166 N. W. 181.

Mr. **Sigmond Slonim** for defendant.

Brown, Ch. J., delivered the opinion of the court:

Defendants were jointly indicted by the grand jury of St. Louis county, and thereby charged with the crime of criminal syndicalism, as that crime is defined and declared by chapter 215, General Laws 1917 (Gen. Stat. Supp. 1917, §§ 8596—1 to 8596—4). Defendant Maki, on a separate trial, was found guilty as charged in the indictment, and at his instance, and before sentence was pronounced, the cause was certified to this court for the determination of two questions, namely: (1) Is the statute on which the prosecution is founded a valid constitutional law? and, if valid, (2) Do the facts presented by the indictment and certified record constitute a violation thereof? We answer both questions in the affirmative.

The statute in question defines the crime charged against defendant in the following language: "Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage [this word as used in this bill meaning malicious damage or injury to the property of an employer by an employee] violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends."

The advocacy or teaching of the acts or things thus condemned, whether by word of mouth or by the circulation, distribution, or public display of written matter in any form, is declared a felony, punishable by imprisonment in the state prison for not more than five years, or by fine not exceeding $1,000, or by both fine and imprisonment. Public assemblies for the advocacy and teaching the condemned doctrines are prohibited, and all persons voluntarily participating in any such assembly by their presence, aid, or instigation are declared guilty of a felony, and punishable by imprisonment for not more than ten years, or by a fine not exceeding $5,000 or by both fine and imprisonment.

It is contended by defendant that the statute violates the provisions of the 14th Amendment of the Federal Constitution, wherein it is declared that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to him the equal protection of the law. And, further, that the statute violates the provisions of the state Constitution, prohibiting special or class legislation, and also the prohibition against excessive fines, and cruel and unusual punishments for crimes.

1. The contention that the statute violates rights granted and secured by the Federal Constitution is without special merit. The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism, employed by certain laborers in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like in terrorem methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety, of which the courts will take notice. That they are unlawful, and within the restrictive power of the legislature, is clear. Sabotage, as practised by those advocating it as an appropriate and proper method of adjusting labor troubles, embraces, among other lesser offensive acts, the wilful and intentional injury to or destruction of the property of the employer, in retaliation for his failure or re-

fusal to comply with wage or other kindred labor demands. It amounts to malicious mischief, and is a crime at common law as well as by statute. The methods of terrorism referred to in the statute have close relation to sabotage, and are practised for the purpose of intimidation, and to coerce employers into a compliance with labor demands. Methods of that sort are equally unlawful and open to legislative condemnation.

Courts—power—interference with legislature.

It is the exclusive province of the legislature to declare what acts, deemed by the lawmakers inimical to the public welfare, shall constitute a crime, to prohibit the same, and impose appropriate penalties for a violation thereof. With the wisdom and propriety thereof, the courts are not concerned. State v. Shevlin-Carpenter Co. 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; Clark & M. Crimes, § 41. Judicial consideration of enactments of the kind is limited to the inquiry whether the constitutional rights of the citizen have been invaded or violated. If such rights be in no wise infringed or abridged, the statute must stand, however harsh it may seem to those who run counter to its commands. It requires no argument to demonstrate that the subject-matter of this statute was and is within legislative cognizance, vesting in that body the clear right to prohibit the advocacy or teaching of the iniquitous and unlawful doctrines which it condemns.

The argument in attempted palliation or justification of the practice of sabotage, on the theory that it is an appropriate and effective method of combating or countervailing frauds committed by others, such as the act of the manufacturer in the adulteration of food products with ingredients and foreign substances detrimental to the consumer, which are placed on the market under the label of pure food, is wholly beside the question. The law equally condemns frauds and deceits of that kind; and the perpetrator thereof is punishable to the extent and in the manner prescribed by particular statutes. No person heretofore has had the courage publicly to advocate such frauds as a means of redressing alleged wrongs, nor the temerity, when charged with a violation of the statutes prohibiting the same, to appeal to the courts on the claim that the adverse statute impaired his constitutional liberties. It follows that no right granted or secured to the citizen, by either the Federal or state Constitution, has in any way been taken away or impaired.

Constitutional law—criminal syndicalism.

2. It is next contended that, since the statute is limited in its application to employer and employee, with protection only to the employer, to the exclusion of all other persons, it is class legislation, and a denial of the equal protection of the law, and for that reason unconstitutional and void. The point is without force. While the practice of sabotage applies only between employer and employee, the other methods of terrorism referred to in the statute are not so limited, and the statute in that respect has general application. But, for the purposes of the case, it may be conceded that the statute applies only to the relation of employer and employee, yet we have no difficulty in affirming its validity against this attack. The relation of master and servant, employer and employee, has long been the basis and foundation for specific legislation in this state, as well as in the other states of this country. And, though often vigorously challenged as class legislation, statutes applying only to that relation have, in later years, been sustained by the courts with few exceptions. A few instances of such legislation may be referred to for the purposes of comparison. In an early day in this state, the common-law rule of nonliability of the master for the negli-

Same—excessive fines.

gence of fellow servants was abolished by statute, as to railroad employees. The statute, though it applied to and protected railroad employees only, was sustained in Lavallee v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974. The so-called blacklisting of employees by employers was prohibited, and the statute was sustained in State ex rel. Scheffer v. Justus, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759. A statute prohibiting the malicious interference, by combination of employers, to prevent a discharged employee from obtaining employment elsewhere, was upheld in Joyce v. Great Northern R. Co. 100 Minn. 225, 8 L.R.A. (N.S.) 756, 110 N. W. 975. Statutes regulating the hours of labor, and prohibiting the employment of women and children, except upon adequate compensation, have been sustained, though the classification for such statutes is as limited and restricted as that in the case at bar. Williams v. Evans, 139 Minn. 32, L.R.A.1918F, 547, 166 N. W. 504. In State v. Smith, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545, a statute in protection and for the comfort of street car motormen was sustained, against the attack of class legislation. But the most conspicuous instance of this kind of legislation appears in the case of Mathison v. Minneapolis Street R. Co. 126 Minn. 287, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871, where a statute imposing liability upon the employer for an accidental injury to his employee was held not obnoxious to the objection here made. But further reference to the cases need not be made. The rule is thoroughly settled that the relation of master and servant may properly be made the classification for legislation concerning rights, duties, and obligations arising therefrom.

3. The contention that the penalty fixed by the statute violates the provisions of the Constitution against excessive fines, and cruel and unusual punishments for crime, is not sustained. The nature, character, and extent of such punishments is a matter almost wholly legislative. The legislature may prescribe definite terms of imprisonment, a specified amount as a fine, or fix the maximum and minimum limits of either, which the courts are bound to respect and follow. In fact the court has jurisdiction to interfere with legislation upon this subject, only when there has been a clear departure from the fundamental law, and the spirit and purpose thereof, and a punishment imposed which is manifestly in excess of constitutional limitations. 14 Am. & Eng. Enc. Law, 436; State v. Poole, 93 Minn. 148, 100 N. W. 647, 3 Ann. Cas. 12; State v. Durnam, 73 Minn. 150, 75 N. W. 1127, 11 Am. Crim. Rep. 179. The term "cruel and unusual punishments," as used in the Constitution, has no special reference to the duration of the term of imprisonment for a particular crime, though it would operate to nullify the imposition, by legislation, of a term flagrantly in excess of what justice and common humanity would approve. The purpose of incorporating that particular provision in the Constitution was to prevent those punishments which, in former times, were deemed appropriate, without regard to the character or circumstances of the crime, but which later standards in such matters condemned as unjust and inhuman; such punishments as burning at the stake, the pillory, stocks, dismemberment, and other extremely harsh and merciless methods of compelling the victim to atone for and expiate his crime. The intention was to guard against a return to such inhuman methods. The punishments fixed by this statute do not exceed the limit of legislative discretion, and the statute must stand. It is possible that an excessive punishment may, in a particular case, be imposed by the court. But that possibility will

Statute—basis—relation of employer and employee.

not destroy the statute. The sentence may be reviewed on appeal and, if found excessive, proper correction may be made or ordered. No sentence has yet been pronounced in this case, and we assume that it will be in harmony with the special facts of the case. Gen. Stat. 1913, § 9219.

4. We come lastly to the question whether the facts presented by the indictment and certified record show a violation of the statute. There was a trial below, and a verdict of guilty. The evidence is not returned to this court, though the certificate of the trial judge is to the effect that the evidence presented justified a finding of all the facts alleged in the indictment. The charge made by the indictment is that, at the time and place stated therein, defendants did wrongfully and feloniously circulate, distribute, and publicly display certain written and printed matter in the form of posters (photographic copies of which were made a part of the indictment), which were posted upon certain buildings in the village of Biwabik, St. Louis county, and which contained printed matter, advocating and teaching that industrial and political ends should be brought about by crime, sabotage, violence, and other unlawful methods of terrorism. We here reproduce the photographic copy of the



posters, for without it no clear understanding of their nature can be had.

In this connection and in further explanation it may be said that the posters are small, 1½ inches to 2 inches in size. The background of the circle in which a snarling black cat appears is bright red in color; the background in the next to the right, in which the large wooden shoe appears, is also a bright red, and so is the flag containing the words "Abolition of the Wage System" and also the poster labeled "Join the One Big Union." These were all posted about the village in the nighttime, or, as expressed in the certified record, "under cover of night," but there was no evidence offered in explanation of the figures and characters portrayed, except that contained in the posters themselves.

The question presented is, Does the case so made show an advocacy and teaching of the form of sabotage, or the other methods of terrorism designed to effect industrial and political ends which the statute condemns? We think, and so hold, that the question was one of fact for the jury.

Trial—jury question.

There is, it is true, an innocent meaning to sabotage; at least, a meaning not condemned by this statute. The statute makes criminal the advocacy of that form of the practice which teaches the destruction of or injury to the property of an employer by an employee, in furtherance of industrial ends. But the posters which defendant distributed and caused to be publicly displayed do not attempt to limit the sabotage thus advocated under the captions in large black type, "Beware," and "We Never Forget Sabotage," to the innocent variety. And taking all the posters together, headed by the one with the snarling black cat, we are clear that the jury were justified in finding that the vicious kind of sabotage was intended; and that the public display thereof was an advocacy of such doctrine by the defendant. The whole atmosphere given out by the posters is one of intimidation, indicative of a purpose to incite fear in the employers of labor, and to compel submission to labor demands. If defendant intended some innocent phase of the doctrine of sabotage, he should have made it appear upon the face of the posters, and, not having done so, the jury were justified in finding that he was advocating sabotage in this offensive form.

The proceedings below are sustained, the certified questions answered as heretofore stated, and the cause will be remanded for further proceedings.

ANNOTATION.

Validity of legislation directed against social or industrial propaganda deemed to be of a dangerous tendency.

The reported case (STATE v. MOILEN, ante, 331) seems sound on principle, and is in accord with decisions in several other states, involving somewhat similar statutory provisions.

The validity of the New Jersey statute providing that "any person who shall in public or private, by speech, writing, printing or by any other mode or means, advocate, encourage, justify, praise or incite the unlawful burning, destruction of public or private property or advocate, encourage, justify, praise and incite . . . the killing or injuring of any class or body of persons, or of any individual shall be guilty of a high misdemeanor," was sustained in State v. Quinlan (1914) 86 N. J. L. 120, 91 Atl. 111, as against objections that it violated the state Constitution, in that it restrained and abridged liberty of speech, and was not certain in describing the offense. As to the point regarding the uncertainty of the statute, the court said: "The argument builded on this head

is that, since the legislature alone has the power to define what shall constitute a crime, it cannot delegate this power to a jury. It is claimed that the legislature has practically delegated its power, in this respect, by leaving to the jury to determine what is meant by 'advocate, encourage, justify, praise, or incite,' etc. This contention is palpably unsound. . . . We think the sense of the statute is clear. It denounces, as a high misdemeanor, the act of any person who, in public or private, shall, by speech, writing, printing, or by any other mode or means, advocate, encourage, justify, praise, or incite the killing or injuring of any class or body of persons, or of any individual. The legislature has, in express terms, defined what shall constitute an offense under the statute. Counsel of plaintiff in error seem to have wholly misconceived its purport. We are unable to discern anything contained therein which leaves it to a jury, as claimed by the plaintiff in error, to determine what is meant by 'advocate,' 'encourage,' or 'incite.'" The court stated also that the fact that the statute grouped together various means by which the end might be accomplished, and made any one of them an offense, when done to attain the objects denounced by the act, did not render the statute uncertain and void.

The constitutionality of the same statute was sustained in State v. Boyd (1914) 86 N. J. L. 75, 91 Atl. 586, affirmed without opinion in (1915) 87 N. J. L. 328, 93 Atl. 599, as against objections that it violated a provision of the state Constitution, relating to liberty of speech and of the press, and the 14th Amendment of the Federal Constitution. As to the former point, the court said: "The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and toward breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible. Incitement to the commission of a crime is a misdemeanor at common law, whether the crime advocated be actually committed or not . . . ; and this (by the weight of authority) whether the crime advocated be a felony or a misdemeanor. . . . That the right of free speech is not unlimited is well settled." And the court overruled the objection that "inciting" to a crime is of such a psychologic and imaginative character, as to render the statute void for uncertainty.

In the Quinlan Case (N. J.) supra, the language charged in the indictment advocated personal violence, and in the Boyd Case (N. J.) supra, the indictment charged language advocating injury to property. It was held in both cases that the act of incitement was criminal, whether the crime advocated was actually committed or not.

The validity of the Washington statute, making criminal the editing of printed matter tending "to encourage or advocate disrespect for law," was sustained in State v. Fox (1912) 71 Wash. 185, 127 Pac. 111, affirmed in (1915) 236 U. S. 273, 59 L. ed. 573, 35 Sup. Ct. Rep. 383, as against objections that the statute was unconstitutional, as unjustifiably restricting liberty of speech and of the press, and was uncertain, as applied to a case where the act charged was the encouragement of actual violation of the law. It was said by the Federal Supreme Court: "We understand the state court, by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore, the argument that this act is both an unjustifiable restriction of liberty, and too vague for a criminal law, must fail. It does not appear and is not likely that the statute will be construed to prevent publications, merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case, the disrespect for law that was encouraged was disregard of it,—an overt breach and technically criminal act."

It was held in State v. Holm (1918) — Minn. —, L.R.A.1918C, 304, 166 N.

W. 181, that a state statute, making it a criminal offense to advocate that men should not enlist in the military forces, or aid in prosecuting the war, did not infringe the constitutional provision conferring upon Congress the power to raise armies, nor the constitutional provision preserving freedom of speech and of the press.

And in People v. Most (1902) 171 N. Y. 423, 58 L.R.A. 509, 64 N. E. 175, it was held that the publication of an article advocating the murder of rulers by poison and dynamite, and denouncing those who spare the ministers of justice, as guilty of a crime against humanity, was within the provisions of a statute, making it a misdemeanor wilfully and wrongfully to commit an act which endangered the public peace; and that the publication of such an article was not protected by a constitutional provision that "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." It was said: "While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime, or destroy organized society is essential to the security of freedom and the stability of the state. . . . The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. . . . It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society, according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn, as not sanctioned by the Constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society, or the existence of the government."

Although the facts are not within the scope of the note, attention is called to Ex parte Yarbrough (1884) 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152, and United States v. Waddell (1884) 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35, sustaining the validity of the act of Congress, prescribing punishments for conspiracy to intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.

R. E. H.

HENRY S. ORR et al., Exrs., etc., of John C. Orr, Deceased, Respts.,

v.

DOUBLEDAY, PAGE, & COMPANY, Appt.

New York Court of Appeals—April 23, 1918.

(223 N. Y. 334, 119 N. E. 552.)

Landlord and tenant — proposal to renew — construction.

1. A communication by tenants to their landlord, "We hereby notify you that it is our intention to take advantage of our rights and renew" "with the understanding that this notice is to be withdrawn" if a pending negotiation for a transfer of lease is accepted, is a notification to renew under the lease, and not an independent proposal to renew on new terms, which would require acceptance to become binding.

[See note on this question beginning on page 343.]

Same — request for confirmation — effect.

2. A statement in a notification by tenants of an intention to renew a lease, "Won't you please send us communication acknowledging receipt of our notice to you of our intent to take advantage of this option," does not make the notification equivocal or conditional.

Same — exercise of option to renew — necessity of new lease.

3. The exercise by a tenant of the privilege of renewing a lease for an additional term creates a present demise for the aggregate of the first and extended terms without the necessity of a new lease for the additional years.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a trial term for Nassau County in favor of plaintiffs in an action brought to recover rent under an alleged renewal term. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Mr. **Earle Beatty**, with Messrs. **Kellogg, Emery, & Cuthell**, for appellant:

The writings relied on by the plaintiffs were not binding renewals. The letter of March 29th, 1911, was nothing more than a counter proposition.

Ganss v. Guffey Petroleum Co. 125 App. Div. 760, 110 N. Y. Supp. 176; Milwaukee Mechanics' Ins. Co. v. Rhea, 60 C. C. A. 103, 123 Fed. 9; Standiford v. Thompson, 68 C. C. A. 425, 135 Fed. 991; Sizer v. Clark, 116 Wis. 534, 93 N. W. 539; Adams v. Peabody Coal Co. 230 Ill. 469, 82 N. E. 645; Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150; John v. Elkins, 63 W. Va. 158, 59 S. E. 961; Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Hamilton v. Patrick, 62 Hun, 74, 16 N. Y. Supp. 952; 9 Cyc. 284; Quick v. Wheeler, 78 N. Y. 300; Schenectady Stove Co. v. Holbrook, 101 N. Y. 45, 4 N. E. 4; Poel v. Brunswick-Balke-Collender Co. 216 N. Y. 310, 110 N. E. 619, 216 N. Y. 771, 111 N. E. 1098; Wittwer v. Hurwitz, 216 N. Y. 264, 110 N. E. 433.

The letter of October 28, 1912, is insufficient as a notice of renewal. Moreover, it was incompetent, and its admission in evidence was error.

Hough v. Brown, 19 N. Y. 112; McDonald v. Metropolitan Street R. Co. 167 N. Y. 66, 60 N. E. 282; Thurman v. Wells, F. & Co. 18 Barb. 500; Dougherty v. Hunter, 54 Pa. 380; Martin v. Farnsworth, 49 N. Y. 555; North River Banks v. Aymar, 3 Hill, 262; Woodruff v. Rochester & P. R. Co. 108 N. Y. 39, 14 N. E. 832; Chicago & N. W. R. Co. v. James, 22 Wis. 197; Walworth County Bank v. Farmers' Loan & T. Co. 14 Wis. 325; Morawetz, Priv. Corp. §§ 58–61, rule 5; Dabney v. Stevens, 40 How. Pr. 341, affirmed in 46 N. Y. 681; Olcott v. Tioga R. Co. 27 N. Y. 557, 84 Am. Dec. 298; Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 262; Alexander v. Cauldwell, 83 N. Y. 485, 5 Mor. Min. Rep. 650; Knight v. Lang, 4 E. D. Smith, 381; Wilson v. Kings County Elev. R. Co. 114 N. Y. 487, 21 N. E. 1015; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

Even had defendant's two letters amounted to an election to renew, plaintiffs could not sue for rent accrued during the renewal period, their remedy being an action for breach of a contract to renew.

Hausauer v. Dahlman, 72 Hun, 607, 25 N. Y. Supp. 277; McAdam, Land. & T. § 152; Tiffany, Land. & T. § 218, p. 1514; Taylor, Land. & T. § 332, p. 406; Underhill, Land. & T. § 803; 24 Cyc. 1007; Swan v. Inderlied, 187 N. Y. 372, 80 N. E. 195; Neiderstein v. Cusick, 178 N. Y. 543, 71 N. E. 100; Kolasky v. Michels, 120 N. Y. 635, 24 N. E. 278; Crawford v. Kastner, 63 How. Pr. 90; Piggot v. Mason, 1 Paige, 412.

The alleged renewal was invalid under the Statute of Frauds.

Crouse v. Frothingham, 97 N. Y. 105; Talamo v. Spitzmiller, 120 N. Y. 37, 8 L.R.A. 221, 17 Am. St. Rep. 607, 23 N. E. 980; Durand v. Curtis, 57 N. Y. 7; Hess v. Martin, 36 Misc. 541, 73 N. Y. Supp. 946; 20 Cyc. 215; Emery v. Boston Terminal Co. 178 Mass. 172, 86 Am. St. Rep. 473, 59 N. E. 763; Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103, 8 Mor. Min. Rep. 541; Rosen v. Rose, 13 Misc. 565, 34 N. Y. Supp. 467; Long v. Stafford, 103 N. Y. 274, 8 N. E. 522; Probst v. Rochester Steam Laundry Co. 171 N. Y. 584, 64 N. E. 504; Bailie v. Plaut, 11 Misc. 30, 31 N. Y. Supp. 1015.

Messrs. **Atwater & Cruikshank**, for respondent:

Under the agreement for renewal contained in the lease, a new lease was not

necessary to such renewal. The tenant's notice of election to renew operated automatically to renew the lease and to extend the term thereof for ten additional years.

Hausauer v. Dahlman, 72 Hun, 607, 25 N. Y. Supp. 277; Chretien v. Doney, 1 N. Y. 419; Pugsley v. Aikin, 11 N. Y. 494; House v. Burr, 24 Barb. 525; Kelso v. Kelly, 1 Daly, 419; Decker v. Gaylord, 8 Hun, 110; Sherwood v. Gardner, 2 N. Y. City Ct. Rep. 64; Chamberlain v. Dunlop, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966; Voege v. Ronalds, 83 Hun, 114, 31 N. Y. Supp. 353; Clendinning v. Lindner, 9 Misc. 682, 30 N. Y. Supp. 543; Bogan v. Wright, 22 Misc. 94, 48 N. Y. Supp. 546; Kelly v. Varnes, 52 App. Div. 100, 64 N. Y. Supp. 1040; Probst v. Rochester Steam Laundry Co. 171 N. Y. 584, 64 N. E. 504; Swan v. Inderlied, 187 N. Y. 372, 80 N. E. 195; Mattlage v. McGuire, 59 Misc. 28, 111 N. Y. Supp. 1083; Finn v. Krieger Shoe Co. 93 Misc. 83, 156 N. Y. Supp. 424; Kramer v. Cook, 7 Gray, 550; Dix v. Atkins, 130 Mass. 171; Stone v. St. Louis Stamping Co. 155 Mass. 267, 29 N. E. 623; Ferguson v. Jackson, 180 Mass. 557, 62 N. E. 965; Ranlet v. Cook, 44 N. H. 512, 84 Am. Dec. 92; Wiener v. Graff, 7 Cal. App. 580, 95 Pac. 167; Holley v. Young, 66 Me. 520; Willoughby v. Atkinson Furnishing Co. 93 Me. 185, 44 Atl. 612; Harding v. Seeley, 148 Pa. 20, 23 Atl. 1118; Sons of Abraham v. Gerbert, 57 N. J. L. 395, 31 Atl. 383; Hegan Mantel Co. v. Cook, 22 Ky. L. Rep. 427, 57 S. W. 929; Howell v. Hamburg Co. 165 Cal. 172, 131 Pac. 131; Perry v. Rockland & R. Lime Co. 94 Me. 325, 47 Atl. 534; Thurston v. F. W. Woolworth Co. — Ind. App. —, 117 N. E. 686; McAdam, Land. & T. § 152.

Even if a renewal lease had been proper, the plaintiffs are entitled to recover their rent in this action.

Pom. Civ. Rem. & Rem. Rights, § 80, pp. 99, 100; Bidwell v. Astor Mut. Ins. Co. 16 N. Y. 263; Phillips v. Gorham, 17 N. Y. 270.

The notice of March 29, 1911, was valid and sufficient in form on its acceptance by plaintiffs to operate as a renewal of the lease.

Long v. Stafford, 103 N. Y. 274, 8 N. E. 522; Chamberlain v. Dunlop, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966; Probst v. Rochester Steam Laundry Co. 171 N. Y. 584, 64 N. E. 504; Hausauer v. Dahlman, 18 App. Div. 475, 45 N. Y. Supp. 1088, affirmed on opinion below in 163 N. Y. 567, 57 N. E. 1125; Bailie v. Plaut, 11 Misc. 30, 31 N. Y. Supp. 1015; Viany v. Ferran, 5 Abb. Pr. N. S. 110; Wiener v. Graff, 7 Cal. App. 580, 95 Pac. 167; Sheppard v. Rosenkrans, 109 Wis. 58, 83 Am. St. Rep. 886, 85 N. W. 199; Kramer v. Cook, 7 Gray, 550; Stone v. St. Louis Stamping Co. 155 Mass. 267, 29 N. E. 623.

Defendant confirmed the renewal notice over seventeen months afterwards by its second letter of October 28, 1912, which was binding on defendant as a confirmation of the original notice.

Hall v. Herter Bros. 90 Hun, 280, 35 N. Y. Supp. 769, affirming 157 N. Y. 694, 51 N. E. 1091; Leslie v. Knickerbocker L. Ins. Co. 63 N. Y. 27; Farmers & M. Bank v. Butchers & D. Bank, 16 N. Y. 125, 69 Am. Dec. 678; Credit Co. v. Howe Mach. Co. 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; Deutz Lithographing Co. v. International Registry Co. 32 Mich. 687, 66 N. Y. Supp. 540; North River Bank v. Aymar, 3 Hill, 262.

The defendant's attempted withdrawal in April, 1913, of the renewal notice of March, 1911, was a legal nullity.

Sherwood v. Gardner, 2 N. Y. City Ct. Rep. 64; Dawson v. Lepper, Ir. L. R. 29 Eq. 211; Chandler v. McGinning, 8 Kan. App. 421, 55 Pac. 103; Mershon v. Williams, 62 N. J. L. 779, 42 Atl. 778.

Collin, J., delivered the opinion of the court:

The action is to recover rent accruing through the months of November and December, 1914, and January, 1915. Upon the trial a verdict in favor of the plaintiffs was directed. The consequent judgment was affirmed by the appellate division. We are to determine whether or not the evidence presented an issue of fact; in reviewing it we must give the defendant the advantage of all the facts properly presented and of every favorable inference that can be reasonably drawn.

The defendant, a domestic corporation, as the tenant, and John C. Orr, the plaintiffs' testator, as landlord, entered into a written lease of the premises in question, 133–137 East Sixteenth street, Manhattan, New York city, for a period beginning on November 1, 1904, and expiring October 31, 1914, "with the privilege to said tenant of a renew-

al for another term of ten (10) years, upon the same terms as are contained herein. But should said tenant elect to renew the within lease for said term of ten (10) years, then and in that event it will by a notice in writing notify said landlord, his heirs or assigns, at least ninety days prior to the expiration of the term hereby created, of such intention to renew said lease." The tenant was prohibited from assigning the lease. The judgments thus far have held the defendant liable, as a matter of law, for the rent for the additional or renewal period of ten years.

Prior to January, 1911, the defendant had removed its establishment and plant to premises of its own and desired to be free of the obligations of the lease. Prior to March 29, 1911, negotiations having that end in view were had between the defendant, the plaintiffs and their attorney, and the Irving Place Leasing Company as a potential tenant in the stead of the defendant. Propositions were discussed, a statement of which is not essential to the clarity of our decision or the reasons for it. During the negotiations, and on March 29, 1911, the defendant notified in writing the plaintiffs as follows: "Under the terms of our lease of the Sixteenth street building, we have the right to renew for a period of ten years on the same terms. We hereby notify you that it is our intention to take advantage of our rights and renew for a period of ten years, beginning November 1, 1914, terminating October 31, 1924, with the understanding that this notice is to be withdrawn if the court consents to accept the transfer of the lease now in course of negotiation to the Irving Place Leasing Company, in which event the estate of John C. Orr is to consent to the assignment of our lease to the Irving Place Leasing Company as per agreements now pending."

There was no further action of importance until that of October 28, 1912, consisting of a letter from the defendant to the plaintiffs, which said: "On or about March 29, 1911, we notified you of our intention to renew the lease for the property at 133 East Sixteenth street for a period of ten years, taking advantage of the option given us in our lease. The second term begins November 1, 1914. The present tenant of the building, the Irving Place Leasing Company, desire to give to a prospective tenant a five-year lease for the fifth floor of the building, and have requested us to give them the lease for the second term, namely, from November 1, 1914, to November 1, 1924. Won't you please send us communication acknowledging receipt of our notice to you of our intent to take advantage of this option? . . ."

The majority of my Brethren sitting in the case have concluded that the notification of March 29th was, within the provision of the lease, the notification by the defendant to the plaintiffs of its intention to renew the lease for the additional ten years, and not, as the appellant asserts, an independent proposal to renew it on new terms, which would have effect only upon an acceptance of them declared by the plaintiffs. The language of the notification is direct, unequivocal, and conclusive. The acts of or the circumstances surrounding the parties could not make the meaning of it determinable by the jury, and the rulings of the court, based upon such holding, were not erroneous. It expressed and gave notice of the intention to renew the lease. The intention and its expression were absolute and unconditional. The defendant did not propose a change in or addition to the terms contained in the lease. It reserved or retained the right to withdraw or annul the intention and notification in case the events expressed in the letter occurred, and that was the right which was conditional. The defendant stipulated to withdraw the notification only if the court ap-

Landlord and tenant—proposal to renew—construction.

proved the transfer of the lease and the plaintiffs consented to its assignment. It was the withdrawal of the notification, and not the taking of the new term, which was conditioned upon the approval of the court and the consent of the plaintiffs. The notification contained no offer for the plaintiffs to accept or reject. It proposed no new term or condition to be acted upon by them. It, in effect, said to them, We intend to renew the lease for another term of ten years, upon the same terms as are contained in it; we retain the right to annul our intention in case the specified consent of the court and that of yourselves are had; until then and the annulment of our intention and notification they exist precisely as they would had no right of annulment been retained. The conditions permitting their annulment never existed. Therefore the intention and notification remained.

We are unanimous in the conclusion that the letter of October 28, 1912, was a repetition of the notification of the intention to renew the lease and an abrogation of the right retained in the notification of March 29th to withdraw it. The clause of the letter, "Won't you please send us communication acknowledging receipt of our notice to you of our intent to take advantage of this option?" did not make the notification equivocal or conditional. It was complete and absolute whether or not the plaintiff acknowledged it. The acknowledgment was not essential to the inception and operation of it. It therein differed from the proposition under consideration in Poel v. Brunswick-Balke-Collander Co. 216 N. Y. 310, 110 N. E. 619, cited by the appellant.

Same—request for confirmation—effect.

The exercise by the defendant of the privilege of renewal extended the term of lease for the additional period of ten years as a present demise for the full term of twenty years, the last half of which was to take effect at the termination of the first, at the option of defendant. A new lease for the additional years was not necessary. This conclusion is not in accord with the view of a considerable and weighty body of judicial opinion, which is that the interest of a lessee exercising the privilege of renewal is purely equitable. That view rests upon a distinction made between a privilege or covenant of a renewal and a privilege or covenant of an extension. It holds that the former is a right to the grant of an estate; the latter a present demise operative immediately upon the exercise of the privilege. Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Rep. 560; Leavitt v. Maykel, 203 Mass. 506, 133 Am. St. Rep. 323, 89 N. E. 1056; Quinn v. Valiquette, 80 Vt. 434, 14 L.R.A.(N.S.) 962, 68 Atl. 515; Fergen v. Lyons, 162 Wis. 131, 155 N. W. 935; Luthey v. Joyce, 132 Minn. 451, L.R.A.1916E, 1235, 157 N. W. 708; Grant v. Collins, 157 Ky. 36, 162 S. W. 539, Ann. Cas. 1915D, 249; Miller v. Albany Lodge, 168 Ky. 755, 182 S. W. 936; Steen v. Scheel, 46 Neb. 252, 64 N. W. 957. Under that view, the remedy of the plaintiffs would be either an action to enforce specific performance by compelling the defendant to accept a lease for the additional period, or an action on the covenant for damages for its breach. We do not give it approval. Our conclusion does not rest upon any decision of this court. In Swan v. Inderlied, 187 N. Y. 372, 80 N. E. 195, we left undetermined, because not necessarily involved, the question whether a covenant in a lease, strictly for a renewal instead of an extension of the demised term, contemplated a new lease. In no subsequent decision by us has the question been considered. The distinction made by the body of judicial opinion we have referred to is too refined and theoretical to be real, as a matter of law, in practical affairs. Men of ordinary learning, intelligence, and

Same—exercise of option to renew—necessity of new lease.

experience do not universally heed or invoke it in their business transactions. The law is neither just nor practical when it founds decisions of controversies exclusively upon that distinction. The word "renewal" or the words "to renew" have not a definite and fixed legal significance to which the parties are bound by the use of them.

A lease, like any other contract, is to be enforced in accordance with the expressed intention of the contracting parties. If interpretation of its language is necessary, the proper and established rules are to be applied. The language in question of the lease at bar means that the demise was for ten years absolutely and for ten additional years in case the lessee so elected, and gave the required notice of its election. The lease is a present demise of the premises. The defendant entered into occupation under it. The lessor had no choice or decision in the matter of renewal. The letting was for the term of ten years "with the privilege to said tenant of a renewal for another term of ten years upon the same terms as are contained herein." There is no express covenant on the part of the lessor to enter into a new lease or do other act. The only acts called for to effect the renewal are on the part of the defendant. The renewal did not evoke new conditions of continuance in occupation, and a new lease would be useless. The acts of the defendant alone were intended, inasmuch as the lease enumerates no other act, to extend the stipulations of the lease to the occupation through the additional years, and it is immaterial that the demise was to take effect as to the additional years or term in the future at the option of the defendant.

Inasmuch as the defendant holds the premises for the full term of twenty years by virtue of the original lease, no question as to the application of the Statute of Frauds arises. McClelland v. Rush, 150 Pa. 57, 24 Atl. 354. A consideration of the points of the appellant discloses none other meriting discussion.

The judgment should be affirmed, with costs.

Hiscock, Ch. J., and **Chase, Cuddeback, Hogan, McLaughlin,** and **Crane**, JJ., concur.

Petition for rehearing denied, May 17, 1918.

ANNOTATION.

What constitutes sufficient notice of exercise of option of renewal in lease.

I. Introductory, 343.
II. Sufficiency as to form:
a. Generally, 343.
b. Signature of parties, 347.
III. Sufficiency as to time, 348.

I. Introductory.

In the discussion in the present note of the sufficiency of a notice by a tenant to the landlord of his exercise of an option of renewal given in the lease, the cases holding that holding over by a tenant after the expiration of the lease constitutes a sufficient notice of an election to renew or a renewal of the lease have not been included.

II. Sufficiency as to form.

a. Generally.

In the absence of a specific provision in the lease, it seems that any form of notice which definitely imparts to the landlord the information that the tenant has availed himself of an option of renewal given by the lease is sufficient.

Thus, in Thurston v. F. W. Woolworth Co. (1917) — Ind. App. —, 117 N. E. 686, it appeared that a lessee notified the lessor in due time that "we are desirous of availing ourselves of the option contained therein regarding the renewal of the lease for a

period of five years from" a specified date. It was held that the notice was sufficient to constitute an election on the part of the lessee to renew the original lease for the further term.

In the reported case (ORR v. DOUBLEDAY, P. & CO. ante, 338), it appeared that a lease gave an option of renewal for a second period of ten years on the same terms, but prohibited the assignment of the lease. The tenant gave a notice of renewal, adding thereto that it was given "with the understanding that the notice is to be withdrawn" if the court and the landlord consented to the substitution of a sublessee. The court holds that the notice was direct and unequivocal, and that the stipulation as to the withdrawal of the notice proposed no new term or condition.

Where a lease provided for an extension of its term by two years, provided the lessee, three months before the expiration of the original five years, gave a written notice to the lessor of his desire to extend the lease for that further period, and the lessee did this, the fact that he made a suggestion in that notice that if the lessor chose, they would regard the lease as extended two years and a half, was held to have no bearing on the sufficiency of the written notice. Chamberlain v. Dunlap (1891) 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966, affirming (1889) 5 Silv. Sup. Ct. 98, 8 N. Y. Supp. 125.

In House v. Burr (1856) 24 Barb. (N. Y.) 525, it appeared that lessees, by writing on the back of a lease containing the privilege of renewal on notice, assigned it to other persons, after informing the agent of the lessor that the assignees wanted the premises for the additional time, and obtaining his consent thereto. It was held that this information from the lessee to the agent, given in due time, with the consent given by him, was, without anything further, a sufficient notice to effect the extension of the lease provided for.

In some cases it has been held that an oral notice of renewal of a lease for years, and an oral waiver of the requirement of the lease that the notice be in writing is sufficient, though the Statute of Frauds makes void all leases for more than one year, not evidenced by writing. This holding is based on the theory that the terms and conditions of the contract being embodied in the lease, which was in writing and under seal, the element of the Statute of Frauds is not in the case, and the effect is to make the original lease operative for the renewal period. Gaggiano v. Gallorenzi (1899) 26 Misc. 819, 57 N. Y. Supp. 2; Re Rubenstein (1887) 13 N. Y. S. R. 891; McClelland v. Rush (1892) 150 Pa. 57, 24 Atl. 354; Dockery v. Thorne (1911) — Tex. Civ. App. —, 135 S. W. 593.

A fortiori, where there is no agreement in the lease as to how a desire for its renewal is to be manifested, whether orally or by writing, there is no necessity for any written notice. Darling v. Hoban (1884) 53 Mich. 599, 19 N. W. 545.

In Maxwell v. Ward (1822) 11 Price, 16, 147 Eng. Reprint, 387, it was held that a court of equity will relieve a lessee from the effect of the objection that no notice in writing was given, if it is shown that a fair intimation of an intention to renew was given in any way. Compare, however, Beller v. Robinson (1883) 50 Mich. 264, 15 N. W. 448, wherein it was held that an oral notice or understanding under a lease for a year, containing a privilege of renewal for three years thereafter on the giving of a written notice, was insufficient under the Statute of Frauds, either for the renewal of the lease or for a waiver of the requirement of a written notice.

A notice of election to hold for the additional term, provided for in a lease, is effective though it was given by an agent whose authority from the lessee was not in writing, since the option having been exercised, the holding is under the original lease, and not under the notice, and the Statute of Frauds has no application. Sheppard v. Rosenkrans (1901) 109 Wis. 58, 83 Am. St. Rep. 886, 85 N. W. 199.

In Broadway & S. Ave. R. Co. v. Metzger (1891) 27 Abb. N. C. 160, 15 N. Y. Supp. 662, it appeared that a lease provided that, should the lessees

desire to remain in possession for a further year, they "must advise the owner or his agents of their intention so to stay not later than" a specified date. It was held that oral notice by the lessees, given to a clerk in the employ of the agents of the lessors, while he was on the demised premises in the business of his employers, was sufficient, where he was authorized to receive notice for his employers, since no particular form of notice was prescribed by the lease.

In Whitcomb v. Indianapolis Traction & Terminal Co. (1917) — **Ind.** App. —, 116 N. E. 444, the lease in suit contained the following provision: "The lessee, provided he gives notice of his election so to do, in writing to the lessor three months before the expiration of the first ten-year term, shall have the right to a renewal of this lease for another period of ten (10) years upon the following terms; viz., for the first five (5) years of said second term the rent to be at the rate of six thousand dollars ($6,000) per year, and for the second half of the second term of ten (10) years, the rent shall be at the rate of seven thousand dollars ($7,000) per year; but if, at the expiration of the first ten-year period, the lessor is unwilling to confirm to the lessee the second term of ten years at the annual rentals as above set forth, as it shall have the right to do, then and in lieu thereof, the following form of arbitration is hereby agreed upon, to wit: Each party hereto shall nominate a citizen of Indianapolis of good repute, and they together shall agree upon and select a third, and the three persons so selected shall form an arbitration committee who shall determine how much rent the lessee shall pay each year of said second term of ten years." The court held that a notice by the lessee of his election to renew the lease for an additional term of ten years, in accordance with its terms, was not rendered ineffective by his failure to appoint his arbitrator to fix the amount of rent to be paid thereunder, since the lease did not provide for the appointment of an arbitrator at the time of the giving of the notice. Compare, however, Arnsthal v. Patterson (1882) 3 Pennyp. (Pa.) 25, wherein it appeared that a lease provided that the lessee should have the right for five years from its date, to continue it from year to year, at a rental to be fixed as follows: "Lessee to appoint in writing to lessor, on or before December 1, prior to end of such lease, a reputable freeholder as an appraiser, whereafter lessor, on the 3d of said December, shall appoint another, which two appraisers shall be sworn by the alderman of said ward, and shall fix the advance, if any, of the rent for the year, from the 31st of March then next following," etc. On the following November 29th, the lessee served the following notice on the lessor: "Sir: I hereby notify you that I will continue use of rooms 45 and 47 Sixth street, now occupied by me as billiard rooms, according to the terms of our lease." The court held that the notice was entirely insufficient, in that the lessee had not done what he was required by the lease to do, viz., "by writing to lessor, to appoint a reputable freeholder as an appraiser to fix the rent," etc.

In Wright v. Kaynor (1907) 150 **Mich.** 7, 113 N. W. 779, it appeared that two tenants in common united in executing a lease of the land. They described themselves therein as first parties and the lessee as a second party, and jointly agreed to renew it and to insert in the renewal an option whereby the lessee might purchase their joint interests in the property leased. The promises of the lessee were to them jointly and not severally. It was held that the lessors were joint contractors as well as tenants in common, and hence that notice of the renewal of the lease, given to one, was binding on the heirs of the other also.

In Nicholson v. Smith (1882) L. R. 22 Ch. Div. (**Eng.**) 640, 52 L. J. Ch. N. S. 191, 47 L. T. N. S. 650, 31 Week. Rep. 471, it appeared that the lessors in a lease for a term of twenty-one years covenanted that they, their heirs or assigns, would, at any time before the expiration of the term granted, and also at any time before the ex-

piration of every succeeding term granted by future or renewal leases of the land, whenever required by the lessees and on the receipt of a stated sum, grant the latter a new lease for a further term of twenty-one years, to commence from the expiration of the term last granted. And in every such new or renewed lease was to be a covenant on the part of the lessors for its renewal, on the request the lessees, for twenty-one years, the intention of the parties thereunder being that the lease should be renewable forever. In holding, on the facts stated by it, that a notice was given by and to the proper persons, the court said: "It is further argued on the part of the plaintiffs that there has been a sufficient notice given. Now the notice which was given is this: On the 23d of June, 1881, the day before the lease expired, Mr. Smith wrote this letter to the directors of the Globe Insurance Company: 'As one of the joint owners with Mrs. Louisa Garle of property in Cornhill, for which you pay a rent of £100 a year, I think it right to call your attention to the fact that the lease expires to-morrow.' On the same day that letter was answered by Mr. Hendriks in these terms: 'Acknowledging the receipt of your letter of this date, I have to state that the directors are, of course, prepared to renew the lease.' It is said, on the one hand, that that is a proper notice. On the other hand, it is said that the notice is insufficient, for this reason: in the first place, that Mr. Hendriks had no authority to write the letter; in the second place, that the letter was not sent to the persons to whom notice ought to have been given. Mr. George Smith was tenant for life of one moiety, he was cotrustee with two other persons of the remainder in this moiety and of the other moiety. It is said that notice ought to have been given to all the persons interested, and by some person who was duly authorized, as I understand the argument, by resolution of the trustees of the fund, certainly, and possibly also by a resolution of the directors that the lease was to be renewed; for that otherwise Mr. Hendriks had really no authority, and the letter was the letter simply of an outsider having no authority whatever to write it. Now the lease was held undoubtedly in the names of the trustees of the 'Million Fund,' and by the trustees of the 'Million Fund' as a security for the annuities charged on that fund, but it was by way of indemnity only. There was no right for them to apply any part of the interest of that million of money unless the company made default in paying the annuities, and until default was made, the lease, and all the income of it, was to go to the company itself. I consider, therefore, that the persons who are really and truly mainly interested in this fund are the Globe Company itself. It was a part of their assets, simply subject to a special indemnity in favor of the annuitants, who had taken 6 per cent annuities. But whether the company or whether the trustees were the persons who ought to have given notice, Mr. Hendriks united in himself the office of secretary to them both. I have stated that from the evidence given to me in the box by Mr. Hendriks and by Sir Charles Nicholson, I consider that it was a part of the duty of Mr. Hendriks to give due notice before the lease expired that the trustees and directors both wished the lease to be renewed, and I consider that Mr. Hendriks, therefore, was acting as he was bound to act, only rather later than I think he ought to have acted in giving this notice. Then it is said the notice was not given to the proper person. Well, it was given to Mr. Smith, who, as I have said, united in himself the character of tenant for life of one moiety, and of a trustee, not only of the other moiety, but of the moiety of which he was tenant for life, subject to his own tenancy for life. It is said that that is not a sufficient notice. I have not yet been informed distinctly by the counsel for the defendants to whom the notice ought to have been given, but at all events they seem to argue this: that it should have been given to Mr. Thompson and Mrs. Garle, who were the other trustees, as well as to Mr. Smith. I have come to the conclusion that, inasmuch as Mr. Smith was one

of the trustees, a notice to one of the trustees was perfectly sufficient, and therefore I conclude that the notice given by Mr. Hendriks was a requisition given within the time within which the notice was necessary, and that consequently the plaintiffs are entitled to that which they ask. Some trifling observation was made upon the form of Mr. Hendriks's letter. I do not think any form was necessary. No requisition in writing is required by the covenant. The lease is to be a lease which is to be renewed in perpetuity at the option of the lessees. I think the option of the lessees and their desire to remain tenants was stated fairly and broadly upon the letter; not the less so because, even in the lease of 1860, the lessees are expressly stated to be trustees for the directors of the company. It would be, in my judgment, a departure from the deed if I were to hold that any formal notice in any formal words was requisite with regard to this option when no notice in writing is required, and when it is expressly stated in the lease that the lease is to continue at the option of the lessees. I think the option of the lessees was sufficiently plainly declared in this letter, and I must hold, therefore, that the letter, being written on the 23d of June, 1881, and being sent to one of the three trustees, who was also a tenant for life of the moiety which had not fallen into the trusteeship up to that time, was a sufficient notice and a sufficient declaration of the option on the part of the lessees to take a renewal of the lease."

b. Signature of parties.

In Coy v. Title Guarantee & T. Co. (1912) 198 **Fed.** 275, it appeared that a lease stipulated that the privilege of renewal thereof should be exercised by giving written notice to the lessor at least three months prior to the expiration of the term of the lease, but no particular form of notice was required. The lessee's husband wrote a letter to the receiver of the landlord, stating that, "in accordance, therefore, with the provisions of said lease, and of paragraph number two on page number three therein, as manager, I hereby make application for a renewal of said lease for the remaining five years from the" date of the expiration of the present term. The principal objection to the notice was that it was signed by the husband, and not by the lessee. The court held that as he was the manager for his wife, and as the notice showed that his wife was the owner of the term and the person entitled to the renewal, the informality of the notice did not render it ineffectual or nugatory, and it was held to be a sufficient notice of the lessee's desire to exercise her privilege of renewal.

In Wiener v. Graff (1908) 7 **Cal.** App. 580, 97 Pac. 167, it was contended that a notice not signed by the lessees failed to meet the requirements of the lease, which provided that, in the event of seeking a renewal thereof, they should "signify their acceptance in writing to the party of the first part on or before" a specified date. The notice was forwarded to the lessor by registered mail, inclosed in one of the lessee firm's business envelops, with the firm's name and address in the corner, and was addressed to the lessor, directing him to take notice that the lessee (naming the firm) "does hereby elect to avail itself and accept the privilege contained in said covenant just described (the notice identified the lease by stating its date and place of record, and set forth the particular clause granting the option), and requests the continuance of said lease under the same terms as are now contained in said lease for the period of one year from and after the 1st day of December, 1904." The court said: "On its face and in its body it appeared to have emanated from H. Graff & Company, the lessees, and the purpose of the notice is stated with clearness and precision. When it was delivered to and receipted for by the lessor he could not have doubted by whom it was sent, nor the purpose intended in sending it." Compare, however, Greenwood v. Bancroft (1912) — **B. C.** —, 20 West. L. R. 816, 2 D. L. R. 417, wherein it was held that a notice is writing by the lessee

of the exercise of his option to renew was not a proper and binding notice, not having been signed by him.

Where a lease provides that a named firm is to have the privilege of renewal thereof, the fact that the notice of renewal is signed by a new firm, reorganized from and the successor of the old firm, is immaterial, when the lessor raises no objection to it, and it is regarded by all the parties as in proper form. Reed v. St. John (1867) 2 Daly (N. Y.) 213; Sherwood v. Gardner (1884) 2 N. Y. City Ct. Rep. 64.

In Emery v. Hill (1892) 67 N. H. 330, 39 Atl. 266, it appeared that property was leased by a partnership doing business under the name of James R. Hill & Company. The lease provided that the lessees might extend it for a further period of six years by notifying the lessors, in writing, of their election so to do. Before the expiration of the term the partners and others formed a corporation. The notice given stated that "James R. Hill & Company, the lessees, . . . hereby give notice that they elect to have the said lease extended," and was signed, "The James R. Hill Harness Company. Geo. H. Emery, President." Holding the notice to be insufficient, the court said: "If this was a notice by the partnership, it did not make the possession of the corporation legal; if it was a notice by the corporation, it could have no effect, for legal notice could only be given by the partnership; and if it was a notice by neither, the same result follows. The corporation's wrongful possession could only be made legal by legal methods; and the service of this paper upon the defendants was not a legal method of extending the corporation's illegal possession for a series of years. Nor was the service of the notice of December 15 sufficient, because the time had then expired within which the partnership could elect to have an extension of the lease."

III. Sufficiency as to time.

Where a lease gives the lessee a right of renewal on a specified number of days' notice to the lessor, a notice of an intention to renew the lease, given less than the required number of days before the expiration of the lease, is insufficient. Jackson Brewing Co. v. Wagner (1906) 117 La. 875, 42 So. 356; Emery v. Hill (N. H.) supra; Doepfner v. Bowers (1907) 55 Misc. 561, 106 N. Y. Supp. 932; Keppler Bros. Co. v. Heinrichsdorf (1904) 26 Ohio C. C. 16.

But, when the lessor directs the lessees to notify him through the post-office of their election to renew the lease, the deposit of the letter containing the notice, in the city post-office, addressed as directed and the postage paid, the day before the time for giving notice expires, is good, even though it is not received until a day later. Reed v. St. John (1867) 2 Daly (N. Y.) 213.

An acceptance of and action on a notice of renewal without objection constitutes a waiver of the fact that it was not given in the required time. Sheppard v. Rosenkrans (1901) 109 Wis. 58, 83 Am. St. Rep. 886, 85 N. W. 199.

In Southern R. Co. v. Peple (1915) 143 C. C. A. 251, 228 Fed. 853, it appeared that a lease for ten years provided "as a condition precedent" to renewal for ten years further, that the lessee should serve on the lessor "ninety (90) days' notice in writing of his election of such renewal prior to the exploration of any existing term of renewal thereof." It also appeared that there had been transactions between the lessor and the lessee indicating plainly a purpose on the part of the lessee to renew the lease; but, owing to an inadvertence, notice was given by the lessee sixty instead of ninety days before the expiration of the lease. It was held that the conduct of the lessor in not replying for five weeks after receiving the sixty days' notice indicated an intentional acceptance of that notice as sufficient, and a waiver of the ninety days' requirement.

In I. X. L. Furniture & Carpet Installment House v. Berets (1907) 32 Utah, 454, 91 Pac. 279, the court construed a provision in a lease whereby the lessors agreed in case the lessee

so elected and on his request "at the expiration of the term of" the lease, to continue and renew the lease for a further term of three years. The court held that the lessee was required to make its request on or before the last day of the old term, and that any time on that day was sufficient, but that a request thereafter came too late. H. D. B.

VASHTI TRIPLETT, by Guardian ad Litem, Appt.,
v.
CITY OF COLUMBIA, Respt.

South Carolina Supreme Court—April 17, 1918.

(— S. C. —, 96 S. E. 675.)

Municipal corporation — ponding water in highway — illness — liability.

Illness of an abutting owner, caused by a municipality's permitting water to pond in a highway, is not within a statute giving a right of action to any person who shall receive bodily injury or damage in his person or property through a defect in the street.

[See note on this question beginning on page 355.]

APPEAL by plaintiff from an order of the Common Pleas Circuit Court for Richland County sustaining a demurrer to the complaint in an action brought to recover damages for illness alleged to have been caused by defendant's negligence in allowing a cesspool to remain in the street. *Affirmed.*

The portion of the opinion of the circuit court mentioned in the opinion is as follows:

Omitting the merely formal parts of the complaint, the plaintiff in this cause alleges, substantially, that for some time prior to the 1st day of June, 1916, the defendant, through the neglect and mismanagement of its agents and employees, permitted a large pool of stagnant water, "about 25 feet long by 15 feet wide, and varying at different times from a foot to 4 feet in depth," containing "large quantities of trash, refuse, and decaying matter," to remain in and upon Pulaski street, a public highway within the corporate limits of the said city of Columbia; that the plaintiff, "who resided near to the pool or puddle above referred to," without any negligence on her part or in any way negligently contributing thereto, "was caused to contract colitis on or about the 1st day of June, 1916, and was thereby made sick and ill and to continue sick and ill for a long period of time, and be placed in danger of death, and to suffer great pain, misery, and discomfort," to her great damage, and that such injuries and damage were due to the neglect and mismanagement of the defendant in the particulars mentioned.

The cause was heard by the court on a motion to dismiss the complaint (§ 198, Code Civ. Proc.), and the sole question presented therein for the determination of the court is whether a municipal corporation is liable, under the provisions of § 3053 of the Civil Code 1912, for damages under the facts set forth in the complaint, which are admitted to be true for the purpose of this inquiry. Tutt v. Port Royal & A. R. Co. 28 S. C. 397, 5 S. E. 831.

It is the settled law of this state that a municipal corporation vested with certain powers under the Constitution and laws of the state, and chargeable with the duty of keeping

the streets or public highways within its corporate limits in proper repair, is not liable in a civil action for damages for injuries to the person or property sustained in consequence of a violation of such duty, in the absence of a statute imposing such liability, and a substantial compliance with the requirements and conditions upon which such liability is predicated.

Such a liability, however, has been created in this state, under the conditions and limitations therein imposed, by a legislative enactment (21 Stat. at L. 91) now appearing as § 3053 of the Civil Code 1912, and which is as follows: "Any person who shall receive bodily injury, or damages in his person or property, through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under control of the corporation within the limits of any town or city, may recover, in an action against the same, the amount of actual damages sustained by him by reason thereof. If any such defect in a street, causeway or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured if his load exceed the ordinary weight: Provided, the said corporation shall not be liable unless such defect was occasioned by its neglect or mismanagement: Provided, further, such person has not in any way brought about any such injury or damage by his or her own negligent act or negligently contributed thereto."

Construing the provisions of this act, and those of a similar act, establishing the liability of the county for injuries to the person and property for defects in the public highways and bridges under its control, the court at an early period declared the ground upon which such liability rested. Acker v. Anderson County, 20 S. C. 495; Brown v. Laurens County, 38 S. C. 282, 17 S. E. 21; Mason v. Spartanburg County, 40 S. C. 390, 42 Am. St. Rep. 887, 19 S. E. 15; Dunn v. Barnwell, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 315; Barksdale v. Laurens, 58 S. C. 413, 36 S. E. 661; Hutchison v. Summerville, 66 S. C. 448, 45 S. E. 8; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 229. In the case of Dunn v. Barnwell, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 315, Mr. Chief Justice McIver, delivering the opinion of the court, in his usual clear and forceful statement, does not leave the slightest doubt that liability under this statute is limited solely to such injuries to the person and property as are due to "a defect in any street, causeway, bridge, or public way," and that the terms "neglect" and "mismanagement" are therein used in connection with keeping the streets, etc., in proper repair. That such is the unmistakable conclusion of the court, it is only necessary to refer to the language of the learned Chief Justice (43 S. C. at page 401, as follows: "It is apparent from the title of this act, as well as from the terms used in the body of the act, that the sole purpose was to give a person who had sustained an injury by reason of a defect in a street a right of action to recover damages for such injury. The title of the act is as follows: 'An Act Providing for a Right of Action against a Municipal Corporation for Damage Sustained by Reason of Defects in the Repair of Streets, Sidewalks, and Bridges, within the Limits of Said Municipal Corporation;' and it is manifest that the purpose thus declared in the title was adhered to in the body of the act, especially from the language used in the proviso above set out, where it is declared that the corporation should not be liable, 'unless said defect was occasioned by its neglect or mismanagement;' indicating very clearly that the term mismanagement,' as used in a previous part of the act, meant mismanagement in making repairs on the streets, so that the corporation should be held liable not only for neglect in making the repairs on the streets, but also for mismanage-

ment of anything under the control of the corporation in making such repairs. There is nothing whatever in the act indicating an intention on the part of the legislature to make a municipal corporation liable for any other nonfeasance or misfeasance on its part, except such as was connected with the keeping of the streets, etc., in proper and safe repair."

This doctrine, without the slightest qualification, was recognized and applied in several of the subsequent cases (Barksdale v. Laurens, 58 S. C. 413, 36 S. E. 661; Hutchison v. Summerville, 66 S. C. 448, 45 S. E. 8; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 229), and not until the decision of the court in the case of Irvine v. Greenwood, 89 S. C. 511, 36 L.R.A.(N.S.) 363, 72 S. E. 228, could any question with regard to a modification thereof have been suggested with any degree of plausibility. And it is plain to the court that an examination of the latter case will disclose no intention of the court whatever to abandon the basis of liability so strongly stated in the case of Dunn v. Barnwell, but merely to define, more clearly and definitely, as was made necessary by the facts of that case, the motive and extent of the duty imposed "to keep a street in repair," for the violation of which the act established liability. This distinction is clearly recognized and stated by Mr. Justice Woods in an exceedingly able and elaborate opinion in the use of the following language (89 S. C. at pages 519, 520:

"In the case of Dunn v. Barnwell, supra, the court, construing the statute in the light of its title, held that the liability created by it was limited to misfeasance or nonfeasance connected with the keeping 'of any street, causeway, bridge, or public way' in proper repair. This construction has been followed in cases arising since the statute was incorporated in the Civil Code. Hutchison v. Summerville, 66 S. C. 448, 45 S. E. 8; Bryant v. Orangeburg, 70 S. C. 142, 49 S. E. 229.

"But we are unable to give the duty of keeping streets in repair the narrow meaning contended for by respondents. To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface should be safe; a street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street. In Duncan v. Greenville County, 71 S. C. 170, 50 S. E. 776, it was held that a wagon left on the public road so as to put travelers in peril must be regarded, under the statute, as a failure to keep the road in repair. In this case the pole was placed in the street as a fixture and became a part of the street, which it became the duty of the municipal authorities to keep safe."

Applying the principle thus declared, the defendant was held liable under the act for an injury to the plaintiff, a boy seventeen years of age, caused by coming in contact with a chain hanging by the side of an electric light pole which conveyed a fatal charge of electricity.

In the case of Stone v. Florence, 94 S. C. 375, 78 S. E. 23, the defendant was held liable under the statute for an injury to a child of tender years by falling into an unguarded ditch, in which the defendant had burnt some trash and had left a smouldering fire, regardless of whether the ditch was *in* the street or on the extreme edge thereof. The most casual consideration of this case obviously sustains the rule declared in the case of Irvine v. Greenwood. In stating the conclusions of the court, Mr. Justice Hydrick, 94 S. C. at pages 377, 378, says: "In Irvine v. Greenwood, supra, the neglect or mismanagement of the corporation in the repair of the street complained of consisted in leaving an electric light pole in the street from which an iron chain connected with the wire hung so low that plaintiff caught it and received a deadly charge of elec-

tricity. It was argued for the city that this was not such a defect in the repair of the street as was contemplated by the statute. In rejecting that contention, the court said: 'But we are unable to give the duty of keeping streets in repair the narrow meaning contended for by respondents. To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface should be safe; a street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street. In Duncan v. Greenville, supra, it was held that a wagon left on the public road so as to put travelers in peril must be regarded under the statute as a failure to keep the road in repair. In this case the pole was placed in the street as a fixture and became a part of the street, which it became the duty of the municipal authorities to keep safe.' In Hutchison v. Summerville, 66 S. C. 442, 45 S. E. 8, this court held that the corporation was liable for an injury to plaintiff resulting from negligence in leaving a ditch at the end of a sidewalk unguarded, so that plaintiff fell into it. Hence, if a ditch or drain along the edge of a street or highway is negligently left unguarded, and a person lawfully using the highway is injured thereby, the corporation is liable. It is not material, therefore, whether the ditch into which the plaintiff fell was wholly within the street, or merely along the extreme eastern edge of it; for, in either case, defendant is liable if, under all the circumstances, it was negligence to leave it unguarded. Negligence in the repair of a street may consist in omission or nonaction."

The application of the doctrine declared in the case of Irvine v. Greenwood, supra, and distinctly recognized in the case of Stone v. Florence, supra, quite naturally and logically led to the enforcement of liability against a municipality for an injury caused by being carelessly and negligently run over on a public street by a fire engine under the control of its employees (Creps v. Columbia, 104 S. C. 371, 89 S. E. 316), and by an automobile negligently operated upon its streets while engaged in a speed contest with its knowledge and consent (Burnett v. Greenville, 106 S. C. 255, 91 S. E. 203, Ann. Cas. 1918C, 363; Sexton v. Rock Hill, 107 S. C. 505, 93 S. E. 180). In the latter cases the court strictly adhered to the doctrine that the acts complained of rendered the street unsafe for street purposes, and liability was therefore ultimately based upon the ground stated in the case of Irvine v. Greenwood.

A careful examination of the cases will show beyond controversy that, in every instance in which it has been sought to hold a municipality liable for personal injuries under the statute, its liability has been limited to some act of nonfeasance or misfeasance connected with a failure to keep its "streets, etc., in proper and safe repair" (Dunn v. Barnwell, supra); or, to put it in different language, for some act of omission or commission which rendered the streets, etc., not "reasonably safe" for "prime street purposes" (Burnett v. Greenville, supra); that a discharge of the duty to keep "in proper and safe repair" imposes the duty to keep "reasonably safe" for "prime street purposes," and that the plaintiff in such cases sustained a "bodily" injury as the direct and proximate result of the delict while engaged in the use of the street for legitimate purposes. The case of Irvine v. Greenwood, supra, is not in conflict with the latter view, as the court in that case expressly refused to sanction the doctrine (89 S. C. p. 522, "that playing by boys and girls while they are still of the age of youthful sportiveness is an *illegitimate* use of a street, not to be anticipated by the authorities whose duty it is to keep highways in a

reasonably safe condition." (Italics added.)

Naturally, the next inquiry is to determine whether the requirements of the statute as determined by the cases have been fully met in the allegation of this complaint.

It will be observed that there is no allegation which either directly or inferentially charges that the "pool or puddle" of water rendered the street unsafe for "street purposes." There is no allegation that the plaintiff sustained any "bodily injury" as the direct and proximate cause thereof, while engaged in the use of the street for a legitimate purpose. On the contrary, the allegation setting forth the character of the injury complained of,—the contraction of a disease,—and that the plaintiff "resided near to the pool or puddle," would clearly indicate that the only unsafety alleged was to the health of one who "resided near," and, as a matter of fact, may never have used the street at all, rather than an allegation of "bodily injury" to one while engaged in the legitimate use thereof.

The court is clearly of the opinion that it was never the purpose of the legislature to extend the liability of a municipal corporation to a case of this nature.

Messrs. **Alfred Wallace, Jr.,** and **W. Boyd Evans** for appellant.

Mr. **C. S. Monteith,** for respondent: Defendant is not liable under the provisions of § 3053 of the Civil Code 1912.

Tutt v. Port Royal & A. R. Co. 28 S. C. 397, 5 S. E. 831; Acker v. Anderson County, 20 S. C. 495; Brown v. Laurens County, 38 S. C. 282, 17 S. E. 21; Mason v. Spartanburg County, 40 S. C. 390, 42 Am. St. Rep. 887, 19 S. E. 15; Dunn v. Barnwell, 43 S. C. 398, 49 Am. St. Rep. 843, 21 S. E. 315; Barksdale v. Laurens, 58 S. C. 413, 36 S. E. 661; Hutchison v. Summerville, 66 S. C. 448, 45 S. E. 8; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 229; Hines v. Rocky Mount, 162 N. C. 409, L.R.A.1915C, 751, 78 S. E. 510, Ann. Cas. 1915A, 132; Metz v. Asheville, 150 N. C. 748, 22 L.R.A.(N.S.) 940, 64 S. E. 881.

Hydrick, J., delivered the opinion of the court:

We are satisfied with the reasoning upon which the circuit court reached the conclusion that this action cannot be maintained under § 3053, Civil Code 1912; and we would not attempt to add anything to the opinion of the learned judge on that point, but for the contention of appellant that this action falls within the principle upon which this court rested its decision in the case of Mayrant v. Columbia, 77 S. C. 281, 10 L.R.A.(N.S.) 1094, 57 S. E. 857. That case seems to have been overlooked by the circuit court. At any rate, it was not referred to in the opinion.

Municipal corporation—ponding water in highway—illness—liability.

Only by a strained process of reasoning can it be said that this case is not within the ground upon which the decision in the Mayrant Case was rested. Nevertheless, it does not follow that the decision of the circuit court in this case was wrong; for, though the decision in the Mayrant Case was right, it was not put upon the right ground. In the Mayrant Case the wrong was alleged to have been caused by negligence in raising the level of the street, closing up the existing surface drains, and so negligently installing drain pipes of insufficient size and fall to carry off the surface water (which had theretofore been carried off by the surface drains) that it was thrown and ponded upon plaintiff's lot. In this case, the negligence alleged consists in failing to drain the surface water off the street, and thereby allowing a cesspool to be created and remain in the street, which caused plaintiff's sickness. In neither case was the injury caused by any defect in the street which interfered with or affected the use of it for legitimate street purposes, so as to bring it within the ground of decision in Hutchison v. Summerville, 66 S. C. 448, 45 S. E. 8; Duncan v. Greenville, 71 S. C. 170, 50 S. E. 776;

Irvine v. Greenwood, 89 S. C. 511, 36 L.R.A.(N.S.) 363, 72 S. E. 228; Stone v. Florence, 94 S. C. 375, 78 S. E. 23; Creps v. Columbia, 104 S. C. 372, 89 S. E. 316; Burnett v. Greenville, 106 S. C. 255, 91 S. E. 203, Ann. Cas. 1918C, 363; and Sexton v. Rock Hill, 107 S. C. 505, 93 S. E. 180; nor was it caused by mismanagement of something under the control of the corporation while being used in the work of repairing the streets, so as to bring it within the ground of decision in Barksdale v. Laurens (the steam roller case) 58 S. C. 413, 36 S. E. 661, or Strait v. Rock Hill, 104 S. C. 116, 88 S. E. 469 (the rock crusher case).

The Case of Mayrant stands alone. It cannot be brought within the ground of decision of any of our previous cases, in all of which the right to bring the actions was held to be given by the statute, as it was interpreted in Dunn v. Barnwell, 43 S. C. 401, 49 Am. St. Rep. 843, 21 S. E. 315, an interpretation which has been expressly recognized and followed in every subsequent decision except the Mayrant Case. By reference to the opinion of the late Chief Justice Pope in the Mayrant Case, it will be seen that he does not attempt to show that it falls within the statute, as interpreted in Dunn v. Barnwell, supra, or any previous decision of this court. On the contrary, he relies entirely upon the authority of textwriters and the decisions of other courts.

Now, the rule of decision in this court is exceptional with regard to actions against municipal corporations for tort in at least two important particulars, both of which seem to have been overlooked by the learned chief justice, as will clearly appear from a consideration of the quotations found in his opinions. In the first place, the courts of most other states hold that such corporations are liable under the common law for certain kinds of torts, while this court has uniformly denied such liability, and held that no action for tort can be maintained against them unless it is expressly authorized by statute; the reason being that, in the performance of their functions, they are mere agencies of the state for governmental purposes, and the state cannot be sued without its consent. In the second place, the courts of most other states recognize a distinction between what are called governmental, and corporate or ministerial, functions in such corporations, while this court has expressly rejected that distinction, and held that all the powers conferred upon such corporations are to be exercised as governmental powers. Irvine v. Greenwood, 89 S. C. 511, 36 L.R.A.(N.S.) 363, 72 S. E. 228. Therefore, if we follow our previous decisions construing § 3053, the conclusion is inevitable that the decision in the Mayrant Case was rested upon an untenable ground. It might have been rested upon the authority of the Act of 1902, entitled, "An Act to Require Municipalities to Provide Drains for Surface Water." 23 Stat. at L. 1038. That act is quoted in the opinion as § 2010a of the Civil Code of 1902, though it does not appear in the body of that Code, but now appears as § 3026 of the Civil Code of 1912. The decision might also have been rested upon the principle upon which the decision of this court in Hopkins v. Clemson Agri. College, 77 S. C. 12, 57 S. E. 551, was reversed by the Supreme Court of the United States, 221 U. S. 636, 55 L. ed. 890, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654, in which liability was imposed on the ground that the diversion of the waters of Seneca river upon the plaintiff's land was tantamount to a taking thereof without compensation. See the consideration of that ground in Irvine v. Greenwood.

Where an individual has suffered injury as the result of a wrong done, natural justice calls for some remedy, and the courts have ever been alert to provide one; hence the boast of the law, which is often pressed upon the attention of

courts, that for every wrong there is a remedy. But there is another axiom of practical wisdom equally important to be observed—hard cases make bad law. Not infrequently the hardship of a particular case leads to the strained, if not incorrect, application of sound principles to fit the facts, so as to afford a remedy; and, when the same principles are invoked in similar cases, it is discovered that they lead to results that are exceedingly inconvenient, if not so illogical that they cannot be justified on settled principles of legal liability. And the consequence is that the previous decision must be distinguished, modified, or overruled.

The courts are not invested with the power to make laws. They should and do keep pace with the progress and development of society by the application of settled principles to new relations and conditions, but in doing this the point is sometimes reached when the power of the court ends. And the duty of the legislator begins.

If the plaintiff, who has been injured by disease, superinduced by the negligence of defendant, can maintain her action for damages, why may not every other member of the family, or of the community, or, indeed, of the entire city, who has suffered a like injury from a like cause, maintain such an action? The fact that the exciting cause of the disease was in a street, and the result of negligence in failing to keep it in proper repair, is an immaterial incident. The consequences would have been the same if the nuisance has been created or allowed to exist on a private lot. Upon what principle could the court justify the allowance of the action in one case and deny it in the other?

A moment's reflection will disclose innumerable evils that would result from the allowance of such an action. Municipalities, the agencies of government, would become liable for epidemics of typhoid fever and other diseases caused, actually or supposedly, by negligence in water supplied to the people, the disposition of sewerage and refuse matter, and on other grounds which will readily be suggested. The floodgates of litigation would be thrown wide open, and the funds that are raised by taxation for public improvements would be dissipated in tort suits. Such liability could not be sustained under the principles of the common law; and it is perfectly clear that it was never contemplated by the legislature in the enactment of § 3053.

Judgment affirmed.

The reporter will report the opinion of the circuit court down to and including the last paragraph on page 8 of respondent's argument ending with the words, "to a case of this nature."

Watts, Fraser, and Gage, JJ., concur. Gary, Ch. J., did not sit.

ANNOTATION.

Liability of municipality for sickness due to condition of street.

A search has failed to discover any other decisions discussing the question whether municipal liability for personal injuries sustained by reason of a defect in a street, whether such liability is statutory (as in the reported case, TRIPLETT v. COLUMBIA, ante, 349), or is held to exist independently of statute, extends to a case in which the injury sustained is occasioned by illness arising from the condition of the street. An opportunity to pass upon the point was presented in Hines v. Rocky Mount (1913) 162 N. C. 409, L.R.A.1915C, 751, 78 S. E. 510, Ann. Cas. 1915A, 132, in which it was sought to recover damages for illness caused by a nuisance created by a municipal corporation which, acting under its charter authority to dispose of rubbish accumulated within its limits, used it to fill an excavation

in a highway. The decision, however, was that the condition complained of was caused by an exercise of the power conferred upon the municipality to make proper regulations for the conservation of the public health, and therefore should be considered governmental in character, and consequently that illness caused thereby was not a proper element of damages.

E. S. O.

S. L. HARRIS et al., Plffs. in Err.,

v.

C. P. NORTH et al.

West Virginia Supreme Court of Appeals—March 28, 1916.

(78 W. Va. 76, 88 S. E. 603.)

Abatement — misjoinder.

1. Misjoinder of defendants in an action of assumpsit is not pleadable as matter of abatement of the action, but is matter of defense under the general issue.

[See note on this question beginning on page 362.]

Pleading — error — verdict — case.

2. If a plea setting up such misjoinder as matter of abatement is not objected to in any manner by the plaintiff, but, on the contrary, is replied to and issue is joined thereon, the error is cured by the verdict, under and by virtue of the Statute of Jeofails.

Appeal — waiver of error.

3. Trial of the issues so made separately and preliminary, as other issues on pleas in abatement are tried, over the objection of the plaintiff, is not reversible error, his failure to object to the plea and his replication thereto having invited and induced the error of the court.

Same — harmless error.

4. If the issue so erroneously made has been fully and fairly heard by the jury and determined by the verdict, the error is harmless.

Intoxicating liquor — recovery of purchase money.

5. The statutes regulating sales of intoxicating liquors in this state, before the Prohibition Laws became effective, did not govern or regulate purchases of supplies of such liquors by retail dealers therein from manufacturers and wholesale dealers as to liability for purchase money.

Same — liability of holder of license.

6. Such statutes did not, by their own force and vigor, make one in whose name a retail liquor license was issued and posted liable for the purchase money of liquor sold for use in the saloon for which the license was procured, as a part of the stock of goods, to another person who exclusively owned and conducted the business done under the license, and with whom alone the vendor contracted the sale thereof.

Same — absence of notice of noninterest.

7. Nor did failure of such a licensee to notify persons selling liquors to the real proprietor of his lack of interest in the business make him liable to them, under the legal rule making retiring dealers liable for goods sold to their successors under certain conditions, when notice of the retirement has not been given.

Partnership — holding out — liability.

8. In such cases the question of liability on the part of the licensee depended upon the general commercial law imposing liability upon one who has permitted himself to be represented or held out as a partner, in favor of persons who have sold their goods to the firm of which he is represented as being a member, on the faith of the representation, and under the belief that the person so represented or held out was a partner of the person to whom the sale was actually made.

Evidence — partnership — holder of liquor license.

9. Under this rule the display of the license was a circumstance tending to lead a wholesale dealer seeing it to believe the licensee was a partner of the

Headnotes by POFFENBARGER, J.

person or persons who owned the saloon and to whom the liquors were actually sold, but upon which he could not hold the licensee liable for the purchase money, if he knew the latter had no interest in the business, or if he did not make the sale or extend the credit under belief that he had.

ERROR to the Circuit Court for McDowell County to review a judgment in favor of defendant North, in an action brought to recover a balance alleged to be due on an account for liquors bought by defendants from plaintiffs for a saloon. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Anderson, Strother, Hughes, & Curd,** for plaintiffs in error:

It was improper to treat the plea of North, denying partnership, as a plea in abatement, and to try it as a separate issue.

Burks, Pl. & Pr. § 66; Bush v. Campbell, 26 Gratt. 403; Steptoe v. Read, 19 Gratt. 1; State ex rel. Clark v. Long, 37 W. Va. 271, 16 S. E. 578; Snyder v. Snyder, 9 W. Va. 419; Carlon v. Ruffner, 12 W. Va. 306.

Plaintiffs were entitled to try the general issue as to North, since Lukacs and Szilagyi were proper but not necessary partners.

George, Partn. p. 374.

Defendant North could not have the license in his name and permit someone else to run the business and avoid liability of debts of the concern doing business under a tradename.

Young v. Stevenson, 75 Ark. 181, 86 S. W. 1000; Hoyt v. McLaughlin, 250 Ill. 442, 95 N. E. 464.

Third persons dealing with the Old Miners' Saloon, seeing the license to conduct it in the name of C. P. North, had a right to assume that he was interested in the business; and if they were thereby misled and did not have actual knowledge that North was not a partner, the jury should find that he was a partner.

Mechem, Elements of Partn. 560; Grieff v. Boudousquie, 18 La. Ann. 631, 89 Am. Dec. 698; Farmer's Bank v. Smith, 26 W. Va. 541; Brown v. Higginbotham, 5 Leigh, 583, 27 Am. Dec. 618; Robinson v. Allen, 85 Va. 721, 8 S. E. 835; Moore v. Harper, 42 W. Va. 39, 24 S. E. 633.

Evidence insufficient to prove a partnership as between the parties might be sufficient to prove it as to third persons.

Hinkson v. Ervin, 40 W. Va. 111, 20 S. E. 849; 22 Am. & Eng. Enc. Law, 38, 39; Setzer v. Beale, 19 W. Va. 274; Townley Bros. v. Crickenberger, 64 W. Va. 385, 63 S. E. 320.

It would have been contrary to public policy and in violation of law for anyone to have owned the business of the Old Miners' Saloon other than North, who owned the license, and North should not be permitted to deny such ownership.

Young v. Stevenson, 75 Ark. 181, 86 S. W. 1000; Gilday v. Warren, 69 Conn. 237, 37 Atl. 494; David Mayer Brewing Co. v. Mack, 59 Misc. 202, 110 N. Y. Supp. 245; Hoyt v. McLaughlin, 250 Ill. 442, 95 N. E. 464; State v. Ross, 70 W. Va. 549, 74 S. E. 670.

Messrs. **Harold A. Ritz** and **Ira J. Partlow,** for defendant in error North:

Defendant North claimed that he was improperly joined as a defendant. He pleaded this fact in abatement.

Hogg, Pleading & Forms, § 214; Rutter v. Sullivan, 25 W. Va. 427; Urton v. Hunter, 2 W. Va. 83.

The evidence rejected was properly rejected. It was evidence of statements made to Harris by Lukacs in the absence of North, and was not proper.

Rosendorf v. Poling, 48 W. Va. 621, 37 S. E. 555; Garber v. Blatchley, 51 W. Va. 148, 41 S. E. 222.

No bill of exceptions was taken to the action of the court in rejecting this evidence, and even if it was error, it is waived.

Bartlett v. Bank of Mannington, 77 W. Va. 329, 87 S. E. 444.

The instructions for plaintiffs which were refused were not proper.

Moore v. Harper, 42 W. Va. 39, 24 S. E. 633; Webster v. Clark, 34 Fla. 637, 27 L.R.A. 126, 43 Am. St. Rep. 217, 16 So. 601; Seabury v. Crowell, 51 N. J. L. 103, 11 L.R.A. 136, 16 Atl. 54; Sheldon v. Bigelow, 118 Iowa, 586, 92 N. W. 701; Mate Creek Coal Co. v. Todd, 66 W. Va. 671, 66 S. E. 1066.

Plaintiffs could not recover if they knew that North was not interested in the business.

Moore v. Harper, 42 W. Va. 39, 24 S. E. 633; Webster v. Clark, 34 Fla.

637, 27 L.R.A. 26, 43 Am. St. Rep. 217, 16 So. 601.

Poffenbarger, J., delivered the opinion of the court:

In this action of assumpsit against three defendants for recovery of a balance due on an account for liquors bought from a wholesale house for a saloon, two of the alleged partners were absolved from liability on a plea of discharge in bankruptcy. Before this occurred the other one interposed a plea of misjoinder, averring that the alleged promises, if any, had been made only by his codefendants, and not by him. All three of them filed a plea denying the partnership, and the solvent one a plea of non assumpsit. Issues having been joined on the pleas, the court, on the demand of the solvent defendant, ordered a trial on the plea of misjoinder, regarding it as a plea in abatement, and postponed the trial of the general issue. The result was a verdict for the defendant C. P. North and a judgment of abatement of the action as to him.

The sufficiency of the plea was not challenged by any demurrer, objection to it, or motion to strike it out. Without denial of its sufficiency, the plaintiffs replied to it generally. The only assignment of error pertaining to it is based upon the exception to the order of the court requiring disposition of the issue made on it before trial of the one raised by the plea of non assumpsit, which was rendered immaterial by the result of the trial of the other, if the assignment of error is untenable.

Only one precedent for such a plea has been found, Gasquet v. Fisher, 7 Smedes & M. 313, and the opinion in that case is disappointing and unsatisfactory, in that it cites no authority for the conclusion. As to the basis of the ruling, the opinion says this: "It is a rule of pleading that, if two or more are sued together when by law the action should have been brought against any less number of them only, the misjoinder is pleadable in abatement."

We have been unable to find the learned judge's authority for the rule in any textbook or decision, prior or subsequent. In Stafford v. Nutt, 51 Ind. 535, in which the defendants endeavored to defend in this manner, the court said: "It seems to us that this is a new use of a plea or answer in abatement, —a use that could not be made of it at common law, and cannot be under the Code of Practice of this state. If defendants were jointly sued at common law, and wished to deny such joint liability, their course was to plead the general issue, and thus put the plaintiff to the proof of the liability as alleged, failing in which, the plaintiff failed in his action."

No decision of this court sustains such a plea. No provision of any statute authorizes it. Though the syllabus in Urton v. Hunter, 2 W. Va. 83, says nonjoinder and misjoinder are matters to be pleaded in abatement, there was no such plea in the case; wherefore the expression is a mere obiter dictum. It is quoted in Rutter v. Sullivan, 25 W. Va. 427, in which likewise there was no plea of misjoinder. In neither case could the court have given the matter mature consideration. An assumption of identity of nonjoinder and misjoinder of defendants, in legal effect, seems to have been hastily adopted without inquiry or an attempt at verification. This assumption is clearly erroneous. At common law nonjoinder of defendants was ground of abatement, and, if not pleaded, it was waived. 1 Chitty, Pl. 11th Am. ed. 46, 47. Misjoinder of defendants did not have to be pleaded in abatement. When it appeared in the proof under the general issue, it was matter calling for a nonsuit, and not ground of abatement. 1 Chitty, Pl. 11th Am. ed. 44, 45; 15 Enc. Pl. & Pr. 582; 1 C. J. 13; 1 Enc. L. & P. 17; 5 Rob. Pr. 72. As abatement and nonsuit do not differ very substantially in legal effect,

this rule is manifestly technical. There is really no good practical reason for denying to one improperly joined as a defendant right to show his lack of interest, and thus to avoid the expense and annoyance incident to a defense on the merits. Unable to have his relation to his codefendants quoad the matter in controversy determined separately and in advance of the trial of the general issue, he is bound to make defense to a claim with which he may not be concerned at all, otherwise than by a false allegation of his relation to it. Nevertheless, to permit him to plead the misjoinder in abatement would enable him to deny, in a special and restricted form, what is alleged against him. The office of the plea in abatement is to bring to the attention of the court some fact or circumstance not disclosed on the face of the record, which, not absolutely and forever precluding or excluding right of recovery in the plaintiff, defeats the action in which it is set up for lack of jurisdiction, or on account of some privilege or disability. If the plea is sustained, the plaintiff may proceed against part of the defendants, or in another court, or another form of action, or against the same defendant, at a later date. A matter which forever precludes recovery against the party pleading it should be pleaded in bar. 1 Chitty Pl. 446, 447. The plea under consideration, as has been observed, brings to the attention of the court no new, independent, or undisclosed matter. It deals with the subject-matter of the principal allegation of the declaration, and responds only partially to it. In other words, it attempts to divide the allegation and deny only a portion of it. Some matters, such as outlawry, alien enemy, and attainder, could be pleaded either in abatement or in bar (1 Chitty, Pl. 11th Am. ed. 446), but they were not disclosed by the declaration, nor did pleas thereof respond directly to any allegation or effect a division thereof. Hence the subject-matter of this plea does not belong to that class. We are clearly of the opinion that it is not pleadable by way of abatement, and that it constitutes mere evidence under the general issue.

Abatement—misjoinder.

On this bad plea issue was voluntarily made and joined by the plaintiffs, wherefore the error involved is not strictly one committed by the court; and the issue so joined and tried was in one aspect completely determinative of the question of liability on the part of North. As there were pleas and issues joined thereon, the judgment is not reversible for want of an issue, as in Stevens v. Friedman, 53 W. Va. 79, 44 S. E. 163; Ruffner v. Hill, 21 W. Va. 152; and other cases. The statute (Code, § 3, chap. 134, ser. § 4977) makes a verdict cure misjoinder of issue, but does not dispense with the common-law requirement of an issue. The same section inhibits reversal for any defect or omission in pleadings, "which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of." Here there was no demurrer to the bad plea. Issue was joined on it, and there was a complete development of the only real controversy in the case. To permit the plaintiffs to reverse the judgment on account of the bad plea would violate the statute and give them advantage of their own error.

Pleading—error—verdict—case.

Appeal—waiver of error.

If the court technically erred in sustaining the motion for a separate and preliminary trial of that issue, the error is manifestly harmless; for the trial as to North's liability for the debt, the existence of which was assumed for the purposes of the trial, was full and complete and exactly the same in character and procedure as if that question had been deter-

Same—harmless error.

mined under the general issue. Moreover, the plaintiffs invited the error by their acquiescence in the claim of right to plead misjoinder as matter of abatement. Ordinarily a party is estopped to complain of errors committed or invited by himself. Carpenter v. Utz, 4 Gratt. 270; Warren v. Syme, 7 W. Va. 474, 500; Vance v. Evans, 11 W. Va. 342; 3 Cyc. 244. Having so acquiesced, the plaintiffs could not consistently deny the character of the issue they made on the plea by their objection to the trial of that issue first, agreeably to the statutory requirement as to such pleas. Code, chap. 125, § 21, ser. § 4775.

Lack of any direct pecuniary interest in the saloon or copartnership on North's part was asserted and proved by way of defense. He owned the building in which the business was conducted by the other defendants, and the state license under which ostensibly they sold liquors was in his name and conspicuously posted in the saloon room. It was procured in his name because the owners of the business were aliens, Hungarians, and could not, for that reason, obtain a license in their own names. Prior to their occupancy of the building as North's tenants another person had conducted a saloon in it. On his failure in the business North took an assignment and transfer of the license for the unexpired portion of the year, and Lukacs and Szilagyi bought the stock of goods. On the expiration of the license year a new license was procured in North's name, but the owners of the stock paid the license taxes. Their predecessor had paid $35 a month as rent for a single room. North enlarged the building, more than doubling its length and adding a second story, and the new firm paid him $100 a month for the ground floor for awhile, and later $125 a month for the entire building. Checks used in payment of bills rendered by the plaintiffs bore "Old Miners' Saloon" as the firm name, and were signed for awhile "Old Miners' Saloon, by Steve Lukacs, M. Szilagyi," and later, "Old Miners' Saloon, by Lukacs & Szilagyi." On checks used in the business from August, 1913, to January, 1914, and possibly longer, these parties styled themselves "proprietors." During some portions of their career they styled themselves "managers" on their stationery. Plaintiffs had no direct dealings nor even any conversation or correspondence with North. It does not appear that any of them or any representative of theirs knew him or had ever seen him Their salesman saw his name in the posted license, and was told by Lukacs he was interested. On the subject of that representation the salesman testified, in part, as follows: "I looked around and saw the license in C. P. North's name, and I says to Mr. Lukacs: 'Is Mr. North interested in this business with you?' And he said: 'Yes; Mr. North got the license for us. He owns the building, and we can't own a license, for we are not citizens of the United States; we have no credit, and we don't know anybody,'—or words to that effect."

Though North's place of business was just across the street from the saloon, and he could have been seen at almost any time, no inquiry was made of him as to whether he was a partner in the business. Upon the information the salesman obtained at the saloon and ascertainment of North's financial rating in the commercial agencies, the plaintiffs sold the firm liquors and other goods, and now claim the right to hold North for a balance due, amounting to about $1,150. Though the bills were not always promptly paid, no demand was ever made upon North for payment until after the bankruptcy of the firm. In some instances the salesman immediately drew the cash on checks for as much as $400 and $500 from the local bank on which they were drawn. In others he had the banks certify the checks before he remitted them. Objection to the admission of such checks and others styling Lukacs

and Szilagyi proprietors was unsuccessfully made. Other evidence objected to was the testimony of three or four witnesses to the effect that the salesman made inquiries of them as to the financial condition of Lukacs and Szilagyi.

North cannot be held merely because the license was in his name. No statute expressly made him liable, and protection of creditors of a retail dealer in liquors was not within the spirit or purpose of the regulating statutes. As to criminal or civil liability for unlawful sales, North might have been estopped to deny ownership of the business or the agency of the real owners; and the owners may not have been protected by a license in the name of a stranger. Illegality of the business known to the plaintiffs might have precluded right of recovery from the real owners, but that would not have rendered North liable. Their own violation of law would have estopped them from resort to him for payment. Solution of such questions would have turned upon the construction of the statutes and the legislative policy embodied in them. But neither the terms, spirit, nor policy of the statute touched the subject-matter of this controversy. The relation between a retail dealer and his vendor was a matter as to which the legislature had not expressed its will, wherefore it remained subject to general commercial law. The statutes dealt with the selling and disposition of liquors, not purchases thereof. Nor can North be subjected to the law making a retiring proprietor or partner liable for goods subsequently sold to his successor for want of notice of his retirement. There is no evidence that he ever owned or conducted the Old Miners' Saloon or any other, either individually or jointly with any other person.

Intoxicating liquor—liability of holder of license.

Same—recovery of purchase money.

Same—absence of notice of noninterest.

These special grounds of liability failing, the controversy is determinable by well-known principles of general commercial law. If North permitted himself to be represented or held out to the public or to the plaintiff's as a partner, and the plaintiff's extended credit to him on the faith of the representation, he is liable; otherwise he is not. The posted license in his name was a representation of interest, which, unexplained would likely be sufficient. But, if the plaintiffs knew he was not interested or did not extend credit to him on account of the fact, they cannot hold him for the debt. Authority for the correctness of the court's elimination of the testimony to the representation of North's interest in the business, made by Lukacs, need not be cited. The representation was not made in North's presence, and there is no evidence that he ever heard of it after it was made. The checks and testimony of witnesses tending to prove the plaintiffs knew Lukacs and Szilagyi were the only proprietors, and relied only upon their financial ability, and extended credit only to them, were relevant, material, and, therefore, admissible.

Partnership—holding out—liability.

Evidence—partnership—holder of liquor license.

At the instance of the plaintiffs the court gave one instruction submitting hypothetically the only legal proposition upon which they could recover consistently with the principles here enunciated. It substantially covered the subject-matter of another which the court refused. A peremptory instruction to find for the plaintiffs was properly refused. Two others refused were manifestly inconsistent with the principles here stated. For the defendant the court told the jury North was not an actual partner and could not be held liable if they believed the plaintiffs knew he was not, even though the license was in his name, and they knew it was; and

that knowledge of ownership by Lukacs and Szilagyi was information of North's lack of interest in the business. No error in these directions is perceived.

The judgment will be affirmed.

ANNOTATION.

Misjoinder of parties as ground for plea in abatement.

I. In general, 362.
II. Actions ex contractu:
a. General rule, 362.
b. Actions against tenant, 363.
c. Actions against copærtnership, 363.
d. Actions by husband and wife, 363.
III. Actions ex delicto, 364.

This note is limited to cases directly involving the right to raise by plea in abatement the objection of misjoinder of parties, and does not deal with the general question of the remedy for the misjoinder of parties. Statutory provisions are to be found in most jurisdictions which very largely affect the question of the proper method of raising this objection. Cases involving plea of abatement for nonjoinder of parties are outside of the scope of the note, even when, as in David Rutter & Co. v. McLaughlin (1912) 257 Ill. 199, 100 N. E. 509, the omission is spoken of as a misjoinder.

I. In general.

It is to be noted that generally a plea in abatement is a dilatory plea, and seeks to suspend the action rather than to bar it. It frequently happens that this objection of misjoinder of parties may be raised in more than one way, but the real distinction between the different remedies is to be determined by the scope of the relief sought, or the relief to which the party is entitled. If the purpose is to secure an adjudication which would amount to a bar to the right of action, the remedy is not by the common-law plea in abatement, since that plea, while it affects the pending action, does not affect the right of action itself. It follows that an objection as to parties plaintiff or defendant, if raised to defeat or suspend the particular action, as distinguished from the right of action, may be made by plea in abatement.

Thus it is held that, as a general rule, misjoinder of defendants is a matter for a dilatory plea in abatement. Maynard v. Ponder (1885) 75 Ga. 664. And that a misjoinder of causes of action or parties should be taken advantage of by plea in abatement or by special exception in the nature of such a plea. Brooks v. Galveston City R. Co. (1903) — Tex. Civ. App. —, 74 S. W. 330. The objection that one of the defendants to an action was not interested in one of the causes of action alleged in the complaint can be taken advantage of only by special demurrer or plea in abatement on the ground of misjoinder of defendants. Bronson v. Markey (1881) 53 Wis. 98, 10 N. W. 166.

II. Actions ex contractu.

a. General rule.

In actions ex contractu the objection of misjoinder of parties plaintiff or defendant is not to be raised by plea in abatement, where the objection goes to the merits of the action. In such case, where a joint liability is alleged against different defendants, the burden is upon the plaintiff to establish such liability or submit to a nonsuit, at least as to defendants not jointly liable; hence the objection of misjoinder in such a case is not to be made by plea in abatement, but by the general issue or such other plea as may be necessary to raise the objection upon a trial on the merits. Upon this point see the reported case (HARRIS v. NORTH, ante, 356), holding that one of several defendants to an action ex contractu cannot, by plea in abatement, raise the question of misjoinder of parties defendant on the ground that one party to the contract sued upon was not interested therein or a party thereto, but such defense must be made on the trial on the merits. So, in an action by one heir at

law against other heirs in the possession of lands held in common, to recover the value of her share of the use of such property, the defendants cannot, by plea or answer in abatement, raise the question that their possession and liability are several, and not joint, since a general denial pleaded in an action ex contractu against several defendants puts the plaintiff upon proof of joint liability to be entitled to a joint judgment. Stafford v. Mitt (1875) 51 **Ind.** 535. It has been held, however, that the objection of misjoinder of parties defendant in actions ex contractu may be raised by plea in abatement. Gasquet v. Fisher (1846) 7 Smedes & M. (Miss.) 313. See comment on this case in the opinion in HARRIS v. NORTH. And while it is true that if persons sue on a contract as joint plaintiffs they must show a joint interest therein, yet the objection of misjoinder of parties in this regard can be availed of either by plea in abatement or as a ground for nonsuit on the trial under plea of the general issue. Snell v. DeLand (1867) 43 **Ill.** 323. In an action upon a joint covenant, where one of the joint covenantors was dead at the time of the commencement of the action, he cannot be properly joined as a party defendant to the suit, and the objection is properly raised by plea in abatement. Rowan v. Woodward (1819) 2 A. K. Marsh. (Ky.) 140.

And it has been held that where the defendant to an action for goods sold and delivered claims a misjoinder of parties defendant on the ground that another person was jointly liable with him for such goods and had not been made a party defendant, he must plead this fact in abatement; he cannot raise the question under the general issue, the joint liability not appearing from the plaintiff's pleadings. David Rutter & Co. v. McLaughlin (1912) 257 **Ill.** 199, 100 N. E. 509. If the defendant pleads to the merits instead of raising the objection to misjoinder of parties defendant by plea in abatement, judgment may be rendered against such of the parties defendant as are shown to be liable, although joint liability on the part of all of them is not established. Richmond & D. R. Co. v. Greenwood (1892) 99 **Ala.** 501, 14 So. 495, 11 Am. Neg. Cas. 9.

b. Actions against tenant.

At common law nontenure, joint-tenure, sole tenure, and several tenure were good pleas in abatement to a writ of right, and they could only be pleaded in abatement, for a tenant, by joining the mise or pleading in bar, admitted himself tenant of the freehold. Such a plea was an admission that he had the capacity to defend the suit, and he was estopped from denying it. This rule was not changed by the statutory provision that a tenant, on the trial in a case affecting his tenancy, under the general issue, may give in evidence any matter which might have been specially pleaded, for this provision is manifestly confined to matters in bar. Green v. Liter (1814) 8 Cranch (U. S.) 229, 3 L. ed. 545.

c. Actions against copartnership.

In an action against copartners, if only one of them is sued, or if other parties are improperly joined, the objection thereto may be raised by plea in abatement. Urton v. Hunter (1867) 2 W. Va. 83. See comment on this case in opinion in reported case (HARRIS v. NORTH, ante, 356).

The objection that some of the partners were omitted or sued by the wrong name should be raised by plea in abatement; but this is not true as to the denial of the existence of a copartnership. Long v. McDonald (1869) 39 Ga. 186.

d. Actions by husband and wife.

Where a husband and wife joined in a suit on contract made with the wife when a feme sole, the legality of the marriage cannot be attacked by the defendant on the trial, but such objection must be made by plea in abatement. Coombs v. Williams (1818) 15 **Mass.** 243. And where a husband joined with his alleged wife in a suit on a note payable to her as administratrix, the objection of misjoinder of parties plaintiff on the

ground that the plaintiffs are not married should be made by plea in abatement; it cannot be raised on a trial of the action on the merits. Laster v. Toliver (1850) 11 Ark. 450. And in a trover action by an alleged husband and wife, the defense that the plaintiffs are not lawfully married can be made only by plea in abatement. Hobbs v. Bush (1837) 19 N. C. (2 Dev. & B. L.) 508; Winslow v. Gilbreth (1861) 49 Me. 578. Likewise in an action by persons suing as husband and wife to recover damages for an assault upon the wife, the defense that the plaintiffs are not legally married cannot be made on the trial; to be availed of it must be raised by a plea in abatement. Dickenson v. Davis (1721) 1 Strange, 480, 93 Eng. Reprint, 648.

III. Actions ex delicto.

See supra, "Actions by husband and wife."

In actions of tort, misjoinder of parties defendant may be taken advantage of by plea in abatement; at least where the misjoinder appears on the face of the declaration. Puriington-Kimball Brick Co. v. Eckman (1902) 102 Ill. App. 183; Yeazel v. Alexander (1871) 58 Ill. 254; Baker v. Michigan S. & N. I. R. Co. (1866) 42 Ill. 73; Frink v. Potter (1856) 17 Ill. 406, 9 Am. Neg. Cas. 200; Boswell v. Gates (1881) 56 Iowa, 143; Swigert v. Graham (1847) 7 B. Mon. (Ky.) 661; State, Keer, Prosecutor, v. Oliver (1897) 61 N. J. L. 154, 38 Atl. 693; Allen v. Craig (1833) 13 N. J. L. 294; Montfort v. Hughes (1854) 3 E. D. Smith (N. Y.) 591; Warner v. D'Armand (1907) 49 Or. 199, 89 Pac. 373, 90 Pac. 1113; McMullin v. Church (1886) 82 Va. 501.

It has been asserted that if two or more persons are sued for a tort committed by one only, the misjoinder cannot be pleaded in abatement, but the general issue is the proper plea. Yeazel v. Alexander (1871) 58 Ill. 254. To the same effect is State, Keer, Prosecutor, v. Oliver (1897) 61 N. J. L. 154, 38 Atl. 693, holding that a misjoinder of parties defendant will not defeat an action in tort. And where the declaration in tort is based on the claim of joint negligence of two or more defendants, the error, if any, in such joinder, cannot be reached either by demurrer or plea in abatement, for the tort may be treated as joint or several, and the question of liability is to be determined by evidence produced on the trial, and not by preliminary hearing. Puriington-Kimball Brick Co. v. Eckman (1902) 102 Ill. App. 183. And it has been asserted that in actions in tort, a misjoinder of parties defendant is not available in abatement, for, under the general-issue plea, a several judgment can be rendered against the guilty parties and the others may be acquitted. Montford v. Hughes (1854) 3 E. D. Smith (N. Y.) 591. And it is no ground for the abatement of a tort action against a partnership that some of the defendants were not members of the firm, or that some members of the firm were not joined as defendants to the action. Warner v. DeArmand (1907) 49 Or. 199, 89 Pac. 373, 90 Pac. 1113. Where an action is brought not for nonfeasance of a contract, but for tortious negligence or mismanagement in the exercise of rights and duties arising out of the relation created by the contract, being for a breach of duty imposed by law, it is not necessary to prove any stipulations of the contract or the contract itself; hence, the plaintiff's right to recover is not affected by the alleged misjoinder of parties defendant, and a plea in abatement on that ground is properly subject to demurrer. Swigert v. Graham (1847) 7 B. Mon. (Ky.) 661.

The foregoing cases apparently assume that the particular action was based upon a tort for which several persons might be jointly or severally liable, and the point is not developed as to whether or not the rule applied would be applicable in an action where the tort complained of was of such a character that, as a matter of law, the parties defendant were only severally liable. In an action based upon a tort of this character the general rule relative to pleas in abatement, that their purpose is to suspend or defeat the particular action, and not to affect the cause of action complained of, would seem to make it

proper if not imperative to raise the objection of misjoinder of defendants by a plea in abatement. For example, different owners of stock which had trespassed upon and injured the property of another, in the absence of some statutory provision, would not ordinarily be jointly liable for the injury resulting, but each would be liable for the injury caused by his stock. In an action to recover the damages, if the case presented was one of individual liability, and all the owners of the stock were joined in the action, it would seem proper, if not necessary, to raise the objection of misjoinder by plea in abatement. And where the misjoinder is based on the claim that the defendant raising the objection is not subject to a suit of that character, either jointly with other parties or severally, the objection can be raised by plea in abatement. Harlem v. Emmert (1866) 41 Ill. 319, holding that a claim of misjoinder of parties defendant by joining in a damage suit a township and commissioners of highways must be taken by plea in abatement. Of course, where the misjoinder of plaintiffs in a tort action does not appear from the declaration, it need not be pleaded in abatement, but may be raised when the fact appears, on the trial. Gerry v. Gerry (1858) 11 Gray (Mass.) 381. A. G. S.

LAURENCE MINOT et al., Trustees, etc., of Julia B. Paine, Deceased,
v.
JOHN B. PAINE et al.

Massachusetts Supreme Judicial Court—June 25, 1918.

(230 Mass. 514, 120 N. E. 167.)

Perpetuity — valid exercise of power.

1. The exercise by will of a power of appointment by one in being when the power was created, by directing payment of income for life to one also in being at that time, with remainder to persons who must reach the age of distribution within twenty-one years after death of the one exercising the power, and the life tenant, is valid under the rule against perpetuities.

[See note on this question beginning on page 374.]

Same — power of appointment — calculation of time.

2. For the purpose of determining whether the exercise of a power of appointment by will violates the rule against perpetuities, time begins to run from the creation of the power, not from the time it is exercised.

Same — vested estate — validity.

3. The exercise of a power of appointment by one in being when the power was created, by directing payment of income for life to one also in being at that time, and, after his death, to pay the income to one not in being at the death of the donor, for life, with remainder to his adopted daughter by name, is valid, since the estate of the adopted daughter is vested.

Same — remainder to issue — validity.

4. The exercise of a power of appointment by one in being when the power was created, by directing payment of income for life to one also in being at that time, and, after his death, to pay the income to one not in being at the death of the donor, for life, with remainder to his issue, of which none exists when the power is exercised, is invalid under the rule against perpetuities, since such issue might be born more than twenty-one years after the death of the one exercising the power.

Same — second power of appointment.

5. The exercise of a power of appointment by one living at the death of

the donor, by conferring power upon another to appoint by will, is void under the rule against perpetuities, because the power might be exercised more than twenty-one years after the death of the one exercising the first power.

Will — construction — exercise of power of appointment.

6. Where the donee of a power of appointment disposes of the property together with his own as one mass, expressing a design that there shall be no intestacy, those provisions of the will which can operate as disposing of the property under the power will be given that effect, and the other portions of the will applied to the donees' own property.

Same — second bequest in residuary clause.

7. A provision in a will that the residuum shall be held on the same trusts and for the same purposes as in the clause of the will which, inter alia, gives a specified person, a specified sum, does not operate to give the person named a second bequest of the amount named in the clause referred to.

RESERVATION by the Supreme Judicial Court for Suffolk County for determination by the full court of questions arising in a proceeding for the construction of the will of Julia B. Paine, deceased. *Will construed.*

The facts are stated in the opinion of the court.

Mr. **F. Brewster** for the trustees.

Mr. **G. M. Palmer**, for respondent Paine:

The gifts to the now living sons, John, Charles, and Frank, are valid in any view of the question.

Stone v. Forbes, 189 Mass. 163, 75 N. E. 141; Loring v. Blake, 98 Mass. 253; Seaver v. Fitzgerald, 141 Mass. 401, 6 N. E. 73; Gray v. Whittemore, 192 Mass. 367, 10 L.R.A.(N.S.) 1143, 116 Am. St. Rep. 246, 78 N. E. 422.

Whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity is the time of the execution of the power, not the creation of it.

1 Sugden, Powers, **471, 472; Rous v. Jackson, L. R. 29 Ch. Div. 521, 54 L. J. Ch. N. S. 732, 52 L. T. N. S. 733, 33 Week. Rep. 773; Re Flower, 55 L. J. Ch. N. S. 200, 53 L. T. N. S. 717, 34 Week. Rep. 149; Stuart v. Babington, Ir. L. R. 27 Eq. 551; Bradshaw v. Bradshaw [1902] 1 Ch. 447, 71 L. J. Ch. N. S. 230, 86 L. T. N. S. 253.

Having power to convey in fee, Mrs. Paine exercised it to its full extent, thereby creating new estates which date from her will, to which alone they owe their origin.

Amory v. Meredith, 7 Allen, 397; Olney v. Balch, 154 Mass. 318, 28 N. E. 258; Clapp v. Ingraham, 126 Mass. 200; Weeks v. Grace, 194 Mass. 296, 9 L.R.A.(N.S.) 1092, 80 N. E. 220, 10 Ann. Cas. 1077; Davis v. Allen, 224 Mass. 551, 113 N. E. 364.

Messrs. **Joseph Wiggin** and **Arthur P. Stone**, for respondents Winsor et al.:

The appointee takes as recipient of the bounty of the donor, and not as legatee of the donee.

Rous v. Jackson, L. R. 29 Ch. Div. 521, 54 L. J. Ch. N. S. 732, 52 L. T. N. S. 733, 33 Week. Rep. 773; Shattuck v. Burrage, 229 Mass. 448, 118 N. E. 889; Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033; Drake v. Atty. Gen. 10 Clark & F. 257, 8 Eng. Reprint, 739; Stamp Duties Comr. v. Stephen [1904] A. C. 140, 73 L. J. P. C. N. S. 9, 89 L. T. N. S. 511, 20 Times L. R. 63.

Even if the rule against perpetuities is violated as to Mrs. Lee's estate, the provisions of Mrs. Paine's will should be carried out.

Re Lee, 18 Pick. 285; Malcolm v. Malcolm, 3 Cush. 473; Stone v. Forbes, 189 Mass. 163, 75 N. E. 141.

It is plain from both will and codicil that the legacies given by item 14 are a first charge on the residuary estate.

Treadwell v. Cordis, 5 Gray, 341.

Messrs. **Fletcher Ranney** and **Thomas Allen, Jr.**, for respondent Margaret D. Osborn:

Where the donee has power to dispose of the property only by will, the remoteness of the appointment depends on its distance, not from the exercise, but from the creation, of the power.

Gray, Perpetuities, 3d ed. 1915, §§ 514, 515, 526–526b, 963; Re Powell, 39 L. J. Ch. N. S. 188; Boyd's Estate, 199 Pa. 487, 49 Atl. 297; Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91; Reed v. McIlvain, 113 Md. 140, 77 Atl. 329; Re

Dows, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094; Stone v. Forbes, 189 Mass. 163, 75 N. E. 141; Thayer v. Rivers, 179 Mass. 280, 60 N. E. 796; Thompson v. Pew, 214 Mass. 520, 102 N. E. 122.

The donor of the power of appointment, rather than the donee, must be regarded as the decedent whose estate is liable for inheritance taxes.

Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033; Harmon v. Weston, 215 Mass. 242, 102 N. E. 470.

The validity and meaning of the appointment are to be determined as if it were made at the time of the creation of the power. This would subject the appointment to all the uncertainties of the future, looking forward from the time of the creation of the trust.

Gray, Perpetuities, §§ 214, 325, 369, 373, 523a; Sears v. Russell, 8 Gray, 86; Loring v. Blake, 98 Mass. 253; Dorr v. Lovering, 147 Mass. 530, 18 N. E. 412; Gray v. Whittemore, 192 Mass. 367, 10 L.R.A.(N.S.) 1143, 116 Am. St. Rep. 246, 78 N. E. 422.

The persons to whom the appointments are made have all the qualities as to relationship and age which they had at the time of the exercise of the power. The donee, acting at a later period, can effect a desired object by a limitation which will be good, although this could not have been foreseen when the power was created.

Hooper v. Hooper, 203 Mass. 50, 89 N. E. 161; Gray, Perpetuities, §§ 523, 524; Stone v. Forbes, 189 Mass. 163, 75 N. E. 141.

There is also, in default of appointment, the second contingency as to the number of issue each may leave surviving her,—a fact which is necessary to be known before the share of each of such surviving issue can be determined as to amount.

Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094; Minot v. Doggett, 190 Mass. 435, 77 N. E. 629; Gray, Perpetuities, §§ 205A, 245E & L, 477, 954, 957; Minot v. Taylor, 129 Mass. 160.

The rule against perpetuities does not apply to vested remainders, nor to equitable interests, such as this, in the nature of remainders.

Gray, Perpetuities, §§ 9, 205; Seaver v. Fitzgerald, 141 Mass. 401, 6 N. E. 73; Stone v. Forbes, 189 Mass. 163, 75 N. E. 141; Gray v. Whittemore, 192 Mass. 367, 10 L.R.A.(N.S.) 1143, 116 Am. St. Rep. 246, 78 N. E. 422.

The gift over the balance of Sumner's share is too remote, because it could not be determined until his death whether he left any issue, or, if any, how many issue among whom this balance should be divided. And this contingency, in case he died more than twenty-one years after his father's death, would be too remote. The fund from which Margaret's life income is to be paid goes in the same way on her death, and this gift over, also, would, for the same reason, be too remote.

Hills v. Simonds, 125 Mass. 536; Stone v. Bardlee, 183 Mass. 165, 66 N. E. 708.

Messrs. **Lawrence Bond**, and **Addison R. Pike**, for respondent Salome B. Fisher:

The remoteness of limitations created by the exercise of a testamentary power is to be determined with reference to the time when the power was created, and not to the time when it was exercised.

Powell's Trusts, 39 L. J. Ch. N. S. 188; Gray, Perpetuities, 3d ed. §§ 514, 515, 526–526b, 963, 967, 968.

A person taking under a power of appointment derives his title from the donor of the power, and not from the donee.

2 Greenleaf's Cruise, Real Prop. title 32, Deed, chap. 24, § 27, p. 723; 4 Kent, Com. *327; Walker v. Treasurer, 221 Mass. 600, 109 N. E. 647.

And the estates created by the exercise of the power take effect in the same manner as if the power and the instrument executing the power had been incorporated in one instrument.

4 Kent, Com. 337; Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033.

If, by any possibility, the event, upon the happening of which the gift over is to take effect, may not occur within the prescribed period, the gift over is void for remoteness.

Welsh v. Foster, 12 Mass. 93; Nightingdale v. Burrell, 15 Pick. 104; Sears v. Russell, 8 Gray, 86; Odell v. Odell, 10 Allen, 1; Sears v. Putnam, 102 Mass. 5; Lovering v. Worthington, 106 Mass. 86.

To hold that the donee of a power may, by the exercise thereof, suspend the vesting of an estate beyond the time within which the donor might suspend it, is to defeat the very purpose of the rule.

Winsor v. Mills, 157 Mass. 362, 32 N. E. 352; Gray v. Whittemore, 192 Mass. 367, 10 L.R.A.(N.S.) 1143, 116

Am. St. Rep. 246, 78 N. E. 422; Hooper v. Hooper, 203 Mass. 50, 89 N. E. 161.

By the exercise of her power of appointment Julia B. Paine did not make the property of Hannah Farnham Lee her own.

Hooper v. Hooper, 203 Mass. 50, 89 N. E. 161.

The respondents have claims against the estate of Julia B. Paine under the terms of her will, but the claims of such of the respondents as were her issue surviving her (or the representatives of such issue) are against the estate of Hannah Farnham Lee, under the terms of her will, and not under the terms of Julia B. Paine's will. The claims are separate and distinct claims against two different estates, and the doctrine of marshaling does not apply; but the doctrine of election seems more applicable.

Gray, Perpetuities, §§ 556, 561g; Bradshaw v. Bradshaw [1902] 1 Ch. 436, 71 L. J. Ch. N. S. 230, 86 L. T. N. S. 253.

Rugg, Ch. J., delivered the opinion of the court:

The main question in this case is whether, in the case of a power to appoint property given by will, to be exercised solely by the will of the donee of the power, the period established by the rule against perpetuities is to be reckoned from the creation or from the exercise of the power. That precise question never has been decided in this commonwealth. It has arisen in England and in some of the other states.

In Re Powell, 39 L. J. Ch. N. S. 188, it was held by Vice Chancellor James that a power vested in a daughter by the will of her father, to appoint by will after the termination of a life estate, "being exercisable only on her death, was not equivalent to her having the absolute ownership of the fund, which was tied up for the whole of her life. The interests in the fund purported to be conferred by Mrs. Hall's [the donee of the power] will on" her appointees "must, therefore, be taken to be interests created by the will of James Powell [the father and donor of the power.]. Hence, the rule against perpetuities must apply to this case, and the gift" over by the donee was held void for remoteness. In D'Abbadie v. Bizoin, Ir. Rep. 5 Eq. 205, at page 210, the same line of reasoning appears to be followed. It is said at page 210, in commenting upon the will of a donee in execution of a power created by will: "The limitations subsequent to the life estate . . . are given in language which does not render it necessary that, if they had been inserted in the will which created the power, they should become vested within the limits which the law has prescribed. In my opinion, they are therefore bad."

The opposite view was taken, however, by Chitty, J., in Rous v. Jackson, L. R. 29 Ch. Div. 521, 54 L. J. Ch. N. S. 732, 52 L. T. N. S. 733, 33 Week. Rep. 773, and he was followed by North, J., in Re Flower, 55 L. J. Ch. N. S. 200, 53 L. T. N. S. 717, 34 Week. Rep. 149, and by Vice Chancellor Chatterton in Stuart v. Babbington, Ir. L. R. 27 Eq. 551. All these decisions were made by single judges. There is no adjudication by the court of appeal or the House of Lords.

There are several cases in England which hold that, where power to appoint to children is conferred by marriage settlements, the appointments are referable, for determination as to remoteness, to the settlement and not to the will of the donee. Of this kind are Wollaston v. King, L. R. 8 Eq. 165, 38 L. J. Ch. N. S. 61, 392; Tredennick v. Tredennick [1900] 1 Ir. R. 354; Cooke v. Cooke, L. R. 38 Ch. Div. 202, 36 Week. Rep. 756. See also Morgan v. Gronow, L. R. 16 Eq. 1, 42 L. J. Ch. N. S. 410, 28 L. T. N. S. 434. We need not pause to consider whether, by analogous reasoning, resort should be had for the same purpose to the will of the donor, of a power created by will. See in this connection Gray, Perpetuities, 3d ed. § 520. In any event, there appears to be some uncertainty as to the law of England.

In this country the current of authority is all in one direction, to the effect that the question, whether the

rule against perpetuities has been violated, is referable to the time of the creation of the power. In Re Dows, 167 N. Y. 227, 231, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439, it is said: "For the purpose of determining whether the execution of a power is in contravention of the Statute of Perpetuities, the estate created under such power must be referred back to the instrument granting the power. This is settled law, and was so held in Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91. Any other rule would permit the evasion of the statute against perpetuities by the grant of powers."

Although there is a pertinent statute in New York, these cases contain a discussion of the common law as an essential part of the chain of reasoning. This is the law of Maryland as established by a line of decisions, the last of which is Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094, where earlier cases are collected and reviewed. To the same effect are Brown v. Columbia Finance & T. Co. 123 Ky. 775, 97 S. W. 421; Boyd's Estate, 199 Pa. 487, 493, 49 Atl. 297; Lawrence's Estate, 136 Pa. 354, 364, 11 L.R.A. 85, 20 Am. St. Rep. 925, 20 Atl. 521; and Re Phillips, 28 Ont. L. Rep. 94.

So far as there are intimations in our decisions they support the same conclusion. It was said in Stone v. Forbes, 189 Mass. 163, 172, 75 N. E. 141, 144: "If the gifts are treated, as they must be, as made in effect by the will of John M. Forbes [the donor], they are not too remote."

In Thompson v. Pew, 214 Mass. 520, 523, 102 N. E. 122, are these words: "With the exception of a difference in the application of the rule against perpetuities, founded upon the fact that the property to be given was to come from her husband and not from her, except as the appointor, the testatrix had the same power of testamentary disposition over it as over her own."

The view taken by Mr. Gray in his work on the Rule against Perpetuities, 3d ed. §§ 514, 515, 521 to 526a, is in harmony with Re Powell, supra, and the American decisions, and adverse to Rous v. Jackson and the two other English cases following it, hereinbefore cited. It is stated with clearness and the reasoning somewhat amplified in an article by him in 26 Harvard L. Rev. 720. The opposite view is put forward with acuteness in 26 Harvard L. Rev. 64, and 27 Harvard L. Rev. 705.

The nature of the power created by will and conferred upon a donee to appoint property by will has been considered by this court in several different aspects. In Crawford v. Langmaid, 171 Mass. 309, 50 N. E. 606, the effort was made to treat the right to exercise such a power as property under the Reach and Apply Statute. See Rev. Laws, chap. 159, § 3, cl. 7. But it was held that although, if the power was exercised, the property appointed is deemed assets of the estate of the donee, so as to be subject to his debts if needed (Clapp v. Ingraham, 126 Mass. 200), yet, since the nature of the estate of the remaindermen, in case the property is given over in default of appointment, is not affected until the power is exercised, there was no property right in the donee of the power. The rights of creditors again were considered in Shattuck v. Burrage, 229 Mass. 448, 118 N. E. 889. There the donee of the power had made the appointment by his will, and the question was whether such property could, under the circumstances there disclosed, be treated as "new assets" of his estate, under Rev. Laws, chap. 141, §§ 11, 18. It was said (229 Mass. at page 451): "When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property. The appointee named by exercise of this delegated authority takes as recipient of the

bounty of the donor, and not as legatee of the donee."

It was held in Sewall v. Wilmer, 132 Mass. 131, that the effect and validity of the instrument whereby the appointment was exercised were to be determined according to the law of the domicil of the donor, and not of the donee. It there was said (132 Mass. 136): "The property of which Mrs. Wilmer has a power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect, not as a disposition of her own property, but as an appointment of property of her father under the power conferred upon her by his will. The domicil of the testator whose property is in question is, therefore, the domicil of her father."

The question has arisen in reference to taxation. In Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033, the point presented was whether, under the Collateral Inheritance Tax Law, the appointed property was to be regarded as that of the testamentary donor or of the donee. After a review of the authorities it was held that it passed as under the will of the donor, and not of the donee. It was there said (p. 412): "Generally speaking, what is done under a power of appointment is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor [citing a large number of authorities]. This is the ancient and established rule."

In Walker v. Treasurer, 221 Mass. 600, are these words at page 602, 109 N. E. 647: "The power is a deputation of the donee to act for the donor in disposing of the donor's property. Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power."

Again, in Hill v. Treasurer, 229 Mass. 474, L.R.A.1918D, 337, 118 N. E. 891, the question arose whether, when the power of appointment had been exercised, and the property was seized by equity and applied to the payment of the debts of the donee of the power, because otherwise they would have gone unpaid, the property so seized was subject to the inheritance tax as property passing under the will of the donee. In holding that it did not so pass, it was said: "It is settled that, the donee having exercised the power, the property appointed becomes in equity assets of his estate, so far as needed to pay his debts, to the exclusion of the persons appointed. . . . The property, however, was the property of the donor of the power. The donee had no title to it. He simply had the privilege, if he chose to exercise it, of disposing by will of property of the donor. He was the deputy of the donor in disposing of the latter's property. This was decided before the enactment of the Succession Tax Law. Therefore, it was inevitable that it should be held, in the application of the Succession Tax Law, that the assessment should be levied upon the theory that the property appointed was that of the donor, and not of the donee of the power."

To the same effect are Drake v. Atty. Gen. 10 Clark & F. 257, 8 Eng. Reprint, 739, and Stamp Duties Comr. v. Stephen [1904] A. C. 137–140, 73 L. J. C. P. N. S. 9, 89 L. T. N. S. 511, 20 Times L. R. 63.

The nature of the estate created was discussed in Hooper v. Hooper, 203 Mass. 50, 58, 89 N. E. 161, and it there was said: "It is to be noted that the donee of the power is not the owner of the estate. The interest of the appointee, as finally determined, is founded upon the deed of the donor."

This statement was quoted with approval in Harmon v. Weston, 215 Mass. 242, 249, 102 N. E. 470, where it further was said: "It is from the donor of the power that the property comes to him who takes it, either through the exercise of that power by its donee or by reason of the latter's failure to exercise it."

See O'Grady v. Wilmot [1916] 2

A. C. 231, 85 L. J. Ch. N. S. 386, 114 L. T. N. S. 1097, 32 Times L. R. 456, 60 Sol. Jo. 456.

This review of our decisions demonstrates that in all other aspects where the question has arisen the property appointed is regarded as the property of the donor, and is treated as passing under his will, manifested by the words employed by the person upon whom he has conferred the power to express his testamentary design in specified particulars.

It seems difficult to say, in view of the reasoning upon which these decisions rest, that, when the rule against perpetuities is to be applied, the ground is to be shifted, and the property is to be regarded as that of the donee and disposed of by his will.

There are numerous serious and well-recognized limitations upon the interest of the donee of a power, in the property over which he has the power of appointment. Allusion already has been made to some of these. His interest is far from an absolute one. No one can be an owner unless he can sell his property at will. Although a life tenant with power to appoint by will, failing which remainder goes to his children, enjoys many of the incidents of ownership, he lacks the fundamental one of power to sell a fee. Even though he has the power to appoint to his own estate, that does not go far enough. The liability of appointed property to debts of the appointer, in case his own estate is insufficient, is not an incident of ownership, but arises from a doctrine of equity. See in this connection, Tuell v. Hurley, 206 Mass. 65, 68, 91 N. E. 1013, and Vinton v. Pratt, 228 Mass. 468–470, L.R.A. 1918D, 343, 117 N. E. 919. The life tenant who has an absolute power of appointment, both by deed or by will, may stand upon a different footing. But the donee of a power to appoint by will, alone, does not act as an owner of the appointed property. As was said by Chief Justice Baldwin in Bartlett v. Sears, 81 Conn. 34, 44, 70 Atl. 33: "One to whom a power of appointment is given by will stands to the testator substantially in the position of an agent toward his principal. An agent cannot do that which the principal cannot do."

The essential nature of his act in exercising the power is that he is speaking for the original testator in directing the devolution of the property of the latter. The nature of his power is to express by his own will a disposition of the property of the donor, who, by the terms of his will, adopted in advance these subsequently written words of the donee, as disclosing his ultimate testamentary purpose.

Although there are instances of a complete new title springing into existence, as for example, by the exercise of eminent domain or the sale of property to satisfy the lien for taxes, title arising from the exercise of a power is simply the transmission of an old title by virtue of the will of the donor of the power, given momentarily a new manifestation through the phrase uttered by the donee of the power. Although the power of appointment by will may be unlimited, the title springs from the will of the donor, and not from that of the donee. Different considerations might apply if the power were not only general, but also capable of being exercised by deed, and thus an absolute title be vested in the donee during life. The making of a deed to the donee himself in exercise of his power might, in that case, be regarded as a vain form. But that is not the case at bar.

The donee in exercising the power is, in effect, writing the will of the donor respecting the appointed property. The donee in doing this, in reason, is bound by the same limitations of the law as bound the original testator. The donee can take advantage of facts of which the donor was ignorant, because they were not in existence when he made his will. But the donee cannot free himself from the rules of law which

limited the power of the donor. The will of the donor, and that of the donee so far as it exercises the power of the appointment, in a sense, together constitute the complete testamentary design of the donor respecting the donor's estate. The words used by the donee in exercising the power are to be construed and interpreted, as to their meaning, in the light of the facts as they are at the time the power is exercised. The will of the donor is projected forward to the time of the exercise of the power, so as to receive the benefit of the facts which have appeared since his decease.

The ordinary statement of the rule against perpetuities is simple: "The rule is that executory limitations are void unless they take effect, ex necessitate and in all possible contingencies, within the period of a life or lives in being at the death of the testator, and twenty-one years afterwards." Hall v. Hall, 123 Mass. 120, 124; Sears v. Putnam, 102 Mass. 5; Church in Brattle Square v. Grant, 3 Gray, 142, 152, 63 Am. Dec. 725; Gray v. Whittemore, 192 Mass. 367, 373, 10 L.R.A.(N.S.) 1143, 116 Am. St. Rep. 246, 78 N. E. 422.

As applied to the exercise of a power of appointment, the words of the rule are satisfied if it appears that, in the light of facts as to relationship and longevity existent when the appointment is exercised, the estates created in truth will vest and take effect within the period limited by the rule, although this may not have been certain at the death of the donor of the power. Gray, Perpetuities, 3d ed. §§ 523, 524; Hooper v. Hooper, 203 Mass. 50, 61, 89 N. E. 161.

There are strong practical considerations to the same end. As is pointed out by Mr. Gray in § 514 of his book, already cited, unless the remoteness of an appointment depends on its distance from the creation and not from the exercise of the power, "estates for life with powers of appointment by will might be created; the tenants for life might appoint for life, with powers to the appointees to appoint by will; these appointees might, in their turn, appoint in like manner, and so an indefinite series of life estates could be created."

Both on principle and on authority our conclusion is that the remoteness of an appointment, made in the exercise of a power to appoint by will alone, so far as affected by the rule against perpetuities, must be measured from the time of the creation, and not the exercise, of the power.

Perpetuity—power of appointment—calculation of time.

These are the particular facts of the case at bar to which these principles must be applied: Hannah F. Lee, a resident of Boston, died in 1865, and by her will created a trust to pay the income to her granddaughter, Julia Bryant, a minor, then unmarried, during her life, "and on her death to transfer and convey the same in fee to such persons and on such terms as said Julia by her last will and testament, executed after her majority, may direct and appoint, and in default of such will . . . then to her issue, if any, surviving her." Julia Bryant in March, 1867, married Charles J. Paine, born in 1833, had four sons and three daughters, and died on September, 1901, leaving her husband and all her children surviving. Her son Sumner died in 1904, leaving a widow, Salome B., but no issue, and an adopted daughter, Margaret. The husband, Charles J. Paine, died in 1916. Mrs. Paine left a will, wherein she exercised the power of appointment given by Mrs. Lee. But she left a large estate of her own, and in her will made no distinction between her own and the property appointed.

Treating first the will of Mrs. Paine as relating solely to the appointed property, some of its provisions would not be too remote and others would be too remote, under the rule against perpetuities. By her will she gave $525,000 to trus-

tees to pay the income to her husband during his life and, after his death, "to hold the same for the benefit of my children." With respect to this fund at the termination of the interest of the husband, Mrs. Paine made different dispositions for the benefit of her several children. It is necessary in this connection to consider only the provisions for the benefit of her sons. The provision for the benefit of three of her sons, excluding the fourth son Sumner, was that each should receive an equal proportionate share in the income after the death of their father, "until he shall have attained the age of twenty-five years and, on his attaining the age of twenty-five years, to transfer and convey his equal and proportionate share of the trust fund to such son in fee, free of these trusts." Since each of these sons was old enough, at the decease of his mother, to be certain to reach the age of twenty-five years within twenty-one years thereafter, and, if not before, within twenty-one years from the death of Charles J. Paine, the life tenant, both lives in being at the death of the donor of the power, Mrs. Lee, and they have now reached that age, the appointment to them was good and the share of each has become vested. The final residue of the estate being left upon the same trusts, the share of it given to these three sons, for the same reasons has become vested.

Same—valid exercise of power.

The provision for the son Sumner was, in substance, that, after the death of the husband, one equal and proportionate share of the estate, being in fact $75,000, be set apart as a separate fund, the income thereof to be paid to him during his life and, at his decease, the income of $25,000 of the fund to be paid to his adopted daughter Margaret, and the remainder be paid to the issue, if any, of Sumner then living, and in default of issue to add to the shares of the other children. The gift of income to Sumner and to his adopted daughter Margaret was vested, although the enjoyment of the latter was postponed until his decease. This appointment was good, since the rule against perpetuities does not apply to such vested interests. Seaver v. Fitzgerald, 141 Mass. 401, 6 N. E. 73; Gray v. Whittemore, 192 Mass. 367, 374, 10 L.R.A.(N.S.) 1143, 116 Am. St. Rep. 246, 78 N. E. 422. The gift over of the remainder of the share set apart for Sumner was void for remoteness. He had no issue. It was not certain that he might not live until more than twenty-one years after the decease of both his father and his mother, and then leave issue. Hills v. Simonds, 125 Mass. 536, 539; Stone v. Bradlee, 183 Mass. 165, 171, 66 N. E. 708. Numerous pecuniary legacies are given outright, without being deferred as to payment or enjoyment, and free from any trust, by clauses 3 to 13, both inclusive. Plainly these can be upheld as appointments under the power.

Same—vested estate—validity.

Same—remainder to issue—validity.

An annuity was given to Mrs. Koopman, with a power to appoint by will the sum of $3,000. Manifestly, this sum of $3,000 might not vest within the required period from the decease of Mrs. Lee.

Same—second power of appointment.

It is clear, however, from the statement of the amount of property to be appointed, and the amount of Mrs. Paine's own estate, that the gifts to the three sons, excluding Sumner, which are not void, and the pecuniary legacies given by clauses 3 to 13 of the will of Mrs. Paine, both inclusive, which validly can be made out of the property to be appointed, will exhaust, or more than exhaust that property. It was the obvious intent of Mrs. Paine that there should be no intestacy, either as to the appointed property or her own estate. It is the fundamental rule in the interpretation of wills that the purpose of the testator shall be effectuated, unless contrary to

some positive rule of law. Where the testator deals with goods and estates, including those over which he has a power of appointment as well as those which belong to himself as one mass, and clearly expresses a design that there shall be no intestacy as to any part, as matter of construction that testamentary purpose should be executed by applying those portions of the will which can operate, according to the rules of law, upon the property to be appointed, as disposing of that property, and the other provisions of the will as disposing of his own property. Stone v. Forbes, 189 Mass. 163, 170, 75 N. E. 141. Following this rule of construction there will be no intestate property either of her own or of that over which she has power of appointment, and all the provisions of the will of Mrs. Paine can be carried into effect. It is unnecessary to determine whether the same result could be reached by the operation of the doctrine of marshaling of assets (Carter v. Tanners Leather Co. 196 Mass. 163, 166, 12 L.R.A.(N.S.) 965, 81 N. E. 902; Tod v. Mitchell, 228 Mass. 541, 117 N. E. 899), or the doctrine of election (Watson v. Watson, 128 Mass. 152; Noyes v. Noyes, 224 Mass. 125, 134, 112 N. E. 850; Re Bradshaw [1902] 1 Ch. 436, 437, 71 L. J. Ch. N. S. 230, 86 L. T. N. S. 253).

Will—construction—exercise of power of appointment.

The provision of the residuary clause to the effect that the residuum shall be held by the trustees "on the same trusts and for the same purposes as set forth in clause 2," as matter of construction, does not give the income of a second $25,000 to Margaret, the daughter of Sumner. It seems clear from the terms of clause 2 that the total benefaction to her was intended to be limited to the income of that sum.

Same—second bequest in residuary clause.

Decree accordingly.

ANNOTATION.

Validity of appointment under power, with reference to the rule against perpetuities.

Both the courts and the text-writers are unanimous in holding that the period within which estates and interests limited by an appointment made in the exercise of a special or particular power, i. e., a power to appoint among a restricted class of objects, must vest, under the rule against perpetuities, or during which the power of alienation may be suspended, under statutes restricting the suspension of the power of alienation, is to be measured from the time of the creation, and not from the time of the exercise, of the power; which is, in the case of a power created by deed, the date when such deed became effective, and, in the case of a power created by will, the death of the donor. See, as stating or applying this rule, Robinson v. Hardcastle (1788) 2 T. R. 241, 100 Eng. Reprint, 131, 2 Bro. Ch. 22, 29 Eng. Reprint, 11, 1 Revised Rep. 467; Routledge v. Dorril (1794) 2 Ves. Jr. 357, 30 Eng. Reprint, 671, 2 Revised Rep. 250; Griffith v. Pownall (1843) 13 Sim. 393, 60 Eng. Reprint, 152; Peard v. Kekewich (1852) 15 Beav. 166, 51 Eng. Reprint, 500, 21 L. J. Ch. N. S. 456; Harvey v. Stracey (1852) 1 Drew. 73, 61 Eng. Reprint, 379, 22 L. J. Ch. N. S. 23, 16 Jur. 771; Wilkinson v. Duncan (1861) 30 Beav. 111, 54 Eng. Reprint, 831, 7 Jur. N. S. 1182, 30 L. J. Ch. N. S. 938, 5 L. T. N. S. 171, 9 Week. Rep. 915; Wollaston v. King (1869) L. R. 8 Eq. (Eng.) 165, 38 L. J. Ch. N. S. 392, 20 L. T. N. S. 1003, 17 Week. Rep. 641; Morgan v. Gronow (1873) L. R. 16 Eq. (Eng.) 1, 42 L. J. Ch. N. S. 410, 28 L. T. N. S. 434; Slark v. Daykins (1874) L. R. 10 Ch. (Eng.) 35, 44 L. J. Ch. N. S. 205, 31 L. T. N. S. 712, 23 Week. Rep. 118;

Re Brown (1876) L. R. 3 Ch. Div. (Eng.) 156, 24 Week. Rep. 782; Von Brockdorff v. Malcolm (1885) L. R. 30 Ch. Div. (Eng.) 172, 55 L. J. Ch. N. S. 121, 53 L. T. N. S. 263, 33 Week. Rep. 934; Cooke v. Cooke (1887) L. R. 38 Ch. Div. (Eng.) 202, 36 Week. Rep. 756; Whitby v. Mitchell (1889) L. R. 42 Ch. Div. (Eng.) 494, affirmed in L. R. 44 Ch. Div. 85, 59 L. J. Ch. N. S. 485, 62 L. T. N. S. 771, 38 Week. Rep. 737; Re Boyd (1890) 63 L. T. N. S. (Eng.) 92; Re Gage [1898] 1 Ch. (Eng.) 498, 67 L. J. Ch. N. S. 200, 78 L. T. N. S. 347, 46 Week. Rep. 569; Whitby v. Von Luedecke [1906] 1 Ch. (Eng.) 783, 75 L. J. Ch. N. S. 359, 54 Week. Rep. 415, 94 L. T. N. S. 432; Re Thompson [1906] 2 Ch. (Eng.) 199, 75 L. J. Ch. N. S. 599, 54 Week. Rep. 613, 95 L. T. N. S. 97; Re Oliphant (1916) 86 L. J. Ch. N. S. (Eng.) 452, 116 L. T. N. S. 115; Massey v. Barton (1844) 7 Ir. Eq. Rep. 95; D'Abbadie v. Bizoin (1871) Ir. Rep. 5 Eq. 205; Hutchinson v. Tottenham [1898] 1 Ir. Rep. 403; Tredennick v. Tredennick [1900] 1 Ir. R. 354; Re Hallinan [1904] 1 Ir. R. 452; Re Manning (1915) 49 Ir. L. T. 146 (as digested in Butterworth's Yearly Dig. 1915, col. 867); Bartlett v. Sears (1908) 81 Conn. 34, 70 Atl. 33; Heald v. Briggs (1910) 83 Conn. 5, 74 Atl. 1123; Brown v. Columbia Finance & T. Co. (1906) 123 Ky. 775, 97 S. W. 421; Conner v. Waring (1880) 52 Md. 724; Albert v. Albert (1887) 68 Md. 352, 12 Atl. 11; Thomas v. Gregg (1892) 76 Md. 169, 24 Atl. 418; Ogden v. McLane (1907) 73 N. J. Eq. 159, 67 Atl. 695; Thomson v. Livingston (1851) 4 Sandf. (N. Y.) 539; Hillen v. Iselin (1895) 144 N. Y. 365, 39 N. E. 368; Re Dows (1901) 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439 (obiter); Pepper's Appeal (1888) 120 Pa. 235, 6 Am. St. Rep. 702, 13 Atl. 929; Gardette's Estate (1883) 13 W. N. C. (Pa.) 315; Ingersoll's Estate, 15 Pa. Co. Ct. 19. A reason given for this is that the appointee really takes from the original testator, the donee of the power acting as a mere conduit of the former's bounty. Bartlett v. Sears (1908) 81 Conn. 34, 70 Atl. 33. It is also supported by the practical consideration that otherwise a power of appointment might be made the means of tying up property for a longer period than is allowed by the rule against perpetuities, or its statutory substitutes.

The statement is sometimes made that the validity of the appointment under a special power is to be tested by reading it as inserted in the deed or will creating the power, in place of the power (Cf. 1 Jarman, Wills, 6th ed. *259; Heald v. Briggs (1910) 83 Conn. 5, 74 Atl. 1123). This is not to be taken as meaning that the precise language of the instrument exercising the power is to be read into the instrument creating it, as in such case a limitation created by the exercise of the power, which the event has proved not to be too remote, might, if literally read into the instrument creating the power, be held bad because of the possibility of remoteness. To illustrate, a limitation to one for life with remainder to his children at the age of twenty-five, which, if made by the instrument creating the power, would have been too remote because not vesting within a period measured by a life in being and twenty-one years thereafter, may be good, where in the form of a limitation to one for life, with power to appoint to his children, though he appoints to them at the age of twenty-five, if the appointees have attained the age of four years at the time when the appointment takes effect; since it is certain that the estate will vest in them within the period allowed by the rule. See Von Brockdorff v. Malcolm (1885) L. R. 30 Ch. Div. (Eng.) 172, 55 L. J. Ch. N. S. 121, 53 L. T. N. S. 263, 33 Week. Rep. 934; Re Thompson [1906] 2 Ch. (Eng.) 199, 75 L. J. Ch. N. S. 599, 54 Week. Rep. 613, 95 L. T. N. S. 97; Re Hallinan [1904] 1 Ir. R. 452.

Where, on the other hand, the power is general to the donee, to appoint to whomsoever he may choose, either by deed or will, the donee is regarded as practically the owner, since he can appoint as well to himself as to any other person, and in such case the degree of remoteness is measured from the time of the exercise of the power, and not from the time of its

creation. See Lawrence's Estate (1860) 136 **Pa.** 354, 11 L.R.A. 85, 20 Am. St. Rep. 925, 20 Atl. 521 (obiter); Mifflin's Appeal (1888) 121 **Pa.** 205, 1 L.R.A. 453, 15 Atl. 525; Genet v. Hunt (1889) 113 **N. Y.** 158, 21 N. E. 91; Farmer's Loan & T. Co. v. Kip (1908) 192 **N. Y.** 266, 85 N. E. 59; Re Thompson (**Eng.**) supra; Gray, Perpetuities, § 524, and text-writers there cited. As the vesting of an absolute estate is in theory, not suspended during the time while the power remains unexecuted, such period is not to be taken into account in determining whether an estate or interest created by the exercise of the power is too remote.

[It should be noted, however, that, under the statutory law of powers in New York, the rule above stated does not apply, in a case where the property subject to a general power of appointment by deed or will is a remainder upon the termination of a trust, which is to continue during the lifetime of the donee. See Farmers' Loan & T. Co. v. Kip (1908) 192 **N. Y.** 266, 85 N. E. 59, more fully stated infra.]

A general power exercisable by deed, but only by consent of third persons, is not equivalent to the ownership in fee, and is therefore treated like a special power. Gray, Perpetuities, 2d ed. § 527, citing Webb v. Sadler (1872) L. R. 14 Eq. (**Eng.**) 533, 20 Week. Rep. 740.

There is, however, a difference of opinion as to whether, where the donee of the power, though not restricted in his choice of objects, and therefore having, as it is commonly expressed, a general power of appointment, may exercise it by will only, the period in which estates and interests limited by the appointment must vest is to be measured from the creation of the power, or from the time of its exercise.

That it is to be measured from the creation of the power is the view taken by Professor Gray, whose conclusion has undoubtedly exercised a considerable influence on the American courts. See Gray, Perpetuities, §§ 526–526c; Re Powell (1869) 39 L. J. Ch. N. S. (**Eng.**) 188; Re Phillips (1913) 28 **Ont.** L. Rep. 94; Graham v. Whitridge (1904) 99 **Md.** 248, 66 L.R.A. 408, 57 Atl. 609, 58 Atl. 36; Levenson v. Manly (1913) 119 **Md.** 517, 87 Atl. 261; Reed v. McIlvain (1910) 113 **Md.** 140, 77 Atl. 329; Gambrill v. Gambrill (1914) 122 **Md.** 563, 88 Atl. 1094; MINOT v. PAINE (reported herewith) ante, 365; Smith's Appeal (1879) 88 **Pa.** 492; Lawrence's Estate (1890) 136 **Pa.** 354, 11 L.R.A. 85, 20 Am. St. Rep. 925, 20 Atl. 521; Boyd's Estate (1901) 199 **Pa.** 487, 49 Atl. 297; Cox v. Dickson (1917) 256 **Pa.** 510, 100 Atl. 947; Ronckendorff's Estate (1882) 11 **Pa.** Co. Ct. 447. That an absolute power of appointment by will is not equivalent to ownership of the property, so far as the rule against perpetuities is concerned, seems also to have been the opinion of Lord Selborne, Ld. Ch., in Morgan v. Gronow (1873) L. R. 16 Eq. (**Eng.**) 1, 42 L. J. Ch. N. S. 410, 28 L. T. N. S. 434, who held, with respect to an appointment of a life interest to a person not in being at the date of the instrument creating the power, and after her death as she should by will appoint, that inasmuch as nothing could vest in her or her representative, or in anyone else, under an exercise of the power, except as at a time which might be beyond the limits allowed by the rule as to perpetuities, the appointment was void for remoteness; it being the same thing as if there had been a gift to her for her own benefit, dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time.

The opposite view that the period within which an appointment by the donee of a general power to appoint by will must take effect is to be measured from the time of the exercise of the power, rather than from its creation, rests upon the argument that the donee is practically the owner, at the date of the exercise of a general power to appoint by will only, because at that time he can do all that any owner can do with his property upon a similar occasion. See article by Professor Kales in 26 Harvard L. Rev. 64.

Professor Gray's reply to this is (in substance) that the reason why a general power to appoint by deed is good is that the donee of the power may appoint to himself, and so, when he makes what purports to be an appointment under such a power, he may be regarded as having made an appointment to himself, and then as granting his own property to the person named as appointee; but that a testator cannot take as legatee under his own will. He further says: "This is not only so as a metaphysical necessity. When a donee is given a general power by deed on his marriage, the creator of the power means to give the nominal donee, on his marriage, the absolute interest in the property; he does not mean to delegate his own right to make a limitation. But when he gives a testamentary power, he distinctly means that the donee shall have only a delegated authority; he does not mean at any time, or on the performance of any condition, to make a gift to the donee himself. When there is a power by deed given, the creator of the power means that at some time or on some condition the donee shall have, in substance, the fee. When a testamentary power is given, the creator as distinctly means that the donee shall never have the fee." 26 Harvard L. Rev. 720.

To which Professor Kales rejoins: "If A owns property and devises it, the remoteness of the interests limited are determined by reference to his death. Whether he has owned the property during his entire life or acquired it only the moment before his death, the rule is the same. The fact that he acquired the property the moment before his death, and therefore had, practically speaking, no power to enjoy or alienate it in his lifetime, is immaterial. A, with a general power to appoint by deed, is in the same position as the owner in fee, who enjoyed such ownership during his life. A, with a general power to appoint by will only, is in the same position as the person who acquires property the moment before he dies. If the remoteness of the interests appointed are to be determined as of the date of appointment, in the former case, because it is the same as if A had the fee during his lifetime, why should not the remoteness of the interests appointed be determined as of the date of the appointment, in the latter case, because it is the same as if A had acquired the property the moment before he died?" 26 Harvard L. Rev. 727.

Professor Gray's view was again very forcibly attacked by Mr. J. L. Thorndike, in an article in 27 Harvard L. Rev. 705, who says, in part: "The principle stated by Lord St. Leonards is, that whatever estates may be created by a man seised in fee may equally be created under a general power of appointment, and therefore, in point of perpetuity, the time of the execution of the power, and not of the creation of it, is to be regarded, the law's anxiety against perpetuities being the restraint of alienation. Sugden, Powers, 394, 396. This applies with the same force to a general power of appointment by will, as to a like power of appointment by deed, for every estate or interest that could have been created by the absolute owner may be created by an exercise of the power of appointment by will. The power enables the donee to give the property to any person, or for any purpose. He may, by his will, bring it into the market at once and direct that it be sold for payment of his debts, or he may mix it, or the proceeds, with his own property, and put it in the same course of devolution as if it had been actually vested in his as his own property at the time of his death. He may do this so completely that he is said to make the property his own by his will. His power over it is so absolute that, if he exercises the power at all in favor of any person or object, he thereby makes the property to that extent liable for his debts and engagements as if it had been his own, although that result may be contrary to his wishes. It is plain that there is no restraint of alienation, when the power of alienation is so unrestricted. Mr. Gray has mistaken for a principle a mere incident of the exercise of the power, when the donee exercises it by

deed in his lifetime. He may then appoint to himself, and he cannot do this by his will, which takes effect only at his death. But this arises from the nature of things and not from any restriction of the power of disposition. When his will takes effect, there is one person less in existence than there was the moment before he died, and that is the only thing that limits his power of appointment; and the death of any other person before the exercise of a power prevents, in the same manner, an appointment to that person, whether the power is exercisable by deed or will. There is, however, no restraint of alienation when the power of disposition extends to all persons in existence at the time of the exercise of the power, or afterwards born. There is no statement of the principle that confines it to cases where the power may be exercised by deed, or by either deed or will, and in the language used by Lord St. Leonards and Mr. Butler there is no suggestion of a distinction, where the power is exercisable only by will. They may use, as examples to illustrate the working of the principle, cases where the power was exercisable by deed as well as by will; but these examples can be readily adapted, by a proper change of expression, to cases where it is exercisable only by will, in the same manner as they may be adapted to personal property, where the words apply, as they generally do, exclusively to real property. When Mr. Butler says that a general power 'enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely from every species of limitation inconsistent with that fee,' he states a principle that is as applicable to dealing with the property as his own, by making it a part of his own estate by his will, as it is to a dealing with personal property. There is no distinction suggested in the one case or in the other. The language used by Lord St. Leonards in his examples does not require change to adapt it to an appointment by will. He says, as regards the donee of a general power, that 'it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so;' and in another passage; 'By the creation of the power no perpetuity, not even a tendency to a perpetuity, is effected. The donee may sell the estate the next moment.' These phrases do not mean that the donee may bring the estate into the market, or sell it, at any moment before the power arises. If a power is given to him to appoint in any manner that he pleases after his marriage, or after he attains the age of fifty years, he can bring the estate into the market, or sell it, the next moment after that event, but not before. The language certainly includes these cases. In like manner, the donee of a general power exercisable only by will may bring the estate into the market or direct its sale immediately after his will takes effect, and it has long been a common practice for him to do so. If there is a distinction between making the estate his own property the instant before his death, and making it a part of his estate the instant after his death, the distinction is of a most shadowy kind."

The principal decision embodying the view that a general testamentary power of appointment is equivalent to ownership, so that, for the purpose of the rule against perpetuities, the interest arising under the execution of the power must be considered as created by the will of the donee of the power rather than under the deed or will conferring the power, is Rous v. Jackson (1885) L. R. 29 Ch. Div. (Eng.) 521, in which it was said by Chitty, J., referring to a contrary decision of James, V. C., in Re Powell (1869) 39 L. J. Ch. N. S. (Eng.) 188; "I think the vice chancellor, in that case, fell into an error. I can find no distinction between the case of capacity to alienate, existing by reason of a general power, and general capacity to alienate property. For the purposes of the power, the person exercising it, whether a man or a married woman, stands in exactly the same position with reference to

the disposition purported to be made under the power. Mr. Butler and Lord St. Leonards both treat a general power of appointment as outside the rule against perpetuities. Lord St. Leonards in his work on Powers says (Sugden, Powers, 8th ed. p. 394): 'A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases.' He draws no distinction between a power exercisable by deed or will, or by will only, and it appears to me to make no difference by what instrument the power is made exercisable. Lord St. Leonards also says (p. 395): 'Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations, in point of perpetuity, is the time of the execution of the power, and not of the creation of it.' He goes on to quote Mr. Powell's note to Fearne's Contingent Remainders, p. 5, in favor of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. Powell can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee. There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. Butler, who says that this proposition is established 'after a series of cases:' Butler's Coke upon Littleton, 272a. I think, therefore there must be some error, some slip, in the decision of James, V. C., in Re Powell (**Eng.**) supra, and that the case was wrongfully decided."

Professor Gray states, in the article already referred to, that the context shows that Lord St. Leonards, in the passages above quoted was speaking of general powers to appoint by deed: while Mr. J. L. Thorndike (see 27 Harvard L. Rev. 715, note) is of a contrary opinion.

Rous v. Jackson is followed and approved in Re Flower (1885) 55 L. J. Ch. N. S. (**Eng.**) 200, 53 L. T. N. S. 717, 34 Week. Rep. 149, and Stuart v. Babbington (1891) Ir. L. R. 27 Eq. 551; and a similar view was expressed in Frear v. Pugsley (1894) 9 Misc. 316, 30 **N. Y.** Supp. 149, which was, however, only a special term decision.

In Genet v. Hunt (1889) 113 **N. Y.** 158, 21 N. E. 91, it was said that Rous v. Jackson (**Eng.**) supra, proceeded on a failure to discriminate between a general and unrestricted power, and one to be exercised by will only, and that this is the view taken in Gray, Perpetuities, and in Marsden, Perpetuities.

It is perhaps worth while, in this connection, to take notice of a statement made in 1 Jarman, Wills, 5th Am. ed. 290, quoted in Genet v. Hunt (**N. Y.**) supra, that when the power, though general in its objects, is to be exercised by will only, the power of disposition is suspended during the life of the donee, and appointments made by virtue of it are, therefore, to be tested in the same way as appointments under a special power. This statement, as is pointed out by a writer in 27 Harvard L. Rev. 711, was not made by Mr. Jarman himself, but was added by the editor of such edition. The passage is omitted in the 6th Am. ed. and another substituted, stating that it has been held that the same principle applicable to appointment under general powers applies where the power is to be exercised by will only, and citing the later English cases. In a note, it is added that Re Powell (**Eng.**) supra, seems inconsistent with the course of authority.

In New York, it is provided by statute that "the period during which the absolute right of alienation may be suspended by an instrument in execution of a power shall be computed, not from the date of the instrument, but from the time of the creation of the power," and that "no estate or interest

can be given or limited to any person by an instrument in execution of a power, which such person could not be capable of taking under the instrument by which the power was granted." Decisions under this statute are: Genet v. Hunt (1889) 113 N. Y. 158, 21 N. E. 91; Dana v. Murray (1890) 122 N. Y. 604, 26 N. E. 21; Fargo v. Squiers (1897) 154 N. Y. 250, 48 N. E. 509; Maitland v. Baldwin (1893) 70 Hun, 267, 24 N. Y. Supp. 29; Re Pilsbury (1905) 50 Misc. 367, 99 N. Y. Supp. 62, affirmed without opinion in (1906) 113 App. Div. 893, 99 N. Y. Supp. 72, which was affirmed without opinion in (1906) 186 N. Y. 545, 79 N. E. 1114; Re Bankers' Trust Co. (1913) 82 Misc. 375, 143 N. Y. Supp. 843. The case is not taken out of the statutory rule by the fact that the donee has an unrestricted power of appointment by deed or will, where, by reason of an existing trust for the benefit of the donee during the life of the longer liver of the donee and another, the donee has no right to give possession, though he may convey the title, there being in such case no "absolute power of disposition of the entire fee," within the meaning of the New York statute (Real Property Law, § 133), that "every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute," and the accompanying statutory provision that where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, subject to any future estates limited thereon. Farmers Loan & T. Co. v. Kip (1908) 192 N. Y. 266, 85 N. E. 59.

In concluding this discussion, it seems proper to point out that an appointment which is apparently too remote, if the period of suspension is to be measured from the creation of the power, may nevertheless be held valid on another ground. This is where the appointment is, in fact, also a resettlement of the property by an appointee, who at the time of appointment may do with it as he pleases. In such case the appointment, rather than the time of the creation of the power, is taken as the starting point, there having been, in theory, a moment of time when the whole estate became absolutely vested in the primary appointee. The point, however, has always been discussed in the form, whether the actual appointees were objects of the power. See Gray, Perpetuities, §§ 528, 529. An instance of this sort is Birley v. Birley (1858) 25 Beav. 299, 53 Eng. Reprint, 651, 27 L. J. Ch. N. S. 569, 4 Jur. N. S. 315, 6 Week. Rep. 400, where it is said that when the donee of a power intends to appoint, and the appointee intends to settle the property, the whole may be effected by one deed or one instrument, and the appointment and settlement may be made simultaneously; but that, if the reason of the appointment being made to the appointee arises from a previous contract with the donee of a power so to appoint, such appointment cannot be supported; and that the question is, In what character did the appointee take the property? If he took absolutely, he might do with it as he pleased: but if in trust for the donee of the power and to effect that which it was not within the authority of the donee to effect, under the terms of the power, then it is illegal and amounts to nothing. E. S. O.

B. B. POSTEN, Appt.,
v.
E. H. CLEM.

Alabama Supreme Court—April 18, 1918.

(— Ala. —, 78 So. 883.)

Contract — promise to hold surety harmless — writing.

1. A promise by one surety on a note to his cosurety to hold him harmless must, under the Statute of Frauds, be in writing to be enforceable.

[See note on this question beginning on page 383.]

Same — performance — payment to payee.

2. Payment of a note by a surety, to the payee, does not take out of the Statute of Frauds a promise by one surety to the other to hold him harmless on the instrument.

Pleading — demurrer — agreement within Statute of Frauds.

3. Demurrer lies to a pleading affirmatively disclosing reliance on an agreement invalid under the Statute of Frauds.

APPEAL by defendant from a judgment of the Circuit Court for Walker County in favor of plaintiff in an action on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Ray & Cooner**, for appellant:

The agreement between the parties was within the Statute of Frauds, and void.

Browns v. Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; 5 Ellis, Contr. § 3997; Hurt v. Ford, 142 Mo. 283, 41 L.R.A. 823, 44 S. W. 228; Hartley v. Sandford, 66 N. J. L. 627, 55 L.R.A. 206, 50 Atl. 454; Craft v. Lott, 87 Miss. 590, 40 So. 426, 6 Ann. Cas. 670; 20 Cyc. 178, 180, note 8; Bissig v. Britton, 59 Mo. 204, 21 Am. Rep. 379; Wolverton v. Davis, 85 Va. 64, 17 Am. St. Rep. 56, 6 S. E. 619.

Mr. **W. F. Finch**, for appellee:

If two persons sign the same obligation as sureties for a third, one of them at the request of the principal and the other at the request of the first surety, they are not cosureties as between themselves, but the first surety stands in the relation of principal to the second, and is responsible to him for whatever he may be compelled to pay, and has, in no event, any claim against him for contribution.

Gross v. Davis, 10 Am. St. Rep. 642, note, 6 R. C. L. 1043; Moore v. Trott, 134 Am. St. Rep. 137, note.

If plaintiff signed the note paid by defendant, at the latter's request, and with the understanding that defendant would pay the same when due, such promise does not come within the Statute of Frauds.

Godden v. Pierson, 42 Ala. 370; Mason v. Hall, 30 Ala. 599.

The Statute of Frauds does not prevent the voluntary execution of a contract within its provisions, by the parties, nor annul it when executed.

Sawyer v. Ware, 36 Ala. 675; Godden v. Pierson, supra; Kling v. Tunstall, 124 Ala. 268, 27 So. 420; Blount v. Hawkins, 19 Ala. 100; Dargin v. Hewlitt, 115 Ala. 510, 22 So. 128; Lagerfelt v. McKie, 100 Ala. 430, 14 So. 281.

Anderson, Ch. J., delivered the opinion of the court:

As we understand the question as presented by the defendant's second plea of set-off and the plaintiff's second replication thereto, the plea claims an indebtedness from the plaintiff to the defendant, growing out of the facts that they were cosureties upon a note of one Thomas, principal, and payable to McAnnally, that defendant paid the note, and the plaintiff is called upon to contribute his share. The said second replication sets up a promise from the defendant to the plaintiff, his

cosurety (that he told him), that if he, the plaintiff, would sign the note as cosurety, he, the defendant, would see it paid, and hold the plaintiff harmless. Did the promise have to be in writing to be binding under the Statute of Frauds? This case presents a question not easy of solution, and involves a point upon which there has been quite a division among the authorities, and as to which many of the courts which hold that the transaction does not come within the Statute of Frauds reach the conclusion upon different ideas and lines of reasoning.

"In England it is practically settled that if one person, at the request of another and on his oral guaranty of indemnity against loss, assumes a responsibility for the discharge of a third person's obligation to a fourth, he may recover against the guarantor, although there is, on the part of the third person, a coexistent implied obligation to indemnify the promisee; and the weight of authority in this country is in accordance with the English view. In many states, however, a contrary view has been adopted, and a promise of indemnity given under such circumstances is held to be within the statute." 20 Cyc. 178.

Contract—promise to hold surety harmless—writing.

For cases holding the promise not within the statute, see note 7, p. 179, and for those holding that it is within the Statute of Frauds, see cases cited in note 8, p. 180, and which last citation refers to the early Alabama case of Brown v. Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 36, and which said case has never been overruled. While our Alabama case is classed by the text-writers as with the minority line of decisions, we are disposed to follow same, and think the holding wholesome and salutary, as closing the door to confusion, fraud, and perjury by not permitting cosureties on notes, bonds, and other instruments to promote contests between themselves through oral promises and agreements as to their indemnity and liability. We therefore hold that the trial court erred in not sustaining the demurrer to the plaintiff's second replication to the defendant's second plea. The third plea sets up that the defendant was surety upon the note for the plaintiff, and we do not see how the replication as to this plea presents the question of the Statute of Frauds, which is the only point argued in brief of counsel. The said replications seem to be more of a denial or traverse of the material averments of the plea. While the third replication does not present the question argued as an answer to either of the pleas, it merely sets up the fact that the plaintiff did not sign the note as a cosurety with the defendant, as averred in the second plea, or as principal of the defendant as averred in the third plea, but as surety for the defendant, who merely agreed to and did do what he was primarily liable to do.

From reading the fifth headnote to the case of Godden v. Pierson, 42 Ala. 370, it would perhaps indicate a conflict with the case of Brown v. Adams, supra, by the use of the letter P. A careful consideration of the opinion, however, will disclose that the promise relied upon to Evans was made by Brazelton, "the defendant in attachment," and who was the principal upon the note, and was not made by Pierson, who was not the defendant in the case, but was the garnishee. Of course, the promise from Brazelton, the principal upon the note, to pay the same and thus hold his surety, Evans, harmless, was but a promise to discharge an original legal duty placed upon him by the law. It was his legal duty to do this, independent of the promise made Evans his surety.

We are, of course, aware of the rule that the Statute of Frauds applies only to executory and not executed contracts; that the Statute of Frauds does not prevent the voluntary execution of a contract within its provisions, by the parties, nor annul it when executed. Godden v.

Pierson, supra; Sawyer v. Ware, 36 Ala. 675; Lavender v. Hall, 60 Ala. 214; Gafford v. Stearns, 51 Ala. 434; Gordon v. Tweedy, 71 Ala. 202. While the defendant's pleas aver a payment of the note to the payee McAnnally, and show that the contract had been executed as between the defendant and said payee, it did not become executed as between the defendant and his cosurety, the plaintiff. Code 1907, §§ 5384, 5385.

Same—performance—payment to payee.

While the general rule is that the Statute of Frauds, to be available, should be especially pleaded, yet it seems that, in law as well as equity, if the bill, complaint, or pleading affirmatively disclose an agreement within the Statute of Frauds, the question is available by a demurrer. 7 Mayfield's Dig. p. 375, and cases there cited.

Pleading—demurrer—agreement within Statute of Frauds.

For the error above pointed out, the judgment of the Circuit Court is reversed and the cause is remanded.

Mayfield, Somerville, and **Thomas,** JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Promise by other than the principal to indemnify a surety, as one to answer for the debt, default, or miscarriage of another.

I. In general, 383.
II. Surety on note, 384.
III. Surety on bond, 386.
IV. Bail, 387.
V. Cosurety, 388.
VI. Miscellaneous cases, 391.

I. In general.

There has been considerable conflict as to whether a promise by one other than the principal to indemnify a surety is a promise to answer for the debt, default, or miscarriage of another, so as to be within the Statute of Frauds, and required to be in writing, the conflict appearing first in the English cases, where the view that a promise to indemnify a surety is not within the Statute of Frauds was established by Thomas v. Cook (1828) 8 Barn & C. 728, 108 Eng. Reprint, 1213, 3 Moody & R. 444, 7 L. J. K. B. 49, and Reader v. Kingham (1862) 13 C. B. N. S. 344, 143 Eng. Reprint, 137, 32 L. J. C. P. N. S. 108, 9 Jur. N. S. 797, 7 L. T. N. S. 789, 11 Week. Rep. 366, the opposite rule being declared by Green v. Cresswell (1839) 10 Ad. & El. 453, 113 Eng. Reprint, 172, 2 Perry & D. 430, 4 Jur. 169, 9 L. J. Q. B. N. S. 63, which criticized the rule laid down in Thomas v. Cook.

In Resseter v. Waterman (1894) 151 Ill. 169, 37 N. E. 875, holding that a promise by the payee of a note that, if another would sign the same as surety for the maker, he (the payee) would indemnify and save him harmless, was not within the Statute of Frauds, the court states the principle governing such cases to be that the statute is applicable only to promises made to persons to whom another is answerable; and, while the maker might properly be regarded as under an implied obligation to indemnify his surety, he was not bound to do so, and neither in law nor in equity was such implied obligation susceptible of being enforced. The only obligation upon the part of the maker being that which arose by operation of law to reimburse and make good to his surety the amount expended in payment of his debt, upon which no action could be maintained until the surety had paid the debt, there was no actual liability on the part of the maker, by express agreement, or otherwise, to indemnify his surety, which was capable of enforcement; and, therefore, the promise of the defendant was an independent undertaking, not within the statute. The court said, further, that, treating the obligation of the maker to indemnify his surety as equivalent to a contract actually made within the contemplation of the statute, it does not necessarily follow that the promise of a party to hold the surety harmless would, in such case, be regarded as

collateral, as the promisor does not undertake to be answerable for the amount of the note, but to pay what his promisee, the surety, would be ultimately liable to pay, the measure of the amount of the recovery in such case, not being the amount of the debt, but the actual damages sustained, including payments made down to the time of the trial.

In Macey v. Childress (1875) 2 **Tenn.** Ch. 438, a promise by one who made an assignment in trust for creditors, that he would indemnify the plaintiff for becoming surety for the trustee, was held to be within the Statute of Frauds, the court being influenced, to some extent at least, by the fact that the plaintiff failed to prove more than an implied promise on the part of the debtor, to indemnify him; but, apparently on general principles, agreeing with the cases which hold that a promise to indemnify is within the Statute of Frauds. The court points out the difficulty of finding a principle which logically leads to the conclusion that a promise to indemnify is not within the statute, from the fact that so many different reasons have been assigned for their decision by the courts taking that position, some taking the view that a promise, to be within the statute, must be to the creditor, whereas the promise to indemnify is made to the debtor; others, that the promise to indemnify is the main inducement to the risk, even if the principal obligor be also bound, either expressly or by implication; others resting their decisions upon the ground that the action in favor of the surety against the principal obligor would be founded upon an assumpsit, raised by a subsequent fact, to wit, the payment of the debt, which would not prove that there was any contract, express or implied, between him and the surety when the obligation was signed; while still others seem to be influenced by the inherent equity of the particular case, rather than by any connected chain of reasoning.

II. Surety on note.

A promise by one not a party to a note to one who becomes a surety thereon, to save the latter harmless, is not within the Statute of Frauds. Reed v. Holcomb (1863) 31 **Conn.** 360; Mills v. Brown (1860) 11 **Iowa,** 314; Dunn v. West (1845) 5 B. Mon. (**Ky.**) 376; George v. Hoskins (1895) 17 **Ky.** L. Rep. 63, 30 S. W. 406: Adams v. Brown (1895) 17 **Ky.** L. Rep. 634, 32 S. W. 282; Smith v. Sayward (1829) 5 **Me.** 504; Chapin v. Lapham (1838) 20 Pick. (**Mass.**) 467; Garner v. Hudgins (1870) 46 **Mo.** 399, 2 Am. Rep. 520; Minick v. Huff (1894) 41 **Neb.** 516, 59 N. W. 795; Warren v. Abbett (1900) 65 **N. J. L.** 99, 46 Atl. 575; Myers v. Morse (1818) 15 Johns. (**N. Y.**) 425; Jones v. Bacon (1895) 145 **N. Y.** 446, 40 N. E. 216; Hyde v. Equitable Life Assur. Soc. (1908) 61 Misc. 518, 116 **N. Y.** Supp. 219; O'Brien v. Donnelly (1915) 169 App. Div. 709, 155 **N. Y.** Supp. 790; Shook v. Vanmater (1868) 22 **Wis.** 532; Wildes v. Dudlow (1874) L. R. 19 Eq. (**Eng.**) 198, 44 L. J. Ch. N. S. 341, 23 Week. Rep. 435. At least this is the case where the surety acts solely upon the promise. Demeritt v. Bickford (1879) 58 **N. H.** 523; Vogel v. Melm (1872) 31 **Wis.** 306, 11 Am. Rep. 608.

So, where defendant took a note from a firm that was indebted to him, and had it made payable to the order of the plaintiff for the purpose of getting plaintiff's indorsement to make it discountable, and, upon plaintiff refusing to indorse the note, defendant promised to see it paid and save him harmless if it was not paid by the makers, it was held that defendant never intended to become surety for the makers, and that the plaintiff never intended to accept his undertaking as that of a surety, and that, as plaintiff indorsed it without relying on the makers, and for the sole accommodation of the defendant, defendant's promise was not within the Statute of Frauds. Reed v. Holcomb (1863) 31 **Conn.** 360.

And a promise by defendant that, if plaintiff would sign a note as surety for a third party, which note was to be used in a matter in which defendant was attorney for the third party, and from which he would re-

ceive compensation, defendant would indemnify plaintiff against any loss or damage that might result, was not within the Statute of Frauds, either for the reason that the liability incurred operated directly to the benefit of defendant, or because it was a promise to indemnify one for becoming a surety of another. Mills v. Brown (1860) 11 Iowa, 314.

And a promise by purchasers of real estate, who wish to keep their identity secret, that, if plaintiff would sign notes as surety for their agent who made the purchase, they would save him harmless, was not a promise to answer for the debt of another, within the Statute of Frauds. Smith v. Sayward (1829) 5 Me. 504.

In Garner v. Hudgins (1870) 46 Mo. 399, 2 Am. Rep. 520, it was held that a promise by a partnership to indemnify a surety upon a note of one of the partners, by means of which he borrowed money for the use of the firm, was not a promise to answer for a default of another, within the Statute of Frauds.

In Myers v. Morse (1818) 15 Johns. (N. Y.) 425, it was held that, where plaintiff promised not to require from the defendant the payment of a certain note, in consideration of which defendant promised to indemnify the plaintiff against one third of all loss in consequence of his indorsement of certain notes for a third person, this promise was not within the Statute of Frauds, because there was a new and original consideration moving between the contracting parties.

In Hyde v. Equitable Life Assur. Soc. (1908) 61 Misc. 518, 116 N. Y. Supp. 219, it was held that an agreement by an insurance association to indemnify the guarantors of the debt of a third person, such guaranties being for its benefit, was not within the Statute of Frauds.

In Dunn v. West (1845) 5 B. Mon. (Ky.) 376, the court, in sustaining a judgment for the promisee, who signed a note, as surety, with the promisor's son, upon the promise that, if the promisee had to pay anything on the note, the promisor would pay back the same, which judgment was based upon the theory that credit was given solely to the promisor, the court said that the father did not promise to pay the surety if the son did not pay him, but to pay him if, in consequence of his son's failure to pay the original debt to another, the surety should have to pay that debt. The court further said that they were not prepared to say that, even if the surety looked to the son's liability as well as to the father's promise, for his ultimate indemnity, the father's promise would necessarily be regarded as collateral merely.

In George v. Hoskins (1895) 17 Ky. L. Rep. 63, 30 S. W. 406, the court, in holding that a promise by a third party to indemnify another for becoming surety upon a note was not within the statute, said that the action was not by the creditor to whom the debt was due, but it was an action upon a promise to pay the surety any sums of money which he might be compelled to pay, by reason of the fact that he signed the renewal note, and was not a promise to pay the debt of another.

Where the sureties on one note promised that, if the sureties upon another note by the same maker would release the proceeds of property given for the security of the second note, and permit them to be applied in payment of the first note, the sureties upon the first note would preserve the sureties harmless upon the second note, the promise was not within the Statute of Frauds. Adams v. Brown (1895) 17 Ky. L. Rep. 634, 32 S. W. 282.

In Shook v. Vanmater (1868) 22 Wis. 532, it was held that a promise of a third person to accommodation makers of a note that, if they would release certain securities which they held, such third person would indemnify them against any loss resulting from their signing the note, was not within the Statute of Frauds.

And in Chapin v. Lapham (1838) 20 Pick. (Mass.) 467, the court said that one distinction is well settled, that when the party making the promise is alone liable, or when, in other words, the whole credit is given to him, it is an original and not a collateral prom-

ise; so, the promise of a father to the surety upon a note given by his minor son, that he would save the surety harmless, is not within the statute, the son not being liable to an action because of his minority.

However, a few cases take the opposite view, and hold that a promise to indemnify a surety upon a note is within the Statute of Frauds, and must be in writing. Spear v. Farmers' & M. Bank (1895) 156 Ill. 555, 41 N. E. 164, affirming (1893) 49 Ill. App. 509; First Nat. Bank v. Bennett (1876) 33 Mich. 520; Hurt v. Ford (1897) 142 Mo. 283, 41 L.R.A. 823, 44 S. W. 228; Kelsey v. Hibbs (1862) 13 Ohio St. 340.

So, in Hurt v. Ford (1897) 142 Mo. 283, 41 L.R.A. 823, 44 S. W. 228, it was held that an oral promise to indemnify the promisee against any loss from becoming surety upon the note of a third person is within the Statute of Frauds.

In Kelsey v. Hibbs (1862) 13 Ohio St. 340, it was held that an oral promise by one who was not a party to a bill of exchange, to indemnify another for becoming indorser thereof, was within the Statute of Frauds.

And an agreement by one creditor with another creditor who was surety upon the note of the debtor, that they would work together in protecting their claims, and, in case of any loss, would share it equally, was a promise to answer for the default of another, within the Statute of Frauds. Spear v. Farmers' & M. Bank (1895) 156 Ill. 555, 41 N. E. 164, affirming (1893) 49 Ill. App. 509.

And in First Nat. Bank v. Bennett (1876) 33 Mich. 520, it was held that a written agreement made by the president of a bank, personally, to indemnify a surety upon a note against any loss because of his signing it, was such an agreement as would be within the Statute of Frauds, unless in writing, and therefore an attempt to show, by parol, that such an agreement was made by the president in behalf of the bank, would bring the whole contract, so far as the bank was concerned, within the Statute of Frauds.

Where a married woman signed, as surety, a note given by her son, upon the request of her husband and his oral promise to see it paid, the promise of the husband was within the Statute of Frauds. Miller v. Long (1863) 45 Pa. 350.

And where a father made an oral promise to plaintiff that, if he would indorse his son's note, the father would save him harmless from any loss by reason of such indorsement, the contract was within the Statute of Frauds; and this conclusion is strengthened by the fact that the plaintiff first consistently and persistently followed the son and his estate with his claim, and did not resort to the father during his life, nor against his estate, until after every other resource had failed. Clement's Appeal (1885) 52 Conn. 464.

III. Surety on bond.

In Nugent v. Wolfe (1886) 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15, it was held that a promise by one to indemnify another for becoming bail for stay of execution, upon a judgment against a third person, was within the Statute of Frauds.

And in Campbell v. Pucket (1880) 1 Posey, Unrep. Cas. (Tex.) 465, it was held that a promise by a third party to plaintiff that, if he would go upon an appeal bond, he would indemnify plaintiff and hold him harmless, was within the Statute of Frauds.

And where an attorney agreed that he would guarantee, if plaintiffs would justify upon an appeal bond for his client, that they should be protected and saved harmless from any liability incurred, the promise was within the Statute of Frauds. Esch v. White (1899) 76 Minn. 220, 78 N. W. 1114.

And a promise by defendant that, if plaintiff would enter into a bond as security for a third person as sheriff, defendant would see to the management of the office and save plaintiff harmless from all liability he might incur by reason thereof, was a promise to answer for the default of another, within the Statute of Frauds. Brown v. Adams (1827) 1 Stew. (Ala.) 51, 18 Am. Dec. 36.

Likewise, a promise by a son to indemnify a surety upon his father's official bond was within the statute. Craft v. Lott (1905) 87 Miss. 590, 40 So. 426, 6 Ann. Cas. 670.

And Easter v. White (1861) 12 Ohio St. 219, follows Green v. Cresswell (1839) 10 Ad. & El. 453, 113 Eng. Reprint, 172, 2 Perry & D. 430, 4 Jur. 169, 9 L. J. Q. B. N. S. 63, and holds that a promise by a third person to indemnify a surety upon a replevin bond is within the Statute of Frauds, and therefore void unless in writing.

But in Tighe v. Morrison (1889) 116 N. Y. 263, 5 L.R.A. 617, 22 N. E. 164, it was held that an agreement by defendant to indemnify plaintiff against loss, if he would, as surety, sign the administration bond of a third person, was not within the Statute of Frauds, as such a promise was not to answer for the default of one who owed any duty to the plaintiff, because the administrator had neither expressly nor impliedly entered into any agreement with him, and his only duty was to the people, standing as the creditor, or fourth person.

And a promise to save one harmless if he will become the surety of another is not such as is required by the Statute of Frauds to be in writing, and it is immaterial whether the surety commits himself to the payment of a certain amount, or the extent of his liability cannot be stated, as in the case of a sheriff's bond. Spurrier v. Nottingham (1885) 7 Ky. L. Rep. 453 (abstract).

And where defendant requested plaintiff to become surety upon a liquor license bond for a third person, promising that he would see that plaintiff was all right in the transaction, and also telling plaintiff that he, defendant, intended to go into the liquor business with the third party, which he, in fact, did, after the license was issued, it was held that the case was the same, in substance, as if plaintiff had signed the defendant's own bond to enable him to procure a license and become a dealer, and therefore it was not within the Statute of Frauds. Smith v. Delaney (1894) 64 Conn. 264, 42 Am. St. Rep. 181, 29 Atl. 496.

In Lucas v. Chamberlain (1848) 8 B. Mon. (Ky.) 276, it was held that a promise by one whose property would be released from a levy by an injunction that, if plaintiffs would become sureties upon the injunction bond, he would indemnify them, was not within the Statute of Frauds; and the court said that, even if he had been an entire stranger to the debt, his promise to indemnify the plaintiffs for becoming sureties to third persons was an original promise, not within the statute.

In Hanna v. Laurence (1887) 9 N. Y. S. R. 619, it was held that a promise by defendant, who was the real party in interest, to indemnify plaintiff for becoming surety in a replevin suit brought by defendant's husband, was an original undertaking, not within the Statute of Frauds.

In Fidelity & C. Co. v. Lawler (1896) 64 Minn. 144, 66 N. W. 143, it was held that a counter bond given by third parties to indemnify a surety company against any loss which it might sustain by reason of the default of an employee of an elevator company, for whom it furnished bonds to the employer, was not within the Statute of Frauds.

And where a surety signed a bond, relying solely upon the promise of a third party to indemnify him, the promise was not within the Statute of Frauds. Hawes v. Murphy (1906) 191 Mass. 469, 78 N. E. 109.

IV. Bail.

An agreement to indemnify one for becoming surety, upon a recognizance for the appearance of a third party to answer to a criminal charge, is generally held not to be within the Statute of Frauds. McCormick v. Boylan (1910) 83 Conn. 686, 78 Atl. 335, Ann. Cas. 1912A, 882; Clark v. Toney (1916) 17 Ga. App. 803, 88 S. E. 690; Anderson v. Spence (1880) 72 Ind. 315, 37 Am. Rep. 162; Keesling v. Frazier (1889) 119 Ind. 185, 21 N. E 552; Perley v. Spring (1815) 12 Mass. 297; Aldrich v. Ames (1857) 9 Gray (Mass.) 76; Cripps v. Hartnoll (1863)

4 Best. & S. 414, 122 Eng. Reprint, 514, 10 Jur. N. S. 200, 11 Week. Rep. 953, 32 L. J. Q. B. N. S. 381, 8 L. T. N. S. 765. Contra see May v. Williams (1883) 61 Miss. 125, 48 Am. Rep. 80 and Kingsley v. Balcome (1848) 4 Barb. (N. Y.) 131.

But if the promisee voluntarily pays an amount to discharge his liability upon the bond, before his liability has been fixed by law, he cannot recover such amount from the promisor. Clark v. Toney (1916) 17 Ga. App. 803, 88 S. E. 690.

In Aldrich v. Ames (1857) 9 Gray (Mass.) 76, it was held that the promise of one to indemnify another, and save him harmless, if he would become bail for a third party charged with a criminal offense, was not within the statute, because the promise in such case is to the debtor, and not to the creditor.

In Anderson v. Spence (1880) 72 Ind. 315, 37 Am. Rep. 162, expressly overruling Brush v. Carpenter (1854) 6 Ind. 78, which involved a promise to a surety on a replevin bond, it is held that a promise to indemnify one against loss, in becoming bail for a third party charged with a criminal offense, is not within the statute, the court pointing out that much of the confusion arising over the question is due to a failure of the courts to distinguish between contracts of guaranty and contracts of indemnity, and points out that, to come within the statute, the debt or default must be toward the promisee.

In Cripps v. Hartnoll (1863) 4 Best & S. 414, 122 Eng. Reprint, 514, in holding that a promise by a third person to indemnify one for becoming surety on a criminal bail bond, and in distinguishing the case from Green v. Cresswell (1839) 10 Ad. & El. 453, 113 Eng. Reprint, 172, 2 Perry & D. 430, 4 Jur. 169, 9 L. J. Q. B. N. S. 63, which involved bail in a civil suit, the court says: "Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt and, with respect to the person who bails, there is hardly a duty."

And where a debtor in jail deposited sufficient property with defendant to indemnify him, and the defendant solicited plaintiff and others to become bail for the debtor, and, in consideration of their becoming bail, promised to indemnify them and save them harmless from all damages and costs, the promise was not within the statute. Perley v. Spring (1815) 12 Mass. 297.

But in May v. Williams (1883) 61 Miss. 125, 48 Am. Rep. 80, and Kingsley v. Balcome (1848) 4 Barb. (N. Y.) 131, the courts refuse to recognize the distinction made between an agreement to indemnify a surety on a criminal bail bond, and a surety upon other obligations, and hold that such a promise is within the Statute of Frauds.

V. Cosurety.

The overwhelming weight of authority is to the effect that a promise by a surety to indemnify a cosurety, or an agreement that a cosurety shall be responsible only for a certain proportion of any loss sustained, is not a promise to answer for the debt or default of another, and therefore need not be in writing, this rule being sustained by the following cases:

—Weeks v. Parsons (1900) 176 Mass. 570, 58 N. E. 157, where the directors of a corporation, who indorsed notes for the benefit of the corporation, had an understanding among themselves that the indorsements were to be joint and not several;

—Potter v. Brown (1877) 35 Mich. 274, where one agreed to become a cosigner of a note and pay it at maturity, in consideration of which another signed it, the object of the note being to raise money for the promisor, though the ultimate purpose was to make use of it for the benefit of third persons who were first signers of the note;

—Cortelyou v. Hoagland (1885) 40 N. J. Eq. 1, where directors of a corporation made a promise to one of their number, to induce him to indorse

a corporate note, that they would respond to him and save him harmless from all loss incurred by the indorsement, except his appropriate share as a director, which was to be borne by himself;

—Sanders v. Gillespie (1874) 59 N. Y. 250, where an agreement was made between the first and second indorsers of a promissory note that, if the first indorser would pay the note at maturity, the second would deliver goods to him to the amount so paid;

—Westfall v. Parsons (1853) 16 Barb. (N. Y.) 648, where an agreement was made between the first and second indorsers of a promissory note, on being informed by the maker that he would be unable to pay it at maturity, that, in consideration of an assignment by the maker of his property, giving preferences to the note, they would pay it, and look to the assignment for remuneration, the agreement being in terms joint, with nothing to show that it was not intended to create a joint obligation, as such agreement terminated the relation of the parties as first and second indorsers, and deprived them of recourse to the maker beyond the assignment, or of recourse as against each other;

—Oldham v. Broom (1875) 28 Ohio St. 41, where one executed a note jointly with the principal debtor, as his surety, and intrusted it to his principal to be used, and the latter procured the signature of another surety by agreeing that the first surety would indemnify him against loss; as, by intrusting the note to the principal as it was, the first surety impliedly authorized him to issue it as it then was, or to procure such further security as would make it available, and, for that purpose, to accept such further terms as the party signing it might prescribe;

—Rose v. Wollenberg (1896) 31 Or. 269, 39 L.R.A. 378, 65 Am. St. Rep. 826, 44 Pac. 382, where an oral contract was made between cosureties, fixing the proportion and extent of their several or correlative liability as between themselves;

—Anderson v. Peareson (1831) 2 Bail. L. (S. C.) 107, where plaintiff, who had been compelled to pay as surety on a note, sued a cosurety, and offered parol testimony to show that defendant had undertaken to indemnify him, and that plaintiff signed only in consideration of that undertaking;

—Sloan v. Gibbes (1899) 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408, where a first indorser in blank on a negotiable note sued the second indorser for contribution, relying on an alleged parol agreement between them that they would be sureties, as between themselves, proportionately, the Statute of Frauds being satisfied by the indorsement in blank on the note; such signature applying to the contract already written in the note, and to such contract as the parties authorize to be written above their signatures;

—Hall v. Taylor (1906) — Tex. Civ. App. —, 95 S. W. 755, where an agreement was made by one of the sureties upon a note given for the purchase price of a horse that, if the note was not paid, he would take the horse and pay the note;

—Alphin v. Lowman (1913) 115 Va. 441, 79 S. E. 1029, Ann. Cas. 1915A, 863 (disapproving Wolverton v. Davis (1888) 85 Va. 64, 17 Am. St. Rep. 56, 6 S. E. 619), where an indorser promised that, if the other indorsers would join him, he would reimburse them for any loss they might sustain by default of the principal, as he was not a stranger to the note, but was answerable for it independently of the other indorsers;

—Faulkner v. Thomas (1900) 48 W. Va. 148, 35 S. E. 915, where two fathers indorsed the notes of their sons to enable them to procure money to go into business as partners, it being agreed between them that each was to be liable only for one half of the debts;

Clevenger v. Commercial Guaranty State Bank (1916) — Tex. Civ. App. —, 183 S. W. 65; Apgar v. Hyler (1854) 24 N. J. L. 812; and Horn v. Bray (1875) 51 Ind. 555, 19 Am. Rep. 743, where a surety upon a promissory note agreed that, if another

would also become surety, he would indemnify him from all loss and harm;

—Handsaker v. Pedersen (1912) 71 Wash. 218, 128 Pac. 230, where two persons signed a note as accommodation parties, at the instance of another accommodation party, and upon his promise to pay the note in any event, and save them harmless;

—Jones v. Shorter (1846) 1 Ga. 294, 44 Am. Dec. 649, where one about to become a surety upon a bond called upon another to join him, and agreed that, if he would do so, he would indemnify him against any loss;

—Hoggatt v. Thomas (1883) 35 La. Ann. 298, and Rae v. Rae (1857) 6 Ir. Ch. Rep. 494, where one of the sureties upon an official bond of a third person agreed to hold the other surety harmless from all liability and loss thereon, in consideration of which the latter became a surety;

—Blake v. Cole (1839) 22 Pick. (Mass.) 97, where a surety upon an administrator's bond promised his cosurety to save him harmless;

—Ferrell v. Maxwell (1876) 28 Ohio St. 383, 22 Am. Rep. 393, where a surety upon an administration bond, by agreeing to indemnify another, induced the latter to sign the same bond as surety with him;

—Noyes v. Ostrom (1910) 113 Minn. 111, 129 N. W. 142, where one member of a partnership, which was the payee of a note given by a public contractor, became a surety upon the contractor's bond, and also procured the defendants to become sureties upon the bond, promising to save them harmless from any and all liability as sureties, defendant's agreement with the other sureties being enforceable against him, although, in an action upon the bond, they could not vary their liability by parol testimony;

—Barry v. Ransom (1855) 12 N. Y. 462, where one surety upon an official bond became such at the special instance and request of another surety, and upon his express promise that he would indemnify and save him from any loss, in consequence of his becoming such surety;

—Harrison v. Sawtel (1813) 10 Johns. (N. Y.) 242, 6 Am. Dec. 337, where the promisor requested the promisee to become special bailor for one who had been arrested in a civil action, the promisor being bound to indemnify such person from arrest; and the promisee was entitled to recover against the promisor for expenses he had been put to, in endeavoring to obtain a surrender of the person arrested;

—Boyer v. Soules (1895) 105 Mich. 31, 62 N. W. 1000, where defendant took a mortgage on the stock of goods of a third person, as security for a loan, and, upon the goods being levied upon by a creditor of a former owner, induced plaintiff to join as surety upon a replevin bond for the third party, by promising to save plaintiff harmless;

—Hockaday v. Parker (1860) 53 N. C. (8 Jones, L.) 16, where an agreement was made by a surety, whose land had been sold under execution for the debts of the principal, and bid in by the other surety, by which he was to take an assignment of the bid and pay off the debt;

—Mickley v. Stocksleger (1891) 10 Pa. Co. Ct. 345, where defendant in an action for contribution offered to show that he had signed as cosurety, under a promise of indemnity from plaintiff, the other surety;

—Daniel v. Ballard (1834) 2 Dana (Ky.) 296, in which the court said that if one surety became bound at the instance of the other surety, and for the latter's benefit, he would not be liable for contribution to such surety, but it was held that the allegations in this respect were not sustained by proof.

And in Thomas v. Cook (1828) 8 Barn. & C. 728, 108 Eng. Reprint, 1213, 3 Moody & R. 444, 7 L. J. K. B. 49, where defendant promised that if plaintiff would join with him as surety upon the bond of a third person, to indemnify a fourth person against certain debts, the defendant would save plaintiff harmless from all loss by reason of the bond, it was held that the promise was binding, although not in writing, as, to be within the Statute of Frauds, the promise must be made to the creditor.

In Barry v. Ransom (1855) 12 N. Y. 462, the court, in holding that a promise by one surety upon the official bond of a public officer, to another surety, to indemnify him from loss, made prior to or contemporaneously with their executing the bond, was not within the statute, the sureties being bound severally as well as jointly, distinguishes this class of cases from those where the promisor was not bound to answer for the default of the third party, except by his promise to the surety; and, in answer to a contention made in Green v. Cresswell, supra, that if a promise to indemnify was not held to be within the statute it might be evaded, as every promise to become answerable for the debt or default of another may be shaped as an indemnity, says: "This reason certainly does not apply where the indemnitor is otherwise bound, in writing, for the party whose default is to be provided against. I am of opinion that where a person is about to become bound by writing, to answer for the default of a third party, and he procures another to be bound with him in the same obligation, by promising to indemnify him, that this is an original promise, and not within this branch of the Statute of Frauds."

And in Rae v. Rae (1857) 6 Ir. Ch. Rep. 490, involving the proof of an oral agreement by one surety to indemnify another, the court decides the question upon the ground that the doctrine of contribution among cosureties is not founded on contract, but is the result of general equity; but says that, if it were necessary to decide the question on the Statute of Frauds, it would hold that such a promise did not come within the statute.

But in Bissig v. Britton (1875) 59 Mo. 204, 21 Am. Rep. 379, it was held that a promise by one who has already signed a replevin bond as surety to another that, if the latter would also sign, he would hold him harmless from all damages arising therefrom, is a promise to answer for the debt or default of another within the Statute of Frauds, and is invalid unless in writing.

And in Draughan v. Bunting (1848) 31 N. C. (9 Ired. L.) 10, it is held that the maker of a note is under legal liability to indemnify his surety, and the promise of a cosurety to indemnify the surety is superadded, and is a promise to answer for the default of another within the Statute of Frauds.

This view of the question is also taken in the reported case (POSTEN v. CLEM, ante, 381).

VI. Miscellaneous cases.

In Hartley v. Sandford (1901) 66 N. J. L. 627, 55 L.R.A. 206, 50 Atl. 454, it was held that where defendant applied to plaintiff to become surety for defendant's son, and promised him that if he was compelled to pay the debt he would reimburse him, the court held that the promise was within the Statute of Frauds, and distinguished earlier New Jersey cases on the ground that, in those cases, the promisor had some liability for the debt other than the promise.

A promise that, if the promisee will become security upon a lease executed by a third party, the promisor will guarantee the payment of the lease, and secure the plaintiff harmless, was within the Statute of Frauds. Brand v. Whelan (1885) 18 Ill. App. 186.

So, in Baker v. Dillmann (1861) 12 Abb. Pr. (N. Y.) 313, it was held that a written promise by members of an association to indemnify another member against loss, upon his becoming surety for the association as tenant under a lease, came within the Statute of Frauds and was void, because it did not express any consideration.

Where plaintiff, upon the promise of defendant to indemnify and save him harmless, entered into an agreement with third persons that, if they would sell goods to a fourth person, plaintiff would be liable for the fourth person's nonpayment for such goods, it was held that the agreement of defendant was not with the party buying or selling the goods, but was an original undertaking with plaintiff, and not within the Statute of Frauds. Chapin v. Merrill (1830) 4 Wend. (N. Y.) 657.

A promise by the owners of a vessel to the master that, in consideration of his paying over to them money re-

ceived in a certain transaction as master, they would save him harmless from any action taken by a third person, concerning such transaction, was not within the statute. Stocking v. Sage (1816) 1 Conn. 519. R. L. S.

HAROLD ZETERSTROM, Appt.,
v.
HERBERT C. THOMAS.

Connecticut Supreme Court of Errors—July 23, 1918.

(92 Conn. 702, 104 Atl. 237.)

Bailment — direction to take possession.

One who has conveyed a police officer to the scene of a collision between an automobile and a motorcycle does not become liable as a bailee for loss of the motorcycle because he refuses to obey the order of the officer to take possession of and remove it to a garage, although he subsequently returns to do so and finds that it has been stolen during his absence.

[See note on this question beginning on page 394.]

APPEAL by plaintiff from a judgment of the Court of Common Pleas for New Haven County, setting aside a verdict in his favor in an action brought to recover damages for the loss of his motorcycle, due to defendant's alleged carelessness. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Fitzgerald & Walsh**, for appellant:

In setting aside the verdict for the plaintiff, his constitutional right to a jury trial was invaded.

Robinson v. Backes, 91 Conn. 457, 99 Atl. 1057.

Defendant was liable as bailee for loss of the motorcycle.

Burns v. State, 145 Wis. 373, 180 Am. St. Rep. 1081, 128 N. W. 987; State v. Chew Muck You, 20 Or. 218, 25 Pac. 355; Dobie, Bailm. pp. 13, 122; Schouler, Bailm. 3d ed. ¶ 3.

The delivery necessary to create a bailment may be a constructive delivery as well as actual.

Merriam v. Hartford & N. H. R. Co. 20 Conn. 359, 52 Am. Dec. 344; Means v. Williamson, 37 Me. 556.

Defendant, a private party, was working for his own profit and for his own ends, and is not entitled to immunity.

Hourigan v. Norwich, 77 Conn. 364, 59 Atl. 487, 17 Am. Neg. Rep. 445; Platt Bros. & Co. v. Waterbury, 72 Conn. 548, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154.

Mr. **Charles F. Roberts**, for appellee:

Without the actual possession of the chattel itself, there could be no express or implied contract of bailment between the parties.

4 Elliott, Contr. § 3013; Schouler, Bailm. 3d ed. § 32; Story, Bailm. 9th ed. §§ 51, 141; Hale, Bailm. p. 12.

The evidence expressly shows that the defendant never was a voluntary bailee.

4 Elliott, Contr. § 3013; Kohler v. Hayes, 41 Cal. 455; Blosser Co. v. Doonan, 8 Ga. App. 285, 68 S. E. 1074; Hale, Bailm. p. 14; Newhall v. Paige, 10 Gray, 366.

The promise of the defendant to go after the motorcycle on the morning after the accident was a mere executory contract, contemplated performance in future, was without consideration, was therefore unenforceable and could not be used by the jury as a ground for assessing damage.

4 Elliott, Contr. § 3015; Elsee v. Gatward, 5 T. R. 143, 101 Eng. Reprint, 82; Thorne v. Deas, 4 Johns. 84; Dobie, Bailm. & Carr. pp. 60, 61.

Roraback, J., delivered the opinion of the court:

The complaint alleges that in October, 1916, the plaintiff was riding a motorcycle upon a highway in the town of Orange, when he collided with a motor vehicle and was seriously injured. Certain police officials of the town of Orange took charge of the motorcycle, and one of them authorized and employed the defendant to remove the machine in question, which was slightly damaged because of this collision. The defendant accepted such employment, and undertook to remove the motorcycle from the highway to his garage in the town of Orange, but negligently and carelessly left the same unsecured, without anyone to guard it, so that the motorcycle was taken by some person or persons unknown to the plaintiff, and the plaintiff has never been able to recover possession of his machine.

The defendant's motion to set aside the verdict was properly granted, for it appears from the evidence that about 9:30 o'clock at night on October 10, 1916, the plaintiff and a companion were riding a motorcycle along the highway in the town of Orange, when he collided with an automobile. The force of the collision threw the plaintiff off his machine, which caused a severe injury to him, and he was removed to the hospital. The fact of the collision was communicated to the police headquarters of the town of Orange. The chief of police of this town requested the defendant to send a car to take him to the place of the accident. The defendant took a light touring car, and carried the officer to the place of the collision, which was about 4 miles distant from the defendant's garage. This was about 11 o'clock at night. The defendant refused to permit the motorcycle to be loaded into his car, because of its size and weight. After an unsuccessful attempt to remove the motorcycle from the highway, the defendant carried the officer back to police headquarters, where a report was made of the collision. After the matter had been reported to police headquarters, the defendant went to his home. Early in the morning of October 11th, the defendant was called up by an officer of the police department and requested by him to go up in the morning and get the plaintiff's machine. This the defendant agreed to do. When the defendant attempted to obtain possession of the plaintiff's machine, it could not be found, as someone had removed it during the latter part of the night.

It is plain from the evidence that the defendant did not stand in the relation of bailee of the plaintiff when his property was surreptitiously taken from the highway. While it is true that there are a number of different kinds of bailments, the different kinds are of the same general character, and for the purposes of this case the word may be defined to be: "A delivery of goods in trust, on a contract, express or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered."

This is a standard definition of this word, and in the present case there can be no difficulty in understanding its application to the facts presented by the record. The evidence plainly shows that the plaintiff's property was never for a moment in the defendant's possession as bailee, nor does it appear that there was any acceptance of the article by the defendant, as the law of bailment requires. The record clearly indicates that the verdict of the jury was one which could not have been reasonably reached from the evidence, and that it was properly set aside by the court below.

Bailment—direction to take possession.

There is no error.

In this opinion the other Judges concur.

ANNOTATION.

Bailment: what amounts to delivery of, or assumption of control over, property essential to a bailment.

I. Delivery:
a. Necessity for, 394.
b. Sufficiency of, 395.
II. Acceptance:
a. Necessity for, 397.
b. Sufficiency of, 398.

Scope.

It is designed in the present annotation to present only the general principles of the law of bailments as respects delivery and acceptance of property requisite to the establishment of the relation of bailor and bailee. This treatment is therefore not necessarily exhaustive, since specific classes of bailees, such as carriers, etc., have been excluded, especially in so far as decisions in the cases falling therein are distinctive to such particular classes. In other words, the purpose of this annotation is to state the general law of bailments respecting delivery and acceptance, excluding the law relating to particular cases, such as bankers, carriers, etc.

I. Delivery.

a. Necessity for.

The general rule is that, in order to constitute a transaction an actual bailment, there must be a delivery to the bailee, i. e., the property must be put in his possession;[1] but this delivery may be either actual,[2] which consists of giving to the bailee or his au-

[1] Ex parte Fitz (1876) 2 Low. Dec. 519, Fed. Cas. No. 4,837; Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; ZETERSTROM v. THOMAS (reported herewith) ante, 392; Atlantic Coast Line R. Co. v. Baker (1903) 118 Ga. 809, 45 S. E. 673; Durnford v. Seghers' Syndics (1821) 9 Mart. (La.) 470; Thibaud v. Thibaud (1830) 1 La. 493; Blondell v. Consolidated Gas Co. (1899) 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817; Com. v. Williams (1856) 6 Gray (Mass.) 1; Houghton v. Lynch (1868) 13 Minn. 85, Gil. 80; Sherman v. Commercial Printing Co. (1888) 29 Mo. App. 31; Gilson v. Pennsylvania R. Co. (1914) 86 N. J. L. 446, 92 Atl. 59, affirmed on opinion below in (1915) 87 N. J. L. 690, 94 Atl. 1102; Tomko v. Sharp (1915) 87 N. J. L. 385, 94 Atl. 793; Phelps v. People (1878) 72 N. Y. 334; Wamser v. Browning, K. & Co. (1907) 187 N. Y. 87, 10 L.R.A.(N.S.) 314, 79 N. E. 861; Van Wagoner v. Buckley (1912) 148 App. Div. 808, 133 N. Y. Supp. 599; Wentworth v. Riggs (1913) 159 App. Div. 899, 143 N. Y. Supp. 955, 5 N. C. C. A. 848; Pattison v. Hammerstein (1896) 17 Misc. 375, 39 N. Y. Supp. 1039; Barnes v. Stern Bros. (1915) 89 Misc. 385, 151 N. Y. Supp. 887; Trowbridge v. Schriever (1873) 5 Daly (N. Y.) 11; Swann v. Smith (1887) 14 Daly, 114, 3 N. Y. S. R. 588; Samuels v. McDonald (1871) 1 Jones & S. (N. Y.) 211; Owens v. Kinsey (1859) 52 N. C. (7 Jones, L.) 245; Hanes v. Shapiro (1914) 168 N. C. 24, 84 S. E. 33; Matthews v. Carolina & N. W. R. Co. (1917) 175 N. C. 35, L.R.A.1918C, 899, 94 S. E. 714; State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. (1908) 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Outcault Advertising Co. v. Brooks (1917) 82 Or. 434, 158 Pac. 517, 161 Pac. 961; Rodgers v. Stophel (1858) 32 Pa. 111, 72 Am. Dec. 775; Trunick v. Smith (1869) 63 Pa. 18; Hutchison v. Com. (1876) 82 Pa. 472, 2 Am. Crim. Rep. 362, 4 Mor. Min. Rep. 208; McBride v. McNally (1914) 243 Pa. 206, 52 L.R.A. (N.S.) 259, 89 Atl. 1131; Stimpson Computing Scale Co. v. Schetrompf (1900) 31 Pa. Super. Ct. 377; Philippine Sugar Estates Development Co. v. Iribar (1905) 5 Philippine, 316; Northcutt v. State (1910) 60 Tex. Crim. Rep. 259, 31 L.R.A.(N.S.) 822, 131 S. W. 1128; Nowell v. Seattle Transfer Co. (1911) 63 Wash. 685, 116 Pac. 287; Walker v. Norfolk & W. R. Co. (1910) 67 W. Va. 273, 67 S. E. 722; Crosby v. German (1855) 4 Wis. 373; Fletcher v. Ingram (1879) 46 Wis. 191, 50 N. W. 424; Buckman v. Levi (1813) 3 Campb. (Eng.) 414.

[2] Ex parte Fitz (1876) 2 Low. Dec. 519, Fed. Cas. No. 4,837; Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; Blondell v. Consolidated Gas Co. (1899) 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817; Gilson

thorized agents the real possession of the chattel,[3] or constructive,[4] or, as is sometimes called, implied,[5] which comprehends all those acts which, although not truly comprising real possession of the goods transferred, have been held by legal construction equivalent to acts of real delivery, and including in this sense symbolical or substituted delivery.[6]

And the bailment itself may be merely a constructive one, such a bailment arising where the person having possession of a chattel holds it under such circumstances that the law imposes upon him the obligation to deliver it to another.[7] And it follows from this definition itself that it is not necessary that there be either an actual or a constructive delivery in case of a constructive bailment.[8]

And as pointed out in a New York case,[9] constructive bailments and constructive delivery are distinct, and should not be confused.

b. Sufficiency of.

On the question of fact whether or not there is a sufficient delivery in any given case, the general rule is that, in

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v. Pennsylvania R. Co. (1914) 86 N. J. L. 446, 92 Atl. 59, affirmed on opinion below in (1915) 87 N. J. L. 690, 94 Atl. 1102; Wentworth v. Riggs (1913) 159 App. Div. 899, 143 N. Y. Supp. 955, 5 N. C. C. A. 848; Hanes v. Shapiro (1914) 168 N. C. 24, 84 S. E. 33; State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. (1908) 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846.

[3] See Wentworth v. Riggs (1913) 159 App. Div. 899, 143 N. Y. Supp. 955, 5 N. C. C. A. 848.

[4] Ex parte Fitz (1876) 2 Low. Dec. 519, Fed. Cas. No. 4,837 (holding that the bailee was not bound to remove the locomotive engines in question and put them into his house or into a warehouse); Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; Blondell v. Consolidated Gas Co. (1899) 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817; Gilson v. Pennsylvania R. Co. (1914) 86 N. J. L. 446, 92 Atl. 59, affirmed on opinion below in (1915) 87 N. J. L. 690, 94 Atl. 1102; Sherman v. Hicks (1908) 14 N. M. 439, 94 Pac. 959; Wilson v. Little (1849) 2 N. Y. 443, 51 Am. Dec. 307; Phelps v. People (1878) 72 N. Y. 334; Bunnell v. Stern (1888) 14 Daly, 357, 13 N. Y. S. R. 71, reversed on point of fact in (1890) 122 N. Y. 539, 10 L.R.A. 481, 19 Am. St. Rep. 519, 25 N. E. 910, 1 Am. Neg. Cas. 864; Wentworth v. Riggs (1913) 159 App. Div. 899, 143 N. Y. Supp. 955, reversing on question of facts (1913) 79 Misc. 400, 139 N. Y. Supp. 1082; Hanes v. Shapiro (1914) 168 N. C. 24, 84 S. E. 33; State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. (1908) 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Trunick v. Smith (1869) 63 Pa. 18; Hutchison v. Com. (1876) 82 Pa. 472, 2 Am. Crim. Rep. 362, 4 Mor. Min. Rep. 208; Collins's Appeal (1883) 107 Pa. 590, 52 Am. Rep. 479; Woodruff v. Painter (1892) 150 Pa. 91, 16 L.R.A. 451, 30 Am. St. Rep. 786, 24 Atl. 621, 1 Am. Neg. Cas. 872; Hunter v. Reed (1899) 12 Pa. Super. Ct. 112; Nowell v. Seattle Transfer Co. (1911) 63 Wash. 685, 116 Pac. 287; Burns v. State (1911) 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987.

[5] See Tuttle v. Campbell (1889) 74 Mich. 653, 16 Am. St. Rep. 652, 42 N. W. 384 (holding that where one owner in common of personalty has exclusive possession thereof, he is the bailee of his co-owner's share, the law implying a delivery from the peculiar relationship and circumstances), and Lloyd v. Barden (1849) 3 Strobh. L. (S. C.) 343.

[6] Gilson v. Pennsylvania R. Co. (1914) 86 N. J. L. 446, 92 Atl. 59, affirmed on opinion below in (1915) 87 N. J. L. 690, 94 Atl. 1102; Wentworth v. Riggs (1913) 159 App. Div. 899, 143 N. Y. Supp. 955.

[7] See Gilson v. Pennsylvania R. Co. (N. J.) and Wentworth v. Riggs (N. Y.) supra.

[8] Wentworth v. Riggs (N. Y.) supra.

[9] See Wentworth v. Riggs (N. Y.) supra, wherein the court said: "Confusion has been engendered by certain cases, which seem to discuss constructive bailment as if it were identical with constructive delivery. The two things are distinct. Formerly, delivery was regarded as the essence of a bailment. As this branch of the law has developed, cases of constructive bailment have been recognized, covering cases where there had been no delivery, either actual or constructive, as where one held the possession of a chattel under such circumstances that the law placed upon the person

order to constitute such a delivery, there must be a full transfer, either actual or constructive, of the property to the bailee, so as to exclude the possession of the owner and all other persons, and give to the bailee for the time being the sole custody and control thereof.[10] And for the purposes of this rule, possession may be taken or kept by an authorized agent of bailee,[11] and the agency to receive may be implied.[12] And the agent may be the bailor himself.[13]

And where, because of the nature of the property or the circumstances, the delivery can be constructive only, there must be an intention to transfer such a possession of the property as would exclude for the time of bailment the possession of the owner.[14]

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having the possession of the chattel the obligation to deliver it to another. The typical instance of such a constructive bailment is where one sells a chattel to another, who pays the price thereof, and the vendor refuses to deliver it to the vendee. Here the law implies the contract of bailment, and holds the vendor answerable as bailee. In such a case it is apparent that there has been no delivery by the bailor to the bailee, and yet the bailment exists constructively. All the other examples of constructive bailment which are given in the books, as in the case of a finder or a captor or salvor, or an attaching officer, are cases where the person having possession of the chattel is held to be a bailee, although there has never been either an actual or a constructive delivery of the chattels to the bailee by the bailor. In other words, the essential fact of legal significance in all these cases is possession. It certainly is not delivery, for, in none of these cases of constructive bailment is there either an actual or a constructive delivery."

[10] Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; Atlantic Coast Line R. Co. v. Baker (1903) 118 Ga. 809, 45 S. E. 673 (holding that where an owner of timber contracted with another that the latter should convert the trees into ties, and agreed to pay therefor a certain rate for each tie when inspected and delivered, the workman had no such exclusive possession to cut ties as would render him a bailee); Blondell v. Consolidated Gas Co. (1899) 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817 (holding that the placing of a gas meter on premises did not make the owner of the premises a bailee thereof, where the gas company retained control of the meter); Com. v. Doane (1848) 1 Cush. (Mass.) 5 (holding that one employed to assist in the discharge of the cargo of a vessel is not a bailee of such cargo); Sherman v. Commercial Printing Co. (1888) 29 Mo. App. 31 (holding that one who merely grants storage room without assuming, expressly or impliedly, any duty of care or control over the property stored, is no bailee); Wentworth v. Riggs (1913) 159 App. Div. 899, 143 N. Y. Supp. 955, reversing (1913) 79 Misc. 400, 139 N. Y. Supp. 1082; Voland v. Reed (1917) 164 N. Y. Supp. 19 (holding that there was no delivery of a machine where essential parts were missing); Matthews v. Carolina & N. W. R. Co. (1917) 175 N. C. 35, L.R.A. 1918C, 899, 94 S. E. 714 (holding generally that possession and control are essential); Outcault Advertising Co. v. Brooks (1917) 82 Or. 434, 158 Pac. 517, 161 Pac. 961; Crouse v. Lubin (1918) 260 Pa. 329, 103 Atl. 725; Churchill v. Miller (1916) 90 Wash. 694, 156 Pac. 851 (holding that one who has no control over property is not a bailee thereof); Fletcher v. Ingram (1879) 46 Wis. 191, 50 N. W. 424.

[11] Ex parte Fitz (1876) 2 Low. Dec. 519, Fed. Cas. No. 4,837; Collins's Appeal (1883) 107 Pa. 590, 52 Am. Rep. 479; Woodruff v. Painter (1892) 150 Pa. 91, 16 L.R.A. 451, 30 Am. St. Rep. 786, 24 Atl. 621, 1 Am. Neg. Cas. 872; Lloyd v. Barden (1849) 3 Strobh. L. (S. C.) 343; Reeves v. Capper (1838) 5 Bing. N. C. 136, 132 Eng. Reprint, 1057, 6 Scott, 877, 1 Arnold, 427, 8 L. J. C. P. N. S. 44, 2 Jur. 1067.

[12] Lloyd v. Barden (1849) 3 Strobh. L. (S. C.) 343.

[13] Ex parte Fitz (1876) 2 Low. Dec. 519, Fed. Cas. No. 4,837; State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. (1908) 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Collins's Appeal (1883) 107 Pa. 590, 52 Am. Rep. 479; Reeves v. Capper (1838) 5 Bing. N. C. 136, 132 Eng. Reprint, 1057, 6 Scott, 877, 1 Arnold, 427, 8 L. J. C. P. N. S. 44, 2 Jur. 1067.

[14] Gilson v. Pennsylvania R. Co. (1914) 86 N. J. L. 446, 92 Atl. 59, affirmed on opinion below in (1915) 87

So it has been ruled that a written transfer of the muniments of title of the property bailed is sufficient, since it constitutes a delivery of the means of obtaining possession, which is equivalent to actual possession.[15]

Upon the other hand, an unsuccessful attempt to gain possession of the property cannot constitute the one making the attempt a bailee,[16] nor is it sufficient to show that the property, according to certain rules and regulations of the alleged bailee, should have come into his possession,[17] or that the property was ordered and the order canceled before delivery.[18] And more specifically, a sufficient possession is not shown where it merely appears that a person was asked to carry a piece of property then present, and refused to do so, and, upon being subsequently asked to go and get the same, went, but found that the property had been stolen in the meantime.[19]

In any given case the burden of proof as to delivery is upon the bailor.[20]

II. Acceptance.

a. Necessity for.

In order to establish a bailment, there must be an acceptance of the article bailed, it being necessary to show either an express contract to take the article and later redeliver it, or circumstances from which such a contract can be implied,[21] it being sufficient to prove acceptance either directly or by circumstances showing a constructive acceptance.[22] In other words, since the relation is founded

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N. J. L. 690, 94 Atl. 1102; Trunick v. Smith (1869) 63 Pa. 18. And see Collins's Appeal (1883) 107 Pa. 590, 52 Am. Rep. 479, and Fletcher v. Ingram (1879) 46 Wis. 191, 50 N. W. 424.

[15] Goodenow v. Dunn (1842) 21 Me. 86; Wilson v. Little (1849) 2 N. Y. 443, 51 Am. Dec. 307; State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. (1908) 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846; Hutchison v. Com. (1876) 82 Pa. 472; Collins's Appeal (1883) 107 Pa. 590, 52 Am. Rep. 479; Meyerstein v. Barber (1866) L. R. 2 C. P. (Eng.) 38, affirmed in (1867) L. R. 2 C. P. 661, which was affirmed in (1870) L. R. 4 H. L. 317, 4 Eng. Rul. Cas. 798.

[16] Sproule, A. & Co. v. Ford (1823) 3 Litt. (Ky.) 25.

[17] Samuels v. McDonald (1871) 1 Jones & S. (N. Y.) 211.

[18] Stimpson Computing Scale Co. v. Schetrompf (1900) 13 Pa. Super. Ct. 377.

[19] ZETERSTROM v. THOMAS (reported herewith) ante, 392.

[20] Bates v. Capital State Bank (1910) 18 Idaho, 429, 110 Pac. 277.

[21] Bohannon v. Springfield (1846) 9 Ala. 789; Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; ZETERSTROM v. THOMAS; Smith v. Eichelberger (1912) 175 Ill. App. 231; Houghton v. Lynch (1868) 13 Minn. 85, Gil. 80; Cory v. Little (1833) 6 N. H. 213, 25 Am. Dec. 458; Smith v. Nashua & L. R. Co. (1853) 27 N. H. 86, 59 Am. Dec. 364; Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co. (1889) 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146; First Nat. Bank v. Ocean Nat. Bank (1875) 60 N. Y. 278, 19 Am. Rep. 181; Wamser v. Browning, K. & Co. (1907) 187 N. Y. 87, 10 L.R.A.(N.S.) 314, 79 N. E. 861; Van Wagoner v. Buckley (1912) 148 App. Div. 808, 133 N. Y. Supp. 599; Pattison v. Hammerstein (1896) 17 Misc. 375, 39 N. Y. Supp. 1039; Krumsky v. Loeser (1902) 37 Misc. 504, 75 N. Y. Supp. 1012; Barnes v. Stern Bros. (1915) 89 Misc. 385, 151 N. Y. Supp. 887; Feder v. Franklin Simon & Co. (1916) 157 N. Y. Supp. 895; Swann v. Smith (1887) 14 Daly, 114, 3 N. Y. S. R. 588; Samuels v. McDonald (1871) 1 Jones & S. (N. Y.) 211; Hanes v. Shapiro (1914) 168 N. C. 24, 84 S. E. 33; Lloyd v. West Branch Bank (1850) 15 Pa. 172, 53 Am. Dec. 581, 1 Am. Neg. Cas. 574; Rodgers v. Stophel (1858) 32 Pa. 111, 72 Am. Dec. 775; Tulane Hotel Co. v. Holohan (1903) 112 Tenn. 214, 105 Am. St. Rep. 930, 79 S. W. 113, 2 Ann. Cas. 345, 15 Am. Neg. Rep. 719; Walker v. Norfolk & W. R. Co. (1910) 67 W. Va. 273, 67 S. E. 722; Cosentino v. Dominion Exp. Co. (1905) 16 Manitoba L. R. 563; Lethbridge v. Phillips (1819) 2 Starkie (Eng.) 544; Buckman v. Levi (1813) 3 Campb. (Eng.) 414; Neuwith v. Over Darwen Industrial Co-op. Soc. (1894) 63 L. J. Q. B. N. S. (Eng.) 290, 70 L. T. N. S. 374, 10 Reports, 588.

[22] Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D,

upon contract, either express or implied, the duty and liability springing therefrom ordinarily cannot be thrust upon one without his knowledge or consent, but must be voluntarily assumed by the party himself or some authorized agent.[23] And no legal responsibility rests on one who declines to become a bailee, even though previously he had gratuitously agreed to do so.[24] And even where property is committed to one, to be held for the use of or delivery to another, it has been said that it is customary for such person to signify to the mandatory his assent to it.[25]

b. Sufficiency of.

And delivery of property into possession, pursuant to an authorization to do so, constitutes a sufficient acceptance so that the bailee cannot subsequently turn out the property without notice to the bailor, and

943; Sherman v. Hicks (1908) 14 N. M. 439, 94 Pac. 959; Phelps v. People (1878) 72 N. Y. 334; Bunnell v. Stern (1888) 14 Daly, 357, 13 N. Y. S. R. 71, affirmed on this point in (1890) 122 N. Y. 539, 10 L.R.A. 481, 19 Am. St. Rep. 519, 25 N. E. 910, 1 Am. Neg. Cas. 864; Gaff v. O'Neil (1872) 2 Cin. Sup. Ct. Rep. 246, 13 Ohio Dec. Reprint, 882; Lloyd v. West Branch Bank (1850) 15 Pa. 172, 53 Am. Dec. 581, 1 Am. Neg. Cas. 574; Rodgers v. Stophel (1858) 32 Pa. 111, 72 Am. Dec. 775.

[23] Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943 (holding that the responsibilities and duties growing from a bailment arising from possession of property can only exist and continue so long as the party to be charged has and knows that he has, or has notice that he has, such possession and custody); Copelin v. Berlin Dye Works & Laundry Co. (1914) 168 Cal. 715, L.R.A.1915C, 712, 144 Pac. 961, 12 N. C. C. A. 362; Blosser Co. v. Doonan (1910) 8 Ga. App. 285, 68 S. E. 1074 (holding that consent is essential); Michigan C. R. Co. v. Carrow (1874) 73 Ill. 348, 24 Am. Rep. 248 (holding that knowledge or consent is necessary); Chesley v. Woods Motor Vehicle Co. (1909) 147 Ill. App. 588 (sample case left with defendant's servant, who had no right to receive same, and without either knowledge or consent upon defendant's part); Perkins v. Dacon (1865) 13 Mich. 81; Cory v. Little (1833) 6 N. H. 213, 25 Am. Dec. 458 (holding that consent is essential); Smith v. Nashua & L. R. Co. (1853) 27 N. H. 86, 59 Am. Dec. 364; Delaware, L. & W. R. Co. v. Central Stock-Yard & Traction Co. (1889) 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146; First Nat. Bank v. Ocean Nat. Bank (1875) 60 N. Y. 278, 19 Am. Rep. 181; Bunnell v. Stern (1888) 14 Daly, 357, 13 N. Y. S. R. 71, reversed on other grounds in (1890) 122 N. Y. 539, 10 L.R.A. 481, 19 Am. St. Rep. 519, 25 N. E. 910, 1 Am. Neg. Cas. 864; Pattison v. Hammerstein (1896) 17 Misc. 375, 39 N. Y. Supp. 1039; Krumsky v. Loeser (1902) 37 Misc. 504, 75 N. Y. Supp. 1012 (holding that knowledge is necessary); Barnes v. Stern Bros. (1915) 89 Misc. 385, 151 N. Y. Supp. 888, holding that knowledge is necessary); Feder v. Franklin Simon & Co. (1916) 157 N. Y. Supp. 895 (holding that knowledge is essential); Weinstein v. Modern Silk Co. (1918) 170 N. Y. Supp. 529 (holding that one cannot be made a bailee without his consent, and in the face of an active protest); Trowbridge v. Schriever (1873) 5 Daly (N. Y.) 11; Hanes v. Shapiro (1914) 168 N. C. 24, 84 S. E. 33 (holding that acceptance must be voluntary); King v. Richards (1841) 6 Whart. (Pa.) 418, 37 Am. Dec. 420; Lloyd v. West Branch Bank (1850) 15 Pa. 172, 53 Am. Dec. 581, 1 Am. Neg. Cas. 574 (holding that delivery to a servant not authorized to receive deposits, and unknown to the master, does not make the master a bailee); Philippine Sugar Estates Development Co. v. Iribar (1905) 5 Philippine, 316; Tulane Hotel Co. v. Holohan (1903) 112 Tenn. 214, 105 Am. St. Rep. 930, 79 S. W. 113, 2 Ann. Cas. 345, 15 Am. Neg. Rep. 719; Cosentino v. Dominion Exp. Co. (1905) 16 Manitoba L. R. 563; Lethbridge v. Phillips (1819) 2 Starkie (Eng.) 544; Buckman v. Levi (1813) 3 Campb. (Eng.) 414; Neuwith v. Over Darwen Industrial Co-op. Soc. (1894) 63 L. J. Q. B. N. S. (Eng.) 290, 70 L. T. N. S. 374, 10 Reports, 588. And see Batistoni v. Dance, The Times, Jan. 8, 1908, as set out in Butterworths' Dig. (1908) col. 23.

[24] Tomko v. Sharp (1915) 87 N. J. L. 385, 94 Atl. 793.

[25] See Lockhart v. Wyatt (1846) 10 Ala. 231, 44 Am. Dec. 481.

escape liability for its loss.[26] And knowingly taking property into possession or control is a sufficient acceptance,[27] provided there was a delivery for the purpose of creating a bailment.[28] But the acceptance need not be actual, it having been held that a constructive possession and control is sufficient,[29] as, for instance, where property comes into one's possession either accidentally, fortuitously, or by mistake.[30] And a written acknowledgment of the receipt of goods constitutes a sufficient acceptance, although the goods do not actually come into the bailee's possession.[31] However, it has been held that it is essential that the person sought to be charged as a bailee have notice of the possession and knowledge that it is the property of another.[32] Of course, for the general purpose of these rules, the one acquiring possession must have knowledge or notice thereof, since, as pointed out supra,[33] the relation exists and continues only so long as the party to be charged has knowledge or notice of the possession and custody.

And actual consent or acceptance is not essential to bailments classed as

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[26] Neally v. Wilhelm (1854) 4 G. Greene (Iowa) 240, 61 Am. Dec. 118. And see Batistoni v. Dance, The Times, Jan. 18, 1908, as set out in Butterworths' Dig. (1908) col. 23.

[27] Smith v. Eichelberger (1912) 175 Ill. App. 231; Smith v. Nashua & L. R. Co. (1853) 27 N. H. 86, 59 Am. Dec. 364. And see Corbe v. Burkett (1910) 43 Pa. Super. Ct. 186.

[28] Walker v. Norfolk & W. R. Co. (1910) 67 W. Va. 273, 67 S. E. 722; Fletcher v. Ingram (1879) 46 Wis. 191, 50 N. W. 424.

[29] Sherman v. Hicks (1908) 14 N. M. 439, 94 Pac. 959; Phelps v. People (1878) 72 N. Y. 334; Bunnell v. Stern (1888) 14 Daly, 357, 13 N. Y. S. R. 71, reversed on other grounds in (1890) 122 N. Y. 539, 10 L.R.A. 481, 19 Am. St. Rep. 519, 25 N. E. 910, 1 Am. Neg. Cas. 864; Burns v. State (1911) 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987; Newman v. Bourne (1915) 31 Times L. R. (Eng.) 209, 138 L. T. Jo. 343.

But even an implied acceptance of an article is not shown where it merely appears that a person requested to go and get an article went after it, but found that it had been stolen previous to his arrival. ZETERSTROM v. THOMAS (reported herewith) ante, 392. Nor can an acceptance sufficient to constitute a bailment be implied from the fact that the overseer of a plantation took cotton seed left thereon by a former occupant, and, at the direction of the owner, used it on the plantation, it being impossible in such a case to find that there was an implied contract upon the part of the overseer to redeliver the cotton seed. Bohannon v. Springfield (1846) 9 Ala. 789.

[30] Bertig v. Norman (1911) 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; Newhall v. Paige (1857) 10 Gray (Mass.) 366; T. J. Moss Tie Co. v. Kreilich (1899) 80 Mo. App. 304; Phelps v. People (1878) 72 N. Y. 334; Morris v. Third Ave. R. Co. (1862) 1 Daly (N. Y.) 202; Burns v. State (1911) 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987; Armory v. Delamirie (1786) 1 Strange, 505, 93 Eng. Reprint, 664, 1 Smith, Lead. Cas. 9th ed. 631, 10 Mor. Min. Rep. 66; Newman v. Bourne (1915) 31 Times L. R. (Eng.) 209, 138 L. T. Jo. 343. But see Houghton v. Lynch (1868) 13 Minn. 85, Gil. 80, wherein it was held that there was no acceptance by mistake established where it merely appeared that a carrier by boat having a barrel of whisky and a cask of brandy for defendant, by mistake landed in place of the whisky a cask of brandy consigned to another person at another point, and that the defendant signed a receipt for a cask of brandy and a barrel of whisky, and that he saw the other cask there at the time of signing, but never assumed any control over it.

[31] Quiggin v. Duff (1836) 1 Mees. & W. 174, 150 Eng. Reprint, 394, 1 Gale, 420, 5 L. J. Exch. N. S. 149. And see Gillett v. Hill (1834) 2 Cromp. & M. 530, 149 Eng. Reprint, 871, 4 Tyrw. 290, 3 L. J. Exch. N. S. 145.

[32] Krumsky v. Loeser (1902) 37 Misc. 504, 75 N. Y. Supp. 1012; Cosentino v. Dominion Exp. Co. (1905) 16 Manitoba L. R. 563; Lethbridge v. Phillips (1819) 2 Starkie (Eng.) 544. And see Buckman v. Levi (1813) 3 Campb. (Eng.) 414.

[33] See supra, text, and note 23.

involuntary, as, for instance, where things are left in a building by an outgoing tenant, without the consent of the owner of the building.[34] However, there can be no bailment where one takes possession of property left on his premises, with intent to appropriate it to his own use, since an implied acceptance such as would render him an involuntary bailee cannot arise from such an appropriation.[35] And it has been held that there is no duty cast upon the recipient with respect to goods sent to him voluntarily by another without solicitation.[36]

[34] Preston v. Neale (1858) 12 Gray (Mass.) 222. And see Schneider v. Dayton (1897) 111 Mich. 396, 69 N. W. 829. But see also Copelin v. Berlin Dye Works & Laundry Co. (1914) 168 Cal. 715, L.R.A.1915C, 712, 144 Pac. 961, 12 N. C. C. A. 362, wherein it was held that a clothes cleaner was not an involuntary bailee of articles found in clothes sent to be cleaned, within the meaning of Cal. Civ. Code, §§ 1815, 1816, which provide that an involuntary deposit is made by the accidental leaving or placing of personal property in the possession of any person without negligence on the part of its owner. However, this decision was upon the ground that the owner was negligent in leaving the articles in the clothes when sent to the cleaners. And in connection with this case, see Cosentino v. Dominion Exp. Co. (1905) 16 Manitoba L. R. 563.

[35] Walker v. Norfolk & W. R. Co. (1910) 67 W. Va. 273, 67 S. E. 722.

[36] Howard v. Harris (1884) 1 Cab. & El. (Eng.) 253. G. J. C.

WILLIAM H. BRAMMER
v.
IOWA TELEPHONE COMPANY, Appt.

Iowa Supreme Court—November 21, 1917.

(— Iowa, —, 165 N. W. 117.)

Trespass — poles on private property — mistake.

A telephone company is not liable in trespass for placing its poles on private property, where it set them under the direction of the highway engineer, who purported to locate them in the public highway.

[See note on this question beginning on page 403.]

APPEAL by defendant from a judgment of the District Court for Franklin County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been sustained by the location by defendant of telephone poles on plaintiff's property. *Reversed.*

Statement by **Salinger, J.**:

The action is, in effect, one claiming damages for a trespass committed by the defendant in putting its telephone poles and telephone line upon the land of plaintiff. He had a verdict.

Messrs. Parker, Parrish, & Miller, Neal M. Monroe, and E. P. Andrews, for appellant:

The company has the right to construct its line in the highway without paying the adjoining owner anything therefor.

Meyer v. Standard Teleph. Co. 122 Iowa, 514, 98 N. W. 300; Des Moines v. Iowa Teleph. Co. — Iowa, — 162 N. W. 323.

Since the statute provides that highway authorities shall locate new telephone lines, and that the telephone company shall put the lines in at the place designated, there can be no liability to the plaintiff on the part of the defendant for placing its line at a

point designated by the highway engineer, acting in pursuance of this statute.

Pollard v. Baldwin, 22 Iowa, 328; Hendershott v. Ottumwa, 46 Iowa, 658, 26 Am. Rep. 182.

Messrs. **R. R. Stuart** and **John M. Hemingway**, for appellee:

If illegally located on plaintiff's land, the order of the board or engineer will not relieve defendant from liability.

Wolfe v. Erie Teleg. & Teleph. Co. 33 Fed. 320.

There is nothing in the act indicating that there is any attempt on the part of the legislature to delegate to the engineer any authority to act without the boundaries of the highway.

Meyer v. Standard Teleph. Co. 122 Iowa, 514, 98 N. W. 300.

There was no issue on which the defendant can claim exemption from liability because the line was pointed out by the engineer.

Dyson v. Ream, 9 Iowa, 51; Patterson v. Clarke, 20 Iowa, 429.

Salinger, J., delivered the opinion of the court:

I. It is charged in the petition that for what defendant did it "never received any permit." A general denial interposed challenges this averment. A motion to direct verdict for defendant asserts that the evidence fails to prove that the line complained of is not located within a highway legally laid out and established on the west side of the plaintiff's land, and that the line is upon plaintiff's land. Further, that, if a verdict should go against defendant, it would be the duty of the court to set such verdict aside on the ground that there was not sufficient evidence to sustain the same. Instructions offered present the theory that if the defendant placed its poles at the point designated by the highway engineer, then there can be no substantial recovery by the plaintiff; that the said engineer, in surveying said land, was acting in obedience to a statute of the state, and so the survey is an official one, and prima facie correct; that the line constructed according to his direction is therefore prima facie placed and located within the limits of the highway. The point is properly presented in the brief points of appellant.

There was fair occasion for making a survey in order that it might be known where the line of the highway was, and so to avoid putting the poles on the land of appellee through error. The highway engineer did make a survey for that purpose. The great weight of the evidence is in favor of its correctness, and it might well be claimed, as it is, that the poles and line are in the highway, and not upon plaintiff's land. But though we assume that whether this is so was a question for the jury, it is still unquestionable that if the line is on the land of appellee, it is there because the engineer, intending to have it on the line of the highway, through honest mistake gave a direction that in fact put it upon the plaintiff's land. The engineer says he used this survey "to establish the line where the poles would go; when I located the place where the telephone company should put its poles I intended to put them within the limits of the highway, and measured with that purpose in mind. I did locate these poles within the limits of the highway; I set a line of stakes on the highway past Mr. Brammer's land, and they put their poles in according to the line that I set."

While, as said, there is dispute over whether the line is on the side of the roadway or is on plaintiff's land, there is no dispute that, if the latter is true, it is due, as said, to an honest mistake on the part of the engineer. Indeed, one can scarcely imagine why either the engineer or the telephone company should desire to put the line out of the highway and upon plaintiff's land, especially as the record indicates that, so far as the defendant is concerned, doing the latter made its line longer. Nor is it disputed that the defendant set its lines as the engineer directed it to. It is without dispute that the engineer has charge of the roads in the county; that at the request of the telephone company he

was ordered by the board of supervisors to establish this line according to law, and that the defendant put the poles as by him directed. Aside from any authority that may have been derived from the action of the board of supervisors, § 1527s-17, Supplement Code 1913, provides that "any new lines or parts of lines, wherever constructed, shall be located by the engineer."

The question we have is, then, whether appellant can be made a trespasser for obeying the one who had authority to command, because the commander honestly erred in requiring what he required. Appellant would have been a trespasser had it put its poles in a different place than the one directed by the engineer. Is it one as well because it put them where he told it to?

Taeger v. Riepe, 90 Iowa, 484, 57 N. W. 1125, is no warrant for putting defendant into such a position. In that case the landowner claimed that a highway through his land which had been used as a traveled road for forty-five years was from 80 to 230 feet to one side of where it should be. To prove this he introduced an old survey in which the magnetic variations had been omitted, and as to which survey competent surveyors testified they were unable to locate it on the ground from the plat and notes. The decision was just this and no more: That where it is uncertain where the exact situation of an established highway is, a finding that it is the traveled way, used and worked as such highway for many years, and with reference to which houses and fences have been built, will not be disturbed, though some facts appear which cannot be reconcilable with such finding, other facts being irreconcilable with any other findings suggested.

Appellee relies upon Wolf v. Erie Teleg. & Teleph. Co. (C. C.) 33 Fed. 320,—the charge of a Federal judge. The jury was charged that where a pole was located in a street extensively used by the public as a thoroughfare, though in accordance with a permit from the city, that, in an action for damages sustained by reason of a buggy striking such pole, it was for the jury to say whether such pole was, in point of fact, dangerous to the public, and if it found the pole was a dangerous obstruction, the permit of the city would not bar recovery by one injured. Aside from the fact that this is a mere nisi prius holding, the same is further weakened by such broad statements as that, if an erection be dangerous, "no grant" can validate a permit to erect it, no consideration being given to the fact that the sovereign is the ultimate owner of highways, and that nothing in the record shows the city was authorized, much less directed, to permit poles to be put in the street. It should not be difficult to distinguish a case wherein a city, having been granted no power by the state to do so, permits one to put a dangerous obstruction in a traveled street, and one wherein the sovereign has expressly authorized a specified officer to determine where a telephone line shall be located. The first does not justify holding that, where such authority is given such officer, one who obeys his direction is responsible as a wrongdoer.

Trespass—poles on private property—mistake.

It seems to us there are at least two reasons why appellant should not be dealt with as a trespasser: (a) It is competent for the legislature to delegate to the highway engineer the function of determining where telephone lines should be located. The delegation gives to his acts the protection against collateral attack which attaches to the decisions of quasi judicial tribunals, except that possibly injunctional proceedings would lie, as their use would settle in advance whether the proposed location was proper.

(b) Appellant concedes that Hendershott v. Ottumwa, 46 Iowa, 658, 26 Am. Rep. 182, holds against the position it now takes. Be that so, it is none the less the fact that the

instant case is in analogy with the decision in Pollard v. Baldwin, 22 Iowa, 328, wherein an army officer who had seized private property, acting under instruction of a superior, was held not to be liable for having done so, because he was legally bound to obey, and the law would not mulct him from having obeyed as the law directs him to do.

We think, too, appellant is protected by considering the analogy between obeying the direction of the highway engineer and the immunity given an officer who obeys a writ directed to him by competent authority. We held in State ex rel. Hart v. Rosencrans, 65 Iowa, at page 385, 21 N. W., at page 690, that a return to the writ of habeas corpus, stating that the sheriff holds the applicant "by reason of the evidence," is a mistaken return because "it was his duty to hold him, regardless of the evidence, until he was . . . discharged," which is another way of saying that an order of commitment by a magistrate or a bench warrant on indictment protects the one who obeys these writs until competent authority directs him that he shall no longer hold the prisoner. And by analogy the present case is governed by the rules which, until a de facto officer is ousted, make his acts valid as to all who are compelled to deal with him.

We have no occasion to declare, and leave expressly undecided, what the law is should there be collusion between the engineer and the telephone company, and the two plan a deliberate trespass in the guise of an honest official act on part of the engineer and honest compliance on part of the company.

As to the parties before us, the line located is, in the circumstances presented by this record, a location of the line on the line of the highway. If the result reached injures the plaintiff, that injury flows from a statute the validity of which he does not challenge. It is not for us to consider whether the legislature left him remediless. Nor is it for us to suggest bindingly what his proper remedy, if any, is. It must suffice to say, in addition to the suggestion as to injunction proceedings, that the very statute which empowers the engineer to locate contemplates there may be removals after such location. An appeal to the legislature is open to prevent either the creation or the continuance of such injury, though caused by honest mistake. All we decide is that, as the law now stands, appellee must seek redress other than dealing with appellant as a trespasser.

It follows from what we have said that the judgment of the trial court must be reversed.

Gaynor, Ch. J., and **Ladd** and **Evans**, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Authority from public official as affecting responsibility of public service corporation for infringing property rights.

In the reported case (BRAMMER v. IOWA TELEPH. CO. ante, 400) the court holds that a telephone company which placed its poles at a point designated by the county highway engineer was not liable in trespass because the engineer, intending to place the poles and line on the line of the highway, through an honest mistake in surveying put them on an abutting property owner's land. It appeared therein that the engineer had charge of the county roads, that at the request of the telephone company he was ordered by the board of supervisors to establish the line according to law, and that the telephone company put its poles and set its line as directed by the engineer. The court holds that, there being no collusion between the telephone company and the engineer, the telephone company could not be made a trespasser for obeying the engineer's orders for the reasons that the legis-

lature's delegation to the engineer of the function of determining where telephone lines should be located protected his acts from collateral attack, except possibly in injunction proceedings. The court also adverts to the analogy between the act of the company in obeying the direction of the engineer and that of an officer who obeys a writ or order directed to him by competent authority.

In Southern Bell Teleph. Co. v. Francis (1895) 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1, the following facts appeared: A telephone and telegraph company, invested with the right of eminent domain under the law of the state, and authorized by law to erect poles and stretch wires thereon through the streets of a city, was required by an ordinance of that city to remove its poles and wires from a certain street and to place them on the sidewalk in front of the plaintiff's lots. In complying with the ordinance, it became necessary to cut and remove many of the limbs of the trees which had entwined themselves about the wires, and also to cut other limbs in order that the trees should not interfere with the wires after the removal of the poles and while the wires were suspended over the tops of the trees. The mayor promised to obtain the consent of the property owners thereto, but, without having obtained it, sent an officer of the city fire department to superintend the trimming of the trees, and under his direction the work was done by the defendant corporation's employees. It was held that an action of trespass did not lie in favor of the owners of the lots abutting on the street where the trees were standing, against the corporation, for the acts of its employees in cutting the trees, since the cutting was done under lawful authority. See to the same effect, Southern Bell Teleph. & Teleg. Co. v. Constantine (1894) 9 C. C. A. 359, 23 U. S. App. 56, 61 Fed. 61, arising apparently from the same transaction.

In Memphis Bell Teleph. Co. v. Hunt (1886) 16 Lea (Tenn.) 456, 57 Am. Rep. 237, 1 S. W. 159, suit was brought to recover damages from a telephone company for entering on the plaintiff's premises at midnight and cutting certain limbs of trees growing in her yard, after she had refused positively to give the employees and agents of the company permission to cut the limbs specified. The defendant telephone company had obtained from the president of the taxing district, in pursuance of authority granted by the board of police and fire commissioners of the district, a right of way over the street for its line, the location of the line to be fixed by the city. The defendant was also granted authority by the president to cut away limbs overhanging the street and sidewalks that might interfere with the construction and operation of the lines, but this permission, the president claimed, was limited to the right of way only, and did not extend to private property. The line of telephone poles was located under the direction of the city engineer immediately at the curbing on one side of the street, and the foreman of the telephone company testified that the engineer told him that he might cut away any overhanging limbs that interfered with the construction of the line. In affirming a verdict for the plaintiff, the court said: "The only issue was whether the defendant showed any legal authority for an entry on the premises of the plaintiff. The right claimed was under the permission of President Hadden, and no one else, so far as appears in the proof. It is certain, even if he had authority to grant the right to enter on plaintiff's premises, he had not done so. He had granted only the right to locate the line along the streets, the location to be fixed by the city engineer, and the defendant was also authorized to cut away any limbs interfering with the construction of their line, overhanging the street; but even as to this, he says, the defendant was to pay any damages inflicted on owners of property. He adds, his permits only gave the right of way on the street, but in no case were to interfere with private

property, as he did not assume to settle controversies of that kind. This being so, defendant shows no shadow of right to enter on the premises, and cut the limbs of her trees near the body of the tree, thus greatly disfiguring the shade trees in the yard of a city home, as shown by the proof."

In Saginaw Union Street R. Co. v. Michigan C. R. Co. (1892) 91 Mich. 657, 52 N. W. 49, it appeared that the plaintiff street railway company maintained its trolley wires about 20 feet above and crossing the defendant company's tracks. Under an order of the state railroad commissioner instructing general managers and superintendents of railroads not to permit the maintenance of the wires of street railway companies less than 24 feet above the track, the defendant company notified the plaintiff that its wires were less than that distance above the defendant's tracks, and refused to permit the wires of the plaintiff company to be strung across its tracks at the height of 22 feet 6 inches, the standard for railroad bridges. Nothing being done by the plaintiff company, the defendant cut the wires of the plaintiff at two street crossings in the afternoon, during a busy hour, when all its dynamos were at work and the cars running. The court held that the commissioner of railroads had no arbitrary power to fix 24 feet as the height at which street railways wires should be maintained, and that in cutting those of the plaintiff the defendant company was a trespasser ab initio. The court held that its refusal to permit the plaintiff company's wires to be raised to 22 feet 6 inches, when they could have been so raised without cutting the wires or destroying property, and its choosing a time to cut the wires when the plaintiff company was in full operation of its road in the city, were such violations of the latter's rights as could not be excused, and justified a recovery of all damages suffered on account thereof by the plaintiff. H. D. B.

JIM BUTLER TONOPAH MINING COMPANY, Appt.,

v.

WEST END CONSOLIDATED MINING COMPANY, Respt.

Nevada Supreme Court—July 3, 1916.

(39 Nev. 375, 158 Pac. 876.)

Mines — apex — summit of anticlinal fold.

1. The highest point of a vein consisting of an anticlinal fold is its apex, although it does not come to the surface, and the owner of the claim in which the apex exists may follow the respective dips across his opposite side lines, although his point of discovery was not at the apex, but on one of the dips.

[See note on this question beginning on page 418.]

Same — end lines — effect of deflection.

2. Parallel lines of a mining location are not prevented from being end lines, so as to secure extralateral rights, by the fact that parallelism does not extend the whole width of the claim, but for a portion of the width of the claim they are deflected to avoid prior locations.

Same — extralateral rights — opposite directions.

3. The provision of the Mining Law that extralateral rights shall be confined to such portions of the vein as lie between vertical planes drawn downward through the end lines, continued in their own direction, does not prevent the extralateral right from extending in both directions, on the theory that the words "their own direction" relate to the direction of the dip of the discovery vein.

APPEAL by plaintiff from a judgment of the District Court for Nye County in favor of defendant in an action brought to recover the value of ore taken by defendant from certain mining claims owned by plaintiff, and also for an injunction to restrain defendant from committing further trespass. *Affirmed.*

Statement by **Norcross, Ch. J.:**

This is an action brought by the appellant, the Jim Butler Tonopah Mining Company, against the respondent, the West End Consolidated Mining Company, to recover damages for ore extracted by the respondent, and situated vertically beneath the surface of the Eureka and Curtis lode mining claims owned by appellant, and also for an injunction, restraining the defendant from committing further trespass. The respondent owns the adjoining West End lode mining claim, and asserts the right to mine extralaterally on the vein and ore bodies in dispute by virtue of the ownership of this claim, which, it contends, embraces the apex of the vein, so situated with reference to the boundaries of the claim that it can avail itself of the extralateral grant contained in the Federal Mining Statutes. The court, found, among other facts, the following:

"That there is a vein or lode of rock in place, which, at its top or apex, and on its course or strike, crosses the easterly end line of said West End mining claim 130 to 140 feet northerly from the southeasterly corner of said mining claim, and thence, at its top or apex, and on its course or strike, continues westerly in said mining claim between the side lines thereof to a point on the northerly side line of said claim 1,142½ feet westerly from the northeast corner of said claim, at which point the said vein, at its top or apex, and on its course or strike, departs from said mining claim, crossing said northerly side line. That said vein dips southerly, and in its downward course so far departs from the perpendicular as to pass beyond the southerly side line of said West End mining claim, extended downward vertically, and thence into and beneath the surface of the said Eureka lode mining claim and the said Curtis lode mining claim of the plaintiff company.

"The said vein does not, on its upward course, or at its top or apex, outcrop or reach the present surface, but is covered or buried to a considerable depth by lava, locally known as and called 'Midway' andesite, which, after the formation of the vein, flowed over the then surface of the territory in which the vein exists; that at and for a distance of 360 feet westerly from where said vein or lode crosses the easterly end line of said West End claim, which crossing is at a distance of 135 feet northerly from the southeast corner of said West End claim, there is a juncture, or union, between two limbs or sides of said vein, and from the summit of said juncture, or union, the downward course of one limb or side thereof is in a northerly direction, and the downward course of the other limb or side thereof is in a southerly direction; that there is a continuation upward from the summit of said juncture, or union, of said northerly and southerly dipping limbs or sides of said vein of ore and silver-bearing quartz or rock in place for a distance from 20 or 30 to more than 100 feet, and to what was the surface before the same was buried beneath the said lava flow; that such ore and silver-bearing quartz were deposited where the same are now found, at the same time and during the same period that the main vein below was created, and from mineral-bearing solutions having the same source; that the dip is fairly conformable, and strike, or course, of such upward continuation of ore and silver-bearing quartz is conformable to the dip and strike, or course, of said northerly dipping limb or side of said vein from the summit of said juncture downward, and the court finds that said upward continuation is a part of said vein

or lode; that thence westerly, and for a distance of 360 feet, the northerly and southerly dipping limbs, sides, or slopes of said vein do not unite or form a union, or juncture, in their upward course, but for that distance each of said limbs or sides has a separate and independent top or apex; that thence westerly, for a distance of 40 feet, the northerly and southerly dipping limbs, sides, or slopes of said vein are again found in conjunction, as in the said most easterly 360 feet; that thence westerly, and until said northerly and southerly dipping limbs, sides, or slopes of said vein intersect with and cross said northerly side line of said mining claim, they do not unite or form a union or juncture in their upward course, but for that distance each of said limbs or sides has a separate and independent top or apex; that between said distance of 40 feet, where said northerly and southerly dipping limbs, sides, or slopes of said vein, as aforesaid, unite or form a union or juncture in their course upward, and said points on said northerly side line of said mining claim, where, as aforesaid, said contra dipping limbs, sides, or slopes of said vein respectively intersect said side line and cross the same, and so depart from said mining claim, there are two points at which it appears that said contra dipping limbs, sides, or slopes of said vein on their upward course approach closely to a juncture or union, but as to said contra dipping limbs, sides, or slopes of said vein at said two points, actually forming a juncture or union on their upward course, the evidence is meager and unsatisfactory; that the point where the said northerly dipping limb or side of said vein departs from the said mining claim through the northerly side line thereof is 1,120 feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that the point where said southerly dipping limb or side of said vein departs from said mining claim through the northerly side line thereof is 1,142½ feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that throughout said distance of 40 feet, where the contra dipping limbs or sides of said vein are found in conjunction, as hereinbefore stated, there is a continuation upward from the summit of the juncture or union of said two limbs or sides of said vein of ore or vein quartz to what was the surface, before the same was covered by the lava flow; that the dip or downward course of both the northerly and southerly dipping sides or limbs of the vein where the two are found in conjunction, as aforesaid, and also in the places where each, as aforesaid, has its separate and independent top or apex, is regular, and practically free from undulations; that the said southerly dipping limb or side of the vein in the easterly portion of the West End claim, that is to say, the easterly 360 feet thereof, has been developed from the top or summit of said juncture of said contra dipping limbs to and beyond the southerly side line of said claim, or for a distance, measured on the slope or downward course of said southerly dipping limb or side, of 800 feet or thereabouts, the average dip there being 17 degrees from the horizontal; that the westerly portion, that is to say, the westerly 300 feet of said southerly dipping limb or side of said vein found in the West End claim, has been developed from its top to and beyond the southerly side line of said claim, or for a distance, measured on its slope or downward course, of 1,000 feet or thereabouts, the average dip there being 30 degrees from the horizontal; that the average dip of said northerly dipping limb or side of said vein, so far as the same has been developed in its downward course, is 17 degrees from the horizontal; that said vein is a fissure vein that there is a difference in the strikes or courses of said northerly and southerly dipping limbs of said vein of about

40 degrees; that at said places and throughout said distances, where said contra dipping limbs of said vein are found to intersect and form a juncture, as aforesaid, there has been a mingling of the mineralizations of said two limbs of said vein within the angle beneath the juncture of the said two limbs; that at such places and throughout said distances the footwall of said two limbs of said vein, within the angle beneath their said juncture, by the process of replacement, has been converted into mineralized quartz for considerable distances below said juncture, said replacement quartz extending from limb to limb."

Appellant bases its appeal from the decision of the trial court on the following grounds:

A. Erroneous Findings of Fact.

(1) That the finding of the trial court that the two sides of northerly and southerly dipping slopes of the single vein involved are not united at the cost of the anticlinal roll, but are separated for considerable distances within the West End claim, thus forming separate terminal edges along the upper edges of each of these slopes, is unsupported by the evidence.

(2) That the finding of the trial court, giving the occurrences of quartz in the "A" series of, raises the dignity of a vein, is not justified by the evidence, and, further, that no matter what may be its character, it admittedly dips to the north, and has no bearing on a claimed extralateral right extending to the south.

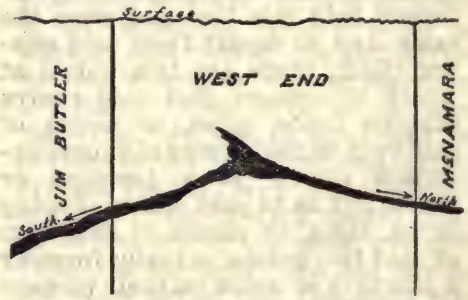
B. Errors of Law.

(1) The trial court found that the discovery in the West End claim was on the northerly dipping portion or slope of the vein, and in spite of this finding awarded an extralateral right to appellee on the southerly dipping limb or slope of the vein. Appellant contends that this is an erroneous construction of the Federal statute, granting the right to follow a vein extralaterally, and that extralateral rights in two opposite directions, attaching to the same mining claim and the same vein, are not contemplated by this statute.

(2) The trial court found that the northerly and southerly dipping limbs or sides of the vein were united and joined at the crest of the roll for a considerable distance within the West End claim. Appellant contents that the court should have denied the appellee the right to follow the vein extralaterally where such a condition exists, and that no extralateral right whatsoever attaches to an anticlinal occurrence in a vein, since the latter does not constitute an apex within the meaning of the Federal Mining Statute.

(3) The westerly end line of the West End claim is a broken line. Appellant contends that no extralateral right whatsoever may be exercised under such circumstances, since such right attaches only to mining claims possessing straight end lines.

The following diagram represents a cross section of the vein where the two limbs have been shown, by development work, to be united at the crest of the anticlinal fold.



Messrs. **Curtis H. Lindley, William E. Colby, Hugh H. Brown,** and **J. H. Evans** for appellant.

Messrs. **Peck, Bunker, & Cole, Cheney, Downer, Price, & Hawkins, H. H. Atkinson,** and **Dickson, Ellis, Ellis, & Schulder,** for respondent:

He who by his labor and enterprise brings into circulation the hidden treasures of the earth is entitled to his reward.

2 Lindley, Mines, § 335; Lawson v. United States Min. Co. 207 U. S. 1, 13,

52 L. ed. 65, 75, 28 Sup. Ct. Rep. 15; Bullion-Beck & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 3, 11 Pac. 515; United States Min. Co. v. Lawson, 67 C. C. A. 587, 134 Fed. 769; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 52 C. C. A. 219, 114 Fed. 417, 22 Mor. Min. Rep. 104.

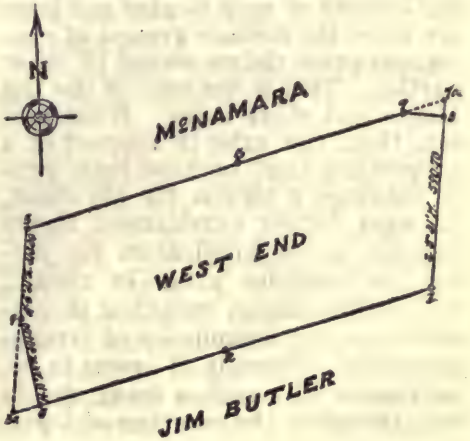
The owner is entitled to follow the vein extralaterally between planes, one drawn through the end line so crossed, and the other parallel thereto, through the point on the side line where the vein leaves the claim.

Del Monte Min. & Mill. Co. v. New York & L. C. Min. Co. 66 Fed. 212, 18 Mor. Min. Rep. 188; Fitzgerald v. Clark, 17 Mont. 100, 30 L.R.A. 803, 52 Am. St. Rep. 665, 42 Pac. 273; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 91, 43 L. ed. 72, 87, 18 Sup. Ct. Rep. 895; Work Min. & Mill. Co. v. Doctor Jack Pot Min. Co. 114 C. C. A. 392, 194 Fed. 620; Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co. 48 C. C. A. 665, 109 Fed. 538, 21 Mor. Min. Rep. 317; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 99, 131 Fed. 591, 58 C. C. A. 311, 121 Fed. 973, 22 Mor. Min. Rep. 560; Walrath v. Champion Min. Co. 171 U. S. 293, 311, 43 L. ed. 170, 177, 18 Sup. Ct. Rep. 909, 19 Mor. Min. Rep. 410; Tyler Min. Co. v. Sweeney, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284.

Norcross, Ch. J., delivered the opinion of the court:

This case presents two main questions of law, to wit: First. Whether the fact that the westerly end line of the surface area of the West End claim was patented, being not a straight, but a broken, line, in and of itself deprives the owner of that claim of extralateral rights upon any vein apexing therein. Second. Whether, within the meaning of the act of Congress, the crest or crown of a vein which is found in the form of a single anticline may be regarded as the top or apex of the vein, and extralateral rights exist upon such vein in opposite directions. The answer to these questions must be found in an interpretation of that portion of the Mining Act which contains the grant of extralateral rights, and which reads as follows: "The locators of all mining locations . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Section 2322, U. S. Rev. Stat. Comp. Stat. 1916, § 4618.

The following diagram shows the relative position of the surface boundaries of the patented West End location:



1. The location would embrace a full claim of 1,500 feet by 600 feet, excepting for the excluded area embraced within the two triangles 3, 3a, 4, and 7, 7a, 8. The lines 4, 5, and 1, 8, are parallel. While the plat and field notes accompanying application for the patent are not in the record, it is probably that they would disclose that the surface boundaries of the claim, as located, would include the two triangular pieces of ground above mentioned, and that the same were excluded from the patent application because in conflict with prior existing locations. In every great mining district, locations are made from time to time in every direction, and a map of such a district presents a confusing mass of conflicting boundaries. In locating a claim the locator may lay his lines upon or across portions of prior existing claims, in order to secure parallelism of end lines, and thus secure to himself extralateral rights. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370.

While a locator, prior to patent as well as after patent, may have no greater extent of extralateral rights than the extent of the vein within the boundaries of his surface rights (2 Lindley, Mines, § 574), he may, prior to patent, have its extralateral rights determined by planes parallel to planes passing through his located end lines, even though one or both of such located end lines are upon the surface ground of contiguous prior claims owned by other parties. This is the rule of the Del Monte and other cases. What reason, then, can exist in support of a proposition that, because such owner obtained a patent for his claim, he must forfeit extralateral rights because, in his application for patent, he excludes areas in conflict with prior claims, resulting in patented surface boundaries of irregular shape. There is, it seems to us, no reason why such a thing should be. Certainly the securing of a patent to a location ought not to leave a locator with less rights than he had before. That the Mining Laws are to be liberally construed in favor of the locator is a proposition now too well settled to need a citation of authorities. To hold that, simply because the boundaries of the surface of a patented claim are so irregular in shape as not to present parallel end lines, due to exclusions of conflicts, extralateral rights are lost, is to place upon the statute a construction contrary to its purpose, as that purpose has frequently been enunciated. Lawson v. United States Min. Co. 207 U. S. 1, 52 L. ed. 65, 28 Sup. Ct. Rep. 15, 2 Lindley, § 584.

Mines—end lines —effect of deflection.

Even if this is a more liberal construction of the statute than is warranted, which we think it is not, nevertheless, so far as this particular case is concerned, it cannot, we think, be said that the patented surface area of the West End claim does not present parallel end lines. The end lines 1, 8, and 4, 5, are each part of the original located end lines. They should, we think, still be considered end lines, and the true end lines of the patented claim. To so hold requires that the line 3, 4, be regarded as a side line rather than as a part of a so-called broken end line. We think it should be so regarded. Side lines are not required to be parallel. No rule can well be applied governing courses and distances of side lines, other than that they shall not be so laid as to increase the statutory width or length of a claim. The line 1, 8, is conceded to be an end line. But if the line 4, 5, is not also an end line, but rather a part of a broken end line, it is drawing a rather fine distinction to say that the lines 3, 4, and 4, 5, are parts of a broken end line, and that the lines 7, 8, and 8, 1, are not. The difference is only in the degree of the angle and the length of the lines, a difference which has no reasonable basis upon which to support a distinction. We think the ruling that the line 4, 5,

is the westerly end line of the West End claim finds support in both reason and authority. Walrath v. Champion Min. Co. 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909.

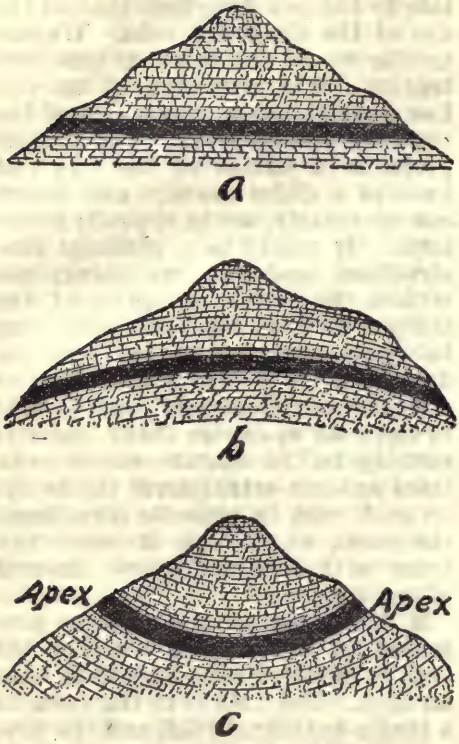
2. We come now to a consideration of the question whether extralateral rights exist upon a vein in the form of a single anticlinal fold. It is the contention of counsel for appellant that such rights do not exist, for the reason, among others alleged, that the Federal statute does not contemplate extralateral rights in opposite directions. It is the contention that only veins dipping in the same direction as the discovery vein may be followed extralaterally; that where, within the same location, a secondary vein is found dipping in the opposite direction as that of the discovery vein, extralateral rights thereon cannot be enjoyed. We think the statute is not susceptible of this construction. The statute given to the locators "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines . . . although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

Same—extralateral rights—opposite directions.

Congress manifestly contemplated that the locator of a mining claim might discover more than one vein within his surface boundaries, and provided that he should have "all veins, lodes, and ledges, throughout their entire depth." But it is contended that the concluding portion of the section, limiting extralateral rights between "vertical planes drawn downward . . . through the end lines . . . so continued in their own direction," negatives an intent to permit extralateral rights in opposite directions, because the words "in their own direction" relate to but one direction, that of the dip of the discovery vein. We are unable to see the force of this contention. The direction of an end line depends upon which end of the line it is viewed from. The courses given in a patent of the two end lines of a claim usually, and doubtless invariably, are in opposite directions. It would be a strained construction, and one, we think, not within the letter or spirit of the statute, to hold that end lines may be considered as having but one direction. If a vein in the form of a single anticlinal fold may be said to have an apex, we think there is nothing in the statute which militates against extralateral rights upon such vein in opposite directions, the same as though it were two veins with separate apices, instead of one vein.

3. The most serious question presented in this case is whether the vein in question may be said to have an apex. The vein is in the form of a single anticlinal fold, and the precise question presented by a vein in such form appears never, heretofore, to have been determined. Counsel for appellant, in their brief, say: "The definition of the term 'apex,' as employed in the mining statute, involves the elements of terminal edge of a vein and downward course extending therefrom. According to this definition, the horizontal sheet 'a' on figure 3 here inserted and the anticlinal fold 'b' have no apices, while the synclinal fold 'c' has two apices. . . ."
[See page 412.]

It is apparent that no extralateral rights could attach to a horizontal vein, as represented in sheet "a," because such vein has no "course downward," as prescribed in the statute. Such a vein has a top, if not an apex, in the strict sense of that word, and will support a valid location. Why a synclinal fold should be said to have two apices and an anticlinal fold have none is not so easy to find a reason for, unless we accept as conclusive appellant's contention that a terminal



edge is essential to a true definition of the word "apex," as used in the statute. The words "terminal edge" are not used in the statute, nor have they been of universal use in defining an apex. The great majority of veins have terminal edges, and in all such cases the apex of the vein is its terminal edge. If veins in the form of a single anticlinal roll were the rule rather than the rare exception, we are of the opinion that a contention that a terminal edge was essential to an apex would be as rare as the character of the vein now in question. It has been repeatedly said by courts and textwriters that the words "top" and "apex" were not a part of the miner's terminology, prior to the adoption of the Federal Mining Statutes. They were words used by legislators to convey the intent of the framers of the statute. There is no controversy regarding the general purpose and intent of the Mining Statutes. The government, as a matter of public policy, was interested in the development of the mining resources of the nation. It offered to the prospector and miner the most liberal reward for his enterprise in discovering and developing the hidden treasures of the earth. It gave him the exclusive possession of the surface of every valid location made, placed no limit upon the number of such locations, gave him all veins, lodes, and ledges throughout their entire depth, the top or apex of which were within his surface lines. It exacted no price for the land as a condition precedent to mining operations, and placed no restrictions upon him that were not consistent with the public purpose, such as requiring a minimum of annual labor as an evidence of good faith. To say that a miner, fortunate enough to discover a valuable vein in the form of a single anticline, shall not have extralateral rights upon each limb of his vein because, forsooth, the summit or crest of the anticlinal fold does not present a terminal edge, as is the case of the ordinary form of a fissure vein, in our opinion, would do violence to the spirit if not the very letter of the statute. The well-settled policy of the courts is to construe the statutes liberally, in the interest of the miner. It has been determined that if the locator, by inadvertence, places his location crosswise instead of lengthwise of his vein, he does not lose his extralateral rights, but his side lines will be regarded as end lines, and vice versa. So, too, if his vein crosses an end and a side line, he will be given a new side line for purposes of determining the extent of his extralateral rights. So, too, in the matter of discovery, the first essential to a valid location, the extreme liberality of the courts has been manifested in hundreds of cases.

If a locator finds his surface boundaries embrace the apices of two or more valuable veins, he is simply fortunate, the same as the locator whose single ledge is more valuable than the one of his neighbor. The statute makes no distinction between rights of locators,

based upon the value of the discoveries. Such distinctions are not within the policy of the statute. The only difference between a vein in the form of a single anticlinal fold, and the ordinary fissure vein, is that the former has a crest, the limbs of which dip in opposite directions, while the latter has a terminal edge and a dip in but one direction. But this distinction presents no difference such as would violate the purpose of the statute, if the crest of the former, like the terminal edge of the latter, should be held to constitute an apex. The distinguished counsel for appellant, in his great work on Mines, says: "In the light of the rules announced in the previous articles, if a given mineral deposit is in place, it is a lode. The law assumes that the lode has a top, or apex, and provides for the acquisition of title by location upon this apex. A lode without an apex is not contemplated, and no provision is made for locating it. It cannot be located under the Placer Laws, because these laws apply only to deposits not in place, and, before it can be legally located as a lode, the apex, or top, must be found. If a location is made on the side or on the dip, whoever discovers and properly locates the apex will be entitled to enjoy the full rights accorded to regular valid lode locations, and the rights of those who have located on the side edge, or dip, must yield. The most serious difficulty in defining the apex has arisen in connection with certain flat or 'blanket' deposits, which have been judicially determined to be lodes, within the meaning of the statutes. It is often quite impracticable to fix upon any exposure of such a deposit, which properly constitutes the apex. It is true that, after a lode patent is issued, the existence of an apex within the patented ground will be conclusively presumed, but not necessarily the apex of the vein in dispute. Nor will it be conclusively presumed that any particular exposure of the vein is that apex. It must still remain a question of proof." 1 Lindley, Mines, 3d ed. § 305.

Can it be said with reason that a vein in the form of a single anticlinal fold was not intended to be the subject of a location, within the meaning of the Mining Statutes, because it does not possess a terminal edge? It is conceded that it is a vein or lode, and it is well settled that it is one. "All valuable mineral deposits . . . are . . . free and open to exploration and purchase" is the language of the statute. U. S. Rev. Stat. § 2319, Comp. Stat. 1916, § 4614. The Federal statutes clearly contemplated that the vein in question was subject to location, for it made no exclusions of veins of any particular character. If a vein without an apex is not contemplated, and no provisions made for locating it, as the distinguished author says, then it follows, as a necessary conclusion, that the vein in controversy has an apex. If it has an apex, there is no other possible place for it to be than at the crest of the anticlinal fold.

It is contended, however, that the Supreme Court of the United States is committed to the view that a terminal edge is essential to an apex of a vein or lode, and the recent case of Stewart Min. Co. v. Ontario Min. Co. 237 U. S. 350, 59 L. ed. 989, 35 Sup. Ct. Rep. 610, is cited in support of this contention. In that case, Mr. Justice McKenna, speaking for the court, said: "An apex is, on cited authority, defined to be 'all that portion of the terminal edge of a vein from which the vein has extension downward in the direction of the dip.' And it is further said that the definition has been approved in Lindley on Mines, because, as therein expressed, it 'involves the elements of terminal edge and downward course therefrom.' We may accept the definition. In its application, however, it immediately encounters a question of fact —the locality of the terminal edge; and in this case the state courts did

not find it to be where plaintiff asserted it to be."

The court in the Stewart-Ontario Case did "accept the definition" of apex to be the terminal edge of the vein. The vein in controversy in that case had a terminal edge, and there was no occasion to consider whether the definition given was comprehensive. The Idaho court, from which the case was reviewed, on error, had determined that that which the Stewart company claimed was an apex was only the side of the vein where the vein, on its strike, was cut off by a fault. The Idaho court was sustained. See same case, 23 Idaho, 724, 132 Pac. 787, and Stewart Min. Co. v. Bourne, 134 C. C. A. 123, 218 Fed. 327. As said by Chief Justice Marshall, in the celebrated case of Cohen v. Virginia, 6 Wheat, at page 399, 5 L. ed. 290: "It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This maxim has been reiterated times almost without number. It is applicable to the Stewart-Ontario decision. The definition was sufficient for the question involved in that case; otherwise, we may assume the question would have been given more consideration than the laconic sentence: "We may accept the definition. Judge Hawley, in Book v. Justice Min. Co. 58 Fed. (C. C.) at page 121, 17 Mor. Min. Rep. 617, in reference to the definition of a vein or lode, said: "Various courts have at different times, given a definition of what constitutes a vein, or lode, within the meaning of the act of Congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits, or vein matter," etc.

The Idaho court, in the Stewart-Ontario Case, supra, at page 737 of 23 Idaho, 132 Pac. 792, speaks of the definition of the word "apex," as follows: "The definitions of the word 'apex,' as used in the statute (U. S. Rev. Stat. § 2322, Comp. Stat. 1916, § 4618), all reach the one inevitable conclusion that it is the highest point in the vein (Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 469, 25 L. ed. 253, 9 Mor. Min. Rep. 607; Lindley, Mines, 2d ed. §§ 305, 309; Costigan, Min. Laws, p. 137, § 35; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370); but this is only a general definition, and its application to any particular vein or peculiar location may and often will call for further particularity of description. It must be the top or terminal edge of the vein on the surface, or the nearest point to the surface, and it must be the top of the vein proper, rather than of a spur or feeder, just as the highest point in the roof of a house would be taken to be the apex of the house, and not the chimney or flagstaff. Again, an apex is a point from which the vein has a dip, as well as strike, or course, else it confers no extralateral right."

Where a vein has a terminal edge, its apex is a point from which, or a line along which, is its strike, and from which it has a dip; but this is equally true of the crest of a vein in the form of a single anticlinal fold. Counsel for appellant quote the following definitions from text-writers in support of the terminal edge theory:

"Conceiving a vein or lode to be an intrusive sheet of mineralized matter, of varying thickness, found

in the mass of the mountain, the apex of a vein is thus seen to be that edge of the sheet which shows on the surface of the location, or is nearest to the surface. It is not a point, though apex naturally suggests point. It is not a line, though it has the full extension of the upper edge of the lode. It is the whole surface of the upper edge of the vein, with all the width and length which that edge has." Costigan, Min. Law, 139, 140.

"The mere fact of proximity to the surface is insufficient to establish the apex, without the evidence that it is the upper edge, or end, of the vein." Barringer & A. Mines & Mining, p. 442.

"In the mathematical sense, an apex means the highest point; but it is not used in this sense in the statute. As used therein, it means the edge or termination of the vein which comes to the surface of the earth, forming an outcrop which comes nearest to the surface of the earth when the vein terminates before it reaches the surface. . . . It may not be the highest point of a vein, as such highest point may be found in a swell of the vein." Shamel, Mining, Mineral & Geological Law, 93, 197.

"The top or apex of a vein or lode is the highest point thereof, and may be at the surface of the ground, or at any point below the surface; the end or edge of a vein nearest the surface." Mines and Minerals, 27 Cyc. 537.

"The end or edge of a vein nearest the surface." Raymond, Glossary of Mining & Metallurgical Terms. Trans. Am. Inst. M. E. vol. 9, p. 102.

It is quite manifest, we think, that all the definitions quoted are considering the ordinary form of vein. Definitions given by textwriters are usually based on court decisions, and, like such decisions, are to be considered with reference to the facts upon which they are based. From § 306 of Lindley on Mines, we quote: "Webster defines an apex to be 'the top, point, or summit of anything.' Compilers of dictionaries which have made their appearance since the act under consideration was passed have not been particularly lucid in their definitions. For instance: Standard Dictionary: '(1) The pointed or angular end, or highest point, as of a pyramid, spire, or mountain; extreme point; tip; top. (2) The vertex of a plane or solid angle. (3) The highest point of a stratum; as a coal seam.' Century Dictionary: '(1) The tip, point, or summit of anything. In geometry, the angular point of a cone or conic section. The angular point of a triangle opposite the base. (2) In geology, the top of an anticlinal fold of strata. This term, as used in United States Revised Statutes, has been the occasion of much litigation. It is supposed to mean something nearly equivalent to outcrop; but precisely in what it differs from outcrop has not been, neither does it seem capable of being, distinctly made out.' Evidently the courts, even now, can receive but little assistance from the lexicographers."

It appears, however, that the Century Dictionary, in an effort to give a comprehensive definition, regards "the top of an anticlinal fold of strata" as an apex. Counsel for appellant, in their brief, say: "Probably the most interesting and instructive of all the adjudicated cases is the pioneer case of Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59. The decision of the supreme court of Dakota follows, in the main, the opinion given by the trial court. It is a lucid and masterly presentation of the law; and, while an anticlinal roll was not there involved, several expressions of the court are well worth quoting in support of our contention that a terminal end, or edge, of a vein, is an essential element of apex definition. 'The definition of the top or apex of a vein usually given is "the end, or edge, of a vein nearest the surface." . . . Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case

of Iron Silver v. Louisville, defines "top," or "apex," as the highest or terminal point of a vein "where it approaches nearest the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein." . . .'"

Some expressions of the court, used just prior to the language last quoted, are instructive: "The definition of the top, or apex, of a vein usually given is: 'The end, or edge, of a vein nearest the surface;' and to this definition, the defendants insist, we must adhere with absolute literal and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances that is to be considered as the top or apex of the vein. . . . The definition given is, no doubt, correct under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases; and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition. It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top,' or 'apex;' but it seems, in fact, to have become somewhat clouded. I apprehend if any intelligent person were asked to point out the top, or apex, of a house, a spire, a tree, or hill, he would have no difficulty in doing so, and I do not see why the same common sense should not be applied to a vein or lode."

In the Duggan v. Davey Case, the question was whether an exposed side of a vein, caused by erosion or some other agency, upon which locations were made, constituted the apex of the vein. The question was substantially the same as that involved in the Stewart-Ontario Case, supra. The same contention appears to have been made in this case, based upon the fact that the westerly portion of the vein within the West End claim, by some titanic eruption of the earth's surface, had been cut off, leaving a sharply defined but irregular broken edge. The case of Illinois Silver Min. & Mill. Co. v. Raff, 7 N. M. 336, 34 Pac. 544, is cited by counsel for appellant as "a case possessing many points of similarity to the case at bar." In that case the court said: "We can recognize the definition of a vein as given by Judge Hallett in Hyman v. Wheeler, 29 Fed. 347, 15 Mor. Min. Rep. 519, and still see that the jury in this cause might, from the evidence, have determined that there was a vast bed, lode, zone, or mass of mineral-bearing lime, with no footwall and, in some localities, with no hanging wall or even cap, in others covered with shale, the lime body extending throughout the Illinois, the Calamity, the Andy Johnson, Brush Heap, and locations west and south of the Illinois, as well as possibly other mines. That this body or mass, zone, or lode of lime was broken or cut up into fissures, gashes, pockets, veins, etc., and these spaces filled with mineral, . . . in fact, we might accept either of the theories advanced by geologists and mineralogists as to the formation of the rock or deposit of mineral, and there would yet be nothing to prevent our reconciling that theory with the verdict of the jury in this cause, that there was neither a vein nor an apex upon the Illinois mine, or, at least, such a vein as could be followed beyond the side lines of that claim. There may be a contact, and yet no contact vein. The mineral may be exposed at a point upon one claim, and followed continuously under the surface from this point to another property, though an undisputed vein between clearly defined hanging and foot walls, and still the point at which the mineral is exposed not be the apex of the vein, which may have an apex 10 miles distant, or may have no apex at all. . . . The zone or mass may follow the undulations of a broken country down into the valley, and rising over the divides, cutting

through, covered by, or overlapping, other formations; but until it is broken and the edges exposed, or some edge or end as a beginning point found, from which it can be followed down at some angle below the horizontal, there is no apex from which it can be followed beyond the side lines of a claim located upon it."

The facts before the New Mexico court were so different from those of the case at bar that we think the case affords little aid in determining the question here.

Our attention has been directed to definitions of the word "apex," given in instructions to juries by Judge Hallett in the case of Iron Mine v. Loella Mine (D. C.) 2 McCrary, 121, 3 Fed. 368, 1 Mor. Min. Rep. 548, and by Justice Miller in the case of Stevens v. Williams, 1 McCrary, 480, Fed. Cas. No. 13,413, 5 Mor. Min. Rep. 449, both cases growing out of the peculiarities of the Leadville ore deposits. Referring to the character of these ore deposits, Lindley, at § 300, says: "The blanket deposits at and in the vicinity of Leadville, Colorado, have given rise to most of the controverted questions on the subject of 'lodes,' 'veins,' 'in place,' 'top,' and 'apex;' and the burden of solving many of these difficulties in the first instance fell to the lot of Judge Hallett. His decisions have furnished the text for other courts, in other jurisdictions, where analogous conditions have been, to a limited extent, encountered."

Again, in § 311, the author says: "As in almost all other phases of the mining law, the flat deposits of Leadville have produced their full quota of adjudicated law on the subject of 'tops' and 'apices.' As these deposits are legally held to be veins, or lodes, of rock in place, subject to mineral location, the law contemplated that they should have apices."

The section includes a number of figures illustrative of the Leadville formation, none of which present any similarity to the vein in controversy here. Justice Miller instructed the jury relative to the facts in the Stevens Case, supra, among other matters, as follows: "The top or the apex of a vein, within the meaning of the act of Congress, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. The word 'outcrop' has been used in connection with it. . . . It means the nearest point at which it is found toward the surface of the earth. And where it ceases to continue in the direction of the surface is the top or apex of that vein. It is said in this case that the point claimed to be the top or apex is not such, because at the points where plaintiff shows, or attempts to prove, an interruption of that vein, in its ascent towards the surface, and what he calls the beginning of it, the defendants say that is only a wave or roll of the general shoot of the metal, and that from that point it turns over and pursues its course downwards as a part of the same vein, in a westerly or southwesterly direction. It is proper I should say to you, if the defendants' hypothesis be true, if that point which the plaintiff calls the 'highest point,' the 'apex,' is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex within the statute. It does not mean merely the highest point in a continuous succession of rolls, or waves, in the elevation and depression of the mineral nearly horizontal."

We have here a very different state of facts than were involved in the Leadville cases. In those cases, the court was dealing with a mineral formation nearly horizontal, or varied by a series of anticlinal and synclinal rolls. Here, we have a vein in the form of a single anticline.

The land commission created by Act Cong. March 3, 1879, chap. 182, 20 Stat. at L. 394, sought and ob-

tained, among other matters, many definitions of the word "apex," as used in the Mining Statutes. Many of these definitions are embodied in § 307 of Lindley. Relative to these definitions the author says: "Judge Beatty, then chief justice of Nevada, gave the clearest and most comprehensive of all the definitions. It is as follows: 'The top or apex of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure.' According to this definition, the top or apex of a vein is the highest part of the vein along its entire course. If the vein is supposed to be divided into sections by vertical planes at right angles to its strike, the top or apex of each section is the highest part of the vein between the planes that bound that section. . . . Of course, there are irregular mineral deposits, departing widely in their characteristics from the typical or ideal vein which seems to have been in the mind of the framer of the act of 1872. To such deposits the foregoing definitions will not apply; and, in my opinion, great difficulty will be experienced in any attempt to apply the existing law to them."

If we apply the definition of Judge Beatty to the vein here involved, and follow the line of the dip of either or both limbs of the anticline to the highest point, we come to the crest. There is nothing in this definition which militates against the crest of the anticlinal roll being the apex of the vein, unless it is assumed or conceded that a vein can have but a dip in one direction.

There can be and there is no question in this case but that the so-called West End-McNamara vein was subject to location. If it be true, and we assume that it is, that the law contemplates that every vein has an apex (Lindley, §§ 305, 311), then it necessarily follows, we think, that the crest of the anticlinal roll is the apex. Certainly, by no process of reasoning, can it be said that the apex lies in either Jim Butler or McNamara ground, except as the crest of the anticline may be in McNamara territory after it crosses the northerly side line of the West End claim.

Same—apex summit of anticlinal fold.

The judgment is affirmed.

Affirmed by the Supreme Court of the United States, June 10, 1918, 247 U. S. 450, 62 L. ed. 1207, 38 Sup. Ct. Rep. 574.

ANNOTATION.

What is "top" or "apex" of vein or lode.

I. Introductory, 418.
II. Definition of "top," or "apex," generally, 419.
III. "Apex" and "outcrop" distinguished, 422.
IV. "Apex" with reference to discovery and location, 422.

I. Introductory.

The common-law rule of ownership and possession of the soil, which extended to the center of the earth, and usque ad cœlum, and included everything on its surface and within its bosom, has been abridged by Federal statutes, dealing with mining claims. One of these acts (Rev. Stat. § 2322, 6 Fed. Stat. Anno. 2d ed. 523, Comp. Stat. 1916, § 4618) provides that the locators of mineral deposits "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations." This statute, it was said in Duggan v. Davey (1885) 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59, "undoubtedly in-

troduced an important modification of the common-law rule. It gives to the proprietor of a vein a right unknown to the common law, the right to pursue such vein beyond his own lines, outside of that particular segment of the earth embraced within the lines of his claim extended vertically downward; and it is, therefore, to that extent, an enlargement of his common-law right."

See to the same effect Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370.

It was said in Stewart Min. Co. v. Ontario Min. Co. (1915) 237 U. S. 350, 59 L. ed. 989, 35 Sup. Ct. Rep. 610, affirming (1913) 23 Idaho, 724, 132 Pac. 787, that it is rudimentary that extralateral rights to a vein, under the statute, depend on the position of its top, or apex.

Since the right to pursue a vein into and underneath adjoining lands can be exercised only when the apex of the located vein is found within the surface boundaries of the location, the importance of a correct definition of the term "apex" becomes manifest.

The term "apex," it is said, was not in use among miners prior to the enactment of the acts of Congress respecting mining locations. Duggan v. Davy (Dak.) supra. And see the reported case (JIM BUTLER TONOPAH MIN. CO. v. WEST END CONSOL. MIN. CO. ante, 405), affirmed in (1917) 247 U. S. 450, 62 L. ed. 1207, 38 Sup. Ct. Rep. 574.

Whether a top or apex of a vein exists depends largely on the question as to whether there exists any vein or lode. Iron Silver Min. Co. v. Cheesman (1881) 2 McCrary, 191, 8 Fed. 302, 9 Mor. Min. Rep. 552.

The Supreme Court, in affirming the reported case (JIM BUTLER TONOPAH MIN. CO. v. WEST END CONSOL. MIN. CO.) in (1917) 247 U. S. 450, 62 L. ed. 1207, 38 Sup. Ct. Rep. 574, held that the law assumed that a lode has a top, or apex, and provided for the acquisition of title by location on this apex.

The question, what is the top, or apex, of a vein, is one of fact. Blue Bird Min. Co. v. Largey (1892) 49 Fed. 289. But see Illinois Silver Min. & Mill Co. v. Raff (1893) 7 N. M. 336, 34 Pac. 544, wherein it was held that while the question, what constitutes an apex, is one of law for the court, the existence of the apex presents a question of fact for the determination of the jury.

II. Definition of "top," or "apex," generally.

It has been said that the words "top," or "apex," are not scientific expressions, but words in common use, the meaning of which a common dictionary will determine. Blue Bird Min. Co. v. Largey (1892) 49 Fed. 289. On the other hand, it is said, in the reported case (JIM BUTLER TONOPAH MIN. CO. v. WEST END CONSOL. MIN. CO. ante, 405), quoting Lindley on Mines, that "evidently the courts, even now, can receive but little assistance from the lexicographers."

"The definitions of the word 'apex,' as used in the statute (U. S. Rev. Stat. § 2322, 6 Fed. Stat. Anno. 2d ed. 523, Comp. Stat. 1916, § 4618), all reach the one inevitable conclusion that it is the highest point in the vein, . . . but this is only a general definition, and its application to any particular vein, or peculiar location, may and often will call for further particularity of description. It must be the top or terminal edge of the vein, on the surface, or the nearest point to the surface, and it must be the top of the vein proper, rather than of a spur or feeder, just as the highest point in the roof of a house would be taken to be the apex of the house, and not the chimney or flagstaff." Stewart Min. Co. v. Ontario Min. Co. (1913) 23 Idaho, 724, 132 Pac. 787, affirmed in (1915) 237 U. S. 350, 59 L. ed. 989, 35 Sup. Ct. Rep. 610.

The top or apex of a vein is the end, or edge, or terminal point of the lode, nearest the surface of the earth. Iron Mine v. Loella Mine (1880) 2 McCrary, 121, 3 Fed. 368, 1 Mor. Min. Rep. 548.

The side of a vein which, on its strike, is cut off by a fault, is not its apex. Stewart Min. Co. v. Ontario Min. Co. (1915) 237 U. S. 350, 59 L. ed.

989, 35 Sup. Ct. Rep. 610, affirming (1913) 23 **Idaho**, 724, 132 Pac. 787.

The highest point of a vein is the apex. It may or may not reach the surface of the ground. King v. Amy & S. Consol. Min. Co. (1890) 9 **Mont.** 543, 24 Pac. 200, 16 Mor. Min. Rep. 38.

While the apex is sometimes defined as the highest point of a vein or lode, it is not necessarily a point, but often a line of great length. Larkin v. Upton (1892) 144 **U. S.** 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, 17 Mor. Min. Rep. 465. See to the same effect Debney v. Iles (1907) 3 **Alaska**, 438.

In Larkin v. Upton (**U. S.**) supra, the court, in another part of its opinion, refers to the "apex in its full width," from which Lindley on Mines, at p. 393, concludes that, when the court defines the term apex as a line of great length, it undoubtedly means a surface, since, speaking mathematically, there is no width to a line.

"The word 'top,' while including 'apex,' may also include a succession of points, that is, a line, so that by the top of the vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge." Duggan v. Davey (1885) 4 **Dak.** 110, 26 N. W. 887, 17 Mo. Min. Rep. 59. In that case, it was said, Quoting Chief Justice Beatty, of Nevada: " 'The top or apex of any part of a vien is found by following the line of its dip up to the highest point at which vein matter exists in the fissure.' According to this definition, the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes, at right angles to the strike, the top or apex of each section is the highest part of the vein between the planes that bound that section; but if the dividing planes are not vertical, or not at right angles to a vein which departs at all from a perpendicular in its downward course, then the highest part of the vein between such planes will not be the top or apex of the section which they include."

Lindley, in his work on Mines, at page 390, refers to the foregoing exposition of the term as the "clearest and most comprehensive of all the definitions."

The definition of the top or apex of a vein usually given is "the end, or edge, of a vein nearest the surface," which definition was said in Duggan v. Davey (**Dak.**) supra, to be undoubtedly correct under most circumstances, but, like many other definitions, to lack fullness and accuracy in special cases.

The "top," or "apex," of a vein, within the meaning of the act of Congress, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. Stevens v. Williams (1879) 1 McCrary, 480, **Fed.** Cas. No. 13,413, 1 Mor. Min. Rep. 557. It is the highest end, or termination, of the vein, and this is so, though at an intermediate point or points, where the vein is continuous, it rises higher than such highest end, it being essential to such "top," or "apex," that there shall be no vein continuing beyond it. It must be the end of the vein which approaches nearest to the surface. Stevens v. Williams (**Fed.**) supra, wherein the court said: "It is clear, from an examination of the act, that it was framed upon the hypothesis that all lodes and veins occupy a position more or less vertical in the earth, that is, that they stand upon their edge in the body of the mountain; and these words, 'top' and 'apex,' refer to the part which comes nearest to the surface. The words used are 'top' and 'apex,' as if the writer was somewhat doubtful as to which word would best describe or best convey the idea which he had in his mind. It was with reference to that part of the lode which comes nearest to the surface that this description was used; probably, the words were not before known in mining industry,—at least, they are not met with elsewhere, so far as I am informed. Perhaps they were not the best that could have been used to describe the manner in which the lode should be taken and located. But, whether that be true or not, they are in the act of Congress, and there seems to be little doubt as to their meaning; that are not at all ambiguous. In

some instances they may, perhaps, refer to the floe of the lode, that is, a part of the lode which has been detached from the body of mineral in the crevice, and flowed down on the surface; in others, where there is no such outcrop, they may mean that part which stands in the solid rock, although below a considerable body of the superficial mass which I have attempted to describe to you. We are all agreed, however (the courts and counsel, everyone), that that is the meaning of the words; that they are to be taken in some such sense as that, as being the part of the lode which comes nearest the surface."

In this case the trial court, in its charge to the jury, said: "It is said in this case that the point claimed to be the top, or apex, is not such, because at the points where plaintiff shows or attempts to prove an interruption of that vein, in its ascent towards the surface, and what he calls the beginning of it, the defendants say that is only a wave or roll in the general shoot of the metal, and that from that point it turns over and pursues its course downwards, as a part of the same vein, in a westerly or southwesterly direction. It is proper I should say to you, if the defendant's hypothesis be true, if that point which the plaintiff calls the 'highest point,' the 'apex,' is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex, within the statute. It does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of the mineral, nearly horizontal."

The reported case (JIM BUTLER TONOPAH MIN. CO. v. WEST END CONSOL. MIN. Co. ante, 405) affirmed in (1917) 247 U. S. 450, 62 L. ed. 1207, 38 Sup. Ct. Rep. 574, holds that a terminal edge is not essential to an apex, and that the crest of an anticlinal roll, or the crest of a vein in the form of a single anticlinal fold, is its apex.

In Stewart Min. Co. v. Ontario Min. Co. (1915) 237 U. S. 350, 59 L. ed. 989, 35 Sup. Ct. Rep. 610, affirming (1913) 23 Idaho, 724, 132 Pac. 787, the action was to assert extralateral rights by one alleging that the apex of the lode was in his claim. Both the trial court and the supreme court of Idaho found that the termination of the vein, at a place known as the Osborne fault, was not the top, or apex, of such vein, as was contended by the plaintiff, but was only its side edge, on the line of the dip. In the course of its opinion, the Federal supreme court said: "It is rudimentary that extralateral rights to a vein depend upon the position of its top, or apex. But principles of law are asserted by plaintiff which, it is insisted, determine against the conclusion of both courts. It is difficult to state or estimate the principles singly. An apex is, on cited authority, defined to be 'all that portion of the terminal edge of a vein from which the vein has extension downward in the direction of the dip.' And it is further said that the definition has been approved in Lindley on Mines, because, as therein expressed, it 'involves the elements of terminal edge and downward course therefrom.' We may accept the definition. In its application, however, it immediately encounters a question of fact, the locality of the terminal edge; and in this case the state courts did not find it to be where plaintiff asserted it to be. But counsel make much of—indeed, appear to give absolute effect to—the other element of the definition, that is, 'extension downward,' or 'downward course' from the terminal edge. But this element, again, has no significance whatever, independently of the 'terminal edge' of the vein, found, as we have said, not to be where plaintiff contended it to be. Plaintiff's contention is that the terminal edge extends 200 feet along the Osborne fault, and from thence there is a pronounced downward course to the southerly boundary of the Stewart Fraction claim, and that, therefore, the two elements essential to an apex in the accepted definition exists, namely, 'terminal edge, and downward course' within 'vertical planes parallel with the vertical planes of the end lines of the claim, extended downward.' If it could be conceded that the apex of the

vein runs along the Osborne fault, the conclusion plaintiff contends for might also be conceded, but the fact is found the other way by the state courts in this case. The finding is dominating, and on account of it the judgment must be sustained."

See to the same effect Alameda Min. Co. v. Success Min. Co. (1916) 29 Idaho, 618, 161 Pac. 862, wherein the court quotes and adopts the same definition.

III. "Apex" and "outcrop" distinguished.

The word "outcrop" has been used in connection with "apex," and "in the true definition of the word 'outcrop,' as it concerns a vein, is probably an essential part of the definition of its apex, or top; but that does not mean the strict use of the word 'outcrop.' That would not, perhaps, imply the presentation of the mineral to the naked eye, on the surface of the earth, but it means that it comes so near to the surface of the earth that it is found easily by digging for it, or it is the point at which the vein is nearest to the surface of the earth; it means the nearest point at which it is found toward the surface of the earth. And where it ceases to continue in the direction of the surface is the top or apex of that vein." Stevens v. Williams (1879) 1 McCrary, 480, Fed. Cas. No. 13,413, 1 Mor. Min. Rep. 557.

It has been said that the definition which is strongly supported by both reason and precedent is that the apex is the top edge, or surface, of the vein, along its strike, whether this is the outcrop or is blind. Debney v. Iles (1907) 3 Alaska, 438. An apex is not necessarily the outcrop, because the latter may be a mere dip exposure. Iron Silver Min. Co. v. Elgin Min. & Smelting Co. (1886) 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, 15 Mor. Min. Rep. 641.

"Top" or "apex," and "outcrop," are not synonymous terms. The word "apex" ordinarily designates a point and, so considered, the apex of a vein is the summit,—the highest point in the vein in the ascent along the line of its dip or downward course, and beyond which the vein extends no further, so that it is the end, or, reversely, the beginning of the vein. Duggan v. Davey (1886) 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59. "The crevice may come to the surface, but may not contain mineral matter until it has been followed down for some distance; yet it is, nevertheless, an apex. Nor is outcrop synonymous with apex, for a portion of the vein on its dip may, in rare instances, be exposed below the true apex." "Outcrop on the actual surface is not essential to an apex; it may exist at considerable depths below the surface." Barringer & A., Mines & Mining, p. 442.

IV. "Apex" with reference to discovery and location.

What constitutes a discovery which will validate a location is a very different thing from what constitutes an apex to which attaches the statutory right to invade the position of and appropriate the property, which is presumed to belong to an adjoining owner. Grand Central Min. Co. v. Mammoth Min. Co. (1905) 29 Utah, 491, 83 Pac. 648. Prior to the statute, a prospector was entitled to a discovery if he located the lode; but, under the statute, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex, of the vein. St. Louis Min. & Mill. Co. v. Montana Min. Co. (1904) 194 U. S. 235, 48 L. ed. 953, 24 Sup. Ct. Rep. 654, affirming (1902) 64 L.R.A. 207, 51 C. C. A. 530, 113 Fed. 900, 22 Mor. Min. Rep. 127.

The extralateral right conferred by the provisions of § 2322, of the Revised Statutes (6 Fed. Stat. Anno. 2d ed. 523, Comp. Stat. 1916, § 4618) is determined by the apex on the surface on which the prospector makes his location, and the dip of the vein, and not on the levels in the depths of the earth, opened and disclosed in the working of the mine. Alameda Min. Co. v. Success Min. Co. (1916) (Idaho)

supra. See to the same effect Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1897) 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370.

It is unquestioned law that the top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title. Larkin v. Upton (1892) 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614, 17 Mor. Min. Rep. 465. The apex of a vein is not necessarily a point, but often a line of great length, and any portion of the apex on the course or strike of the vein, found within the limits of a claim, is sufficient discovery to entitle the locator to obtain title. Ibid. The top or apex which must be located is the end, or edge, or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on, or near, or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by the location. Iron Mine v. Loella Mine (1880) (D. C.) 2 McCrary, 121, 3 Fed. 368, 1 Mor. Min. Rep. 548.

It was said in Debney v. Iles (1907) 3 Alaska, 438, that the definition of the apex of a vein which is supported by both reason and precedent is that the apex is the top edge or surface of the vein, along its strike, whether this is the outcrop or is blind; hence, it was held that any number of claims may be located along the apex, on its strike.

L. S. B.

JOHN RUEB, Appt.,
v.
HARRY J. REHDER et al.

T. J. FORD, Appt.,
v.
SAME.

New Mexico Supreme Court—August 28, 1918.

(— N. M. —, 174 Pac. 992.)

Associations — acquittal of member — effect.

1. If a member of a society is once acquitted on a trial upon charges preferred against him, he cannot be tried again for the same offense, unless the by-laws of the association specifically authorize a second trial therefor.

[See note on this question beginning on page 431.]

Appeal — assignments — sufficiency.

2. Assignments of error considered, and held sufficiently specific.

Evidence — records of corporation.

3. The records and minutes of a private corporation are admissible to prove its acts; but they are not the only mode of proof. They are prima facie admissible, but may be rebutted by parol. Hence, where the minutes of a voluntary association are silent as to the question of the former trial of a member for the same offense for which he was expelled, as shown by said minutes, it is competent for such member to introduce parol evidence to establish the fact that he had been theretofore tried and acquitted of such alleged offense against the by-law of the association, and also to show that he was expelled without evidence being heard.

Associations — trial without jurisdiction.

4. If, under the by-laws, rules, and regulations of an association, it has no power or jurisdiction to try a member and expel him for a given offense, or if its action is without jurisdiction, or

Headnotes by ROBERTS, J.

without notice or authority, it does not change the legal status of the member, and the member so unlawfully expelled is not required to appeal within the order, but may resort to the courts for relief.

Same — contract — by-laws.

5. The constitution and by-laws of a voluntary association constitute the contract between the member and the association, and govern and limit the rights and liabilities of the member and the association. So long as such an association is acting under such rules and regulations, and in accordance therewith, the member must likewise act, as he is required to do under the contract. When, however, the association departs from the letter and spirit of the contract, and does an act which it is not authorized to do under the contract, a member injured by such action is not required to conform to the rules in order to secure relief from such unauthorized action.

Same — acquittal — guilt.

6. Where a member has been once tried and acquitted of charges preferred against him in a voluntary association, and the right to expel him from such association exists only upon conviction, the fact that he was, in fact, guilty of violating a rule of the association, is no defense to an action by him to secure his reinstatement, where he was subsequently retried and found guilty; such second trial being without jurisdiction.

APPEAL by plaintiffs from a judgment of the District Court for Bernalillo County dismissing the complaints in consolidated actions, brought to enjoin defendants from refusing to recognize plaintiffs as members of a certain association, from denying them the rights and privileges of membership therein, and to annul an order made by defendants, expelling them from such rights and memberships. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Albert G. Simms** and **John F. Simms**, for appellants:

Plaintiff was entitled to have introduced oral evidence as to what took place at the second trial, in which he alleges he was summarily expelled, without evidence or a hearing of any kind.

McKelvey, Ev. pp. 344, 345; Jones, Ev. Pocket ed. ¶ 203.

There is no rule or statute of the order which justifies or permits a second trial for the same offense of which a member has been acquitted.

Pickering v. Palmer, 18 N. M. 473, 50 L.R.A.(N.S.) 1055, 138 Pac. 198; Mulroy v. Supreme Lodge, K. H. 28 Mo. App. 463.

Expulsion after a trial at which no evidence of any kind was introduced is a void expulsion.

People ex rel. Johnson v. New York Produce Exch. 149 N. Y. 401, 44 N. E. 86.

The court erred in refusing to permit plaintiff to show that a right of appeal, if any such did technically exist within the order, was not available to him, on account of the fact that the Grand International Division to which he would have been obliged to have appealed, would not meet for three years, and that plaintiff's insurance would have been canceled before his appeal could have been heard.

Fritz v. Knaub, 57 Misc. 405, 103 N. Y. Supp. 1003; State ex rel. Schrempp v. Grand Lodge, A. O. U. W. 70 Mo. App. 456; Robinson v. Dahm, 94 Misc. 729, 159 N. Y. Supp. 1053; Loubat v. LeRoy, 40 Hun, 549.

Mr. **A. B. McMillen** for appellees.

Roberts, J., delivered the opinion of the court:

This is a consolidated case, made up of two cases which were brought and tried in the distrtict court of Bernalillo county upon the same questions of law and fact. The pleadings, evidence, and final judgment in each case are exactly alike. The purpose of each suit was to enjoin the defendants, who were all the members and the officers of the Rio Puerco Division No. 446 of the Brotherhood of Locomotive Engineers, from refusing to recognize the plaintiff in each case as a member of the said association, and from denying them the rights and privileges of membership therein, and to annul an order made by the defendants,

expelling plaintiffs from such rights and membership.

The ground upon which relief was sought was that the order of expulsion was null and void, of no force and effect, and illegal, in that plaintiffs were once tried and acquitted of the charge upon which they had been expelled, and that, under the constitution, rules, and regulations of the order, the association was without power or authority thereunder to try plaintiffs the second time for the same offense; further, that at the second trial, which resulted in plaintiffs' expulsion, no evidence was heard, and plaintiffs were given no opportunity to combat such charges by the introduction of evidence. It was further alleged that, by reason of membership in the division in question, plaintiffs were entitled to and did carry policies of life and accident insurance in the Locomotive Engineers' Mutual Life & Accident Insurance Company, a corporation organized for the purpose of affording the members of the association, of which plaintiffs had been members, and other similar organizations, opportunity to obtain life and accident insurance in said corporation, at terms and rates favorable to members of the association; that plaintiffs had carried policies therein for some years, which were in full force and effect, but which would be subject to cancelation, and would be canceled, unless plaintiffs were restored to membership in the local association. A copy of the policy carried in each case was attached as an exhibit to the complaint. Further, that the association owned certain property, consisting of insignia, paraphernalia, and personal property, in which the plaintiffs had an interest as members. That plaintiff's membership in said association, by virtue of the insurance carried by them, was a property right of value, which would be lost without the intervention of the court. The complaint, after setting forth in detail the acts and grievances complained of, alleged that they had exhausted all their remedies within the order.

The answer denied that plaintiffs had been tried twice for the same offense; alleged that they were guilty of a violation of the statutes and rules of the order, the penalty for the specific act which was set up in the answer being expulsion from the order, upon a finding of guilt by the local organization; denied that the local association owned any property, except a Bible and a gavel; alleged that plaintiffs had not exhausted their remedies within the order; and asked that the complaint be dismissed.

The court, after hearing evidence on behalf of the appellants, upon motion of counsel for the appellees, dismissed the complaints, upon the ground that appellants had a remedy within the order, and that they could not appeal to the courts for redress until they had exhausted such remedies. From the judgment this appeal is prosecuted.

At the outset, appellants are met by the contention of appellees that their assignments of error are not sufficient to warrant a review of the proceedings of the district court. Ten separate assignments of error are stated in the assignment filed by appellants. It would unduly lengthen the opinion to set them out. Some of the assignments are not as specific as they should have been, but there are good assignments, which sufficiently present the questions we will consider. The eighth assignment reads as follows: "That the court erred in refusing to permit the plaintiff to prove that at the second trial of August 4, 1916, the plaintiff pleaded not guilty to the charge of having violated § 35 of the standing rules, and that no testimony was introduced against him, and no evidence was before the division at said meeting, and that the plaintiff was expelled by the defendants at the said meeting upon the ground that they were obliged to expel the plaintiff, or lose the charter of the division, and that they [defendants] knew in fact that the

Grand Chief had ordered them to expel the plaintiff, and they [defendants] would either have to do so, or lose the charter of the division, and that there was no testimony of any kind before the said meeting at the trial of these plaintiffs, and up to the time of their expulsion, and there was no evidence produced against plaintiff at said second trial.

The fifth assignment reads as follows: "That the court erred in ruling that the plaintiff has a right of appeal within the order from the second trial and expulsion from the order."

Clearly the eighth assignment was sufficiently specific, and pointed directly to the error sought to be reviewed. The error assigned by the fifth paragraph was the turning point in the case and, we think, was sufficient to present the question as to the propriety of the court's ruling.

Appeal—assignments—sufficiency.

Appellees cite and rely upon the following cases: Mogollon Gold & C. Co. v. Stout, 14 N. M. 245, 91 Pac. 724; Friday v. Santa Fe C. R. Co. 16 N. M. 434, 120 Pac. 316; Schofield v. Territory, 9 N. M. 526, 534, 56 Pac. 306; Pearce v. Strickler, 9 N. M. 467, 54 Pac. 748; Farmers' Development Co. v. Rayado Land & Irrig. Co. 18 N. M. 1, 133 Pac. 104. An examination of the cases, however, will show the assignments therein involved fall far short of being as specific as the ones quoted. While holding the two assignments stated to be sufficient, we do not desire to be understood as holding that all the others are insufficient. Some of them are equally good, but the two stated are, in fact, sufficient to present the decisive questions in the case.

Passing, now, to a consideration of the case on its merits. The first question logically requiring consideration is whether or not the court was in error in not permitting appellants to introduce evidence to show that they had been theretofore tried and acquitted by the lodge of the charges upon which they were expelled, and also for the purpose of showing that the order of expulsion was voted without evidence against the appellants, or without appellants having an opportunity to introduce evidence to combat the charges. In order to understand the question properly, it is perhaps advisable to briefly state the facts which appellants desire to prove, the offer of which was refused by the court. Section 35 of the standing rules of the association in question reads as follows: "Any member who, by verbal or written communication to railroad officials or others, interferes with a grievance that is in the hands of a committee, or at any other time makes any suggestion to any official that may cause discord in any division, shall be expelled as per §§ 49 and 54 of statutes, when proven guilty: Provided, however, this law shall not apply to a brother in official position, when called upon to express an opinion in his official capacity."

The statutes of the order provide for the filing of charges against a member and investigation by an investigating committee, and, if any evidence is found against the accused, he is to be furnished with a copy of the charges and notified when to appear for trial, at which trial the committee is required to produce the evidence against him, and the evidence in his defense is required to be heard, after which a vote of the members present is required to be taken by ballot, as to the guilt or innocence of the accused; and a majority vote is required to declare him guilty.

Appellants attempted to show that they have been accused of violating § 35 of the standing rules; that they had been tried as required by the statutes of the order, and that they had been adjudged not guilty; that thereafter, upon orders from the Grand Chief Engineer, new charges for the same identical offense had been filed against them; that they had been notified to appear for trial; that they appeared, and

protested against being tried the second time for the same offense; that no evidence was offered at the second trial; that a ballot was taken, and they were adjudged guilty, which resulted in their expulsion from the order. The minutes of the association, which were received in evidence, were silent as to whether appellants had been theretofore tried for the same offense. Said minutes recited that evidence had been taken. The court refused to permit proof of the facts to be given, holding that the minutes of the association were the best evidence as to what transpired at that meeting. It is true that the entry of an order of suspension or expulsion on the minutes of a society is prima facie evidence of its legality; but parol evidence is admissible for the purpose of showing that such minutes did not speak the truth, where it is sought to bind a member by such record, and also for the purpose of showing facts not recorded.

Evidence—records of corporation.

"The records and minutes of a private corporation are admissible to prove its acts, but they are not the only mode of proof. They are prima facie admissible, but may be rebutted by parol." Niblack, Ben. Soc. 2d ed. § 46; Supreme Lodge, K. H. v. Wickser, 72 Tex. 257, 12 S. W. 175.

Here we are not concerned with the question as to the amount of proof required to contradict the minutes, but with the question as to whether such evidence is admissible. Clearly, the court should have permitted appellants to have introduced the evidence in question.

The main question in this case, however, is as to whether the court rightly held that appellants had not exhausted their remedies within the order, by appeal; hence, were not entitled to the aid of a court of equity to compel their reinstatement as members of the association. The by-laws prohibit a resort to the courts until after the exhaustion by a member of his remedies within the order. In fact, it is provided that, if a member resorts to courts for the settlement of a grievance before exhausting his remedies within the order he shall be expelled. Section 87 of the statutes of the order reads as follows: "Should any member feel that any injustice has been done him by any decision of his division, he may appeal to the Grand Chief Engineer, making a written statement of his case, and file copy of same with the division, except cases of seniority, rights to runs, or distribution of territory, which belong to the chairman and general committee of adjustment, and upon receiving such statement the Grand Chief Engineer shall procure a written statement from the division, and after fully considering each, and the facts and evidence, as well as the law, render his decision, such decision to be final, and is to be complied with unless reversed by the action of the next G. I. D. Convention.

"A member making an appeal to the Grand Chief Engineer under this provision must file the same within sixty days after the action taken by the division of which he is a member."

Under this, a member aggrieved by a decision of the division with which he is affiliated is required to first appeal to the Grand Chief Engineer, and from his decision has a right of appeal to the Grand International Division Convention.

Appellants argue that the appeal would have been without avail, because the Grand Chief Engineer, to whom they were required first to appeal, prejudged their acts and had ordered the division to expel them; that the Grand International Division Convention would not meet for more than two years, and that in the meantime their insurance policies would have been forfeited; that, in such a case, the fact that the constitution and by-laws provide that a member may appeal to these tribunals within the association, and that he shall not be entitled to bring any civil action or legal proceedings until he shall have ex-

hausted all the remedies by such appeals provided within the order, does not debar him from remedy or relief in the courts of the state, because the obstacles to the prosecution of such an appeal amount to almost a denial of justice, and, if prosecuted, no relief could have resulted therefrom; that under the rules and regulations of the insurance fraternity appellants' insurance would have become forfeited before the meeting of the Grand International Division Convention, and that the Grand Chief Engineer had already prejudged the acts on their merits. There are many well-considered cases which sustain this contention. Brown v. Supreme Ct. I. O. F. 66 App. Div. 259, 72 N. Y. Supp. 806, and 176 N. Y. 132, 68 N. E. 145; Fritz v. Knaub, 57 Misc. 405, 103 N. Y. Supp. 1003; Corregan v. Hay, 94 App. Div. 71, 87 N. Y. Supp. 956. And see Bacon, Life & Acci. Ins. 4th ed. §§ 624, 625.

This question, however, we are not required to decide, because there is ample justification for a resort to the courts without appeal, in this case, upon another ground. This point was urged upon the lower court, and is likewise urged here, and, briefly stated, is as follows: That a member of an association, such as the Brotherhood of Locomotive Engineers, is only required to apply for relief by appeal, where the action of which he complains was regularly taken by the tribunal having original jurisdiction. In other words, where the original tribunal acts without jurisdiction, that is, without authority under the by-laws or rules, its order is null and void, and from such an order the complaining party is not required to appeal, but may seek redress in the civil courts.

It is claimed here that, under the by-laws of the association in question, a member cannot be tried a second time for the same offense; also, that he cannot be found guilty of an offense and expelled from the order, without a trial; that if he were tried a second time for the same offense of which he had been previously acquitted and, on the second trial, was found guilty and expelled, that the order of expulsion was null and void, in that the association had not the jurisdiction and authority to try him the second time for the same offense; also, that the order was made without jurisdiction, in that appellants were not allowed to introduce evidence to combat the charges. If a member of a society is once acquitted on a trial upon charges preferred against him, he cannot be tried again for the same offense, unless the by-laws of the association specifically authorize a second trial therefor. In Bacon on Life & Accident Insurance, vol. 1, 4th ed. § 130, the author says: "If a member of a society is once acquitted on a trial upon charges preferred against him, as, for example, by the failure of a resolution or motion for expulsion to pass, by reason of its not receiving the majority of votes required by the charter or by-laws, he cannot be tried again for the same offense. A subsequent passage of the same resolution, or motion, by the requisite majority of votes, is a nullity."

Associations—acquittal of member—effect.

The same rule is announced in Niblack, Ben. Soc. § 45. This proposition is so consonant with natural justice that it would seem to be indisputable. While it is true the by-laws of the association in question are silent upon the question as to whether a member can be tried the second time for the same offense, they do provide for a trial and a vote of the order upon the question of the guilt or innocence of the accused. We think that, before a member can be tried the second time for the same offense, the by-laws of the association of which he is a member should explicitly and clearly make such a provision; otherwise, such a construction should not be given to them. If this were not so, a member of such an association could be constantly harassed by repeated trials until,

becoming weary of the ceaseless vexations, he would either withdraw from the order, or permit a vote of expulsion without protest. Again, suppose, for example, that upon the first trial a member should be convicted; if the by-laws authorize any number of subsequent retrials upon the same offense, the member might procure the preferment of new charges, and secure a new trial, and a vote of acquittal. We do not think that the by-laws can be reasonably construed as authorizing a second trial upon the same charges. This being true, it necessarily follows that the lodge had no jurisdiction or authority to try appellants the second time for the same offense, and the question logically follows as to whether or not a member is required to appeal from a void order of expulsion, before resorting to the courts for relief.

Same—trial without jurisdiction.

While there is some conflict among the authorities upon this question, we believe that the weight of authority is to the effect that if the action of the lodge is without jurisdiction, or without notice or authority, it does not change the legal rights or status of anyone; that the obligation to appeal within the order is not imposed, when the judgment is void for want of jurisdiction. Bacon, Life & Acci. Ins. 4th ed. § 133; Hall v. Supreme Lodge, K. H. (D. C.) 24 Fed. 450; Mulroy v. Supreme Lodge, K. H. 28 Mo. App. 463; Hoeffner v. Grand Lodge, G. O. H. 41 Mo. App. 359; Malmsted v. Minneapolis Aerie, 111 Minn. 119, 137 Am. St. Rep. 542, 126 N. W. 486; St. Louis Southwestern Co. v. Thompson, 102 Tex. 89, 113 S. W. 144, 19 Ann. Cas. 1250; Supreme Lodge, K. P. v. Eskholme, 59 N. J. L. 255, 55 Am. St. Rep. 609, 35 Atl. 1055; Schou v. Sotoyone Tribe, 140 Cal. 254, 73 Pac. 996; Neto v. Conselho Amor Da Sociedade, 18 Cal. App. 234, 122 Pac. 973; Kohler v. Klein, 39 Misc. 353, 79 N. Y. Supp. 866; People ex rel. Deverell v. Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; Glardon v. Supreme Lodge, K. P. 50 Mo. App. 45; People ex rel. Keefe v. Women's Catholic Order of Forresters, 162 Ill. 78, 44 N. E. 401. In the latter case the court said: "But the weight of authority seems to be in favor of the position that the obligation to take the appeal allowed by the laws of the society does not exist, when the judgment is void for want of jurisdiction. A judgment of expulsion made by the lower tribunal, when it has no jurisdiction for want of notice to the member expelled, or for want of authority to entertain the charge brought against him, is regarded as null and void, like a judgment rendered by a court having no jurisdiction over the person or the subject-matter; and, in case of the rendition of such void judgment, the member affected by it is not bound to take steps to have it reversed in the higher tribunals of the society. Niblack, Ben. Soc. & Acci. Ins. 2d ed. § 47; 1 Bacon, Ben. Soc. & L. Ins. § 107. We think that, where the association is not acting within the scope of its powers, so far as to have jurisdiction over the member charged with an offense, and over the offense with which he is charged, then the expelled member is not under obligations to seek the remedy, by appeal, afforded by the laws of the society. In other words, the proceeding for expulsion must be in accordance with the constitution and by-laws of the society, to the extent that the member expelled shall have notice, and shall be tried upon a charge within the jurisdiction of the tribunal trying him. Pitcher v. Board of Trade, 121 Ill. 412, 13 N. E. 187."

The constitution and by-laws of such an association constitute the contract between the member and the association, and govern and limit the rights and liabilities of the member and the association. So

long as such an association is acting under such rules and regulations, and in accordance therewith, the member must likewise act, as he is required to do, under such a contract or rules and regulations. When, however, the association departs from the letter and spirit of the contract, and does an act which it is not authorized to do under the contract, it would be without reason to say that the member was required to conform to the rules, in order to secure relief from such unauthorized action. The contract, which is the constitution, rules, and regulations, operates alike on both the association and the member. He agrees that it shall have the right, for certain infraction of its rules, to expel him from his membership, in a certain prescribed manner; that, if it votes to expel him in that manner, he will not resort to the courts for relief until after he has exhausted his remedies in the order; that he will first appeal to the Grand Chief Engineer, and from his decision, if adverse, to the Grand International Division Convention. But he has not contracted that he will appeal from some decision rendered by the association, where he did not contract that it should have the power or authority to render such a decision.

Same—contract—by-laws.

Under the by-laws in question in these cases, appellants contracted that they would abide by the rules and regulations; that for an alleged violation of the same they would submit to a trial by the local organization with which they were affiliated; that, if convicted thereof, they would appeal within the order to the designated tribunals. They did not agree that they should be subjected to a second trial for an alleged offense, where once tried and acquitted, nor that they could be expelled without evidence being produced in support of the charges, or an opportunity to introduce evidence to controvert charges that might be brought against them, and that, if they were tried in a manner not authorized by the rules and regulations, they would appeal to the tribunals within the order. The case of Screwmen's Benev. Asso. v. Benson, 76 Tex. 552, 13 S. W. 379, holds that the exhaustion of the remedies within the order is a condition precedent to relief by mandamus, even though the expulsion was contrary to law and void. We are not inclined to follow this decision, as we are unable to understand why the member of such an association would not have the right to the remedy by mandamus to secure his reinstatement. The case of Brown v. Supreme Court, I. O. F. 66 App. Div. 259, 72 N. Y. Supp. 806, and 176 N. Y. 132, 68 N. E. 145, was a suit in mandamus, and the propriety of the action was sustained.

Appellees argue that appellants had no severable interest in the property belonging to the association, but we fail to see the applicability of this argument. Concededly, if the only interest affected by their expulsion was their joint ownership of the Bible and gavel, the courts would not interfere. But the property rights of appellants were affected by their expulsion. The insurance policies, which they had carried for years, were subject to cancelation, and would be canceled, unless they were reinstated to membership. This property right justified the assumption of jurisdiction by the civil courts.

Appellees further claim that appellants are barred in this case by the equitable maxim, "He that hath committed iniquity shall not have equity;" that it appears from the undisputed facts in the case that appellants committed an act contrary to the constitution, statutes, and standing rules of said association, for which the penalty provided is expulsion from said association. We fail to see how this equitable maxim applies in this case. It may be, as asserted, that they did violate a rule of the association, and that they had been found

guilty of so doing, and had been expelled without notice; that a court would not reinstate them, if they admitted their guilt. But here the question as to whether they had violated the rule in question had been submitted for determination to the tribunal established by the statutes of the association for that purpose, and this tribunal, after a trial in the manner provided by the statutes, determined that appellants were not guilty. It is neither alleged nor claimed that appellants practised any fraud or deception in the first trial, or were guilty of any inequitable conduct in regard to the same. This being true, and the matter having been determined by the tribunal established for that purpose, in accordance with the rules of the association, we fail to see the applicability of the rule stated.

When the local association, the tribunal established and agreed upon for the determination of the question, said that appellants were not guilty, after a trial had in the manner prescribed, the question of their guilt or innocence was settled. Having been adjudged not guilty, the appellants were, after such adjudication, entitled to enjoy the benefits of their contract, and to protection against its breach by appellees. The contract provided how a member might be expelled, and his rights under the contract terminated. His rights were not cut off by a violation of the by-laws, but by an adjudication by the constituted tribunal that he had violated the same. The adjudication was that they (appellants) had not violated the by-laws in question; hence, no right of expulsion existed under the by-laws.

Same—acquittal —guilt.

It is possible that injunction was not a proper remedy, on other grounds (Bacon, Life & Acci. Ins. § 613, and Niblack, Ben. Soc. § 54); but, as no point is made in this regard, it will not be considered.

For the reasons stated, the cause will be reversed, and remanded to the District Court, with instructions to proceed in accordance with the views herein expressed; and it is so ordered.

Hanna, Ch. J., and Parker, J., concur.

ANNOTATION.

Second trial of member of association for same offense.

Generally.

The few adjudications on the point are to the effect that, if a member of a society or association is once acquitted on charges preferred against him, he cannot be tried again for the same offense, unless the by-laws of the association specifically authorize a second trial therefor. Niblack, Ben. Soc. § 45; Com. v. Philadelphia (1821) 6 Serg. & R. (Pa.) 469. And see the reported case (RUEB v. REHDER, ante, 423) wherein it is said that this proposition is so consonant with natural justice that it would seem to be indisputable.

In Com. v. Philadelphia (Pa.) supra, it appeared that a meeting for the trial of a member was convened, the member heard in his defense, and thereupon the question of his guilt was put to a vote. There not being the requisite constitutional majority to convict, this amounted to an acquittal, and it became the duty of the board to declare that the member had been acquitted of the charges exhibited against him. However, at a later meeting, business was again resumed, and a resolution of the board, that the member should be expelled in consequence of a violation of his duties, was passed. There was no new charge, no new specification, no hearing of the cause de novo, no new defense, nor was the accused called on to make one. The court held that he was twice put in jeopardy for the same offense, condemned after he had been acquitted, and granted a per-

emptory mandamus for his restoration to membership.

Where the by-laws of an association are silent on the question whether a member can be tried the second time for the same offense, but do provide for a trial and a vote of the order on the question of the guilt or innocence of the accused, and the question whether two members had violated a rule thereof had been submitted for determination to the tribunal of the association, established by its rules for that purpose, and it, after a trial in the manner thereby provided, had determined that they were not guilty, the fact that they were actually guilty is held, in the reported case (RUEB v. REHDER) not to be a defense in an action for reinstatement, on appeal from an order of expulsion, rendered on a verdict of guilty on a second trial for the same offense.

The records and minutes of an association being subject to rebuttal by parol evidence, where the minutes of an association, as received in evidence, were silent as to whether the plaintiffs had theretofore been tried for the same offense, it is held in the reported case (RUEB v. REHDER) that the trial court improperly refused to allow plaintiffs to introduce evidence to show that they had been theretofore tried and acquitted by the lodge, of the charges on which they were expelled, and also to show that the order of expulsion was voted without evidence against the plaintiffs, and without their having an opportunity to introduce evidence to combat the charges.

Previous trial invalid.

Where it appeared that the first proceeding against a member of an association was without notice, formal complaint, or trial, and was had in his absence, and that the board of directors, on being advised that it was not only irregular, but utterly void, annulled the whole proceeding and restored the member to membership, it has been held that the first void proceeding against the member was no bar to a subsequent regular proceeding for the same offense. State ex rel. Cuppel v. Milwaukee Chamber of Commerce (1879) 47 Wis. 670, 3 N. W. 760. Compare, however, in this respect, Otto v. Journeymen Tailors' Protective & Benev. Union (1888) 75 Cal. 313, 7 Am. St. Rep. 156, 17 Pac. 217, wherein the court found that the rescission by the central body of the expulsion of a member was not made in good faith, but was made only for the purpose of trying and expelling him again for the same offense.

In Doljanin v. Austrian Benev. Soc. (1902) 137 Cal. 165, 69 Pac. 908, it appeared that the constitution of a society, after providing for the procedure for the preferment of charges, notice to the offending member, the selection of the trial committee, the trial itself, the report and verdict of the committee, and notice thereof, provided that, where no exceptions thereto were filed by the accused, there might be imposed expulsion, or other penalties, as should be decided by a two-thirds affirmative vote of all the members present. It also appeared that the plaintiff was duly tried before a trial committee of the society, on charges duly preferred, and after notice duly given him, on which trial the committee found him guilty of several offenses against the laws of the society, and recommended his expulsion. The report, findings, and recommendation of the committee were duly filed, and, the plaintiff not excepting thereto, were considered at a regular meeting of the society. The result of the balloting was entered by the secretary of the society in its minutes, to the effect that the ballots of a *majority* of the members of the society then present were in favor of the member's expulsion. This vote, at the instance of the plaintiff member, was, by a court of competent jurisdiction, adjudged to be void, and the member's reinstatement ordered, with which order the society complied. After setting aside, at a regular meeting, the order purporting to expel the plaintiff, the society thereupon proceeded to consider the report of the committee, and, finding that the

charges were true, the plaintiff was expelled by a vote of more than two thirds of the members then present. The court held that the decree annulling the first vote did not, in any way, affect the trial of the member before the committee, or its verdict and recommendation, and, the first vote being void, did not deprive the society of jurisdiction thereafter to take a vote which would be valid.

H. D. B.

MAX PLESOFSKY
v.
KAUFMAN & FLONACKER.

Tennessee Supreme Court—June 1, 1918.

(140 Tenn. 208, 204 S. W. 204.)

Damages — inability to pay cash.

1. A buyer need not accept the seller's offer to complete the sale for cash upon breaching his contract to extend credit, in order to mitigate the damages, if he is not able to pay cash.

[See note on this question beginning on page 436.]

Same — breach of contract for credit — mitigation.

2. A buyer need not, upon seller's refusal to comply with his contract to extend credit, purchase from seller in order to mitigate damages, if the seller imposes conditions of part advance payment and balance payment of draft against bill of lading.

Evidence — burden of proof — ability to pay cash.

3. The seller has the burden of showing that a buyer might, upon his breaching his contract to extend credit, have accepted his offer to complete the sale for cash and thereby have mitigated his damages.

(Fentress, J., dissents.)

PETITION for a writ of certiorari to review a judgment of the Court of Civil Appeals, affirming a judgment of the Circuit Court in favor of plaintiff in an action brought to recover damages for breach of a contract to extend credit. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. **Banks & Harrelson** for defendant.

Mr. **Ben Matthews** for plaintiff.

Williams, J., delivered the opinion of the court:

Plesofsky is a retail clothier in the city of Memphis, and purchased of the defendant firm, doing business in New Orleans, a bill of Palm Beach suits for delivery, for the summer trade, about eight months later. The sellers, on accepting the order, gave notice that they would not permit a cancelation.

Near the date set for delivery the sellers wrote the purchaser the following letter (April 14, 1916) in reply to a communication from him: "The reason your order has not been shipped is that we have been unable to get our credit department to approve same. The only way we can have same approved for shipment is on a cash basis, allowing you 6 per cent discount in lieu of the terms. If this will be satisfactory to you, let us have your check for $100 to apply on the account and we will let the goods go forward without delay, bill of lading attached."

A few days later the purchaser wrote the sellers, calling their at-

tention to their previous statement that a cancelation of the order would not be accepted, and saying that he was solvent both at the time the order was given and at the date of his letter; that he had "turned down" other dealers with whom he had done business and who had extended him credit; that he could not accept the sellers' new terms; and that he had made advance sales and his customers were asking about the goods. He said, further: "I am responsible for any debt I make and have always met my obligations. I might have been slow at times, but have always paid same. This is a late date for you to be writing about your credit department and new terms after I have depended on you. . . . I expect that you will ship according to your agreement."

The facts set forth in this letter were shown to be such by plaintiff's proof in this action for damages for defendant's breach. There was no proof that he was able to pay cash, or to borrow funds in order to do so.

May the defendant sellers prevail upon the theory that the buyer should have availed of the opportunity to minimize the damages incident to their breach of his contract by taking delivery for cash according to the offer embodied in the letter of April 14, 1916?

The decision in Lawrence v. Porter, 26 L.R.A. 167, 11 C. C. A. 27, 22 U. S. App. 483, 63 Fed. 62, opinion by Judge Lurton, is referred to as supporting authority. The rule in that case is thus summarized in the headnote in 26 L.R.A. 167: "The duty to minimize loss requires a buyer, upon breach by the seller of a contract to sell goods upon credit, to accept the latter's unconditional offer . . . at a reduced price for cash on delivery, where he is able to accept it, and goods of that kind and quality are not purchasable from other parties."

The decision rests upon the theory that the disappointed buyer does not surrender or yield his original contract or any right of action he may have for its breach. "It rests wholly upon the duty of mitigating the loss by replacing the goods by others, if they are obtainable by reasonable exertion. If this duty be such as to require him to buy from the delinquent seller, if the article can be obtained only from him, or because he offers it cheaper than it can be obtained from others, such a purchase from the seller is not the abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage, save in so far as the damage resulting from his bad faith was thereby reduced. If the seller offers to sell for cash at a reduced price, . . . with the condition that it should operate as a waiver of the original contract, or of any right of action for its breach, then the buyer would not be obligated to treat with the seller, nor would the seller's offer, if rejected, operate as a reduction of damages."

In other words, the seller is not excluded from or to be treated as no longer a part of the market to which the buyer may be held to resort to mitigate his damages, in event the seller offers to sell as stated. We believe that this is a sound doctrine when thus understood and when its severe limitations are regarded. Limited as it is, it must have a narrow application.

The decision in Lawrence v. Porter has been criticized in Coxe Bros. & Co. v. Anoka Waterworks, Electric Light & P. Co. 87 Minn. 56, 91 N. W. 265, but in our view the strictures are based upon a misconception of the theory underlying that decision, which we have just attempted to restate. The criticism runs as follows: "We quite agree with the proposition that it is the vendee's duty to minimize or mitigate loss growing out of a vendor's refusal to perform his contract, but we are convinced that it was a totally unwarranted and unprecedented application of that rule. The

cases cited fall far short of supporting it, and a careful research compels us to say that it is not sustained by a single authority. The learned editor of the Lawyers' Reports Annotated, in the note before mentioned, refers to it as a 'somewhat striking' application of the rule as to the duty of a party to a contract, which has been broken without his fault, to keep down damages. We quite agree with him. It is striking because it 'strikes out' of a contract entered into by a vendor and a vendee one of the conditions, and substitutes another, to which the parties have not assented. It entirely abrogates the contract as made by the parties, and forces upon them another and wholly different one made by the court. . . . It requires the vendee to secure and pay cash, less an amount equal to the interest . . . whether satisfactory or not."

The doctrine set forth in the Lawrence Case has been rejected by several other state courts. Louis Cook Mfg. Co. v. Randall, 62 Iowa, 244, 17 N. W. 507; Havemeyer v. Cunningham, 35 Barb. 515; Creve Cœur Lake Ice Co. v. Tamm, 90 Mo. App. 189, 198.

The doctrine announced in the Lawrence Case is not to be applied here. The facts of the pending case bring it within two of the exceptions recognized by Judge Lurton in the opinion.

The first of these is that the offer to sell must be unconditional. Here, the offer to deliver was not for cash, but on prepayment of $100, and balance cash on delivery, and with bill of lading attached, radical changes in the original contract. The sellers, not being willing to credit the buyer as they had contracted to do, demanded that he credit them to the extent of $100; and, harder still, they would even then ship the goods only on bill of lading attached to a draft. This was a stipulation that the buyer was not compelled to submit to. If the law should require him to do so in order to mitigate damages, it would require a small retailer, struggling to build up his credit, by his own hand to put the bar sinister on that credit by holding himself out as one who must buy his goods under the imposed safeguard of a bill of lading attached. The agents of the carrier or of the bank who should handle the papers would become aware of the plight of the buyer. The law will never place such a distasteful and hurtful burden on a confessedly wronged buyer at the instance of those who stand as guilty breachers of their contract with him.

Damages—breach of contract for credit—mitigation.

In a later case, after referring to the ruling as to the duty to mitigate damages announced in Lawrence v. Porter, supra, Judge Lurton himself recognized the narrowness of the rule of that case, saying: "The duty imposed by the equitable rule referred to must be held within reasonable bounds. It is a rule which has never been regarded as requiring one to yield to a wrongful demand, that he may thereby save the wrongdoer from the legal consequence of his own error." Hirsch v. Georgia Iron & Coal Co. 95 C. C. A. 76, 169 Fed. 578.

And that there must be no change in the conditions of the sale contract, see Coulter v. B. F. Thompson Lumber Co. 74 C. C. A. 38, 142 Fed. 708; Minnesota Threshing Mach. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993.

Another limitation on the rule is that it does not apply unless the buyer is able to accept the offer and pay cash. The essential justice of this restriction lies in the fact that many tradesmen, especially small retailers, must operate on the capital of others. They must have a period of credit for the goods within which they may make sales of them and use the proceeds toward liquidation. Such a buyer enters into a contract for his supplies, disclosing that he must have credit. What fairness

Same—inability to pay cash.

could there be in a rule which would permit the vending wholesaler or manufacturer at a late and critical date, when the buyer must have goods, to say: "Pay cash; if you haven't it, use your credit and find it in bank. We tender you the equivalent or better for the discount you will have to pay."

That would be to mock the buyer, who frankly and confessedly from the outset was never able to pay cash and was in need of the credit. The breaching sellers in this case would be in the attitude of saying to the buyer that he did not have and was not worthy of credit from them, but that he must procure it from another.

As said, the decision in Lawrence v. Porter, supra, recognizes this in the following language: "We do not, therefore, consider whether special damages might not, under some circumstances, be recovered, which were sustained by reason of the inability of plaintiffs [the purchasers] to pay cash for lumber to replace that which defendants had contracted to sell them on credit. It follows that if plaintiffs were able to buy, and did not, they cannot throw upon the defendants any special losses incident to their own failure to mitigate the injury as far as they reasonably could."

This being true, upon whom rests the burden of showing that the buyer had cash, or, by the use of credit, was able to pay cash?

It so happened that one of the counsel of the winning party in the suit of Lawrence v. Porter later went upon the bench of the same court, and he had to deal with the doctrine of that case. Judge Knappen in Campfield v. Sauer, 38 L.R.A.(N.S.) 837, 111 C. C. A. 14, 189 Fed. 579, restated the above limitations on the rule, and then dealt with this question of the burden of proof. He said: "The burden of proving that the damages alleged have been sustained . . . could have been prevented or mitigated by" the plaintiff's "action rested upon" the seller guilty of the breach, citing Lillard v. Kentucky Distilleries & Warehouse Co. 67 C. C. A. 74, 134 Fed. 178 (opinion so announcing being by Judge Lurton); Kentucky Distilleries & Warehouse Co. v. Lillard, 87 C. C. A. 190, 160 Fed. 40; Howard Supply Co. v. Wells, 100 C. C. A. 70, 176 Fed. 516. See also 8 R. C. L. p. 655.

Evidence—burden of proof—ability to pay cash.

If this were not the rule applicable in the pending case, we would have the law requiring the injured buyer to damn his credit by pleading and adducing proof that he was without cash or the credit that was requisite to raise the cash which could alone bring the suggested mitigation; and this, for the protection of the guilty party.

If and so far as the truly great judge who wrote the opinion in Lawrence v. Porter indicated a view to the contrary in regard to the burden of proof in such case, it does not find support in the earlier or later authorities or sound principle.

The defendants did not carry the burden that was on them in the instant case.

Writ of certiorari to the Court of Civil Appeals, which affirmed the judgment of the Circuit Court, is denied.

Fentress, J., dissents.

ANNOTATION.

Duty of purchaser on credit to accept seller's offer to deliver for cash.

The courts are not agreed as to whether or not the rule that the innocent party to a contract owes a duty to use reasonable diligence to minimize his damages due to a breach thereof by the opposite party requires the buyer of goods on credit to accept the seller's offer to deliver the goods on a cash basis, while refusing to deliver the same on a credit basis, as

agreed. All of the cases considering the question assume that if the buyer was not in a financial condition to pay cash, the seller cannot lessen the damages by offering to deliver the goods on a cash basis. The difference in opinion arises where it appears that the buyer was in a position to pay cash for the goods, although as hereinafter specifically pointed out in a few cases, it does not appear that the ability of the buyer to pay cash was considered by the court in holding that it is not the duty of the buyer to minimize his damages by buying of the seller on a cash basis. The weight of authority and the sounder reason favors the rule that credit is generally one of the material elements in a contract for the sale of goods on credit, and that the courts should not modify the contract in this respect by changing a credit contract into a cash contract; and hence it is held that where the seller refuses to deliver goods sold on credit unless paid in cash, his offer to sell for cash cannot be relied upon by him to lessen the damages which the buyer is entitled to recover for this breach of the contract:

—Coppola v. Marden, O. & H. Co. (1917) 282 **Ill.** 281, 118 N. E. 499, holding that a provision for credit in the sale of an article is a material element of the contract; and where the seller refuses to deliver except upon payment of cash, the buyer may purchase elsewhere upon credit terms, and hold the seller for the loss resulting to him; and he is under no obligation to meet the seller's terms and thus minimize his damage;

—Louis Cook Mfg. Co. v. Randall (1883) 62 **Iowa**, 244, 17 N. W. 507, holding that the buyer of goods on credit need not accept the seller's offer to furnish goods upon a cash basis;

—Frohlich v. Independent Glass Co. (1906) 144 **Mich.** 278, 107 N. W. 889, holding that where the seller of goods on credit refuses to furnish the same except upon a cash basis unless the prior account of the buyer is settled, the latter is under no obligation to lessen his damage by buying from the seller for cash;

—F. W. Kavanaugh Mfg. Co. v. Rosen (1902) 132 **Mich.** 44, 102 Am. St. Rep. 378, 92 N. W. 788, holding that where the seller refused to ship the balance of goods sold on credit, unless the buyer paid for instalments already shipped, although payment for the same was not then due, and the buyer offered to pay cash for the balance of the goods, but did not offer to pay for those already received until payment was due, which offer the seller did not accept, the buyer was entitled to recover damages for the breach of contract, including loss of profits;

—Coxe Bros. & Co. v. Anoka Waterworks & Electric Light & P. Co. (1902) 87 **Minn.** 56, 91 N. W. 265, declaring that the application of the general rule relating to minimizing damages in a case of the character under consideration in effect abrogates the contract as made by the parties, and forces upon them another and wholly different one, made by the court;

—Weber Implement Co. v. Acme Harvester Mach. Co. (1916) 268 **Mo.** 363, 187 S. W. 874, applying the rule, where the circumstances disclose that the buyer did not have the pecuniary ability to pay cash as required by the seller;

—Creve Cœur Lake Ice Co. v. Tamm (1901) 90 **Mo. App.** 189, declaring that it is going a great way to require an obligee to show that much solicitude for a defaulting obligor, and such requirement would tend to encourage a disregard for covenanted duties; and it also savors of oppression to compel a performing party to the contract to enter into new relations with a person who has wilfully broken his obligation, solely to protect the latter from loss;

—Lakner v. Korn (1917) 164 **N. Y. Supp.** 165, holding that the buyer of goods on credit was entitled to recover damages from the seller for breach of contract for refusing to deliver goods unless cash were paid for the same. The question under consideration is not discussed.

In the reported case (PLESOFSKY v. KAUFMAN, ante, 433) it is held that where the buyer is not shown to be financially able to pay cash, as required by the seller of goods sold on

credit, the latter cannot rely upon his offer to furnish the goods for cash to lessen his liability for loss to the buyer, due to this breach of the contract. The court, however, recognizes that the buyer might be under the duty of paying cash to the seller if he was pecuniarily able to do so.

In Havermeyer v. Cunningham (1861) 35 Barb. (N. Y.) 515, while not involving the specific point here raised, it is held that the rule of damages for not delivering goods sold is the difference between the price agreed to be paid and the market value on the day of delivery; and this rule cannot be varied by any offer by the seller to sell goods to the buyer for less than the market value, although at a higher price than the contract price.

In Coppola v. Marden, O. & H. Co. (Ill.) supra, in discussing the point it is said: It is a sound and wholesome rule that makes it the duty of one damaged by the unlawful act of another to use reasonable diligence to prevent or lessen the damage; but to construe this rule to apply to a case of this character would be to impose a burden upon the vendee of doing what the contract relieved him from in order that the guilty party might be saved from the full consequences of his wilful wrongdoing.

In Louis Cook Mfg. Co. v. Randall (Iowa) supra, it is said that the object of the buyer in making the contract for time was to be able to deal in the goods upon credit. To say that where credit is refused the buyer is required to purchase for cash is to deprive him of the very benefits the contract contemplates he will receive. The condition as to credit is an important and essential provision in the contract, and the law will not presume that the defendants could have paid cash for the goods, and usually does not require them to do so where they are not shown to have been able to.

It has been held that where the seller of goods on credit refuses to deliver them except upon payment of cash, it is the duty of the buyer, in order to minimize his damage from the breach, to purchase the goods on a cash basis if he is able to do so. Lawrence v. Porter (1894) 26 L.R.A. 167, 11 C. C. A. 27, 22 U. S. App. 483, 63 Fed. 62. In this case the seller offered to furnish the goods on a cash basis, at a sufficient discount to more than offset the interest on the money the buyer would have to use to buy the goods on a cash basis for the credit period. Under these circumstances it was held that the buyer could recover at most but nominal damages for the breach.

And in Deere v. Lewis (1869) 51 Ill. 254, without discussing the point it is held that where the manufacturer of machinery refuses to deliver the same unless paid therefor in cash, at a discount from the credit price, recovery by the buyer for a breach of the contract is limited to nominal damages. Compare with Coppola v. Marden, O. & H. Co. (1917) 282 Ill. 281, 118 N. E. 499.

In Warren v. Stoddart (1882) 105 U. S. 224, 26 L. ed. 1117, it is held that the buyer was not entitled to credit under the terms of the contract which the court construed; but the court, after thus disposing of the case, said that, even though it were conceded that the contract entitled the buyer to a term of credit, and the seller refused to deliver unless cash was paid, under the circumstances this breach of the contract would not entitle the buyer to replace the articles with much more expensive ones and hold the seller for the difference in the cost, but he might have purchased the specific articles of the seller by paying him cash therefor.

In Smith v. Rosenwasser (1915) 191 Ill. App. 95, it is held that where the seller refuses to deliver goods sold on credit unless cash is paid, or payment guaranteed by a third person, it is the duty of the buyer to obtain similar goods and reduce his damages; and where he does not do so, he can recover only nominal damages. Compare with Coppola v. Marden, O. & H. Co. (Ill.) supra.

In Hirsch v. Georgia Iron & Coal Co. (1909) 95 C. C. A. 76, 169 Fed. 578, while not involving this particular point, in referring to the ruling applied in the Porter Case, it is said that the duty imposed by this equitable rule must be held within reasonable

bounds. It has never been regarded as requiring one to yield to a wrongful demand, that he may thereby save the wrongdoer from the legal consequences of his error.

A case not within the scope of this note, although of interest on the point, is Georgia Marble Finishing Works v. Minor (1917) 128 Ark. 124, 193 S. W. 498, which involved the sale of articles on credit. The seller delivered the goods to the carrier for shipment to the buyer, shipment to be on open bill of lading consigned to the buyer. By mistake, however, the bill of lading was sent to the buyer through a bank, attached to a draft, and the seller refused to deliver the bill of lading until the draft was paid. The buyer brought an action to recover the possession of the property on the theory that title had passed to him by delivery to the carrier, and the action was sustained. A. G. S.

FAYETTE OSBURN, Admr., etc., of Estelle Osburn Keister, Deceased, Plff. in Err.,

v.

D. E. KEISTER et al., Exrs., etc., of Z. E. Keister, Deceased.

Virginia Supreme Court of Appeals—June 13, 1918.

(— Va. —, 96 S. E. 315.)

Husband and wife — action for killing wife.

The statutes removing the disabilities of married women give the wife no right to sue the husband for assault, and therefore her personal representatives have no right of action against him for wrongfully causing her death.

[See note on this question beginning on page 449.]

ERROR to the Circuit Court of the City of Norfolk to review a judgment in favor of defendants in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the wrongful act of defendant's testator. *Affirmed.*

Statement by **Sims, J.**:

This case is before us upon review of the action of the court below in sustaining a demurrer to the declaration of the plaintiff in error against the defendants in error, and dismissing the declaration in an action for damages for the death of the plaintiff's intestate, alleged to have been caused by the wrongful act of the testator of the defendants in error.

The material facts appearing from the allegations of the declaration are that a wife (the plaintiff in error's intestate) was killed by her husband (the defendants in error's testator); that the husband and wife were lawfully married, and were living together in that relationship when the wife was so killed; that the husband survived his wife, and then died, leaving a will by the appointment of which the defendants in error duly qualified as his executors.

Mr. **E. R. Baird, Jr.**, for plaintiff in error.

Mr. **E. R. F. Wells**, for defendants in error:

The action cannot be maintained, because if Mrs. Keister had not died she could not have maintained an action for damages for personal injuries, either against her husband in his lifetime, or against his executors after his death.

Russell v. Sunbury, 37 Ohio St. 372,

41 Am. Rep. 523; Wilson v. Brown, — Tex. Civ. App. —, 154 S. W. 322; 21 Cyc. 1519; Thompson v. Thompson, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921; Longendyke v. Longendyke, 44 Barb. 366; Freethy v. Freethy, 42 Barb. 641; Strom v. Strom, 6 L.R.A. (N.S.) 191, and note, 98 Minn. 427, 116 Am. St. Rep. 387, 107 N. W. 1047; Bandfield v. Bandfield, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Schultz v. Christopher, 65 Wash. 496, 38 L.R.A.(N.S.) 780, 118 Pac. 629; Lillienkamp v. Rippetoe, 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901; Peters v. Peters, 156 Cal. 32, 23 L.R.A.(N.S.) 699, 103 Pac. 219.

Inasmuch as no action was instituted against Mr. Keister in his lifetime, it cannot now be brought against the executors of his will, because the liability died with him, and did not survive.

Moe v. Smiley, 125 Pa. 136, 3 L.R.A. 341, 17 Atl. 228; Johnson v. Farmer, 89 Tex. 610, 35 S. W. 1062; Hegerich v. Keddie, 99 N. Y. 259, 52 Am. Rep. 25, 1 N. E. 787; Carrigan v. Cole, 35 R. I. 162, 85 Atl. 934; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192; Brown v. Wightman, 47 Utah, 31, L.R.A.1916A, 1140, 151 Pac. 366; Clark v. Goodwin, 170 Cal. 527, L.R.A.1916A, 1142, 150 Pac. 357, 10 N. C. C. A. 1022; Davis v. Nichols, 54 Ark. 358, 15 S. W. 880; Russell v. Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523; Bates v. Sylvester, 205 Mo. 506, 11 L.R.A.(N.S.) 1162, 120 Am. St. Rep. 761, 104 S. W. 73, 12 Ann. Cas. 457; Anderson v. Hygeia Hotel Co. 92 Va. 687, 24 S. E. 269; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; Baltimore & O. R. Co. v. Ritchie, 31 Md. 191.

Sims, J., delivered the opinion of the court:

The following positions with respect to the law are well settled, and are not questioned by counsel in the case:

Notwithstanding the existence of the statutes, §§ 2902, 2903, and 2906 of the Code of Virginia, the plaintiff in error, in the instant case, had no right to maintain the action, and the demurrer was therefore properly sustained by the trial court, unless the wife, had she survived would have had a right of action against the husband, had he survived, for damages for an assault upon her by him during the coverture. At common law, no such right of action existed on the part of the wife. If such a right of action existed at the time the action in the instant case was instituted, it was conferred by § 2286a of Pollard's Code of Virginia 1904 (Acts 1899–1900, p. 1240). That part of such statute relied on as conferring the right of action in question is as follows: "... A married woman may contract and be contracted with, sue ... in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by ... her, shall have accrued before or after the passage of this act. ..."

The sole controverted question in the case upon which its decision turns, is:

1. Has the statute last quoted changed the common law on the subject, and conferred upon a married woman a right of action against a husband for damages, for an assault upon her committed by the husband during the coverture?

This is a question of first impression in this state, and, must, therefore, be resolved by a consideration of it upon principle and the construction of the statute last quoted, with such aid as we can obtain from the decisions of other jurisdictions, construing statutes on the same subject.

In approaching this question we have to bear in mind the elementary principle that a right of action at law can in no case exist unless: (a) The plaintiff be found to have had, at the time the alleged cause of action arose, a substantive civil right the breach or invasion of which right (constituting, in the case of a tort, a civil wrong) gave rise to a cause of action; and (b) the plaintiff be found to have had, at the time the action is instituted, a civil remedy by action at law.

In regard to the very ancient

maxim that wherever there is a right there is a remedy, it is said in 1 Cooley on Torts, 3d ed. p. 22: "No Wrong without a Remedy.—Judicial development of the law is perceived in two forms: In the recognition of rights and in giving a remedy for the invasion or deprivation of rights. . . . A right cannot be recognized until the principle is found which, supports it. But when a right is found, a remedy must follow of course."

The primary inquiry confronting us in the instant case, therefore, is whether the married woman's statute in Virginia, the portion of which relied on by the plaintiff in error is quoted above, confers upon married women during coverture the substantive civil right essential to support a cause of action in a suit at law for damages instituted during the coverture by a wife against her husband for an assault upon her committed by the husband during the coverture?

The substantive civil right in question is a legal existence, a legal personality, of a married woman, separate and apart from the legal personality of her husband, during coverture. Such a right a married woman had not, and has not at common law.

The inquiry before us, therefore, is not whether the statute relied on, as aforesaid, has given married women the same remedies they would have if unmarried (whether as if they had never married, or as if no longer married), to enforce or to obtain compensation for the invasion of substantive rights which may accrue to married women (whether at common law or by statute), but whether the statute aforesaid has conferred on married women the particular substantive right aforesaid. This is apparent when we consider that the statute may do the former completely, and yet, if a married woman be not given the civil right aforesaid, out of the invasion of which only can arise the cause of action in question, the remedy given her by the statute can avail her nothing, in an action such as that in question.

Hence, it must be constantly borne in mind in the consideration of the subject before us that the primary inquiry is: Has the statute last quoted conferred upon married women the substantive right above mentioned; has it changed the rule of the common law on this subject?

Now, with respect to the construction of statutes in derogation of the common law, there are certain well-settled rules which have been so long and so well established that we need but to refer to them. Among those rules is the following: The legislature is presumed to have known and to have had the common law in mind, in the enactment of the statute; and the statute will be construed to read as if the common law remained unchanged (that is to say, the statute will be read along with the provisions of the common law, and the latter will be read into the statute), unless the purpose of the statute to change the common law appears from the express language of it, or by necessary implication from such language. The existence of the rule last mentioned is not controverted in the instant case. We do not, therefore, occupy space in discussing it, or citing authority to sustain the statement of such rule.

Coming now to construe the statute of Virginia aforesaid in the light of the common law on the subject, and by aid of the rule of statutory construction mentioned, we are met by the following considerations:

Such statute does not expressly confer the substantive right aforesaid. Does it do so by necessary implication? If so, it must, of course, be done by words of no uncertain meaning, by language which must be entirely consistent with the common law on the subject remaining unaltered.

Whether the statute above quoted confers on married women the substantive right aforesaid manifestly depends, in the last analysis, upon ascertaining to what point of time,

in the life of the married woman asserting the right of action in question, the statute means to refer, in its reference to her status as "unmarried," and also upon ascertaining the meaning with which the statute uses the word "unmarried." Does it mean to refer to the time of the arising of the alleged cause of action (to the time of the assault of the husband upon the wife in a case such as the instant case), and to say that the status of a married woman shall be regarded, as of that time, as if it were the same as if she had never been married, or does the statute refer to the time the suit or action is instituted, and mean to say that, as of the latter time, she shall be regarded as not having a husband? Are we to construe the clause of the statute, "as if she were unmarried," to mean "as if she did not have a husband," or "as if she had never been married." It is only by the latter construction that any foundation can be found on which to rest the position that the statute, by implication, changes the common law, and confers upon married women the substantive right aforesaid.

Now, the word "unmarried" originally and ordinarily means, it is true, *never having been married;* "but the term is a word of flexible meaning, and slight circumstances will be sufficient to give the word its other meaning of *not having a husband or wife at the time in question.*" 8 Words & Phrases, 7196. (Italics supplied.) The subject of that part of the statute which is under consideration is the right of married women to sue (and also their liability to be sued, on the side of the statute not quoted above, and with which we are not concerned in the instant case). If the legislature had intended to confer upon married women the substantive civil right of a legal existence and legal personality separate and apart from that of the husband, during coverture, nothing was easier than for it to have said so, in language of no uncertain meaning. If it intended not to confer such a substantive right, but merely to enlarge the remedies of married women with respect to to other substantive rights of theirs existing at common law and conferred by the first portion of this very statute, the language of the statute was appropriate to accomplish the latter purpose, and its object is fully accomplished when the statute is given that meaning. It is not necessary, therefore, that any further meaning be given to it. This being so, we cannot, under the rule of construction above referred to, give any further meaning to it. Hence, it seems clear to us that the statute, in its use of the word "unmarried," has reference to the time the suit or action in question is instituted, and uses the word "unmarried" with the meaning of "not having a husband" at the time of the suit or action. Such being the meaning with which the word "unmarried" is used in the statute, clearly the effect of the statute, as above indicated, is merely to provide that all disabilities of married women *to sue* (and be sued) are thereby removed, *as of the time a suit or action is instituted* by (or against) a married woman upon any cause of action then existing by or against her. That is to say, the statute under consideration merely provides that, at all times during the coverture, a married woman is thereby given a right to sue, provided she had, at the time it is alleged that the cause of action arose, the substantive civil right which was necessary, as aforesaid, to give rights to such cause of action. The statute, therefore, is entirely consistent with the common law, which does not confer the substantive right aforesaid on married women, and hence does not change the common law, in that regard, by implication. That is to say, the portion of the statute under consideration has reference only to the remedies thereby given to married women, and does

not confer the substantive right necessary to support the right of a married woman to sue her husband for an assault upon her committed by him, during the coverture.

Husband and wife—action for killing wife.

Such is the conclusion to which we are led by a consideration of the statute on principle and under what are universally considered and admitted to be proper rules of construction of such a statute. We are confirmed in that conclusion by our examination of the authorities on the subject.

In the case of Fitzpatrick v. Owens, 124 Ark. 167, L.R.A.1917B, 774, 186 S. W. 832, 187 S. W. 460, Ann. Cas. 1918C, 772, relied on by the plaintiff in error, a portion of the Married Woman's Act of Arkansas was substantially the same as that portion of the Virginia statute above quoted. Such portion of the Arkansas statute is as follows: ". . . Every married woman and every woman who may in the future become married shall have all the rights . . . to sue . . . as though she were a feme sole." Laws 1915, p. 684.

As to that portion of the Arkansas statute, the Arkansas court, in a very able opinion by McCulloch, Ch. J., in the case last cited, said: "The words 'to sue and be sued,' when considered by themselves, merely enlarge the remedies of a married woman, and do not enlarge her rights."

It is true that the Arkansas court, in the case last cited, held that the Married Woman's Act of that state conferred the substantive right aforesaid upon married women, and that an action by a married woman against her husband for damages, for an assault committed upon her by the husband during coverture, may be maintained in that state under such statute. But the language of that statute is materially different from the Virginia statute relied on in the instant case. The Arkansas statute, in addition to the language above quoted therefrom having reference to the remedies of married women, contains also the following language conferring substantive rights: " . . . In law and equity shall enjoy all rights, and be subject to all the laws of this state as though she were a feme sole."

This language appears in the Arkansas statute, in the following connection: " . . . Every married woman and every woman who may in the future become married shall have all the rights . . . to sue . . . and *in law and equity and shall enjoy all rights, and be subject to all the laws of this state, as though she were a feme sole.*" (Italics supplied.)

It was because of the words which we have italicized that the Arkansas court held that the substantive right aforesaid was conferred by the statute of that state on married women. This clearly appears to have been the controlling factor in that decision, as will be seen from the following quotation from the opinion of the court in that case: "An analysis of the language of the statute shows that the legislature meant to complete the work of emancipation, and to give married women all the rights and remedies possessed by unmarried women. The words 'to sue and be sued,' when considered by themselves, merely enlarge the remedies of a married woman and do not enlarge her rights, but in considering the significance of those words we must do so in connection with the words which precede and which follow, and undoubtedly the use of those words serves to give a remedy for all the rights found to have been enlarged by the preceding words and those which follow. Now, the preceding words confer, in unqualified terms, the right of the married woman 'to contract and be contracted with,' and the words which follow declare in the very broadest terms her right, 'in law and equity,' to 'enjoy all rights and be subject to all the laws of the state as though she were a feme sole.' If this language be

given any effect at all in the light of preceding statutes enlarging the rights of the married woman, it necessarily means that a married woman is to enjoy in law and equity all the rights which she would enjoy if she still remained *a single woman*, and that with respect to those rights she may sue and be sued." (Italics supplied.)

In the Virginia statute on the subject, we have no provision corresponding with the Arkansas statute, conferring on married women all substantive rights to be enjoyed by her as "if she still *remained a single woman*." (Italics supplied.) Hence, the decision last cited is no authority for the position that the same construction should be given the Virginia statute as that given the Arkansas statute. On the contrary, the principle on which the Arkansas decision was correctly based is opposed to such a construction of the Virginia statute.

With us the merger of the legal existence of a married woman, during coverture, in the personality of the husband, has, it is true, been removed by statute, so as to exist no longer with respect to many subjects, but not as to all subjects. As we have seen above nothing can be found in that portion of our statute relied on, as aforesaid, which has the effect of declaring that a married woman shall, during the coverture, have a separate legal existence and personality from that of her husband, as if she had never been married. Many disabilities of married women have been removed by the statute in Virginia, both with respect to their rights and remedies, but not all, with respect to her personal rights, certainly. To give only one illustration: It was held by this court in Norfolk R. & Light Co. v. Williar, 104 Va. 679, 52 S. E. 380, per the syllabus of that case: "Notwithstanding the comprehensive provisions of the present Married Woman's act in this state (Acts 1899–1900, p. 1240), the husband is still entitled to the services of his wife, and in an action by her to recover damages for injury inflicted upon her, where the only testimony as to diminution of her ability to perform her ordinary duties related to her impaired capacity for attending to her household duties, it is error to instruct the jury that, in assessing the damages, they may take into consideration the diminution, if any, of her physical ability to perform the ordinary duties of life, as the language of the instruction covers damages for which the husband alone can recover.

Here is a substantive right not conferred on married women by the statute, which would have been conferred upon them if the construction of it relied on by the plaintiff in error were correct.

We are indebted to the learning and diligence of able counsel on both sides of this case for their exhaustive citation and discussion of the numerous authorities construing statutes of other jurisdictions, on the subject of the right of action of married women against their husbands for torts committed upon them, during coverture, by their husbands. All of such authorities have been carefully examined and considered. We shall here cite those of them which in any way, even remotely, seem to us to throw light upon the question before us. Fitzpatrick v. Owens, supra; Fiedler v. Fiedler, 42 Okla. 124, 52 L.R.A.(N.S.) 189, 140 Pac. 1022; Brown v. Brown, 88 Conn. 42, 52 L.R.A.(N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70; Gilman v. Gilman, 78 N. H. 4, L.R.A. 1916B, 908, 95 Atl. 657; Thompson v. Thompson, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A.(N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921; Longendyke v. Longendyke, 44 Barb. 366; Freethy v. Freethy, 42 Barb. 641; 2 Bishop, Married Women, § 377, approving the two last-named cases; Schultz v. Schultz, 27 Hun, 26, contra to the two New York cases last above cited, but reversed in Schultz v. Schultz, 89 N. Y. 644, holding in accord with the before named New York cases;

Lillienkamp v. Rippetoe, 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901; Peters v. Peters, 156 Cal. 32, 23 L.R.A.(N.S.) 699, 103 Pac. 219; Strom v. Strom, 98 Minn. 427, 6 L.R.A.(N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047; Schultz v. Christopher, 65 Wash. 496, 38 L.R.A.(N.S.) 780, 118 Pac. 629; Peters v. Peters, 42 Iowa, 182; Bandfield v. Bandfield, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382; Sykes v. Speer, — Tex. Civ. App. —, 112 S. W. 422; 1 Cooley, Torts, 3d ed. p. 474.

In view of the importance of the subject, we will make some special reference to those of the above cited decisions which involve the construction of statutes, which are most nearly like the Virginia statute we have before us for construction.

The case of Thompson v. Thompson, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A.(N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921, was an action by a wife against her husband for damages for an assault upon her by him, committed during the coverture, and involved the construction of the District of Columbia statute. That statute, so far as material, was as follows: "Married women shall have the power to . . . sue separately . . . for torts committed against them, as fully and freely as if they were unmarried." D. C. Code, § 1155 [31 Stat. at L.] 1374, chap. 854.]

In all essential particulars, this statute is the same as the Virginia statute we have under consideration. The majority opinion in the Thompson Case held: "The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort, which, at common law, must be brought in the joint names of herself and husband."

In this opinion it is also said: "We cannot but regard this case as another of many attempts which have failed to obtain, by construction, radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration."

Mr. Justice Harlan delivered a dissenting opinion in the Thompson Case, in which Mr. Justice Hughes and Mr. Justice Holmes concurred. They were of opinion, in substance, that the statute, by necessary implication, changed the common law on the subject, and conferred upon married women the right to maintain such an action. The dissenting opinion takes the position that such a result necessarily followed from the language of the statute unless there was read into and added to the statute the following language not found therein: "Provided, however, that the wife shall not be entitled in any case to sue her husband . . . for a tort committed against her person."

With the utmost respect for the learned judge who delivered such dissenting opinion, and the two learned judges who concurred therein, we are of the opinion that upon principle, apart from its authority, the opinion of the majority of the Supreme Court, in that case, is sustained by the better reasoning. In truth, it was but the common law which the majority opinion read along with, and hence read into, the statute, in the particular just stated. If the statute conferred rights of remedy, only, in respect to torts, and not substantive rights, upon married women, this rule of the common law and the provision of the statute could both stand and be read together. Hence, there was no change of the common law by the statute, by implication. And so the majority opinion held.

In New York, the statute concerning married women which was construed in the New York cases above cited was as follows: "Any married woman may bring and maintain an action in her own name for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole." Laws 1860, chap. 90, § 7.

Here, again, we have a statute very like the Virginia statute we have under consideration. In all essential respects the statutes are the same. As the result of the decision of the court of last resort of New York, in the case of Schultz v. Schultz, 89 N. Y. 644, reversing the holding of the supreme court of New York, in that case, in conflict with the cases of Freethy v. Freethy, 42 Barb. 641, and Longendyke v. Longendyke, 44 Barb. 366, the holding of the two last named cases must be taken to be the construction of the New York statute by its court of last resort. Such construction is that the New York statute above quoted does not confer upon a married woman the right to sue her husband for assault or slander committed upon or spoken against her during the coverture. The court in the Freethy Case in its opinion said: "When the legislature intends to make such a striking innovation of the rules of the common law, . . . it should use such language as will make it clearly manifest, and not leave it to the construction of the courts."

In Fiedler v. Fiedler, supra, in which it was held that the substantive right aforesaid was conferred upon married women by the statute of Oklahoma, the statute law construed provided, amongst other things, that "women *shall retain the same legal existence and legal personality after marriage as before marriage.* . . ." (Italics supplied.) "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." "Detriment is a loss or harm suffered in person or property." "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state. . . ."

The express language of the statute: "Women shall retain the same legal existence and legal personality after marriage as before marriage," conferred upon married women the substantive civil right of a legal existence and legal personality, apart from the personality of the husband, during coverture. Hence, an assault by the husband upon a wife, although during coverture, would be in violation of such civil right, and would give rise to a cause of action therefor in the wife. Therefore, the next following provision of the Oklahoma statute above quoted conferred upon the wife a remedy in the premises by action for damages. Upon principle, therefore, the decision last cited is wholly in accord with the positions taken above, and it was unnecessary for the court in that case to rely at all upon the statute of Oklahoma last above quoted. Hence there is nothing in the construction, by such case, of the Oklahoma statute to warrant the same construction of the Virginia statute. Indeed, a consideration of the former statute discloses the precise enactment which is lacking in the Virginia statute, to confer the substantive civil right upon married women, which is necessary, as aforesaid, to support the action in the instant case.

It is true that in Connecticut and New Hampshire it is held that Married Women's Acts, which seem to us to have gone no further than the Virginia statute law on the subject, have completely emancipated married women from all disabilities of coverture, both as to rights and remedies, and hence have conferred on married women the substantive civil right aforesaid. Brown v. Brown, 88 Conn. 42, 52 L.R.A. (N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70, and Gilman v. Gilman, 78 N. H. 4, L.R.A.1916B, 908, 95 Atl. 657. These are the only decisions to which we have been cited, or which we have been able to find, which are inconsistent with the conclusion we have reached above. For the reasons above stated, however, we cannot consider that these decisions are correct upon principle, and hence we cannot follow them.

The case of Peters v. Peters, 156

Cal. 32, 23 L.R.A.(N.S.) 699, 103 Pac. 219, should, perhaps, be referred to on the question as to whether other portions of § 2286a of the Virginia statute, not quoted above (and not relied on, indeed, by the plaintiff in error) confer the substantive right aforesaid upon married women. The first part of the Virginia statute referred to confers upon married women the substantive right to acquire and hold property, etc., "as if she were unmarried." Here, plainly, the reference in the statute to the status of "unmarried" is to be referred to the point of time when the property is acquired or is held, and hence the statute plainly confers upon women, married at the time they acquire and hold property, the substantive civil right to do so. And the subsequent provision of the statute, conferring rights of remedy upon married women, operates to give them right of action for the violation of any of their rights of property, conferred by the preceding portion of the statute, as well as by the common law. Now, as flowing from these considerations, the question arose in the Peter's Case, whether the right of a married woman to sue her husband for a tort committed upon her by the husband, during coverture, was her property. Of course, if she had such a right of suit, it was, in truth, property. But, as was held in the Peters Case, whether such a right existed was the very question in issue; and it was but begging the question to say that, if she possessed such a right, it was property, and ergo the statute conferred such right when it conferred on married women the right to acquire property. The question still remained whether the statute conferred on married women the substantive right aforesaid, and it was decided that the effect of the provisions of a statute, substantially the same as that of the first part of the Virginia statute aforesaid, did not confer such a substantive right.

But one aspect of the instant case remains to be dealt with by us. It is urged upon our consideration, in behalf of the plaintiff in error, that the statute law, as well as the common law, existing aforetime, should be borne in mind by us in construing that portion of § 2286a relied on as aforesaid, and that the latter statute should be construed in the light of prior statute law on the subject. This should undoubtedly be done, and will be done by us.

Attention is called by counsel to the provision contained in § 2284 of the Code of Virginia of 1887 which is as follows: "Nothing, however, in this or any other section of this chapter shall be construed as giving to a married woman a right to damages or a right of action therefor against her husband for any injury to her person or reputation committed by him before their marriage or during the coverture."

Attention is also called by counsel to what was said by this court in Hirth v. Hirth, 98 Va. 121, 34 S. E. 964, to wit: "If the object of the revisers had been to emancipate all married women from the disabilities of coverture, there would have been no need of chapter 103 of the Code, but it might have been accomplished in a few brief sentences in one section;" and to the fact that this opinion was rendered on the 15th of February, 1900, and that the legislature, in March next following, in Acts 1899–1900, p. 1240, by enacting § 2286a aforesaid, amended §§ 2291, 2293, 2294, and 2296, and repealed the remaining sections of chapter 103 of the Code of 1887, including § 2284 aforesaid. And it is urged that, in view of the broad language of § 2286a aforesaid, with respect to the right to sue thereby given to married women (quoted in the first part of this opinion), the repeal of § 2284 aforesaid, containing the express provision thereof aforesaid, "is the strongest evidence of the existence of an intention upon the part of the legislature not to forbid the assertion of a right such as the plaintiff is in this case insisting upon," and that it is, indeed, strong evidence that the legislature in-

tended to confer and did confer such right on married women by § 2286a aforesaid. There are three considerations which seem to us to wholly negative the inference thus sought to be drawn: First, the statute (Acts 1899–1900, p. 1240) was a general act on the subject, in which the entire Married Woman's Law was recast and condensed, and nine sections of the Code of 1887, including the entire § 2284, were repealed. It is not a case of the amending of a statute, and leaving out a certain portion or portions of the former statute and retaining other portions of it, which necessarily have a different meaning with the former portion, or portions, left out. In principle, the same rule of construction is applicable to such an act as is applicable to a general codification of statute laws. No intention to change the meaning or effect of prior statutes is to be inferred from a mere change of phraseology in the statute, as codified. The presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new. Harrison v. Wissler, 98 Va. 597, 36 S. E. 982. Secondly, § 2284 of the Code of 1887 expressly conferred substantive rights upon married women, and when it expressly stated that the separate estate of a married woman ". . . shall include rights in action, damages for a wrong . . . to which she becomes entitled during coverture," it was necessary for the legislature to include in that section such an express provision as that above quoted, negativing the intention to include the right of a married woman "to damages, or a right of action therefor against her husband," etc., in order to prevent such a right being given by construction of such statute, contrary to the legislative intention. In view of the wholly different phraseology of the subsequent statute (§ 2286a), however, which did not include, expressly or impliedly, "rights in action, damages for a wrong . . . to which she becomes entitled during coverture" among the substantive rights conferred by the statute on married women, it was manifestly unnecessary for the negative provision aforesaid to be included in the § 2286a statute. This consideration is amply sufficient to account for the omission of such negative provision in the latter statute. Thirdly, the language of the § 2286a statute is such that clearly, as above shown it will not admit of the construction contended for by the plaintiff in error. To give it such a construction would be to effect, by an unwarranted judicial construction (to use in part the language of the Supreme Court of the United States in the Thompson Case, above quoted) a "far-reaching change in the policy of the common law, not declared in the terms of the legislation under consideration."

The further question is raised in the instant case whether, if there was a right of action aforesaid in the wife, it survived against the personal representative of the husband. In view of our conclusion that there was no such right of action in the wife, the further question mentioned does not arise in the case before us, and hence we do not deal with it in this opinion.

For the foregoing reasons, we hold that there was no error in the action of the court below in sustaining the demurrer to the declaration of the plaintiff, and the judgment complained of will be affirmed.

Burks, J., concurring:

I concur in the results of Judge Sims's opinion, and will state briefly the ground of my concurrence.

At common law, husband and wife were, for the most part, regarded as one, and that one was the husband. By the mere fact of marriage he became the owner of all her tangible personal property, as fully as if he had bought and paid for it. He also became the owner of all her choses in action, provided he reduced them into possession, actual or constructive, during the cover-

ture. He was entitled to the rents and profits of her real estate during the coverture, and, under certain conditions, this right was enlarged to an estate for his life in such rents and profits. She could not make a will, nor a contract, nor could she sue or be sued alone. It was these restrictions upon her rights and powers that were considered "a reproach to our civilization," and led to the enactment of statutes in every state of the Union removing, to a greater or less degree, these common-law disabilities. But it must be borne in mind that marriage is something more than a mere civil contract. The mere act of marriage gives rise to a new status between the parties thereto and society, and to new rights and obligations between the parties themselves. It creates the most sacred relation known to society, and is fostered, regulated, and protected by statute. Upon the preservation of its integrity the health, morals, and purity of the state is dependent. For these causes "shall a man leave his father and mother and cleave unto his wife, and they twain shall be one flesh." The like obligation rests upon the wife. It is the duty of the husband to support his wife, and to shield, defend, and protect her in every way possible. It is the duty of the wife to reverence her husband, and to serve him. These duties grow out of the mere act of marriage. The husband may not present a bill against his wife for board and clothing, nor the wife present to her husband a bill for presiding over the household. The law will not imply a contract to pay such bills. By the act of marriage, the parties thereto establish a unit of society, which automatically carries with it primary obligations, which cannot be destroyed without reducing that honorable estate to mere licensed cohabitation. These obligations inhere in the mere fact of marriage, and forbid the idea that this "one flesh" may so divide itself that either spouse may sue the other. Of course it is competent for the legislature to sever this unity so far as it may seem wise to do so, and it has severed it in respect to the wife's property; but, to warrant a holding that either spouse may sue the other for slander, libel, or assault, the language of the statute should be so plain that there could be no room for difference of opinion on the subject. This cannot be said of our statute, which simply provides that: "A married woman may contract and be contracted with, sue and be sued, in the same manner, and with the same consequences, as if she were unmarried, whether the right or liability asserted by or against her shall have accrued before or after the passage of this act."

Statutes in derogation of the common law are to be strictly construed, and I am unwilling, upon such language as is contained in the foregoing statute, to obliterate the primary obligations growing out of the marriage relation, to revolutionize the whole law relating to husband and wife, and open the courts to the public discussion of domestic differences, which, when of sufficient consequence, may be settled by the chancellor in suits for divorce, or by prosecution for violation of the criminal laws of the state.

ANNOTATION.

Action against husband for causing death of wife.

There are numerous cases discussing the broader question of the right of a wife to sue her husband for a personal tort, the reported case (OSBURN v. KEISTER, ante, 439) as well as the majority of the cases therein cited and reviewed, taking the view that such a right did not exist at common law, but is dependent upon legislative enactment. Upon the narrower

question indicated in the title of this note, only two cases other than OSBURN v. KEISTER have been found.

It will be observed that the OSBURN CASE holds that the Married Woman's Statute of Virginia did not change the common law so as to permit a wife to sue her husband for a personal tort, and that therefore a personal representative of the wife could not sue her husband for damages, for her death by his wrongful act.

So, taking the view that legislative enactment has not changed the common-law rule that neither spouse could maintain an action against the other, to recover damages founded solely upon a tort, it is held in Wilson v. Brown (1913) — Tex. Civ. App. —, 154 S. W. 322, that under the statute conferring a right of action for death by wrongful act, and declaring that "no recovery can be had unless the wrongful act, negligence, carelessness, unskilfulness or default of the defendant is of such character that the deceased, if death had not ensued, could have recovered damages for the injury inflicted," a guardian could not sue a husband for damages to infants, in consequence of the murder of their mother by the husband, for the mother could not have maintained an action against the defendant husband for injuries inflicted upon her by him, had she survived.

The Arkansas case, Fitzpatrick v. Owens (1916) 124 Ark. 167, L.R.A. 1917B, 774, 186 S. W. 832, 187 S. W. 460, Ann. Cas. 1918C, 772, which reaches a result different from either of the above cases, is commented upon and distinguished in the opinion of the OSBURN CASE. It is held in Fitzpatrick v. Owens that where married women are, by statute, given the right to sue and be sued, and to enjoy in law and equity all rights as though sole, a man wrongfully causing the death of his wife is liable in damages, under a statute imposing liability in damages for wrongful death in case the person injured might have maintained an action had death not ensued.

J. D. C.

NATIONAL MARKET COMPANY, Appt.,

v.

C. W. COIT et al.

MARYLAND CASUALTY COMPANY, Respt.

Washington Supreme Court (In Banc)—June 22, 1918.

(100 Wash. 377, 174 Pac. 479.)

Assignment — of check for labor claim — effect.

The assignment of a bank check given by a contractor in payment of a labor claim is not an assignment of the claim so as to be enforceable against the contractor's bond.

[See note on this question beginning on page 454.]

(Parker, Fullerton, and Mount, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Superior Court for King County dismissing an action brought to hold defendant casualty company liable as surety on a contractor's bond. *Affirmed.*

The facts are sufficiently stated in the opinion of the court.

Mr. Howard O. Durk, for appellant:

The assignment of a labor claim operates as an equitable assignment of the laborer's right to assert his claim against the bond.

Northwestern Nat. Bank v. Guardian Casualty & G. Co. 93 Wash. 635, 161 Pac. 473, Ann. Cas. 1918D, 644; Gilmore v. Westerman, 13 Wash. 390, 43 Pac. 345; Paul v. Vancouver, 89 Wash.

331, 154 Pac. 453; Small v. Smith, 120 Minn. 118, 139 N. W. 133.

The statute under which the defendant surety's bond was given is in lieu of the right of lien to a laborer, and analogous to it. The bond is given as security and the right to recourse against it passes by operation of law, with the assignment or transfer of a debt secured thereby.

Hines v. Consolidated Coal & Lime Co. 29 Ind. App. 563, 64 N. E. 886; United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400; Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 55 L. ed. 72, 31 Sup. Ct. Rep. 140; Sepp v. McCann, 47 Minn. 364, 50 N. W. 246; St. Paul v. Butler, 30 Minn. 459, 16 N. W. 362; Peters v. St. Louis & I. M. R. Co. 24 Mo. 586; Lewis v. Lodge, 32 Wash. 191, 72 Pac. 1009; Seattle Nat. Bank v. Emmons, 16 Wash. 585, 48 Pac. 262; Griffith v. Burlingame, 18 Wash. 429, 51 Pac. 1059; Thomson v. Koch, 62 Wash. 438, 113 Pac. 1110; Union Iron Works Co. v. Kilgore, 65 Minn. 497, 67 N. W. 1017; Gray v. Bever, 122 Ill. App. 1.

Messrs. Grinstead & Laube, for respondent:

A check is not an assignment of any part of the fund.

People's Sav. Bank & T. Co. v. Lacy, 146 Ala. 688, 40 So. 346; Pease v. State Nat. Bank, 114 Tenn. 693, 88 S. W. 172; Kaesemeyer v. Smith, 22 Idaho, 1, 43 L.R.A.(N.S.) 100, 123 Pac. 943.

An assignment is not the equivalent of a negotiation.

Paine v. Smith, 33 Minn. 495, 24 N. W. 305; Andrews v. Whitehead, — Tex. Civ. App. —, 60 S. W. 800; United States use of Fidelity Nat. Bank v. Rundel, 40 C. C. A. 450, 107 Fed. 227; Citizens' Trust Co. v. Mullinix, 149 C. C. A. 187, 235 Fed. 875; Macy v. Roedenbeck, L.R.A.1916C, 12, 142 C. C. A. 42, 227 Fed. 346; Paul v. Vancouver, 89 Wash. 331, 154 Pac. 453.

Only parties to negotiable instruments are liable thereon.

Bank of British North America v. Hooper, 5 Gray, 567, 66 Am. Dec. 390; Adams v. First Nat. Bank, — Tex. Civ. App. —, 178 S. W. 993; Mineral Belt Bank v. Elking Lead & Zinc Co. 173 Mo. App. 634, 158 S. W. 1066; Beckham v. Decker, 9 Mees. & W. 79, 152 Eng. Reprint, 35.

The parties to an assignment must have intended that the transaction should constitute an assignment.

Fourth Street Nat. Bank v. Yardley, 165 U. S. 633, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83, 17 N. E. 671; Title Guaranty & Surety Co. v. State, 61 Ind. App. 268, 109 N. E. 237, 111 N. E. 19; First Nat. Bank v. Texas Moline Plow Co. — Tex. Civ. App. —, 168 S. W. 420; Duncan v. Guillet, 62 Colo. 220, 161 Pac. 299; Re Hollins, L.R.A.1915B, 438, 131 C. C. A. 349, 215 Fed. 41.

Tolman, J., delivered the opinion of the court:

This case was heretofore before this court, and a departmental decision was rendered which will be found in 100 Wash. 370, 170 Pac. 1009, to which reference is made for a fuller statement of the facts. After the filing of that opinion, a petition for rehearing in banc was filed, which was granted, and the case was reargued before the court in banc.

A sufficient statement of the facts for present purposes is: That the appellant became the owner and holder of seven checks, which it purchased from seven different payees. These checks were drawn by C. W. Coit & Company, and by them delivered to workmen employed upon a public contract which they were engaged in fulfilling. The Maryland Casualty Company, the respondent, furnished the surety bond upon such contract. The checks were the ordinary bank checks, drawn by the contractor in favor of the various laborers, on the Guardian Savings Bank of Seattle. There was nothing on the face of the checks to show what they were issued for, or differentiate them in any way from ordinary bank checks. These checks were indorsed by the various payees, and delivered to the appellant, who paid value therefor in cash or merchandise. Appellant alleges knowledge on its part, at the time of the purchasing of the checks, that the same were issued to the various laborers for work done by them for Coit & Company under their contract. It is stipulated, however, that no assignment has ever been made of the

laborers' claims other than the ordinary indorsement and delivery of the checks.

The respondent Maryland Casualty Company demurred to appellant's complaint setting up these facts, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, appellant elected to stand upon its complaint, and judgment was entered, from which this appeal is taken.

We have repeatedly held that a labor claim assertable against the bond of the contractor engaged in a public work is assignable, and that the assignment of such a claim carries with it all of the laborer's right of action against the contractor, and operates as an equitable assignment of the laborer's right to assert his claim against the bond. Northwestern Nat. Bank v. Guardian Casualty & G. Co. 93 Wash. 635, 161 Pac. 473, Ann. Cas. 1918D, 644; Gilmore v. Westerman, 13 Wash. 390, 43 Pac. 345. Which leaves the only question to be decided here, the effect of the issuance of ordinary checks by a contractor to a laborer, and whether the indorsement of such checks carries with it an assignment of the laborer's claim against the contractor, and the right of lien, or to protection under the bond.

In Northwestern Nat. Bank v. Guardian Casualty & G. Co. supra, it was held that the time checks there under consideration were certificates, evidencing that each of the laborers had worked a certain time upon the public work, at a certain rate, and were entitled to a certain amount of money in payment from the contractor. And each time check bore the indorsement: "For value received I hereby assign to the Northwestern National Bank all my right, title, and interest to the within time check."

The court, having these facts in mind, said: "It is only by virtue of his right to receive his pay from the contractor that the laborer or materialman has any right assertable against the bond as a contract made for his benefit. His right against the bond is ancillary to and dependent upon his right against the contractors. The first right is dependent upon the second. An assignment of the second, therefore, operates as an equitable assignment of the first,"—a doctrine which we in no wise modify, but which is clearly distinguishable, we think, from the case under consideration.

In Small v. Smith, 120 Minn. 118, 139 N. W. 133, it is held that time checks are not negotiable under the law merchant, but are the "evidence and symbol" of the claim for labor of the person therein named. It needs no argument to show that a time check, bearing on its face such facts as are referred to in the Northwestern Nat. Bank Case, supra, is indeed the "evidence and symbol" of the claim of the laborer, and that the assignment thereof is properly held to be an assignment of the laborer's claim, carrying with it all of the equitable rights. It seems to us equally clear that a time check, bearing the evidences before referred to, is in no wise a negotiable instrument, does not confer upon the payee or the indorsees any of the rights which would flow from a negotiable instrument, and that the purchaser of such a time check must know that he is taking by assignment the laborer's claim and nothing more, with no right whatever of recourse upon the laborer in any event.

A bill of exchange or negotiable instrument is defined by our Negotiable Instruments Law substantially as follows: "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand . . . a sum certain in money to order or to bearer." Rem. & Bal. Code, § 3516.

Such an instrument is negotiated by indorsement and delivery, is in-

dorsed by writing the signature of the payee thereon, and, as provided in the Negotiable Instruments Act (Rem. & Bal. Code, § 3457), every indorser who indorses without qualification warrants to all subsequent holders in due course: (1) That the instrument is genuine; (2) that he has good title to it; (3) that all prior parties had capacity to contract; (4) that the instrument is valid and subsisting; and, in addition, he engages that it will be paid on presentation, and if it be dishonored, and the necessary proceedings be duly taken, he will pay the amount thereof to the holder, or any subsequent indorser.

The fundamental error in our former opinion was the holding that the indorsement and delivery of the check was the assignment of the debt, instead of its being simply and only what the Negotiable Instruments Law provides it shall be. The ordinary bank check, is not either in law or in equity, an assignment of the fund upon which it is drawn (Rem. & Bal. Code, § 3579); but is purely and simply an order for the payment of money, which in no wise affects the debt for which it is given until the order is paid, and, being dishonored, leaves the drawer still indebted to the payee, the same in all respects as though the check had never been drawn and delivered. Moreover, such a check is revocable by the drawer at any time before it is paid. People's Sav. Bank & T. Co. v. Lacey, 146 Ala. 688, 40 So. 346; Pease v. State Nat. Bank, 114 Tenn. 693, 88 S. W. 172; Kaesemeyer v. Smith, 22 Idaho, 1, 43 L.R.A.(N.S.) 100, 123 Pac. 943.

The equitable doctrine that the assignment of the debt will carry with it the security, which of course cannot be applied here, because there was no assignment of the debt, has grown up for the purpose of protecting the assignee of the debt, who otherwise would have no means of protecting himself from certain loss. It is in no wise applicable in this case: First, because the debt was not assigned; and, second, because the appellant purchased and accepted negotiable instruments, and its rights were fully fixed by the Negotiable Instruments Law. It had full and clear legal right, upon the dishonor of the checks, to return them to the payees who indorsed them and delivered them to it, and receive back its money, or, if it be urged that the payees and indorsers were execution proof, and could not respond in money, there seems to be no reason why they could not and would not, upon request, have assigned to the appellant their claims against the contractor, which had been in no wise impaired by the giving of the checks, and which were then still enforceable under the bond. And in such an event there could have been no question of double liability on the bond; and no doubt the claims would have been paid without litigation.

We have examined with great care all of the cases to which the industry of counsel has directed our attention, and have made independent search of the authorities, but have found no case wherein any court has held that the indorsement of an ordinary bank check by the payee carries with it, to the indorsee, title to the claim which the check would have paid had it been honored, or any rights, legal or equitable, under such claim.

Assignment—of check for labor claim—effect.

It follows from what has been here said that the judgment of the trial court was right, and it is accordingly affirmed.

Main, Ch. J., and **Mitchell**, **Holcomb**, and **Chadwick**, JJ., concur.

Parker, J., dissenting:

I adhere to the views expressed in our former decision. I think the Negotiable Instruments Law has no controlling force as between the contractor issuing these checks and the laborers, the payees thereof, nor as between the contractor and appellant, to whom the laborers

transferred the checks. Nor do I think the answer to the question of the assignment of any funds supposed to be on deposit in the bank against which the checks were drawn is of any consequence here. To my mind the problem simply reduces itself to this: What are the rights of the laborers as against the casualty company, the surety upon the bond, and does appellant stand in the shoes of the laborers? That the laborers, even after receiving their checks, retained all their rights as against the surety, of course, is plain, because the checks, until they should be actually paid by the bank, would not pay the laborers' claims. I think it follows that, when the laborers transferred their checks to appellant, it then stood in the shoes of the laborers as to all their rights against the contractor and the surety.

I do not think the suggestion that the contractor or casualty company might be called upon to pay the laborers' claims twice adds any weight to the argument advanced in the majority opinion; for both the contractor and his surety would have available to them all the defenses that the contractor would be entitled to make as against any other assignable, non-negotiable chose in action. If the contractor had stopped payment upon the checks at the bank, and thereafter paid the laborers without notice of the laborers having transferred their checks, which I am convinced was an equitable assignment of the debts which the checks evidenced, of course, both the contractor and the casualty company would be relieved from further obligations to pay the laborers' claims. Again, let us be reminded that it is not a question of appellant seeking recovery upon these checks as negotiable instruments.

Since writing our former decision, there has come to my notice the decision of the supreme court of California in the case of Goldman v. Murray, 164 Cal. 419, 129 Pac. 462, wherein there were involved promissory notes, negotiable in form, given by a corporation in payment of its debt due the payee therein named, but which notes were void as negotiable instruments because of want of authority of the corporation to issue them. The notes being assigned by the payee to the plaintiff, by indorsement and delivery only, he was awarded recovery upon the theory that he thereby became the assignee of the debt for which the notes were attempted to be executed. In so holding it was said: "The intent of the parties—of Bowen, on the one hand, to assign, and of the plaintiff, on the other, to accept, the assignment of the corporation indebtedness—thus clearly evidenced by the transaction between them, is not affected by the fortuitous circumstances that the notes themselves were invalid as corporation obligations. They still had validity, not as negotiable instruments, but as evidencing the contract between Bowen and the plaintiff, and this contract amounted to a valid equitable assignment."

Had there been some security to which the creditor to whom the notes were issued had the right to look for the payment of the debt owing him by the corporation, manifestly it would have inured to the benefit of the plaintiff as assignee of the debt.

For these reasons I dissent.

Fullerton and Mount, JJ., concur with Parker, J.

ANNOTATION.

Indorsement of bank check as carrying the title or rights incident to the original claim for which the check was given.

Apart from the reported case (NATIONAL MARKET CO. v. COIT, ante, 450) there is very little authority as to the effect of the transfer of a bank check, upon the original claim or upon rights arising out of the transaction in which

the check was given. In Leach v. Hill (1898) 106 Iowa, 171, 76 N. W. 667, one who had contracted to pay the checks of another was held liable to an indorsee of a check issued by such other, on the theory that the transfer of the check transferred the right under this contract, where such was the intention of the parties. In answer to the argument that the action in this case was upon the check alone, it is stated that the action, as to the one who had guaranteed the payment of the check, was not upon the check alone, but upon his contract of guaranty, which inured to the benefit of the payee of the check. Continuing, the court states that "if nothing more appeared than the check and the indorsement thereof, it might be said that Early [the guarantor] is not liable; but he is confronted by his contract with Sisson [the person whose checks were guaranteed]. This court has many times held that an assignment of a debt carries with it the security. It has been so held where promissory notes, secured by a mortgage, were transferred, and we see no reason why the rule should not apply to the transfer of checks. Early's liability is in the nature of a security, and, under this rule, passed with the transfer of the check. J. C. Hill [the payee of the check] could transfer his right of action against Early by parol, and it is manifest that both he and Leach [the indorsee of the check] intended and understood that all rights which Hill had, growing out of the transaction, were to pass to the plaintiff. By his agreement, Early promised acceptance and payment of the check of Sisson given for stock purchased, and this obligation passed by the transfer of the check, and plaintiff is entitled to maintain an action thereon."

In The Chelmsford (1888) 34 Fed. 399, the transfer, by indorsement, of a draft upon the owners of a vessel, given by the master to those who had furnished supplies to the vessel, under circumstances which gave them a lien therefor, was held to transfer the lien. The court states that "the transfer of the indebtedness transferred the lien. The latter was security simply for the debt, and, as in all other instances, it follows the debt to the transferee."

There is considerable authority as to whether the assignment of a check is an assignment of the fund on which it is drawn, but that presents a question not within the scope of this discussion. W. A. E.

SARAH M. HOPE, Respt.,

v.

THE MACCABEES, Appt.

(— N. J. —, 102 Atl. 689.)

New Jersey Court of Errors and Appeals—November 27, 1917.

Insurance — false statement of age.

1. A merely incorrect statement of one's age in an application for membership in a beneficial order, without more, cannot be said, as matter of law, to be wilfully false, even if untrue in fact.

[See note on this question beginning on page 459.]

Trial — refusal to direct verdict.

2. Where the laws of a beneficial order provide that, should a member engage in certain prohibited occupations or become intemperate in the use of intoxicating liquors, his benefit certificate shall become null and void, and the testimony did not show conclusively that the member was so engaged or so became intemperate, a motion to direct a verdict for defendant in a suit on the beneficial certificate was rightly denied,

Headnotes by WALKER, Ch.

as the questions were for the jury to decide.

Same — construction of instrument.

3. Although it is the province of the court to construe a written instrument, yet, where the effect of such instrument depends, not merely on its construction and meaning, but upon collateral facts in pais and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury.

(Bergen, Heppenheimer, Williams, Taylor, and Gardner, JJ., dissent.)

APPEAL by defendant from a judgment of the Supreme Court, Hudson Circuit, in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fraternal benefit insurance. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Lindabury, Depue, & Faulks,** and **John W. Bishop, Jr.,** for appellant:

William J. Golden, in his application for membership in the defendant association falsely stated his age, the date of his birth, and his occupation, and the certificate upon which plaintiff's claim is based is, therefore, null and void.

Holland v. Supreme Council, O. C. F. 54 N. J. L. 490, 25 Atl. 367; Grand Lodge, A. O. U. W. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142; Golden Star Fraternity v. Martin, 59 N. J. L. 207, 35 Atl. 908; Neenan v. National Council, K. A. L. S. 188 Ill. App. 490; Pride v. Switchmen's Union, 178 Ill. App. 434; Harvick v. Modern Woodmen, 158 Ill. App. 570; Daffron v. Modern Woodmen, 190 Mo. App. 303, 176 S. W. 498; Newman v. Supreme Lodge, K. P. 110 Miss. 371, L.R.A.1916C, 1051, 70 So. 241; Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553; Pacific Mut. L. Ins. Co. v. Glaser, 245 Mo. 377, 45 L.R.A.(N.S.) 222, 150 S. W. 549; Phœnix Ins. Co. v. Benton, 87 Ind. 132; Hartshorn v. Metropolitan L. Ins. Co. 55 App. Div. 471, 67 N. Y. Supp. 13; Supreme Assembly, R. S. G. F. v. McDonald, 59 N. J. L. 248, 35 Atl. 1061.

Golden's benefit certificates are null and void because, after becoming a member of defendant in 1897, he continuously engaged in prohibited occupations up to the year 1914.

21 Cyc. 1113; Burch v. De Rivera, 53 Hun, 367, 6 N. Y. Supp. 206; Graves v. Knights of Maccabees, 199 N. Y. 397, 139 Am. St. Rep. 912, 92 N. E. 792; State ex rel. Strang v. Camden Lodge, A. O. U. W. 73 N. J. L. 500, 64 Atl. 93.

Golden's benefit certificate became void by reason of his intemperate use of intoxicating liquors.

Gilmore v. Knights of Columbus, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223, 1 Ann. Cas. 715; Grand Lodge, A. O. U. W. v. Burns, 84 Conn. 356, 80 Atl. 157; Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893; Supreme Lodge, F. U. v. Light, 115 C. C. A. 591, 195 Fed. 903.

There was no waiver, on the part of defendant, of Golden's fraud, or the misstatements in his application, or of his breaches of the defendant's laws.

Van Woert v. Modern Woodmen, 29 N. D. 441, 151 N. W. 224; Security Ins. Co. v. Laird, 182 Ala. 121, 62 So. 182; Brown v. Great Camp, K. M. M. 167 Mich. 123, 132 N. W. 562; Deming Invest. Co. v. Shawnee F. Ins. Co. 16 Okla. 1, 4 L.R.A.(N.S.) 607, 83 Pac. 918; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Ostmann v. Supreme Lodge, K. L. H. 85 N. J. L. 86, 88 Atl. 949; Harvick v. Modern Woodmen, 158 Ill. App. 570; Schmidt v. Supreme Tent, K. M. 97 Wis. 528, 73 N. W. 22; Hartmann v. National Council, K. L. S. 190 Mo. App. 92, 175 S. W. 212.

Messrs. **Heyman & Heyman,** for respondent:

In the absence of an express provision in the policy, statements in the application are not warranties, and their untruth will affect the validity of the policy, only if made falsely and with the intent to deceive.

19 Cyc. 681.

It was only an engaging in a prohibited occupation at the time of Golden's death which could avoid the policy.

25 Cyc. 823.

To constitute a defense, it must be proved that the prohibited occupation was the usual work of the deceased.

Stone v. United States Casualty Co. 34 N. J. L. 371.

Questions as to breach of warranty and as to occupation of the deceased are questions for the jury.

Hampton v. Hartford F. Ins. Co. 65 N. J. L. 265, 52 L.R.A. 344, 47 Atl. 433; Henn v. Metropolitan L. Ins. Co. 67

N. J. L. 310, 51 Atl. 689; Whitney v. Black River Ins. Co. 72 N. Y. 117, 28 Am. Rep. 116.

Walker, Ch., delivered the opinion of the court:

This is an appeal from the supreme court, the questions raised being presented by an exception to the trial judge's refusal to grant defendant's motion for the direction of a verdict in its favor, and upon certain exceptions to the trial judge's charge to the jury.

On February 28, 1897, William J. Golden applied for membership in the appellant corporation, which is a fraternal beneficial association. He was accepted, and a life certificate for $2,000 was issued to him. Thereafter, on February 22, 1916, he surrendered his life benefit certificate, and, in lieu thereof, a life benefit permanent and total disability certificate was issued to him, in which the respondent was named as beneficiary. Appellant paid to Golden during his lifetime, on account of the last-mentioned certificate, $150. He died March 22, 1916. Respondent brought her suit to recover $1,850, being the balance claimed on account of the last-mentioned certificate. Appellant contested the claim upon the ground that Golden had made false statements in his application for membership; that he had engaged in prohibited occupations, and had become intemperate in the use of intoxicating liquors, contrary to the provisions of the laws of the appellant order, by reason of which his benefit certificate had become null and void. The plaintiff had a verdict, and defendant appealed.

The questions here involved are the following:

1. Did Golden falsely state his age? In his application for membership in the defendant corporation, he stated that he was born at Roundout, New York, February 22, 1868, and declared that the answers he had given to the questions propounded to him were fair and true answers, and agreed that those statements, together with those made by the examining physician, and the laws of the order then in force and that might be thereafter adopted, should form the basis of his contract for beneficial membership; that any untrue or fraudulent answers, any suppression of facts in regard to his health, age, occupation, etc., should vitiate his benefit certificate, and forfeit all payments made thereon; that the application and the laws of the order then in force, or that might thereafter be adopted, were made a part of the contract, and he, for himself and his beneficiary, agreed to conform to and be governed thereby. There was proof in the case to the effect that Golden was born February 21, 1864, instead of February 22, 1868, and that therefore he was four years older than he stated he was. It is to be observed that there is a provision in the application that if a member understates his age in good faith, and without any intention to deceive, he shall not thereby forfeit his certificate, etc.

We fail to find any evidence in the case which would have justified the trial judge in saying, as matter of law, that Golden had misrepresented his age with intent to deceive, and that question was therefore properly left to the jury.

The appellant contends that the statements and answers to questions about age, occupation, and habits in the application are warranties, and, being false, preclude recovery on the certificate. The respondent denies that the statements are warranties, but concedes that their untruth would affect the validity of the certificate, if made falsely and with intent to deceive. This is undoubtedly the law of this state, and they would not have to be warranties if they were made mala fides. McVey v. Grand Lodge O. U. W. 53 N. J. L. 17, 20 Atl. 873.

The appellant relies upon Holland v. Supreme Council, O. C. F. 54 N. J. L. 490, 25 Atl. 367. But that case and the one at bar are clearly to be distinguished. In the Holland Case

the applicant for membership in a beneficial order was asked if he were engaged in the sale or manufacture of wine, beer, or distilled liquors. This question he answered in the negative. It was proved on the trial that, when he made the application, he was employed as a bartender, and continued so to be down to within a few days of his death. In that case the plaintiff had a verdict which was set aside on rule to show cause, and Judge Depue, writing the opinion, observed (54 N. J. L. at page 497) that the proof was plenary that the certificate there under consideration was obtained by positive fraud of such a character as ought, in morals as well as in law, to defeat the fraudulent purpose, and that such must be the result on well-settled legal principles.

Insurance—false statement of age.

Some people do not know how old they are, and others forget their age. A merely incorrect statement of one's age, without more, cannot be said, as matter of law to be wilfully false, even if untrue in fact. In the case before us we have the bare misstatement, without more, and this, in and of itself, is certainly not plenary proof of wilfully false and fraudulent misstatement.

2. Appellant contends that the certificate sued on is null and void because, after becoming a member of the order in 1897, Golden continuously engaged in prohibited occupations up to the year 1914. In his application for membership on February 28, 1897, he stated that his occupation was that of a tobacco salesman. By the laws of the order then in force it was provided that no person should be eligible for membership in the order as a beneficiary, who was engaged, either as a principal, agent, or servant, in the manufacture or sale of spirituous, malt, or vinous liquors; and, should any beneficial member engage in any of those occupations after his admission, his benefit certificate should become null and void, and that he should stand suspended from all rights to participate in the benefits of the order. That provision was amended in 1907 to provide that saloon keepers, bartenders, liquor salesmen, or collectors for liquor houses and breweries, or hotels, and all persons employed in or about saloons and bars in hotels and restaurants, should not be admitted to the association.

The testimony does not show conclusively that Golden was engaged in the liquor business in any capacity at the time he joined the order, and there was testimony to show that at that time he was a tobacco salesman, as stated in his application. He had been in the liquor business, as proprietor of a saloon, prior to 1897, but it was not shown that he was so engaged afterwards, at least not conclusively.

A man named Burr testified that he was in the saloon business for a number of years, operating a number of saloons; that he employed Golden in connection with them to take care of money from the cash registers, and to collect the rent of buildings, and described Golden as a special man employed to take care of his interests, as he did not know anything about the saloon business. It does not appear when Golden became the employee of Burr, but it is shown that he continued in the employment until about two years prior to his death, and during those two years he did nothing. On this state of facts it cannot be said, as matter of law, that Golden was engaged in any capacity in the manufacture or sale of any kind of liquors, or that he was a saloon keeper, bartender, or liquor salesman. Nor does it conclusively appear that he was a collector for a liquor house, brewery, or hotel. That may mean a man who collects money due to liquor houses, breweries, or hotels, and not one who collects, or rather takes up, moneys made in and which are the property of the owner of such places, who is the employer of the collector, if he may in strictness be called a collector. Nor does it conclusively appear that

Golden was a person employed in or about saloons and bars in hotels. Such a description is at least susceptible of being understood as meaning constant work, and not casual employment in or about such places. Then, too, it may be said that merely occasionally engaging in the prohibited occupation does not constitute such engagement therein as is prohibited by the contract. In fact, this was charged by the trial judge, who added that, in order to constitute a defense, it must be proved that the prohibited occupation was the usual work or employment of the deceased. It was argued that this was error. But we find it unnecessary to decide the question, because, if the charge in this respect were erroneous, such error was rendered harmless by the 391st by-law of the defendant corporation, which provides that no benefit shall be paid on account of the death or disability of a member, while engaging in any prohibited occupation. And it is conceded that the deceased member was not so engaged at the time of his death.

Although it is the province of the court to construe a written instrument, yet, where the effect of such instrument depends, not merely on its construction and meaning, but upon collateral facts in pais and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury. Etting v. United States Bank, 11 Wheat. 59, 6 L. ed. 419. See also West v. Smith, 101 U. S. 263, 270, 25 L. ed. 809, 812.

Same—refusal to direct verdict.

3. It is next objected that Golden's benefit certificate became void by reason of his intemperate use of intoxicating liquors. The laws of the appellant order, at the time Golden became a member, provided for the expulsion or suspension of one who should become intemperate in the use of intoxicating liquors, and in July, 1904, the laws were amended to provide that, if any member should become intemperate in the use of intoxicating liquors, he should thereby forfeit all rights as a member of the association, and his certificate should become absolutely null and void, and the payment by him of any rates, assessments, dues, or fines, or the acceptance thereof by the order, should not waive any such forfeiture; and these provisions continued in force until after Golden's death. It was proved that Golden was occasionally intoxicated, but, at best for the appellant, it was a jury question as to whether he was intemperate in the use of intoxicating liquors within the meaning of the laws of the order. To be "intemperate" is to indulge excessively or inordinately. See Webster's Int. Dict.

Upon this whole matter we are clearly of opinion that the case was one for the jury, and that the motion for direction of a verdict for the defendant was properly denied, and that the exceptions to the charge of the judge are not well founded.

Trial—construction of instrument.

Let the judgment be affirmed, with costs.

Bergen, Heppenheimer, Williams, Taylor, and Gardner, JJ., dissent.

ANNOTATION.

Insurance: incorrect statement of age.

I. Rule as to materiality, 460.
II. Construction of statements as warranties or representations, 460.
III. Effect of intention, or good faith, 462.
IV. Effect of provisions of constitution or by-laws fixing age limits, 463.
V. Effect of agent's act in filling up applications, or insurer's mistake, 464.
VI. Right to partial recovery, 467.
VII. Statements of age of others than insured, 468.
VIII. Construction of provision that policy should be void if statements untrue, 469.
IX. Evidence of falsity, and questions for jury, 469.
X. Miscellaneous, 470.

This note does not cover the question of waiver of breaches of warranties or representations as to age, nor does it include the effect of incontestable clauses.

I. Rule as to materiality.

As a general rule, statements with reference to the age of applicants for insurance are held to be material representations, as they are the basis on which the amount of the premium is computed. Alabama Gold L. Ins. Co. v. Garner (1884) 77 **Ala.** 210; Logia Suprema de La Alianza Hispano-Americana v. De Aguirre (1913) 14 **Ariz.** 390, 129 Pac. 503; Maddox v. Southern Mut. L. Ins. Asso. (1909) 6 **Ga.** App. 681, 65 S. E. 789; Swett v. Citizens' Mut. Relief Soc. (1886) 78 **Me.** 541, 7 Atl. 394; Marcoux v. St. John Baptist Beneficence Soc. (1898) 91 **Me.** 250, 39 Atl. 1027; Hunt v. Supreme Council, O. C. F. (1887) 64 **Mich.** 671, 8 Am. St. Rep. 855, 31 N. W. 576; Taylor v. Grand Lodge, A. O. U. W. (1905) 96 **Minn.** 441, 3 L.R.A. (N.S.) 114, 105 N. W. 408; Schmitt v. National Life Asso. (1895) 84 Hun, 128, 32 **N. Y.** Supp. 513; Low v. Union Cent. L. Ins. Co. (1881) 8 **Ohio** Dec. Reprint, 247, affirmed in (1884) 41 Ohio St. 273; McCarthy v. Catholic Knights (1899) 102 **Tenn.** 345, 52 S. W. 142.

And an understatement of age in an application for life insurance has been held to increase the risk, as a matter of law; since death is likely to come more quickly to one of a given age, in sound health, than if he were younger, other conditions being equal. Dolan v. Mutual Reserve Fund Life Asso. (1899) 163 **Mass.** 197, 53 N. E. 398. The court here stated that it might be that in case of insurance for a short term, or endowment policies the rule would be otherwise.

The conclusion in this case was adhered to on a subsequent appeal (1903) 182 **Mass.** 413, 65 N. E. 798.

In Hartman v. National Council, K. L. S. (1915) 190 **Mo.** App. 92, 175 S. W. 212, it was held that beneficial associations were exempt from the provisions of § 6937, Rev. Stat. 1909, making only those representations material that contribute to the risk, and such an association was held not liable on its contract, where the insured made false statements as to his age.

In Hargrove v. Royal Templars (1901) 2 **Ont.** L. Rep. 79, a statute providing that the question of materiality in any insurance contract should be one of fact for the jury was held applicable to an action on a benefit certificate, and findings were sustained that the insured's statement that he was fifty-four, when he was in fact fifty-five, was immaterial, and that the statement was made in good faith, it appearing that the premium would be the same in either case, and it not being shown that a person fifty-five was beyond the age insured by the company; and an action for recovery of the benefit provided for upon a member's reaching the age of seventy was held not prematurely brought, the court holding that the insured was not estopped, by his statement as to age, from showing what his age actually was.

It has been held that where a member of a society was within the age limit fixed by its laws when he became a member, and then correctly stated his age, and the laws did not require one to state his age as a condition of reinstatement, a misstatement of age in an application for reinstatement was an immaterial representation, and did not forfeit the insurance, although he was beyond the insurable age at the time of reinstatement. Colley v. Wilson (1900) 86 **Mo.** App. 396.

II. Construction of statements as warranties or representations.

Where the provisions of the contract show an intention that statements as to age shall be regarded as warranties, they are so construed. In the following cases such statements were held warranties:

—Alabama Gold L. Ins. Co. v. Garner (1884) 77 **Ala.** 210, where the policy provided that the applicant's answers in the application, which was made a part of the contract, were warranted true in all respects, and that if the policy was obtained by fraud, mis-

representation, or concealment, or by any false statement, it should be absolutely void;

—Wynn v. Provident Life & T. Co. (1904) 99 App. Div. 103, 91 N. Y. Supp. 167, where, by the terms of the policy, the application was made a part of the policy, and by the application the insured declared that the answers given by him were true, and agreed that, in case any statement was untrue or fraudulent, the policy should become null and void;

—Krause v. Modern Woodmen (1907) 133 Iowa, 199, 110 N. W. 452, where both the certificate and application stated that the former was based on the latter, and that, if an answer or statement in the application was not literally true, the certificate should be avoided;

—Ætna L. Ins. Co. v. France (1876) 91 U. S. 511, 23 L. ed. 401, and Linz v. Massachusetts Mut. L. Ins. Co. (1880) 8 Mo. App. 363, where the policy provided that, in case the statements made by or on behalf of the insured as the basis of the contract should be found in any respect untrue, the policy should be null and void;

—Grant v. Mutual Protective League (1915) 192 Ill. App. 4, where the application contained a statement of the age of the applicant, and a distinct warranty of the truth thereof, this statement being held a warranty separate and distinct from the answers on the medical examination, attached to the same instrument;

—Modern Woodmen v. Vincent (1907) 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475, 14 Ann. Cas. 89, where the application provided that any untrue statement should forfeit the insured's rights, that the applicant tendered "the following true and complete answers," and that he had verified such answers, and declared and warranted that they were full and complete and literally true, that the exact truth should be a condition precedent to any binding contract, that such answers should form the basis of the contract, and that if any answer was not literally true the policy should be void;

—Alta Friendly Soc. v. Brown (1898) 8 Pa. Super. Ct. 267, where the application stated that the applicant warranted the statements and answers to be full, complete, and true;

—Schmitt v. National Life Asso. (1895) 84 Hun, 128, 32 N. Y. Supp. 513, where insured, in his application, represented and warranted that he was a certain age;

—Hunt v. Supreme Council, O. C. F. (1887) 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576, where the exact wording does not appear.

And in McCann v. Ladies of Maccabees (1913) 182 Ill. App. 319, in an abstract of the decision, a statement as to age was regarded as a warranty, the substantial breach of which avoided the risk.

And in Daffron v. Modern Woodmen (1915) 190 Mo. App. 303, 176 S. W. 498, statements as to age, in an application for insurance in a fraternal benefit society, were regarded as warranties, the court stating that the law construes statements and answers made by an applicant for such insurance as warranties, and that, if they are untrue, neither the applicant nor his beneficiaries have any rights under the certificate.

And in Kabok v. Phœnix Mut. L. Ins. Co. (1889) 21 N. Y. S. R. 203, 4 N. Y. Supp. 718, the insured's misstatements as to age were held to avoid the risk, where the application provided that the application should form the basis and be a part of the contract, and that all answers in the application should be strict warranties, and the policy provided that, in case of untrue statements in the application, the company should only be liable for the amount of paid-up insurance to which the owner of the policy would, at the death of the insured, be entitled, according to subsequent provisions; but it appeared that, by these provisions, there was no right given to a paid-up policy at the time of the insured's death.

And in United Brethren Mut. Aid Soc. v. White (1882) 100 Pa. 12, where it was provided that the statements in the application should form the basis of the contract, and that if any of them were untrue and false the contract should be avoided, the insurance

was held avoided by a false statement as to age; but there was no direct decision that the statements were warranties.

Where the policy does not provide that the application shall be a part of the contract, although it contains a reference to the statements in the application, the application has been held not a part of the contract, and the statements therein as to the insured's age have been held merely representations.

Thus, in Spence v. Central Acci. Ins. Co. (1908) 236 Ill. 444, 19 L.R.A.(N.S.) 88, 86 N. E. 104, where the application for an accident policy provided that the applicant agreed that the "application and warranty, together with the premium paid," should be the basis of the contract, but the application was not made a part of the policy, the only statement therein being that, in consideration of the warranties and agreements in the application for the policy, and of the premium, the applicant was insured, it was held that the statements in the application as to the applicant's age were not warranties, but representations; and that the questions as to the falsity and materiality of the answers were questions of fact, and not of law.

And statements as to the applicant's age were considered representations, in Gurley v. Massac County Mut. Relief Asso. (1914) 186 Ill. App. 492, where the statements made in the application were not incorporated in or made a part of the certificate.

In Maddox v. Southern Mut. L. Ins. Asso. (1909) 6 Ga. App. 681, 65 S. E. 789, where a son, in applying for a policy on his mother's life, stated that she was fifty-three, when she was in fact over sixty, without discussing whether the statement was a warranty or a representation, the policy was held avoided on the ground that the misrepresentation related to a material fact.

Where statements as to the applicant's age are warranties, their falsity will avoid the risk, regardless of whether or not they are considered material. Ætna L. Ins. Co. v. France (1876) 91 U. S. 11, 23 L. ed. 401.

See also Swett v. Citizens' Mut. Relief Soc. infra, IV.

III. Effect of intention, or good faith.

Where the applicant has warranted his statements as to age, their falsity has been held to avoid the risk, regardless of whether they were wilfully or intentionally false. Dinan v. Supreme Council, C. M. B. A. (1902) 201 Pa. 363, 50 Atl. 999; Kansas Mut. L. Ins. Co. v. Pinson (1901) 94 Tex. 553, 63 S. W. 531; Murphy v. Harris (1826) Batty (Ir.) 206.

And, in the following cases, false statements as to age were held to avoid the risk, regardless of the insured's intention to defraud:

—Germania L. Ins. Co. v. Klein (1913) 25 Colo. App. 326, 137 Pac. 73, where the evidence conclusively showed that the applicant was sixty-three instead of fifty, as stated in her application, the court stating that the representations were of matters within her personal knowledge, and so grossly false that, whether attributable to ignorance or an intention to defraud, they constituted fraud in law; the view being taken that the insured's intention was immaterial;

—Metropolitan L. Ins. Co. v. Freedman (1909) 159 Mich. 114, 32 L.R.A. (N.S.) 298, 123 N. W. 547, where it was held, in an action by the insurer to cancel a policy, to make no difference whether the insured, an illiterate man, actually knew that the statements in his application as to his age were false, or ignorantly permitted himself to be used by his son as a tool for the accomplishment of a fraud, it being stated that it was the insured's duty to know that the representations in the application, a copy of which was set out in the policy of which he retained possession, were true;

—Cerri v. Ancient Order of Foresters (1898) 25 Ont. App. Rep. 22, where, notwithstanding the fact that the applicant's false statement as to age was made in good faith, it was held to avoid the risk, there being a provision in the benefit certificate that any untruthfulness of statements in the application should terminate the membership, and it appearing that the

applicant was beyond the age limit for membership.

And in the last case a statute, providing that where a contract of life insurance, or application therefor, contained a false statement as to age, the contract should not be avoided if the statement was made in good faith, was held inapplicable to benevolent societies having an age limit.

In Dolan v. Mutual Reserve Fund Life Asso. (1899) 173 Mass. 197, 53 N. E. 398, a statute providing that no misrepresentations should avoid the policy unless such misrepresentation was made with actual intent to defraud, or increased the risk, was held applicable; but the jury in that case failed to find that a false statement with regard to age had been made by the insured.

The rules of the insurer, or provisions of the application or policy, sometimes take into consideration the good faith of an applicant in stating his age.

It will be noted that in the reported case (HOPE v. MACCABEES, ante, 455) the application provided that if the insured understand his age in good faith, and without any intention to deceive, he should not thereby forfeit his membership, and that it was held that the mere incorrect statement of the insured's age, without more, could not be said, as a matter of law, to be wilfully false, even if untrue in fact.

And in Hemmings v. Sceptre Life Asso. [1905] 1 Ch. (Eng.) 365, 74 L. J. Ch. N. S. 231, 92 L. T. N. S. 221, 21 Times L. R. 207, it was held that the insurer could not avoid its contract because of innocent misrepresentations as to age, although the applications provided that the policy should be void if it should appear that the applicant had made any untrue statement, it being held that this provision should be read with reference to another provision of the policy that, if it was proved that it had been obtained by wilful misrepresentations, it should be void.

And in Erickson v. Ladies of Maccabees (1910) 25 S. D. 183, 126 N. W. 259, amended by-laws, becoming effective after the insured's death, which permitted a partial recovery, although false statements as to age had been made, if they were made in good faith, were held admissible, where they were not shown to be substantially different from those in force at the time of the insured's death, and evidence as to the insured's good faith in giving her age was also admitted.

And the insured's good faith has been held material, although the policy apparently made no reference to it.

Thus, in Dillon v. Mutual Reserve Fund Life Asso. (1903) 5 Ont. L. Rep. 434, it was held that, where the statement as to age was material and untrue, the contract would be avoided, unless it appeared that the statement was made in good faith and without intent to deceive; and the burden of showing this was held to be on the one seeking to uphold the contract.

In Murray v. Supreme Hive, L. M. (1904) 112 Tenn. 665, 80 S. W. 827, it was held that the insurer's action in expelling a member under its laws, for misstatement of age, was not inequitable, and the court refused to restore the insured to membership, the evidence being examined, and held to show an intentional misstatement of her age.

IV. Effect of provisions of constitution or by-laws fixing age limits.

In some instances, the constitution of the insurer establishes an age limit, and it has been held that a false statement of age by one beyond the limit fixed will avoid the risk, whether it be regarded as a warranty or representation, there being no authority for insuring those above the limit fixed:

—Pirrung v. Supreme Council, C. M. B. A. (1905) 104 App. Div. 571, 93 N. Y. Supp. 575, where there was no suggestion that the insured was induced to take insurance by false or fraudulent representations of the agent that he was eligible to membership, and it was held, as a matter of law, that the fact that he was over the age limit fixed by the constitution rendered him ineligible, and that the insurer was not liable, whether the

statement as to age was regarded as a warranty, or a representation;

—McCann v. Ladies of Maccabees (1913) 182 Ill. App. 310, and Steele v. Fraternal Tribunes (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121, where a company authorized to insure applicants up to fifty-one years only was held not liable, although officers of the local lodge knew that an applicant's statement that he was under that age was false, the contract being held ultra vires;

—Walz v. Workmen's Sick & Death Ben. Fund (1913) 141 N. Y. Supp. 578, reversing (1912) 78 Misc. 499, 139 N. Y. Supp. 1016, where the constitution provided that those not past forty-five were eligible as members, and provided for payment of a benefit upon the death of one who had made no false statements, but provided that if false statements were made the insurance should be void, and it appeared that the insured falsely stated that he was forty-two whereas he was forty-six at the time of his application, the false statement being held to preclude a recovery.

The insurer's by-laws, also, sometimes fix an age limit, and false statements as to the applicant's age have been held to avoid the risk, where the applicant was not within the limit fixed:

—Harvick v. Modern Woodmen (1910) 158 Ill. App. 570, holding that, where the by-laws provided that applicants should be over eighteen and under forty-five years of age, an untrue warranty that an applicant was of eligible age relieved the insurer;

—Swett v. Citizens' Mut. Relief Soc. (1886) 78 Me. 541, 7 Atl. 394, where the by-laws of a society restricted membership to those between twenty-one and sixty years, statement by an applicant that he was fifty-nine was held a warranty of the fact, the falsity of which avoided the risk;

—Criscuolo v. Societa Monarchica (1915) 89 Conn. 249, 93 Atl. 532, where a by-law of the insurer provided that no person over fifty years of age should become a member, and that any member misstating his age should, on discovery, be expelled and forfeit all dues paid, the contract was held avoided, there being evidence showing that the insured knew that persons over fifty years could not be admitted, and testimony warranting a finding that he falsely represented that he was not over that age;

—Marcoux v. St. John Baptist Beneficence Soc. (1898) 91 Me. 250, 39 Atl. 1027, where the by-laws prohibited the admission of a person over fifty years of age, and a false statement that an applicant was not over that age was held a misrepresentation of a material fact, which invalidated the contract.

In McRaith v. Grand Lodge, A. O. U. W. (1910) 149 Iowa, 148, 126 N. W. 321, a by-law of the insurer, providing that no person should be admitted to membership, except he was eighteen years of age and under forty-five, was construed with reference to other provisions, and held to relate to qualifications for original admission, and not to apply to the readmission of suspended members.

In Supreme Council, C. K. L. v. Beggs (1903) 110 Ill. App. 139, where one had obtained a certificate of membership, contrary to provisions of the constitution and by-laws limiting the age of members, by means of a wilful false statement as to age, it was held that this could be interposed as a defense in an action on the policy, although the application containing the false statements was not made a part of the certificate; the court holding that a misrepresentation of a material fact, inducing the making of the contract, might be shown to avoid it, and that the application was admissible to show the fraud.

See also cases involving the effect of the agent's act in filling up applications of those not within the age limit of the insurer, infra, V, and Krause v. Modern Woodmen, infra, VI.

V. Effect of agent's act in filling up applications, or insurer's mistake.

If the agent, in filling in the application, makes a mistake in writing the insured's age, the insurer cannot take advantage of the shortcoming of it's own agent, and cannot claim a for-

feiture on that account. Alabama Gold L. Ins. Co. v. Garner (1884) 77 Ala. 210; Fidelity & C. Co. v. Meyer (1912) 106 Ark. 91, 44 L.R.A.(N.S.) 493, 152 S. W. 995; Gray v. Stone (1912) 102 Ark. 146, 143 S. W. 114; Brink v. Guaranty Mut. Acci. Asso. (1889) 28 N. Y. S. R. 921, 7 N. Y. Supp. 847, affirmed in (1891) 130 N. Y. 675, 29 N. E. 1035.

And in Mason v. Massachusetts Ben. Life Asso. (1899) 30 Ont. Rep. 716, where the applicant was illiterate, and the insurer's agent, by mistake, filled in a wrong age in the application, from a family Bible in which the entry was blurred, great weight was given to these circumstances in allowing a recovery.

And in Robson v. Pennsylvania Mut. Live Stock Ins. Co. (1914) 57 Pa. Super. Ct. 491, where the applicant for insurance on a horse correctly stated the horse's age, but through the mistake of the agent, or an officer of the company, the wrong age was stated in the policy, the insurer was held bound.

And where the agent is informed by the applicant that he does not know his age, and the agent makes an incorrect estimate of the age, the insurer is bound by his act:

—Keystone Mut. Ben. Asso. v. Jones (1890) 72 Md. 363, 20 Atl. 195, where an ignorant person told the agent he did not know his age, and the agent estimated it and inserted it in the application, which he afterward read to the applicant, the answer being held, virtually, that of the agent;

—Miller v. Phœnix Mut. L. Ins. Co. (1887) 107 N. Y. 292, 14 N. E. 271, where the general agent made, and inserted in the application, an estimate of the age of an ignorant applicant, based on the latter's statements made in good faith;

—Supreme Council, C. B. L. v. Boyle (1894) 10 Ind. App. 301, 37 N. E. 1105, where a benevolent society was held bound by the statements inserted in the application by its agents, concerning the age of the applicant, who informed them that he did not know his true age, it appearing that the representations inserted affected only the amount of assessments, and not his eligibility.

And an insurer is bound by its agent's fraud in filling in a wrong age. McArthur v. Home Life Asso. (1887) 73 Iowa, 336, 5 Am. St. Rep. 684, 35 N. W. 430, where an agent, authorized to procure and fill up applications in accordance with the facts stated by the applicant, without the latter's knowledge, falsely inserted a wrong age.

And the insurer has been held bound by the act of its agent in inserting a wrong age, where he knew that the applicant was not within the age limit fixed by the insurer's laws:

—Travelers Ins. Co. v. Crawford (1907) 32 Ky. L. Rep. 517, 106 S. W. 290, former appeal (1907) 124 Ky. 733, 124 Am. St. Rep. 525, 99 S. W. 963, where an accident policy was issued to one over sixty-five, the age limit provided for in the policy;

—Wisenstine v. Interstate Business Men's Acci. Asso. (1915) 98 Neb. 365, 152 N. W. 742, where the agent knew that an applicant was below the age limit of persons to which his company issued policies, but filled in the application, showing him to be of the required age, and failed to inform his company of the discrepancy.

But in some cases, where the constitution of the insurer fixed a maximum age limit up to which it might issue policies, its agents have been held to have no power to insure persons beyond such limit, and their knowledge has been held not to preclude the insurer from avoiding the risk:

—Pirrung v. Supreme Council, C. M. B. A. (1905) 104 App. Div. 571, 93 N. Y. Supp. 575, holding that the insurer's officers or agents could not waive the limitation of age fixed by the constitution;

—Daffron v. Modern Woodmen (1915) 190 Mo. App. 303, 176 S. W. 498, where the local secretary's knowledge, and that of a deputy of the head consul, that the applicant was beyond the constitutional age limit, or did not know his age, were held not binding on the insurer, as they had no power

to waive the constitutional provisions;

—McCoy v. Roman Catholic Mut. Ins. Co. (1890) 152 Mass. 272, 25 N. E. 289, where the vice president and directors knew that an applicant was beyond the age limit fixed by the constitution.

And, where the applicant had knowledge that the agent had no authority to insure persons over a certain age, he has been held bound by his knowledge of the limitation of the agent's power:

—Elliott v. Knights of Modern Maccabees (1907) 46 Wash. 320, 13 L.R.A. (N.S.) 856, 89 Pac. 929, where the applicant stated his age correctly to the agent, but knew that he was beyond the age limit fixed by the insurer, and, upon the agent's representation that he needed another man to start a local lodge, and that he could work him in, signed an application in which his age was incorrectly stated, the court holding that he participated in a scheme to defraud the insurer, and that the rule that knowledge of the agent is knowledge of the principal was inapplicable, as it did not apply, where there was a clear presumption that the agent would not communicate it;

—Robinson v. Brotherhood of Locomotive Firemen & Engineers (1915) 170 N. C. 545, 87 S. E. 537, where an applicant knew that an agent was prohibited, by the insurer's constitution, from insuring one over forty-five years, and was held bound by such knowledge, and the insurer was held not precluded by reason of the agent's knowledge that the applicant was over that age, from setting up the applicant's false representations.

And if the applicant made the untrue statement, whether intentionally, or by mistake, its effect is not varied by the fact that the agent wrote the answer. Alabama Gold L. Ins. Co. v. Garner (1884) 77 Ala. 210.

And where the application, by its terms, makes the agent the agent of the applicant in filling up the application, the applicant has been held bound by answers filled in by the agent. Kabok v. Phœnix Mut. L. Ins. Co. (1889) 21 N. Y. S. R. 203, 4 N. Y. Supp. 718, where it was provided in the application that it was agreed and warranted that it had been made, prepared, and written by the applicant, or by his own proper agent, and that the insurer should not be responsible for its preparation, or for anything contained therein, the insured being held bound by untruthful statements inserted, by mistake, by the agent.

Where the insurer itself makes a mistake as to the age of the insured, it cannot avoid the risk or claim to reduce its liability on this account.

Thus, in Lowenstein v. Old Colony L. Ins. Co. (1914) 179 Mo. App. 364, 166 S. W. 889, where an applicant misrepresented his age, but the misrepresentation was subsequently discovered, and a demand was made and complied with for the additional premium due according to his true age, it was held that another company, which took over the business of the original insurer, and issued a policy, by mistake, based on the age given in the application, could not claim the benefit of a provision of the policy, and a statute, that, if the insured's age had been misstated, the amount payable should be such as the premium would have purchased at the correct age; and this was held, although the original insurer, through mistake, after it discovered the misrepresentation, had continued to make assessments based on the incorrect age, it being held that the reinsuring company had possession of the papers of the original insurer, and that the liability could not be reduced on account of its own mistake.

And where the company has knowledge that the applicant does not know her exact age, and issues a policy, it cannot escape liability:

—United Brethren Mut. Aid Soc. v. Rice (1883) 4 Walk. (Pa.) 325, where the insured did not warrant her age, but stated in good faith to the agent that she had no record thereof, and the facts were communicated to the home office, and a policy was issued, an honest mistake as to her age was held not to avoid the risk;

—McCarthy v. Catholic Knights (1899) 102 Tenn. 345, 52 S. W. 142, where the applicant was illiterate and stated that she did not know her exact age, and the application was filled in by the insurer's officers, and the question of her age referred to a committee, in accord with provisions of the constitution of the insurer.

Where the insured seeks to avoid the effect of false statements as to age, on the ground that the insurer's agent inserted the statements in the application, the burden is on him to establish the fact that the mistake was that of the agent. Alabama Gold L. Ins. Co. v. Garner (1884) 77 Ala. 210.

It has been held that the fact, without more, that the application was written by the insurer's agent from a memorandum of the answers of the applicant, it having been afterwards read to and signed by her, did not constitute them the answers or representations of the insurer. Ibid. And the testimony in this case was held insufficient to show that the mistake with reference to the applicant's age was that of the agent, where the only witness who testified as to the matter was the agent, who stated that he took the application at a small building, when others were present, made a memorandum of the applicant's answers, from which he filled the blank and the application, and afterwards read the answers to the applicant, who signed the application while others were present; and the witness testified that, while he did not remember what the applicant said about her age, he intended his memorandum to be truthful, and to follow it.

VI. Right to partial recovery.

Notwithstanding an incorrect statement of age, a recovery is sometimes allowed, based on the amount the premium paid would have purchased at the correct age.

In some instances, this conclusion is based on statutory provisions.

This was the case in Coplin v. Woodmen of World (1913) 105 Miss. 115, 62 So. 7, Ann. Cas. 1916D, 1295, where a statute provided that any misstatement as to age should not invalidate the contract, but the beneficiary should be entitled to recover such amount as the premium would have purchased at the insured's actual age, reckoning according to the rate tables of the company.

And in Krause v. Modern Woodmen (1907) 133 Iowa, 199, 110 N. W. 452, a statute was held applicable, which provided that, in all cases where it appeared that the age of the insured had been misstated, the insurer might deduct from the amount payable the difference of premium which would have been payable, by reason of any difference of age at the time the policy was issued; and that no other defense or deduction should be permitted, notwithstanding any warranty of age; it being held that the pleadings were insufficient to put in issue the statement that the company was a life insurance society, and permit a showing that it was a fraternal beneficiary society, to which the statute did not apply.

And the statute was held not inapplicable on the theory that it had no application where the applicant was not of an insurable age, the pleadings not showing that, notwithstanding a by-law limiting the insurable age to forty-five, there were any limitations in the articles of incorporation, other than those embodied in a statute, prohibiting assessment companies insuring persons over sixty-five, and it appearing that the falsity charged was that the insured stated that he was forty-five, when he was in fact forty-seven; and it was consequently held that the contract was not ultra vires, and that, in the absence of fraud, the insured's alleged misstatement of age did not avoid the policy.

The allowance of a partial recovery, notwithstanding untrue statements as to age, in some cases is governed by provisions of the policy:

—Keenan v. Mutual L. Ins. Co. (1908) 77 N. J. L. 64, 71 Atl. 37, where the policy provided that, if the insured's age had been understated, the amount of insurance would be equitably adjusted, and the insured had understated his age, and it was held, after his death, that the insurer was

liable for the amount which the premiums paid would, if paid by a person of the age given by the insured, have purchased;

—Singleton v. Prudential Ins. Co. (1896) 11 App. Div. 403, 42 N. Y. Supp. 446, where the policy provided that, in case the age of the insured was understated by mistake, the sum insured should be reduced to the amount the premium would pay for at the true age, a mistaken understatement of age was held not a fatal breach of warranty; but it was held that the insurer's remedy was to ask that the sum insured be reduced according to the terms of the policy;

—Edelson v. Metropolitan L. Ins. Co. (1916) 95 Misc. 218, 158 N. Y. Supp. 1018, where the policy provided that, if the age was misstated, the amount payable should be such as the premium paid would have purchased at the correct age, and effect was given to the provision, and the application was held admissible to establish a misrepresentation of age, although it was not made a part of the contract, as required by statute;

—Germania L. Ins. Co. v. Klein (1913) 25 Colo. App. 326, 137 Pac. 73, where a false representation as to the applicant's age was held, by the terms of the contract, to defeat the policy pro tanto; the exact terms governing the decision, however, do not appear.

But a provision of the character under consideration has been held invalid on the ground that it was in conflict with a statute, governing misrepresentations. Burns v. Metropolitan L. Ins. Co. (1909) 141 Mo. App. 212, 124 S. W. 539; Metropolitan L. Ins. Co. v. Stiewing (1913) 173 Mo. App. 108, 155 S. W. 900, where a provision of a policy, for payment only of the amount the actual premium paid would have purchased at the true age of the insured, was held in conflict with a statute providing that no misrepresentation should be deemed material, or render the policy void, unless the matter misrepresented contributed to the insured's death.

And the view has been taken that, although the policy contains a provision for a partial recovery in case of misstatement of age, the provision will be unavailing if the applicant was beyond the age limit of the insurer. Johnson v. American Nat. L. Ins. Co. (1910) 134 Ga. 800, 68 S. E. 731.

In Lincoln Reserve L. Ins. Co. v. Smith (1918) — Ark. —, 203 S. W. 698, where a twenty-payment policy, which was not issued to persons over fifty-five, provided that, if the age of the insured had been misstated, the amount payable thereunder should be such as the premium paid would have purchased at the correct age, provided that age, at the time insured, was not over sixty, it was held that a recovery could be had for the full amount of the policy, notwithstanding an innocent misrepresentation by the insured that he was fifty-three instead of fifty-nine, it being held that, in order to obtain the benefit of the provision in question, the insurer must show that there was a purchasable policy, according to the plan adopted, at the true age of the insured, and that it had failed to show this.

See also Kobok v. Phœnix Mut. L. Ins. Co. supra, II.; Erickson v. Ladies of Maccabees, supra, III., and Lowenstein v. Old Colony L. Ins. Co. supra, V.

VII. Statements of age of others than insured.

In Marbut v. Empire L. Ins. Co. (1915) 143 Ga. 654, 85 S. E. 834, where a double indemnity policy provided for the payment of a certain sum on the death of the beneficiary, and also contained a provision that the beneficiary must be between the ages of twenty-one and sixty years, it was held that the provisions should be construed together, and that no recovery on account of the death of the beneficiary could be had, upon its appearing that he was sixty-seven years of age when the policy was taken.

In Kansas Mut. L. Ins. Co. v. Pinson (1901) — Tex. Civ. App. —, 64 S. W. 818, it was held that the risk was avoided, where statements as to the ages of the insured's sisters were made warranties by the terms of the contract, and the ages given were untrue.

VIII. Construction of provision that policy should be void if statements untrue.

A provision that the policy should be void if the applicant's statements are untrue has been construed, in cases involving misstatements as to age, merely to make the policy voidable at the election of the insurer.

Thus in Modern Woodmen v. Vincent (1907) 40 **Ind.** App. 711, 80 N. E. 427, 82 N. E. 475, 14 Ann. Cas. 89, where the application provided that, if the applicant's statements were not literally true, the certificate should be void, the word "void" was construed to mean voidable, and an answer setting up false statements as to age, although they were construed as warranties, was held not good on demurrer, in the absence of facts showing an election by the insurer to rescind the policy and return the premium.

And in Low v. Union Cent. L. Ins. Co. (1881) 8 **Ohio** Dec. Reprint, 247, affirmed in (1884) 41 Ohio St. 273, where the policy provided that, if any representation in it was false, it should be void, it was held simply voidable at the election of the insurer, so that the insured could not take advantage of his misstatement as to age, and maintain an action to recover the premium paid.

IX. Evidence of falsity, and questions for jury.

This note does not cover the admissibility of records, or admissions of the insured as to his age, or other questions dealing with admissibility.

The burden of proving the falsity of representations as to age is held to be on the insurer. Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co. (1886) 81 **Ala.** 329, 1 So. 561; Grant v. Mutual Protective League (1915) 192 **Ill.** App. 4; Gurley v. Massac County Mut. Relief Asso. (1914) 186 **Ill.** App. 492; Collins v. United Bros. (1917) — **Tex.** Civ. App. —, 192 S. W. 800.

And, to effect a forfeiture because of a misstatement of age, the evidence must be of a clear and positive character. McCarthy v. Catholic Knights (1899) 102 **Tenn.** 345, 52 S. W. 142, holding the evidence insufficient for this purpose, it appearing that the insured had stated that she did not know her exact age, and that the evidence was uncertain.

In some cases, where the evidence was conflicting, the question of the falsity of the statements as to age has been held for the jury. Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co. (1886) 81 **Ala.** 329, 1 So. 561; Dolan v. Mutual Reserve Fund Life Asso. (1903) 182 **Mass.** 413, 65 N. E. 798; Breese v. Metropolitan L. Ins. Co. (1899) 37 App. Div. 152, 55 **N. Y.** Supp. 775; Metropolitan L. Ins. Co. v. Lennox (1910) 103 **Tex.** 133, 124 S. W. 623; Gurley v. Massac County Mut. Relief Asso. (1914) 186 **Ill.** App. 492; Mutual Reserve L. Ins. Co. v. Jay (1907) — **Tex.** Civ. App. —, 101 S. W. 545.

But in the following cases, where the evidence as to the falsity was uncontradicted, it was held a question of law: Germania L. Ins. Co. v. Klein (1913) 25 **Colo.** App. 326, 137 Pac. 73; McCann v. Ladies of Maccabees (1913) 182 **Ill.** App. 319; Hunt v. Supreme Council, O. C. F. (1887) 64 **Mich.** 671, 8 Am. St. Rep. 855, 31 N. W. 576; Hartshorn v. Metropolitan L. Ins. Co. (1900) 55 App. Div. 471, 67 **N. Y.** Supp. 13.

In Lincoln Reserve L. Ins. Co. v. Morgan (1917) 126 **Ark.** 615, 191 S. W. 236, the evidence was held sufficient to sustain a verdict on the policy, where a child of the insured testified that the insured was not over the age stated, and there was other evidence tending to show this.

In Collins v. United Bros. (1917) — **Tex.** Civ. App. —, 192 S. W. 800, the evidence was held insufficient to support the jury's finding that the insured falsely stated her age, the court stating that the presumption that the insured correctly stated her age was as strong as the presumption that the insurer's officers did their duty in inspecting the application, and did not pass it by when it showed that she was older than the insurable limit of the society, which was the evidence relied upon by the insurer.

X. Miscellaneous.

Warranties may be required, not only of the applicant's age, but also of the date of birth. Harvick v. Modern Woodmen (1910) 158 Ill. App. 570, where it was held competent to require an applicant, not only to warrant his actual age, but his precise date of birth, and that such warranties, where made, were separate and distinct, and that it was error to treat them as constituting one and the same defense.

In Mutual Reserve L. Ins. Co. v. Jay (1907) — Tex. Civ. App. —, 101 S. W. 545, where the applicant did not know his age, but knew that it was material, and referred the agent to the applicant's father, he was held bound by the latter's statements.

In Willoughby v. Canadian Order of Forresters (1916) 36 Ont. L. Rep. 507, although, by the terms of the application and certificate, the insurer was not obliged to pay a loss until the insured's age was admitted or proved, it was held that the insurer must be deemed to have admitted that the age stated in the application was correct, there being no suspicion of fraud, and the company having failed to comply with a statute providing that insurers should send annually, until proof of age was admitted, a statement that the age of the insured was material, and that proof of the truth of the age stated would be required before the policy was paid.

J. T. W.

SECOND NATIONAL BANK OF HOBOKEN

v.

WILLIAM E. R. SMITH, Exr., etc., of William Runkle, deceased, Appt.

New Jersey Court of Errors and Appeals—May 3, 1918.

(— N. J. —, 103 Atl. 862.)

Bills and notes — decease of indorser — notice.

1. When a notary on the due day of a promissory note presents it at the bank where it is made payable, and it is dishonored, and he protests it for nonpayment, and receives information from the assistant cashier that the indorser is dead, leaving a will appointing an executor, naming him and giving his address, a notice of protest mailed to the indorser by name, in care of the executor, naming him, at his address, is sufficient evidence of reasonable diligence, as required by § 98 of the Negotiable Instruments Act, to be presented to the jury.

[See note on this question beginning on page 474.]

Trial — request for verdict — effect.

2. The rule adopted in some jurisdictions that, when requests for the direction of a verdict are made by the parties plaintiff and defendant, all questions of fact are left with the court, and are not to be submitted to the jury, has never been adopted in this state; the requests not amounting to a consent that the case be taken from the jury.

Bills and notes — diligence of notary.

3. A holder of a promissory note presented for payment and dishonored is entitled to rely upon the diligence of the notary in inquiring for the address of a party obligated upon the instrument, and is not affected by want of diligence in the officers of the bank where the note was payable, and of whom inquiry was made.

Trial — jury — credibility of witness.

4. The credibility of a witness is for the jury; and where the issue depends upon facts the existence of which is not admitted, even though testified to by a credible witness who is unchallenged, the question is for the jury.

Bills and notes — notice by mail — diligence.

5. It is settled that a written notice of the dishonor of a note to the party to

Headnotes by WALKER, Ch.

be charged, addressed to him properly and put into the postoffice in due season, amounts to what is termed due diligence, even if the notice should never be received by the addressee.

APPEAL by defendant from a judgment of the Supreme Court, Hudson Circuit, in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Church & Harrison** for appellant.

Mr. **Gilbert Collins** for appellee.

Walker, Ch., delivered the opinion of the court:

This case is here on appeal from a judgment entered on the verdict of a jury in the supreme court, Hudson circuit, involving the validity of the notice of protest of a promissory note. The note was made by Harry G. Runkle, and indorsed by the late William Runkle in his lifetime. It was discounted by the plaintiff bank, and the proceeds were paid to Harry G. Runkle the maker. William Runkle the indorser died January 31, 1914, before the maturity of the note, leaving a will in which he appointed William E. R. Smith executor. Harry Runkle filed a caveat against the probate of this will, and the litigation concerning its validity extended over a period of about two years. On February 20, 1914, the Fidelity Trust Company of Newark was appointed administrator pendente lite of the estate of William Runkle, deceased, and letters testamentary were not issued to Mr. Smith until July 19, 1916. On April 27, 1914, the note became due, was protested for nonpayment and, on the same day, a notice of protest was mailed to William Runkle, care of William E. R. Smith, 20 Broad street, New York city.

It is made a ground of appeal that the court should have directed a verdict for defendant, "on the ground that reasonable diligence was not had, and that § 98, p. 3746, Compiled Statutes, was not complied with." The statute referred to is the Negotiable Instruments Act, § 98 of which is as follows: "When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found; if there be no personal representative, notice may be sent to the last residence or last place of business of the deceased."

It is also made ground of appeal that the court did not take the case from the jury and decide it, after each side had requested the direction of a verdict. These questions are mutually involved, and will be considered together.

The notary who made the protest presented the note to the teller of the plaintiff bank, where it was payable, and received word that it was not good, and then inquired of the assistant cashier where the indorser lived, and was told that he was dead, and then asked where he was to send the notice, and the assistant cashier informed him to send it to 20 Broad street, New York city, to William E. R. Smith, who was the executor of Mr. Runkle's will. A copy of the notice of protest, which appears to have been regular, was mailed in due course to the indorser by name, in care of William E. R. Smith, at the address stated, with postage prepaid, which was the address of Mr. Smith.

A case directly in point is that of Herbert v. Servin, 41 N. J. L. 225, in which it was held: "Where a notary makes inquiry at the bank where paper is payable, and receives information from the cashier as to the residence of the indorser, upon faith of which the notary addresses the notice of protest, the jury are justified in finding that he has used due diligence."

Bills and notes—decease of indorser—notice.

In the opinion in this case, Mr. Justice Reed, speaking for the supreme court, observed, at page 227 of 41 N. J. L. that in Barr v. Marsh, 9 Yerg. 253, and Harris v. Robinson, 4 How. 336, 11 L. ed. 1000, the fact that inquiries had been made at the bank was stated to be evidence of diligence in making inquiries. And inquiry at the bank where the paper is payable is just as efficacious, in ascertaining death and the existence of an executor or other personal representative, as it is with regard to the residence of an indorser.

In Goodnow v. Warren, 122 Mass. 79, 82, 23 Am. Rep. 289, Mr. Justice Devens, speaking for the supreme judicial court, said: "Where an executor has been named in a will, as he is the person to whom the testator has confided the administration of his estate, such notice may also be properly given to him, and it may fairly be expected that the benefit to be anticipated will be, at least, as great as if it were left at the last residence or place of business of the testator. It is true that such a person may never be actually appointed executor by the probate court, or that he may renounce the trust; but, as the only object of leaving the notice at the last residence is that the facts therein stated may come to the knowledge of those whose duty it is to protect the estate, it is not to be expected that any person can ordinarily be found there, upon whom this duty will rest more strongly than upon one who is named as executor in the will."

When the testimony was closed counsel for defendant moved for the direction of a verdict on the ground stated, namely, that due diligence had not been exercised to ascertain whether the indorser of the note was dead, and who was his personal representative. Whereupon counsel for plaintiff observed that, on the evidence, it seemed to him that this was a court question, but, not knowing how it impressed the court, if the judge thought it a jury question, he would discuss it; but, if it were a court question, he would complement counsel's motion by a motion for a verdict in favor of the plaintiff; then the judge would have both motions. The trial judge held that a jury question was presented, and denied the motions to take the case from the jury, and each side noted an exception.

Counsel for defendant-appellant argues here that, where both parties ask for a directed verdict and do nothing more, they thereby assume the facts to be undisputed, and request the court to find the facts.

Counsel for plaintiff-respondent argues before us that, even assuming that the rule contended for on behalf of defendant, that is, that where both sides move for the direction of a verdict, without more, the court is required to find the facts, exists in this state, still it is inapplicable in the case at bar, because, although the evidence is undisputed, the inferences to be drawn therefrom are in doubt, and that, where fair-minded men may honestly differ as to conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue is for the jury.

The question thus raised has been decided in this court. In Hayes v. Kluge, 86 N. J. L. 657, 92 Atl. 358, it was held that the rule adopted in some jurisdictions that, when requests for the direction of a verdict are made by the parties plaintiff and defendant, all questions of fact are left with the court, and are not to be submitted to the jury, has never been adopted in this state. And Williams, J., speaking for this court, said, at page 663 of 86 N. J. L. that the fact that both parties moved for a directed verdict did not require the trial judge to direct a verdict; the motions not amounting to a consent that the case be taken from the jury. It follows, therefore, that the trial judge did not err in submitting to the jury the question as to whether the notary used due diligence in as-

Trial—request for verdict—effect.

certaining whether the indorser of the note was dead and who was his personal representative.

It is also made a ground of appeal that the court refused to permit defendant to cross examine the witness Turbell, as to the diligence of the plaintiff in endeavoring to ascertain who was the personal representative of the deceased indorser.

Mr. Turbell was cashier of the plaintiff bank. He testified that he knew that Mr. Smith was Mr. Runkle's executor, from seeing his name in the will, and knew his place of business to be at 20 Broad street, New York city. On cross-examination, he was asked if he became cognizant of proceedings over the will of William Runkle, and he replied that he did; that he may have acquired that knowledge through discussion with people in the bank, and it may have been from a newspaper. Asked if he could say that he read about it in a newspaper, he replied "Yes," and was then asked if the newspaper that he read was not very near the time the proceedings were filed, and he replied that he could not tell. Here, counsel for plaintiff observed that the question was as to the diligence of the notary, and that what the officers of the bank did and what inquiry they made he did not think material. The trial judge observed that the case of Herbert v. Servin, supra, is authority for the proposition that the reasonable diligence required is that on the part of the notary. Counsel for the defendant stated that it was his contention that it was not only the due diligence of the notary, but that of the bank also; whereupon the trial judge asked for an authority upon that point, and counsel for defendant said he did not think he could indicate any, and counsel for the plaintiff stated that there was none. The trial judge then said that he would sustain the objection, on the theory he had stated, and granted an exception.

Taking the view of the trial judge that in this colloquy an objection was made to evidence, which was sustained, the ruling, in our judgment, was right, as the holder of the note was entitled to rely upon the diligence of the notary, and was not affected by any want of diligence in the officers of the bank where the note was payable. Testimony on that question was therefore immaterial.

Bills and notes—diligence of notary.

There was one other ground of appeal, namely, that the court erred in admitting, over objection, the notice of protest, proof of the sending and receiving of which was not properly made. There is nothing in this objection. Protest was duly made, and proof of its being mailed to the executor named in the will of the deceased indorser was also made. Mr. Pruden, trust officer of the Fidelity Trust Company of Newark, testified that his company, who was the administrator pendente lite of William Runkle's estate, received the notice of protest one week after it was sent to Mr. Smith. Mr. Smith testified that he never received it, but said that, if it had come to him, he would have forwarded it to the Fidelity Trust Company. He knew that that company had been appointed administrator pendente lite of William Runkle's estate. It is not shown that it was sent to the trust company by any other person, and the jury had a right to believe that Mr. Smith received and sent it, and that he was mistaken in his assertion that it had not come to him. The credibility of a witness is for the jury. Clark v. Public Service Electric Co. 86 N. J. L. 144, 91 Atl. 83. And where the issue depends upon facts, the existence of which is not admitted, even though testified to by a credible witness who is unchallenged, the question is for the jury. Schmidt v. Marconi Wireless Teleg. Co. 86 N. J. L. 186, 90 Atl. 1017, Ann. Cas. 1918B, 131.

Trial—jury—credibility of witness.

But, in order to bind a party to the instrument who is entitled to

notice of protest, it is not necessary that notice be actually received by him. It is sufficient if it be properly put in train for delivery to him through the mail. Our Negotiable Instruments Act of 1902 (Comp. Stat. p. 3734) provides in § 104 at page 3747, as follows:

"Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

"1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter."

And § 105: "Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails."

On the day the note became due and payable it was dishonored, and thereupon protested for nonpayment, and on the same day notice of protest was mailed to the maker in care of Mr. Smith, the executor named in the will, at his address at 20 Broad street, New York city, New York; so, even if it miscarried in the mail and never reached Mr. Smith, the notice was possessed of entire legal efficacy by virtue of the statutory provision. And this seems to have been the common-law rule on the subject. Saunderson v. Judge, 2 H. Bl. 509, 126 Eng. Reprint, 675, 3 Revised Rep. 492. It was long ago settled that a written notice of the dishonor of a note to the party to be charged, addressed to him properly, and put into the postoffice in due season, amounts to what is termed due diligence, even if the letter should never be received. Washington Bkg. Co. v. King, 14 N. J. L. 45, 47.

Bills and notes—notice by mail—diligence.

The judgment under review will be affirmed, with costs.

ANNOTATION.

To whom should notice of protest or of dishonor of commercial paper be given in event of death of the party entitled thereto.

I. Where identity of personal representative is known to the holder:
- a. In general, 474.
- b. Where maker is also executor, 476.
- c. When partnership is indorser, 476.
- d. Where there is more than one personal representative, 476.

II. Where no personal representative has been appointed, or his identity is unknown to the holder:
- a. In general, 476.
- b. When identity of personal representative cannot be ascertained, 477.

I. Where identity of personal representative is known to the holder.

a. In general.

The question under annotation, of course, presupposes that the deceased party, if living, would have been entitled to the notice in question.

Where the estate of a deceased indorser is in process of administration, and a personal representative has been appointed, it is the general rule that, in order to hold the estate, the notice of protest or nonpayment must be given to such personal representative, where the holder has notice of the death of the indorser and by the exercise of due diligence may ascertain the identity of the personal representative. Hallett v. Mobile Branch Bank (1847) 12 Ala. 193; Dodson v. Taylor (1893) 56 N. J. L. 11, 28 Atl. 316; Smalley v. Wright (1878) 40 N. J. L. 471; Oriental Bank 10 Cush. (Mass.) 557; Weems v. Massachusetts Bank v. Oliver (1852) v. Blake (1837) 22 Pick. (Mass.) 206; Farmers Bank (1859) 15 Md. 231; New Orleans & C. R. Co. v. Kerr (1844) 9 Rob. (La.) 122, 41 Am. Dec. 323; Bank of Louisiana v. Smith

(1843) 4 Rob. (La.) 276; Merchants' Bank v. Bell (1881) 29 Grant, Ch. (U. C.) 413.

And see also upon this point Cosgrave v. Boyle (1880) 5 Ont. App. Rep. 458, wherein, in holding that an intermediate indorser could not benefit by an excuse for failure to give notice to the executor of the deceased indorser which might be availed of by the holder, the court remarked that, "in the case of the death of the indorser, the personal representative takes his place, and becomes, as it were, a party to the bill; and, whilst subject to the liability thereby incurred, becomes so only on the same conditions as the party he represents was liable,—that is to say, that he should receive notice within a reasonable time after the dishonor."

When the holder of a note and an executor or administrator of the estate of a deceased indorser live at different places, notice properly directed to the latter, and deposited in the postoffice, is sufficient. Massachusetts Bank v. Oliver (1852) 10 Cush. (Mass.) 557.

Where a personal representative has been appointed over the estate of the deceased indorser of a note, he is entitled to notice of nonpayment thereof, and a notice to the decedent, left at his last place of residence, is not sufficient, the holder at the time knowing of the decedent's death. Oriental Bank v. Blake (1837) 22 Pick. (Mass.) 206; Massachusetts Bank v. Oliver (Mass.) supra; Bank of Louisiana v. Smith (1843) 4 Rob. (La.) 273.

Notice to the heirs at law is not sufficient. Smalley v. Wright (1878) 40 N. J. L. 471.

It is not sufficient to leave notice with the son of the indorser, at the former place of business of the deceased, where an administrator has been appointed over his estate, and the latter has a separate place of business. Bank of Columbia v. King (1825) 2 Cranch, C. C. 570, Fed. Cas. No. 871.

In New Orleans & C. R. Co. v. Kerr (1844) 9 Rob. (La.) 122, 41 Am. Dec. 323, where the action was against defendant as universal heir and legatee of an indorser, who died before the note fell due, it was held that the executor of the deceased indorser was the proper person on whom to serve the notice of protest, after the instituted heir had been admitted as heir, and had given security and taken possession of the property, but before the executor had rendered an account to the heir, or received from her the sums necessary to pay the debts.

In Christmas v. Fluker (1844) 7 Rob. (La.) 13, an action against the heir who had been put in possession of the estate of the deceased indorser before the maturity of the note, it was held that a notice of protest inclosed in a letter not directed to the defendant by name, but to the legal representative of the indorser, was not sufficient.

It is not sufficient to give notice to the attorney in fact of the indorser, although he was expressly authorized to receive such notices, since the death of the indorser had the effect of revoking his authority in this regard. Bank of Washington v. Pierson (1826) 2 Cranch, C. C. 685, Fed. Cas. No. 953; Brent v. Bank of Washington (1824) 2 Cranch, C. C. 517, Fed. Cas. No. 1,834; Bird v. Doyal (1868) 20 La. Ann. 541.

It has been held that the object of requiring the giving of notice is accomplished, if notice actually reaches the personal representative; and hence, although the notice was addressed to the deceased indorser as if living, nevertheless it is sufficient, where it actually reaches the latter's personal representative. Bank of Ravenswood v. Wetzel (1905) 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 886, 6 Ann. Cas. 48.

While notice should be served upon an executor of a deceased indorser, either by mail or personally, yet if notice is served in some other manner, and it actually reaches such executor, it will be sufficient. Louisiana State Bank v. Dumartrait (1849) 4 La. Ann. 483. If the notice is addressed to the deceased indorser, but is delivered to his personal representative, it is sufficient. Beals v. Peck (1851) 12 Barb. (N. Y.) 245. So, where the notary is

informed of the death of the indorser of a note, and he also receives information at the bank where the note is payable that such executor left a will, appointing a designated person executor, it is sufficient if the notice runs to the deceased indorser as though living, where it is mailed in care of the executor. SECOND NAT. BANK v. SMITH (reported herewith) ante, 470.

b. Where maker is also executor.

Where the maker of a note is also the executor of the estate of the deceased indorser, the fact that demand is made upon the maker for payment does not excuse giving him notice of nonpayment, in order to charge the estate of the deceased indorser. Carolina Nat. Bank v. Wallace (1879) 13 S. C. 347, 36 Am. Rep. 694.

c. Where partnership is indorser.

Where a partnership is the indorser of a note, and one of the partners has died between the execution of the note and its maturity, and a personal representative has been appointed over the estate, in order to hold the estate it is necessary to give such personal representative notice of the nonpayment of the note, and it is not sufficient merely to give notice to the surviving member of the partnership. Cocke v. Bank of Tennessee (1845) 6 Humph. (Tenn.) 51.

In this connection, it is to be noted that this note is limited to the question of the person to whom notice must be given in order to charge the estate of the deceased person; and hence it does not include cases involving the question as to whom notice is to be given in order to charge the estate of a partnership, where one of the partners has deceased subsequently to the partnership indorsement upon which it is sought to hold it liable. Slocumb v. De Lizardi (1869) 21 La. Ann. 355, 99 Am. Dec. 740, is illustrative of the class of cases thus excluded.

d. Where there is more than one personal representative.

Where there is more than one personal representative, it is sufficient if notice is served upon one of them, and this is true, although the one served is interested against the succession. Lewis v. Bakewell (1851) 6 La. Ann. 359, 54 Am. Dec. 561.

Where there is more than one personal representative of the estate of a deceased indorser, it is sufficient if notice of nonpayment or protest is served upon one of them. Beals v. Peck (1851) 12 Barb. (N. Y.) 245.

II. Where no personal representative has been appointed, or his identity is unknown to the holder.

a. In general.

If administration has not yet been granted over the estate of a deceased indorser of a note or bill, or the holder is without knowledge of the death of the indorser, it is sufficient if notice of nonpayment or protest is addressed to the indorser as though living. Maspero v. Pedesclaux (1870) 22 La. Ann. 227, 2 Am. Rep. 727; Mathewson v. Strafford Bank (1863) 45 N. H. 104; Dodson v. Taylor (1893) 56 N. J. L. 11, 28 Am. Rep. 316; Stewart v. Eden (1804) 2 Caines (N. Y.) 121, 2 Am. Dec. 222; Merchants Bank v. Birch (1819) 17 Johns. (N. Y.) 25, 8 Am. Dec. 367; Linderman v. Guldin (1859) 34 Pa. 54; Planters' Bank v. White (1840) 2 Humph. (Tenn.) 112, 36 Am. Dec. 305; Alton v. Robinson (1841) 2 Humph. (Tenn.) 341; Cosgrave v. Boyle (1880) 5 Ont. App. Rep. 458. Notice sent to the decedent's last residence or last place of business is sufficient. Goodnow v. Warren (1877) 122 Mass. 79, 23 Am. Rep. 289; Linderman v. Guldin (1859) 34 Pa. 54.

Where it does not appear that the holder of a note or the notary knew of the death of the indorser, notice is sufficient where it is addressed to the latter at his late postoffice address, especially where it was received by decedent's heirs, one of whom was subsequently appointed administrator of the decedent's estate, there being no administrator at the time the notice was given. Maspero v. Pedesclaux (1870) 22 La. Ann. 227, 2 Am. Rep. 727.

So, where the holders of a note do not know of the death of the indorser, or by the exercise of reasonable dil-

igence cannot ascertain the identity of the legal representative of his estate, it is sufficient if notice is directed to the indorser in person. Barnes v. Reynolds (1839) 4 How. (Miss.) 114.

A notice addressed to the indorser is sufficient, where his death was not known to the holder, and could not be ascertained at the time of the maturity of the note. Merchants Bank v. Birch (1819) 17 Johns. (N. Y.) 25, 8 Am. Dec. 367.

Before the appointment of an administrator, notice of protest left with the son of the deceased, at the place of business of the deceased, is sufficient. Bank of Columbia v. King (1825) 2 Cranch, C. C. 570, Fed. Cas. No. 871.

Where a note matures after the death of the indorser, but before the appointment of a personal representative for his estate, notice of nonpayment may be directed to the indorser at his last place of residence; but notice directed to his brother is not sufficient, although he was subsequently appointed executor of the estate of the deceased indorser. Mathewson v. Strafford Bank (1863) 45 N. H. 104.

Where a note matures after the death of the indorser, but before the appointment of the personal representative, and ten days after maturity notice is given to the personal representative then appointed, such notice is insufficient. Deininger v. Miller (1896) 7 App. Div. 409, 40 N. Y. Supp. 195.

b. When identity of personal representative cannot be ascertained.

Where the holder knows of the death of the indorser, but is unable to ascertain the identity of the personal representative, or no personal representative has yet been appointed for the estate, notice may also be addressed to the personal representative generally, without designating any person in particular. Smalley v. Wright (1878) 40 N. J. L. 471; Barnes v. Reynolds (1859) 4 How. (Miss.) 114; Boyd v. City Sav. Bank (1860) 15 Gratt. (Va.) 501; Boyd v. Orton (1863) 16 Wis. 495; Cosgrave v. Boyle (1880) 5 Ont. App. Rep. 458.

And see Dodson v. Taylor (1893) 56 N. J. L. 11, 28 Atl. 316, holding that notice of protest should be given the executor, if there is any; but if there is none, or his identity cannot be discovered by the exercise of reasonable diligence, notice may be directed to the deceased at his last place of residence.

Where the indorser of a note dies before maturity, and the holder seeks to render his estate liable, if there is no executor or administrator, it is the duty of the holder to use all reasonable diligence to give notice to those interested in the estate. Goodnow v. Warren (1877) 122 Mass. 79, 23 Atl. 289.

The law requires only the exercise of due and proper diligence on the part of the holder or notary, in obtaining the required information. Beals v. Peck (1851) 12 Barb. (N. Y.) 245.

Compare with Pillow v. Hardeman (1842) 3 Humph. (Tenn.) 538, 39 Am. Dec. 195, holding that notice is sufficient, where addressed to the legal representative of the estate of the deceased indorser, without specifying any person in particular, although the holder might, by inquiry, have ascertained who the personal representative was.

Where the notary uses reasonable diligence in the matter, and is unable to ascertain the identity of the personal representative, notice is sufficient where it is addressed to the indorser and left at his last place of residence, there being no personal representative appointed at the time. Weaver v. Penn (1875) 27 La. Ann. 129. But where the holder of a note had information to the effect that an indorser thereon is dead, and his will had been duly proved and was at the surrogate's office at the place of the residence of the indorser, he is not justified in addressing notice of nonpayment to the indorser, rather than to the personal representative. Cayuga County Bank v. Bennett (1843) 5 Hill (N. Y.) 236.

Under a Bill of Exchange Code,

which provides that notice of dishonor, in order to be valid and effectual, must be given in accordance with certain rules, one of which provides that, where the drawee or indorser is dead, notice must be given to the personal representative, if such there is, and with the exercise of reasonable diligence he can be found. Where notice is sent to the wrong person as executor of the estate of the deceased indorser, it is a question for the jury whether or not, in attempting to ascertain the identity of the executor, the holder exercised reasonable diligence. Merchants' Bank v. Brown (1903) 86 App. Div. 599, 83 N. Y. Supp. 1037.

Where the Code provides that the notice of dishonor of a bill or note may be mailed to the decedent's last place of residence, it is sufficient to give notice to the persons appointed executors in the will of the deceased, although no personal representative has yet been appointed by the court. Drexler v. McGlynn (1893) 99 Cal. 143, 33 Pac. 773. Notice served upon a person appointed executor in the deceased indorser's will is sufficient, although he had not at the time accepted. And this is true, although he in fact never accepted the appointment. Shoenberger v. Lancaster Sav. Inst. (1857) 28 Pa. 459.

Where the holder of a note makes reasonable inquiry, and is unable to ascertain the identity of the deceased indorser, it is sufficient if he deposits notice in the postoffice, addressed to the deceased indorser as if living, and another notice addressed to the executors or administrators of the estate of such indorser. Boyd v. Orton (1863) 16 Wis. 495.

It is sufficient where one notice is directed to the decedent personally, and another to his estate, and both are addressed to the decedent at his last place of residence. Bank of Port Jervis v. Darling (1895) 91 Hun, 236, 36 N. Y. Supp. 153.

Notice may be directed to the indorser and left at his last place of residence, where it cannot be ascertained by reasonable diligence whether he has made a will, or who his personal representative is; and where the indorser had two homes, one in the city and one in the country, and the note was dated at and payable in the city, notice may be left at the indorser's late city residence. Stewart v. Eden (1804) 2 Caines (N. Y.) 121, 2 Am. Dec. 222.

Notice addressed to the legal representative of the estate of the indorser, at the latter's last place of residence, is sufficient, where no one had then qualified as personal representative. Boyd v. City Sav. Bank (1860) 15 Gratt. (Va.) 501. A. G. S.

TILLY FIELD, by Guardian, Plff. in Err.,

v.

MARTIN GOAT et al.

VERNON H. HARRIS, Garnishee.

Oklahoma Supreme Court—May 28, 1918.

(— Okla. —, 173 Pac. 364.)

Exemptions — proceeds of homestead.

1. The exemption of the homestead of the family, provided in article 12 of the Constitution, extends to the proceeds of a voluntary sale of such homestead, which are in good faith intended, at the time of such sale, to be invested in another homestead, and such proceeds are exempt from

Headnotes by RUMMONS, C.

seizure by process of garnishment for debts not within the exceptions provided in article 12 of the Constitution.

[See note on this question beginning on page 483.]

Same — Construction.

2. The Exemption Laws of this state are to be liberally construed in favor of the exemption.

ERROR to the District Court for Hughes County to review an order dissolving a garnishment and discharging the garnishee in an action to recover money lent. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Diamond & Sherrow**, for plaintiff in error:

The proceeds of the voluntary sale of a homestead, when said sale is made with the intention of reinvesting said proceeds in improving other lands to be used as a homestead, are not exempt from garnishment.

11 R. C. L. 530, § 43; Knabb v. Drake, 23 Pa. 489, 62 Am. Dec. 352; Andrews v. Rowan, 28 How. Pr. 126; Harrier v. Fassett, 56 Iowa, 264, 9 N. W. 217, 15 Am. & Eng. Enc. Law, 594; Freiberg v. Walzem, 85 Tex. 264, 34 Am. St. Rep. 808, 20 S. W. 60; Kirby v. Giddings, 75 Tex. 679, 13 S. W. 27; Whittenberg v. Lloyd, 49 Tex. 633; Wright v. Westheimer, 3 Idaho, 232, 35 Am. St. Rep. 269, 28 Pac. 430; Fred v. Bramen, 97 Minn. 484, 114 Am. St. Rep. 740, 107 N. W. 159; Freeman, Executions, § 235; Thompson, Homestead, § 745; Mann v. Kelsey, 71 Tex. 609, 10 Am. St. Rep. 800, 12 S. W. 43; Casebolt v. Donaldson, 67 Mo. 308; Giddens v. Williamson, 65 Ala. 439.

Messrs. **Anglin & Hall**, for defendants in error:

The Exemption Laws must be construed in favor of the debtor, and when any doubt arises as to whether or not certain property is exempt, the doubt must be resolved in favor of the exemption.

Hoyt v. Pullman, 51 Okla. 717, L.R.A.1916B, 1288, 152 Pac. 386; Phelan v. Lacey, 51 Okla. 393, L.R.A. 1916B, 786, 151 Pac. 1070.

The homestead may be mortgaged; and when so mortgaged, it does not become liable for any other debts than that for which it was encumbered.

Byers v. Ingraham, 51 Okla. 440, 151 Pac. 1061.

The homestead may be sold free from all liens, except those enumerated in the Constitution, the purchase money, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and no judgment lien will attach.

Gray v. Deal, 50 Okla. 89, 151 Pac. 205; Garrison v. Carl, — Okla. —, 166 Pac. 152; Hedgpath v. Hudson, — Okla. —, 160 Pac. 604.

A homesteader may sell his homestead and invest the proceeds in another homestead, or he may exchange his homestead for a new one; and the new homestead is exempt to exactly the same extent as the old.

13 R. C. L. 588; Goode v. Lewis, 118 Mo. 357, 24 S. W. 61; Mann v. Corrington, 93 Iowa, 108, 57 Am. St. Rep. 256, 61 N. W. 409; Winter v. Ritchie, 57 Kan. 212, 57 Am. St. Rep. 331, 45 Pac. 595; Morris v. Ward, 5 Kan. 239; Gray v. Deal, 50 Okla. 89, 151 Pac. 206; Brenneke v. Duigenan, 6 Kan. App. 229, 49 Pac. 687; Smith v. Gore, 23 Kan. 488, 33 Am. Rep. 188; Watkins v. Blatschinski, 40 Wis. 347; Becher v. Shaw, 44 Wash. 166, 120 Am. St. Rep. 982, 87 Pac. 71; State v. Geddis, 44 Iowa, 537; Campbell v. Campbell, 129 Iowa, 317, 105 N. W. 583; Cullen v. Harris, 111 Mich. 20, 66 Am. St. Rep. 380, 69 N. W. 78; Huntington Bank v. Bowers, 22 Ky. L. Rep. 497, 58 S. W. 418; Lee v. Hughes, 25 Ky. L. Rep. 1201, 77 S. W. 386; Brooks v. Collins, 11 Bush, 622; Rulo v. Murphy, 21 Ky. L. Rep. 295, 51 S. W. 312; Cooper v. Arnett, 95 Ky. 603, 26 S. W. 811; Beckmann v. Meyer, 75 Mo. 333; New Madrid Bkg. Co. v. Brown, 165 Mo. 32, 65 S. W. 297; State ex rel. Schneider v. Hull, 99 Mo. App. 703, 74 S. W. 888; Zollinger v. Dunnaway, 105 Mo. App. 36, 78 S. W. 666.

Rummons, C., delivered the opinion of the court:

The plaintiff in error, plaintiff below, having recovered a judgment against the defendant Martin Goat, caused a writ of garnishment to be served upon one Vernon H. Harris. The garnishee answered, showing

that he had in his possession $550 belonging to the defendant Martin Goat. Thereafter Martin Goat and Josephine Goat filed answer in said garnishment proceeding, claiming said sum of $550 to be exempt because the same was the proceeds of a voluntary sale of their homestead. The cause was tried to the court upon an agreed statement of facts, stipulating that the money sought to be reached by garnishment was the proceeds of a voluntary sale of the homestead of the defendants, and that the defendants, at the time they made the sale, intended to use the proceeds of such sale in the improvement of another homestead. The trial court found that the funds garnished were exempt, dissolved the garnishment, and discharged the garnishee.

The only question to be determined in this case is whether or not the Homestead Laws of this state extend to and protect the proceeds of a voluntary sale of the homestead, which are intended to be invested in another homestead, from being reached by process of law by creditors of the homestead claimant. There is great want of harmony in the authorities upon this question. Some of this diversity of opinion results from the varying provisions of the Homestead Laws of the several states. Where, however, there is no express statute extending the exemption of the homestead to the proceeds of a voluntary sale of such homestead, intended to be reinvested in another homestead, the authorities are still not in harmony. In perhaps the greater number of jurisdictions the rule is that, in the absence of a statute expressly extending such exemption to the proceeds of the voluntary sale of the homestead, such proceeds are not exempt from seizure by legal process at the suit of a creditor, whether they be intended for reinvestment in another homestead or not.

This question seems never to have been passed upon directly by this court. It has, however, been determined by this court that the Exemption Laws are to be liberally construed in favor of the exemption, and, where there is doubt as to whether or not property should be exempt, such doubt should be resolved in favor of the exemption. Phelan v. Lacey, 51 Okla. 393, L.R.A.1916B, 786, 151 Pac. 1070; Hoyt v. Pullman, 51 Okla. 717, L.R.A.1916B, 1288, 152 Pac. 386. Under that rule of construction we feel convinced that, in the instant case, to give full effect and vitality to the Exemption Laws of our state, particularly the exemption of the homestead, which is designated for the protection of the family and of society rather than for the protection of the debtor, the exemption of the homestead provided in our laws must be held to impliedly extend to the proceeds of a voluntary sale of the homestead, bona fide intended to be invested in another homestead.

Exemption—construction.

In Watkins v. Blatschinski, 40 Wis. 347, the supreme court of Wisconsin held that money due a judgment debtor for the purchase of his homestead, as a part of the consideration therefor, which the debtor designs in good faith to apply to the purchase of another homestead, is not liable to garnishment. Mr. Justice Cole, who delivered the opinion of the court, says: "At the outset of the discussion, this important fact must be borne in mind, namely, that the laws of this state not only exempt the homestead from forced sale, while it is occupied by the debtor and family, but they clearly and distinctly provide that the owner may remove from the homestead; may sell and convey the same to a purchaser; and that such removal or sale and conveyance shall not operate to render the homestead liable to forced sale on execution or other final process issued upon any judgment or decree against the owner. Rev. Stat. §§ 23 and 30, chap. 34. The statute further provides that no judgment or decree against the owner shall be

a lien upon the homestead for any purpose whatever, except in certain specified cases, which need not be noticed. The policy of the statute cannot be misapprehended. Its obvious design and plain purpose is to benefit the debtor by securing to him his homestead beyond all liability to forced sale on execution or other process. In case the debtor desires to remove from the homestead for some temporary cause, or to absent himself for a time, the statute permits him to do so (Jarvais v. Moe, 38 Wis. 440); and the statute further enables him to sell and convey the homestead to a purchaser, free from all lien by judgment. It is obvious that this legislation is in the interest of the owner of the homestead, and was intended to confer valuable rights. It is not legislation for the benefit of creditors. Now, is it not plain that the right to sell and convey the homestead free from judgment liens is a barren right, so far as the owner is concerned, if the proceeds of the sale cannot be protected until they reach the hands of the vendor, or while in transition from one homestead sold to another purchased? It certainly seems to us to be a valueless right, if the proceeds of the sale are liable to be attached, or are subject to garnishee process, as soon as the homestead is sold. . . . This undoubtedly is the policy and spirit of the statute, to allow a person to sell one homestead and buy another; and the exemption must cover the change, and protect the proceeds while the transfer is being made. Otherwise, the beneficent object of the law would often be defeated, and the owner would derive no possible benefit from the provision, which enables him to sell and convey his homestead free from all judgment liens except those specified."

In the case of Becher v. Shaw, 44 Wash. 166, 120 Am. St. Rep. 982, 87 Pac. 71, the supreme court of Washington quotes with approval from Watkins v. Blatschinski, supra, and applies the same rule. State v. Geddis, 44 Iowa, 537; Cullen v. Harris, 111 Mich. 20, 66 Am. St. Rep. 380, 69 N. W. 78. Our Homestead Laws have been interpreted by this court in accord with the provisions of the Wisconsin statutes cited in Watkins v. Blatschinski; it having been repeatedly held that the homestead may be sold and conveyed, free and clear of all judgment liens save those excepted in the homestead exemption clause of the Constitution. Gray v. Deal, 50 Okla. 89, 151 Pac. 205; Gerlach Bank v. Allen, 51 Okla. 736, 152 Pac. 399; Hedgpath v. Hudson, — Okla. —, 160 Pac. 604. The Wisconsin case is therefore highly persuasive in determining this question.

In Mitchell v. Milhoan, 11 Kan. 617, it is held that the surplus remaining from the sale of the homestead to satisfy a judgment of foreclosure of a mortgage is not liable to be taken under execution, to satisfy a judgment which was not a lien on the judgment debtor's homestead, so long as the judgment debtor intended and expected to use said surplus for the purchase of another homestead. In Smith v. Gore, 23 Kan. 488, 33 Am. Rep. 188, it is held that, when a person sells his homestead, without at the time having the intention of using the proceeds of such sale in purchasing another homestead, and has no intention of purchasing another homestead immediately with the funds, such proceeds are not exempt from payment of his debts. Mr. Justice Valentine, who delivered the opinion of the court, says: "It is true that this court has decided that the proceeds of a homestead, sold at forced sale by a sheriff, are exempt from the payment of all debts which are not liens upon the homestead, so long as the debtor expects and intends to use such proceeds in procuring another homestead. Mitchell v. Milhoan, supra. And this doctrine probably ought to be extended to cases where the sale of the homestead is made voluntarily, by the owner of the home-

stead himself. Watkins v. Blatschinski, 40 Wis. 347. But we think the intention to use the proceeds in procuring another homestead should be formed at or before the time of the sale, and the intention should be to procure another homestead with the proceeds immediately. It would not do to form the intention two years after the sale, nor would a present intention to procure the homestead two years afterwards be sufficient. If the party himself supposed that he could get along without a homestead, the law would not protect his money or his credits, and exempt them from the payment of his debts, merely because it supposed he needed a homestead. The law does not, in express terms, in any case, exempt money or credits, merely because they are proceeds of a homestead. They are exempted only by a sort of equitable fiction, drawn from the spirit of the Homestead Exemption Laws, and adopted for the purpose of enabling persons to change their homesteads when they desire. This sort of exemption, however, is not allowed in several of the states. Thompson, Homestead, §§ 748 to 751. In this state the Homestead Exemption Laws are construed liberally; but, giving to them the most liberal construction, the plaintiff in error is not entitled to have the money due on said note and mortgage exempted from the payment of his debts."

In Brenneke v. Duigenan, 6 Kan. App. 229, Judge McElroy, who delivered the opinion of the Kansas court of appeals, says: "Are the proceeds of a mortgage on a homestead subject to garnishment for the payment of an ordinary judgment indebtedness? The homestead was exempt, and Holst and wife had a right to sell the homestead or mortgage the same, and the money derived from such sale or mortgage would be exempt. This fund was exempt. It was not subject to garnishment." "The mortgagors had a right to mortgage their home, and use the money in any manner that they saw fit, and this fund was not subject to the garnishment proceedings." [49 Pac. 687] State ex rel. Schneider v. Hull, 99 Mo. App. 703, 74 S. W. 888.

While this court, as we have said, has not passed directly upon this question, yet it was nearly involved in the case of American Surety Co. v. Gibson, — Okla. —, 166 Pac. 112. This court held: "A married man who owned a farm in Caddo county, and who had lived with his family thereon for about ten years, traded this farm for one located in Canadian county, intending to remove his family thereon and to make the same their home. This Canadian county farm was rented at the time of the trade, and the tenant was occupying the one residence thereon, and for that reason he could not immediately establish the family in the new home. He rented a furnished house in El Reno for one month, and moved his family there, and was intending to go to Cushing for temporary employment, but before he got away, and about ten days after his arrival at El Reno, he was sued upon an unsecured debt, and an attachment was issued and levied upon the farm; he moved to discharge the attachment on the ground that the farm was his homestead, and as such exempt from the attachment. Held, that his motion was well taken, and was properly sustained."

Mr. Commissioner Galbraith, who wrote the opinion of the court, says: "All the testimony offered at the hearing was that of Thomas A. Gibson. By this it was established that he was a citizen and resident of Oklahoma, and a married man; that he had traded his homestead in Caddo county for this Canadian county farm, with the intention of making it the home of himself and family, and that, at the commencement of the action, he had no other homestead; that he selected these premises as his homestead, and, as evidence of such selection and intention, had moved his family from

Caddo county to Canadian county, and was prevented from fully carrying out his intent and establishing his new home by a 'temporary obstacle,' namely, the possession of the house on the premises by a tenant, and that he intended to take possession and to establish his home upon this land as soon as this temporary obstacle was removed. His good faith is not questioned. From these facts we submit that it follows that the premises had been invested with the homestead character, and were exempt from the attachment. We are, therefore, constrained to hold that the claim of exemption ought to have been sustained, although the claimant had not actually occupied and used the premises, and that the court was right in so holding."

In the foregoing case the land which was held to be exempt as the homestead of the judgment debtor was clearly the proceeds of an exchange of his former homestead, and if a debtor may be protected in exchanging his homestead for another tract of land which he intends to occupy as a homestead, as soon as a temporary obstacle is removed, it would logically follow that the proceeds of a sale of a homestead which he intended in good faith to invest in another homestead should be protected to the same extent. It is clear that a sale and reinvestment in another home is as efficacious a method of exchanging homesteads as an exchange of lands, and such method is often more readily available than an exchange in kind.

Same—proceeds of homestead.

We are convinced that the judgment of the trial court is in harmony with the interpretation of our Homestead Laws by this court in numerous cases, and that the trial court committed no error in holding the funds sought to be garnished to be exempt.

The judgment of the trial court should be affirmed.

Per Curiam:
Adopted in whole.

ANNOTATION.

Exemption of proceeds of voluntary sale of homestead.

I. General rule, 483.
II. Explicit statutory provisions as to proceeds, 486.
III. Miscellaneous, 487.

Scope.

This note is limited to a consideration of the question whether the funds or evidences of indebtedness arising from the voluntary sale of a homestead are exempt from seizure under legal process. The inquiry whether land taken in exchange for homestead property is exempt is not within the scope of this annotation. Cases involving surplus funds derived from judicial sales or dealing with the exemption of the proceeds of insurance on homestead property have not been included.

I. General rule.

It has been held that the purchase price of homestead property is not exempt from the claims of creditors, in the absence of express statutory provisions as to such proceeds. (It may be noted that, in some of the states so holding, the exemption was subsequently extended to the proceeds by express statutory provisions.) Giddens v. Williamson (1880) 65 **Ala.** 439; Fred v. Bramen (1906) 97 **Minn.** 484, 114 Am. St. Rep. 740, 107 N. W. 159; Adams v. Dees (1884) 62 **Miss.** 354; Lane v. Richardson (1889) 104 **N. C.** 642, 10 S. E. 189 (purchase money of homestead subject to personal property exemption); Schneider v. Bray (1883) 59 **Tex.** 668 (recognizing rule); Mann v. Kelsey (1888) 71 **Tex.** 609, 10 Am. St. Rep. 800, 12 S. W. 43; Moursund v. Priess (1892) 84 **Tex.** 554, 19 S. W. 775; Womack v. Stokes (1896) 12 **Tex.** Civ. App. 648, 35 S. W. 82.

The principle that the exemption cannot be extended to the proceeds of a sale of the homestead, except by vir-

tue of and to the extent allowed by express statutory provisions, is also recognized and vindicated in Casebolt v. Donaldson (1878) 67 Mo. 308, which is not strictly in point, as the sale there involved was an involuntary one.

But in Beckman v. Weyler (1882) 75 Mo. 333, and Holland v. Kreider (1885) 86 Mo. 59, holding that the purchaser takes the homestead with the benefit of the exemption, the court states arguendo that the statutes which are not set out, recognize the right to sell one homestead and purchase another with the proceeds.

There are several Kentucky cases which apparently support the view that the proceeds of the homestead are exempt, at least while being held, for a reasonable time, for reinvestment in another homestead; but the value of these cases as precedents is impaired by the failure of the reports to disclose the terms of the Homestead Statute in this regard, or whether or not there were any express provisions as to the exemption of proceeds. Cooper v. Arnett (1894) 95 Ky. 603, 26 S. W. 811 (before any attempt was made to reach the proceeds, they had been reinvested in a homestead, and the question of the original intention was immaterial); Lee v. Hughes (1903) 25 Ky. L. Rep. 1201, 77 S. W. 386 (intention by debtor, which was carried out, to reinvest in homestead); Fitch v. Duckwall (1904) 25 Ky. L. Rep. 1535, 78 S. W. 185 (recognizing rule, but holding that debtor cannot use proceeds in trading for an indefinite time, and then invest them in another homestead, and claim it as exempt from his antecedent debtor); Huntington Bank v. Bowers (1900) 22 Ky. L. Rep. 497, 58 S. W. 418; Caldwell v. Seivers (1887) 85 Ky. 38, 2 S. W. 651 (holding that where one sells his homestead, and invests the proceeds in a residence in another state, and subsequently returns and purchases a new homestead, the latter is not exempt from debts existing before the original removal); Torbitt v. Jackson (1904) 26 Ky. L. Rep. 196, 80 S. W. 1123; Hall v. McGlothlin (1885) 6 Ky. L. Rep. 661 (abstract decision, denying exemption on the ground that the homestead right in the property from which the funds were derived had been lost, prior to the sale); Goodin v. First Nat. Bank (1893) 15 Ky. L. Rep. 208 (holding that money received by an insolvent debtor, in lieu of homestead rights, cannot be subjected to payment of claims of creditors); Huntington Bank v. Bowers (1900) 22 Ky. L. Rep. 497, 58 S. W. 418; King v. Tompkins (1893) 15 Ky. L. Rep. 29 (abstract); Maynard v. May (1889) 11 Ky. L. Rep. 166, 11 S. W. 806 (declaring generally that a debtor may convey his homestead, without rendering it, or the proceeds of sale, liable to the payment of debts from which it was exempt while occupied as such); Skinner v. Chadwell (1886) 8 Ky. L. Rep. 258, 1 S. W. 437; Allen v. Gravett (1882) 3 Ky. L. Rep. 534 (abstract decision to the effect that homestead and notes executed therefor cannot be subject to the claim, unless the creditors can show a conversion of the notes, or their proceeds, into other species of property, not exempt by law); Lear v. Totten (1878) 14 Bush (Ky.) 101 (declaring that if the owner sells his homestead and converts it into money, with no purpose of reinvesting the proceeds in property not exempt from execution, the protection is gone).

In Brenneke v. Duigenan (1897) 6 Kan. App. 229, 49 Pac. 687, holding that the money derived from a sale or mortgage of an exempt homestead is exempt, it does not appear from the report whether there was any statutory provision other than the general one, exempting the homestead. Nor does that appear in Smith v. Gore (1880) 23 Kan. 488, which says, in effect, that the exemption ought probably to be extended to proceeds, so long as the debtor expects and intends to use them in procuring another homestead, provided such intention is formed at or before the sale. The implication, however, seems to be that this view is taken without reference to any statutory provision; and the opinion cites Watkins v. Blatschinski (1876) 40 Wis. 347, infra.

In Holley v. Horton (1910) 164

Mich. 31, 129 N. W. 6, holding that the provisions of the Michigan Constitution and statute, exempting a homestead consisting of any quantity of land not exceeding 40 acres, cannot be construed to include 41 acres, and that, upon a sale of the homestead, but $^{40}/_{41}$ of the fund is exempt from legal process, it does not appear whether or not there was an express provision as to exemption of proceeds.

Nor was there any reference to an express statutory provision as to proceeds in Ex parte Allison (1895) 45 S. C. 338, 23 S. E. 62, holding that one who, after executing an executory contract of sale of premises occupied by him as a residence, makes a general assignment for the benefit of creditors, embracing such premises, but reserving his rights of homestead, and reserving the rights of the vendee who had entered into possession, has, under the statute exempting a homestead in lands to the value of $1,000, a beneficial interest in the property to the extent of $1,000 of the unpaid purchase money.

Prior to the Texas statute, which expressly exempts the proceeds for six months, there was some conflict among the cases in that state as to the exemption of the proceeds, held with the intention of reinvesting in another homestead.

In Whittenberg v. Lloyd (1878) 49 **Tex.** 633, in the absence of constitutional or statutory provisions on the subject, it was decided that property received in exchange for a homestead, and held with the intention of selling it and applying the proceeds to the payment of a new homestead, bargained for, was not exempt from attachment. This rule was followed in Mann v. Kelsey (1888) 71 **Tex.** 609, 10 Am. St. Rep. 800, 12 S. W. 43, which held that the proceeds arising from the voluntary sale of a homestead are subject to execution, although it was the intention of the homesteader to invest the proceeds in another home, and he had no other means for that purpose.

And in Kirby v. Giddings (1890) 75 **Tex.** 679, 13 S. W. 27, it was similarly held that the proceeds of the recent sale of a homestead, which were on deposit in a bank, were subject to garnishment, although the homesteader contemplated investing in another home at once, and was in the act of doing so when the writ was served.

It is said that, although there are some expressions in the opinions in the cases of Schneider v. Bray (1883) 59 **Tex.** 673, and Watkins v. Davis (1884) 61 **Tex.** 414, which might indicate that, where there was an intention immediately to invest the proceeds in another homestead, they would be exempt, it has since been definitely settled that such proceeds become subject to execution, and the rule, as announced in Whittenberg v. Lloyd (1878) 49 **Tex.** 633, has been reaffirmed. Blum v. Light (1891) 81 **Tex.** 414, 16 S. W. 1090.

The decision in Watkins v. Davis (**Tex.**) supra, was followed in Young v. Matier (1888) 3 **Tex.** App. Civ. Cas. (Willson) 423, which holds, however, that proceeds of the sale of a homestead, conveyed with the present and specific intent to reinvest the proceeds in another, are not subject to garnishment while in process of such change and reinvestment.

In Henry v. Boedker (1911) — **Tex.** Civ. App. —, 141 S. W. 811, under a statute expressly providing that the proceeds of a voluntary sale of the homestead shall not be subject to garnishment, or forced sale, within six months after such sale, it was held that it was not necessary for the debtor to institute a suit within six months to vindicate her rights as against one who had received the proceeds as her agent, and appropriated the same to payment of a debt due him.

The exemption of the proceeds for a reasonable time, while being held with the purpose of reinvestment in another homestead, has been held to be implied, by a statute which authorizes the sale of a homestead, free from all claims or liens, and the acquisition of a new homestead, exempt from attachment or execution. Becher v. Shaw (1906) 44 **Wash.** 166, 120 Am. St. Rep. 982, 87 Pac. 71.

And such an exemption of proceeds has been held to be implied, by a stat-

ute which gives an absolute right to exchange one homestead for another, or to sell the homestead and acquire a new one, which shall be exempt to the same extent as the former one. State v. Geddis (1876) 44 **Iowa**, 537; Huskins v. Hanlon (1887) 72 **Iowa**, 37, 33 N. W. 352; Benham v. Chamberlain (1874) 39 **Iowa**, 358; Robinson v. Charleton (1897) 104 **Iowa**, 296, 73 N. W. 616; Cowgell v. Warrington (1885) 66 **Iowa**, 666, 24 N. W. 266; Mann v. Corrington (1894) 93 **Iowa**, 108, 57 Am. St. Rep. 256, 61 N. W. 409; Richards v. Orr (1902) 118 **Iowa**, 724, 92 N. W. 655; Campbell v. Campbell (1906) 129 **Iowa**, 317, 105 N. W. 583; Milner v. Davis (1903) 120 **Iowa**, 231, 94 N. W. 511 (holding such exemption not lost by a deposit of the proceeds in a bank); Schuttloffel v. Collins (1896) 98 **Iowa**, 576, 60 Am. St. Rep. 216, 67 N. W. 397 (holding sale of homestead, on time, does not deprive proceeds of their exempt character); Rogers v. Raisor (1882) 60 **Iowa**, 355, 14 N. W. 317; Dalton v. Webb (1891) 83 **Iowa**, 478, 32 Am. St. Rep. 314, 50 N. W. 58 (holding proceeds not exempt when carried into another state for investment); Peninsular Stove Co. v. Roark (1895) 94 **Iowa**, 560, 63 N. W. 326 (holding proceeds, invested in business, are not exempt); Campbell v. Campbell (1906) 129 **Iowa**, 317, 105 N. W. 583 (holding the proceeds of the sale, in another state, of the homestead of a widower, without family dependent upon him, and who has no intention of acquiring a homestead, are not exempt).

And a mere provision that the debtor may convey his homestead, free from all liens, has been held to imply the exemption of the proceeds of such sale, which are, in good faith, intended by the debtor to be used in the purchase of another homestead. Watkins v. Blatschinski (1876) 40 **Wis.** 347. This view seems to have been subsequently incorporated in an express statutory provision.

The last-mentioned case is cited as highly persuasive authority in the reported case (FIELD v. GOAT, ante, 478), holding that the exemption of the homestead under the laws of Oklahoma, which are not explicitly set forth, impliedly extends to the proceeds of a voluntary sale of the homestead, intended, in good faith, to be used in purchasing another. Apparently, the implication is drawn in consonance with the Wisconsin case, from the provision of the Oklahoma Constitution, which, with certain specified exceptions, protects the homestead of a family from forced sale for the payment of debts, and in view of earlier Oklahoma decisions, that a homestead may be sold and conveyed free and clear of all judgment liens, save those excepted in the homestead exemption clause of the Constitution. The reasoning underlying these cases is clearly set forth in the quotation from Watkins v. Blatschinski (Wis.) supra, included in the reported case.

But an implied exemption, under a statute authorizing a debtor to convey his homestead free from all liens, was denied in Fred v. Bramen (1906) 97 **Minn.** 484, 114 Am. St. Rep. 740, 107 N. W. 159, notwithstanding that, at the time of the service of garnishee process, the debtor intended to use the proceeds in the purchase of another homestead, within one year from the time the premises were sold. The case was governed by the law in force prior to March 1, 1900, when the Revised Laws of 1905 went into effect.

II. Explicit statutory provisions as to proceeds.

The cases in which the decisions depended upon the construction or effect of constitutional or statutory provisions in relation to homesteads, which did not, in terms, extend the exemptions to proceeds, are considered in the previous division.

The holding or assumption in the following cases, that the proceeds of the voluntary sale of a homestead are exempt, is referable to explicit statutory provisions granting such exemptions, usually for a limited period: Watson v. Saxer (1882) 102 **Ill.** 585 ($1,000, exempt for one year); Fred v. Bramen (1906) 97 **Minn.** 484, 114 Am. St. Rep. 740, 107 N. W. 159 (one year); Thoms v. Thoms (1871) 45 **Miss.** 263 (one year); Zollinger v.

Dunnaway (1904) 105 **Mo.** App. 236, 78 S. W. 666; Kinberlin v. Gordon (1909) 139 **Mo.** App. 464, 122 S. W. 1144; Prugh v. Portsmouth Sav. Bank (1896) 48 **Neb.** 414, 67 N. W. 309; Corey v. Plummer (1896) 48 **Neb.** 481, 67 N. W. 445 (six months); Locke v. Post (1899) 71 **Vt.** 343, 76 Am. St. Rep. 778, 45 Atl. 226; Morgan v. Stearns (1868) 41 **Vt.** 398 (holding that a note given for the purchase price of a homestead was exempt); White v. Capron (1878) 52 **Vt.** 634; Hastie v. Kelley (1884) 57 **Vt.** 293 (holding grantee of a homestead conveyed to secure an annuity, not chargeable as trustee); Brinzel v. Grogan (1886) 67 **Wis.** 147, 29 N. W. 895; Bailey v. Stone (1887) 70 **Wis.** 316, 35 N. W. 735 (holding that the exemption applies, while the proceeds are being held for the purpose of completing payments on a lot bought for a homestead).

The Illinois statute, which exempts the proceeds of the sale for one year, and provides that, if reinvested in a homestead, the same shall be entitled to the same exemption as the original homestead, does not apply as against judgment liens, where a widow made a voluntary conveyance of her homestead to her daughter, and the premises were reconveyed to her within a year. Slattery v. Keefe (1903) 201 **Ill.** 483, 66 N. E. 365. The court observed that there were no proceeds to be exempt, and none to reinvest in a homestead.

The Nebraska statute, expressly exempting the proceeds of the sale of a homestead to the statutory amount, has been held not to impose a single condition, not even that the proceeds shall be held for the purpose of investment in another homestead. Corey v. Plummer (1896) 48 **Neb.** 481, 67 N. W. 445.

On the sale of a homestead, in which the homesteader's equity exceeds the sum made exempt by statute, he has, under the Utah statute, exempting for one year the proceeds derived from the sale of the homestead, the right to elect what payments of the proceeds of the sale he shall claim as exempt, and until he has received and held, for the period of one year, the amount of the proceeds of sale allowed him by statute, his creditors have no right to interfere. Giesy-Walker Co. v. Briggs (1916) 49 **Utah,** 205, 162 Pac. 876.

The statutory exemption conferred upon the proceeds of the sale of a homestead, applies to the proceeds arising from the sale of the equity in property occupied as a homestead under a written contract of purchase. Hansen v. Mauss (1912) 40 **Utah,** 361, 121 Pac. 605.

The exemption accorded for two years by the express provision of the Wisconsin statute, to the proceeds of the sale of a homestead, held with the intention of purchasing another, is said not to depend upon a continued residence of the grantor of the homestead within the state, nor upon an intent to procure another homestead within the state. Hewett v. Allen (1882) 54 **Wis.** 583, 12 N. W. 45.

The statutory exemption is not lost by the fact that a debtor used a portion of the proceeds, received from the sale of his homestead, to pay his debts and maintain his family. Binzel v. Grogan (1886) 67 **Wis.** 147, 29 N. W. 895.

III. Miscellaneous.

The right of a wife to retain, as against creditors, proceeds of the sale of a homestead, which were transferred to her in consideration of her consenting to the alienation of the homestead, or in settlement of a debt due her from her husband, has been considered in several cases.

A note representing part of the purchase money of a homestead, and given to the wife of the grantor in consideration of her consent to the alienation of the homestead, was held subject to garnishment for a community debt, in Ogden v. Giddings (1855) 15 **Tex.** 486, where the husband purchased a new homestead and occupied it, although the wife did not. In this decision, the court adopted the view that the debt secured by the note was designed as an indemnity for the loss of the homestead to the wife; but that it became subject to the claims of the community creditors, on the ac-

quisition of a new homestead by the husband.

The proceeds of the sale of a homestead which is community property, conveyed to the separate use of the wife in consideration of her consenting to the sale, and surrendering her rights of homestead, are not subject to execution. Blum v. Light (1891) 81 Tex. 414, 16 S. W. 1090. In this case the transfer to the wife was held to be on a valuable consideration, and valid. This decision was followed in Gatewood v. Scurlock (1893) 2 Tex. Civ. App. 98, 21 S. W. 55, which holds that personal property received in payment for the homestead of an insolvent debtor, when transferred to the wife to be her separate property, upon the sole consideration of obtaining her consent to the sale, is not subject to levy and sale, under execution issued against the property of the husband. To the same effect is Morgan v. Stearns (1868) 41 Vt. 398.

And in Howard v. Mayher (1905) 39 Tex. Civ. App. 529, 88 S. W. 409, it was held that vendor's lien notes, received on the sale of a homestead and made payable to the vendor's wife, in settlement of a debt due her from her husband, cannot be subjected to the payment of judgments theretofore recovered against the husband.

It has also been held that one does not waive her right to claim the exemption from legal process of the proceeds arising from the voluntary sale of her homestead, where she asserted her right by bill filed for that purpose, as soon as a creditor attempted to subject the fund, by garnishment, to the payment of his claim. Holley v. Horton (1910) 164 Mich. 31, 129 N. W. 6.

A. W. R.

GERMANIA FIRE INSURANCE COMPANY OF NEW YORK, Appt., v. BARBARA TANTON BALLY.

Arizona Supreme Court—June 15, 1918.

(— Ariz. —, 173 Pac. 1052.)

Insurance — prorating of insurance.

1. A provision in a mortgagee clause attached to an insurance policy that, in case of other insurance upon the property, the company shall be liable only for a pro rata share of the whole amount of insurance issued to or held by any party having an insurable interest in the property, does not require a prorating with insurance in which the mortgagee is not interested, if the clause provides that the insurance, as to the interest of the mortgagee, shall not be invalidated by any act of the mortgagor.

[See note on this question beginning on page 498.]

Same — sole ownership — purchase with community funds.

2. That property insured by a wife as hers was paid for out of community funds does not defeat the insurance, under the clause of the policy requiring sole and unconditional ownership, if the property was placed in her name as a gift.

Same — hiatus in assignment — effect.

3. That an insurance policy was never assigned to one of the owners of the property in the chain of title is no defense to an action under a mortgagee clause subsequently attached to the policy.

Same — failure to make proofs of loss — effect on mortgagee clause.

4. Failure of the insured to make proofs of loss within the required time will not bar an action under a mortgagee clause attached to the policy.

Constitutional law — retroactive statute — impairing obligation of contract.

5. Making a statute, allowing an attorney's fee for failure to pay an insurance loss promptly, apply to existing contracts, does not unconstitutionally impair the obligation of a contract.

Same — due process.

6. Making a statute, allowing an attorney's fee for failure to pay an insurance loss promptly, apply to existing contracts, does not unconstitutionally deny equal protection or due process of law.

APPEAL by defendant from a judgment of the Superior Court for Maricopa County in favor of plaintiff, and from an order overruling a motion for new trial, in an action brought to recover, as first mortgagee, on a mortgagee clause in a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **M. T. Phelps** and **Ray A. Hall** for appellant.

Mr. **J. L. Gust** for appellee:

Failure to make proofs of loss within the time required will not bar the action.

Vance, Ins. p. 502; Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882; Reed v. Firemen's Ins. Co. 81 N. J. L. 523, 35 L.R.A.(N.S.) 343, 80 Atl. 462; Dwelling House Ins. Co. v. Kansas Loan & T. Co. 5 Kan. App. 137, 48 Pac. 891; Adams v. Farmers' Mut. F. Ins. Co. 115 Mo. App. 21, 90 S. W. 747; Glen Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. 473; Southern Home Bldg. & L. Asso. v. Home Ins. Co. 94 Ga. 167, 27 L.R.A. 844, 47 Am. St. Rep. 147, 21 S. E. 375; Nickerson v. Nickerson, 80 Me. 100, 12 Atl. 880; Union Inst. for Sav. v. Phœnix Ins. Co. 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 13 Ann. Cas. 433; Lombard Invest. Co. v. Dwelling House Ins. Co. 62 Mo. App. 315; Richards, Ins. p. 178; Evans v. Crawford County Farmers' Mut. F. Ins. Co. 130 Wis. 189, 9 L.R.A.(N.S.) 485, 118 Am. St. Rep. 1009, 109 N. W. 952; 19 Cyc. 865; Burns v. Michigan Mfrs. Mut. F. Ins. Co. 130 Mich. 561, 90 N. W. 411; German Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 130.

The wife has a vested interest in the property, and is as much the owner thereof as her husband.

La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426, Ann. Cas. 1915B, 70.

The assignee is relieved from the consequences of past forfeitures incurred by the assignor.

Richards, Ins. 3d ed. p. 354; Continental Ins. Co. v. Munns, 120 Ind. 30, 5 L.R.A. 430, 22 N. E. 78; North British & M. Ins. Co. v. Gunter, 12 Tex. Civ. App. 598, 35 S. W. 715; Ellis v. Insurance Co. of N. A. 32 Fed. 646; Virginia-Carolina Chemical Co. v. Sundry Ins. Cos. 108 Fed. 451; Bullman v. North British & M. Ins. Co. 159 Mass. 118, 34 N. E. 169; Hall v. Niagara F. Ins. Co. 93 Mich. 184, 18 L.R.A. 135, 32 Am. St. Rep. 497, 53 N. W. 727; Rines v. German Ins. Co. 78 Minn. 46, 80 N. W. 839; Shearman v. Niagara F. Ins. Co. 46 N. Y. 526, 7 Am. Rep. 380; Bayless v. Merchants' Town Mut. Ins. Co. 106 Mo. App. 684, 80 S. W. 289; Ellis v. Council Bluffs Ins. Co. 64 Iowa, 507, 20 N. W. 782.

The provision of the mortgagee clause that provides for contribution must be limited to other insurance existing on the property at the time of the issuance of such mortgagee clause, or as is later taken out with the knowledge or consent of the mortgagee.

Eddy v. London Assur. Corp. 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307; Hardy v. Lancashire Ins. Co. 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209; Richards, Ins. 3d ed. p. 111; Vance, Ins. p. 430; 19 Cyc. 656.

The court should have allowed both the penalty and the attorney's fee.

Alliance Co-op. Ins. Co. v. Corbett, 69 Kan. 564, 77 Pac. 108; British America Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; American F. Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1072; Hanover F. Ins. Co. v. Gustin, 40 Neb. 828, 59 N. W. 375.

Ross, J., delivered the opinion of the court:

The appellee, Barbara Tanton Bally, brought this action to recover, as first mortgagee, on a standard mortgage clause in her favor, attached to what is known as a New

York standard form of fire insurance policy, issued by appellant to Nettie Gilmore. Appellee recovered judgment for the full amount of the policy and $200 attorneys' fees and costs, from which judgment and order overruling motion for a new trial the appellant prosecutes this appeal, and assigns many errors. It first complains that the findings of fact are not supported by the evidence. We have carefully looked into the evidence, and also the findings of fact as made by the court, and, sifting and selecting from both, have come to the conclusion that the material and salient facts are as follows:

The appellant insurance company, in June, 1912, issued to Nettie Gilmore a fire policy on her dwelling for $3,000. October 12th, Nettie Gilmore deeded the premises to one E. D. McDonald, who, on the same day, deeded to C. D. Messner, October 19, 1912, Messner mortgaged the premises to appellee for $3,000. October 23, 1912, Gilmore assigned, with the consent of appellant, the policy to Messner, and on October 25, 1912, appellant attached to the policy a standard mortgage clause, by which it agreed to pay loss, if any, to appellee. In January, 1914, Messner deeded to Olive M. Quartier, and at the same time assigned the policy to her, with the written consent of appellant. Quartier took out two other policies with other insurance companies, aggregating $3,000, to secure a second mortgage on the dwelling in favor of Messner for $1,795. These last policies were taken out without the knowledge or consent of either the appellant or appellee.

Quartier deeded to N. W. Cooper. This transaction, we think, unquestionably took place before the fire, although the trial court's finding is that it cannot be told from the evidence whether it was before or after the fire. The dwelling was damaged by fire October 15, 1914. The court's finding is that the loss was $3,600, and this finding, having support in the evidence, we will treat as correct.

Appellee, Barbara Tanton Bally, has never resided in Arizona. The loan to Messner by her was negotiated and attended to by her agent, Vernon C. Cook, a citizen of Phœnix, and as soon as he learned of the fire loss he, as her agent, undertook to protect her interests, and to that end sought to have proof of loss made and filed with appellant within sixty days after the fire.

Quartier was not a resident of Arizona, and was not present in the state at any of the times mentioned herein. Appellee's agent Cook, believing at the time that Quartier was the owner of the premises, obtained from her a power of attorney, authorizing him to act in the matter of collecting the insurance. When he presented himself to the agent and adjuster of appellant, armed with a power of attorney from Quartier, he was advised by the adjuster that the power of attorney was lacking in both form and substance, and that no dealings could be had with him. This was in November, a month, more or less, from the date of the fire. Cook then endeavored to get another power of attorney that would satisfy the adjuster, and entitle him to be recognized in the matter of settling the insurance. This power of attorney he received two or three days before the expiration of the sixty days allowed in which to file proof of loss, but he was unable to locate or find the adjuster until after the sixty days, and when he did see the adjuster was informed by him that it was too late; that no liability existed because no claim of loss had been filed within sixty days. Notwithstanding, Cook, in the name of Quartier, did make out and give the appellant's agent in Phœnix claim of this loss —this about February 15, 1915— for $5,800. No formal written claim of loss was made by Cooper, and none was made by appellee in her own name. However, the Quartier proof of loss was made by ap-

pellee's agent Cook, for and on behalf of appellee, and in her interest, and for the purpose of saving her rights. The day following the fire, the adjuster and a member of the firm of Kay & Co., who wrote the policy, visited the building, and saw the character and extent of the damages, and shortly thereafter the adjuster caused an appraisal of the loss to be made by a builder and contractor. After the expiration of the sixty days provided in the policy for the making and presenting to the insurance company of the claim of loss, the appellant refused to admit or discuss its liability to the appellee, or anyone else. The standard mortgage clause is as follows: "Loss or damage, if any, under this policy shall be payable to . . . as . . . mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only herein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided that, in case the mortgagor or the owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same. Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void. This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancelation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement. In case of any other insurance upon the within-described property, this company shall not be liable under this policy for a greater portion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise."

From these facts, and some others which we shall state as we go along, the appellant raises several points of law, every one of which, it is claimed, is fatal to the appellee's demand. In the first place, it is said that Nettie Gilmore, in whose favor the insurance policy was originally issued, was not, as she had represented to the company, the sole and unconditional owner of the property insured. The basis for this contention grows out of this state of facts: That Nettie Gilmore was a married woman, and the property, being paid for out of community funds, remained the common property of the spouses, notwithstanding title was in her name. But Nettie Gilmore testified that, while the property was obtained by exchanging common property therefor, it was deeded to her free from any claim of her husband, and as a gift. We know of no rule of law preventing such a transaction being effective as between the husband and wife, and we certainly do not feel inclined to indulge in any technical reasoning in order to relieve the insurance company from liability. Nettie Gilmore, without any gift, was already the owner of one half of the property. La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426, Ann. Cas. 1915B, 70. Against her direct testimony that the whole of the property was hers, we are asked to presume that it was community,

simply because it was, in part, paid for by the husband. We opine that if the husband had paid the full consideration out of his individual funds, and caused the deed to be made to his wife in gift, whatever creditors or others might say, it would afford an insurer no ground of complaint. He could not, in such circumstances, with any semblance of truth or law, assert that the wife was not the sole and unconditional owner of the property.

Insurance—sole ownership—purchase with community funds.

It is also said that the insurance contract has not followed the title to the property; that a hiatus was created when the property was deeded to McDonald, and no assignment of the insurance made to McDonald; that when Nettie Gilmore assigned the insurance policy to Messner, she had no interest whatever in the insured property, having parted with her title some days before. On the same day the property was deeded to McDonald by Nettie Gilmore, he deeded it to Messner. The McDonald transaction is not explained in the evidence. The parties to the transaction may have conceived that the short space of time in which McDonald held the title was so insignificant as not to be taken into consideration in the matter of the assignment of the insurance policy, or it may have been that McDonald was only a "go-between," or a figurehead, in the deal between Gilmore and Messner. It is not claimed that this neglect or lapse was material or, if known to the insurance company or its agents, would have caused the assignment to Messner to be rejected.

But, aside from these reasons, the insurance clause attached to the policy in terms provides that the policy shall not be invalidated as to the mortgagee's interest by reason of any act or neglect of the mortgagor or owner, and, according to the majority of the authorities, this affords protection against previous acts as well as subsequent acts of the insured. As is well known, many insurance policies are issued, primarily, to protect mortgages. In fact, it is made a condition of the mortgage, as in this case, that the insurance shall be carried by the owner of the property to protect the interests of the mortgagee. This exaction by the mortgagee is well known to the insurance companies, and they are only too glad to take the risk. The insurer issues the policy to the mortgagor. It is a contract between the mortgagor and the insurance company. The mortgagee is not interested in the contract in its inception, and only becomes interested after its execution, when the mortgage clause is attached to the policy for his protection. We think the mortgagee, when a policy is presented to him with a standard mortgage clause attached thereto in his favor, is justified in assuming that the insurance company has satisfied itself that the policy is valid and free from impeachment for any conduct or act of the assured at its inception, or prior to the attachment of the mortgage clause. The authorities are not agreed on this proposition, but we think the better reason is with those that hold the rights of the mortgagee are unaffected by any act or neglect of the insured, as well before the attachment of the mortgage clause as afterward. Both views of the law are stated in the following authorities: 14 R. C. L. 1037, § 215; Richards, Ins. p. 354; Brecht v. Law Union & Crown Ins. Co. 18 L.R.A.(N.S.) 197, and note (87 C. C. A. 351, 160 Fed. 399) Bacot v. Phœnix Ins. Co. 25 L.R.A. (N.S.) 1226, Ann. Cas. 1912B, 262, and notes (96 Miss. 223, 50 So. 729; Reed v. Firemen's Ins. Co. 81 N. J. L. 523, 35 L.R.A.(N.S.) 343, 80 Atl. 462; Smith v. Union Ins. Co. 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715, Ostrander on Fire Insurance, p. 502, § 210, says: "When the policy has been assigned with the consent of the company, a new and independent contract has arisen between the company and the assignee,

Same—hiatus in assignment—effect.

and this contract will be subject to no forfeitures by reason of any acts or omissions of the person originally insured. It is wholly immaterial whether the company had or had not knowledge of such forfeitures when consenting to the assignment."

The reason given for applying this rule of construction to the agreement between the mortgagee and the insurer is that their arrangement is, in all essentials, an independent and separate contract, by which the mortgagee is impliedly or expressly relieved from doing the things ordinarily required of the mortgagor, and likewise exempted from the penalties for neglect or omission, the burdens and forfeitures to which he may be subjected being set forth in his contract as contained in the mortgage clause.

It is next objected that appellee should not recover because she failed to make proof of loss, and because the proof of loss by the insured, Quartier, being made more than sixty days after the fire, was not available to the appellee. Under the terms of the policy, the obligation to make proof of loss devolves upon the insured, and not upon the mortgagee. Some of the decisions hold that a failure by the insured to make the proof within the time limit specified will work a forfeiture of the policy as to the insured, whereas others hold that this time limit is not of the essence of the policy, and no forfeiture will be allowed if the insured make proof of his loss within a reasonable time after the fire. Vance, Ins. p. 502; Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882. Since the mortgagee does not contract to furnish proof of loss, certainly the reasoning in the first line of cases should not apply to him. Ordinarily, he is not any more familiar with the property insured than the insurance company, and, in case of fire, is as little likely to know of it, or its cause. The particulars called for in the statement of loss are peculiarly within the knowledge of the insured, and by the terms of the policy it is made his personal duty to take care of it. Whatever effect the neglect or omission of the insured, in this regard, may have upon his rights, it should not be a bar to a recovery by the mortgagee. Perhaps it is generally allowed that someone should make the proof of loss; and, if the insured fails to do so, then the mortgagee may make it, or if the insured makes the proof after the time limit specified, even though, as to him, it is too late, it may be taken advantage of by the mortgagee. 14 R. C. L. 1325, § 500; 4 Cooley's Briefs on Ins. 3352–3374; Union Inst. for Sav. v. Phœnix Ins. Co. 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 13 Ann. Cas. 433. The agent of the mortgagee made the proof of loss here in the name and, ostensibly, for the benefit of Quartier. This proof was lodged with the appellant some four months after the fire, or sixty days beyond the limit named in the policy. As a matter of fact, Quartier, at the time of the fire, as also the proof of loss, had alienated the premises, and had no interest in the policy of insurance, although it stood in her name. At the time of the fire and proof of loss, she had forfeited her rights in the policy, and the only person left within its protection was the mortgagee. The mortgagee was the only one who had an enforceable right or claim against the appellant, and in her name the proof of loss properly should have been made. It was, as found by the court, in fact and in truth, made by appellee's agent for the benefit of appellee, and in aid of her claim. We will therefore treat it as though it had been made in appellee's name and solely for her use, and in entire disregard of the insured. If we should take the view that it was incumbent upon the mortgagee to make proof of loss (the insured having failed to do so) before she could maintain an action upon the policy, we believe

Same—failure to make proofs of loss—effect on mortgagee clause.

appellee has fully met that condition. However, we think the better view to be that it is not necessary for the mortgagee to furnish proof of loss, under a policy with the standard form of mortgage clause attached. The mortgage clause does not require him to furnish proof of loss, neither does the policy, and, when the two are read and construed together, no such duty is discovered. Reed v. Firemen's Ins. Co. 81 N. J. L. 523, 35 L.R.A.(N.S.) 343, 80 Atl. 462; 2 Cooley's Briefs on Ins. p. 1228; Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. 463.

The most perplexing and difficult question is the one growing out of the provision in the mortgage clause with reference to prorating the loss when there is other insurance on the property covered by the mortgage, other insurance not of the mortgagee's interest in the property, but of the interest of others therein. Prominently and loudly it is proclaimed in the first sentence in the contract: "This insurance, as to the interest of the mortgagee only herein, shall not be invalidated by any act or neglect of the mortgagor, or owner, of the within-described property."

As we have seen in other parts of this opinion, the acts or negligence of the mortgagor or owner that will not affect or impair the mortgagee's indemnity are those occurring before the mortgagee's rights accrue, as well as those occurring subsequently, up to and even after the loss. It is evident that a loss of insurance by the mortgagor, or owner, because of some violation of its terms, was not intended to affect or impair the mortgagee's insurance. Whatever may happen to other insurance upon the property, so long as the mortgagee pays the premium when the insured neglects to do so, or pays for additional hazard, or notifies the insurer of any change of ownership, occupancy or increase of hazard, if these come to his knowledge, the mortgagee's indemnity is safe. These seem to be the only affirmative duties placed upon the mortgagee, all the other duties being personal to the mortgagor, or owner, and so recognized by the insurer, at least until a question of liability arises. If, however, the sentence in the mortgage clause concerning contribution among insurers be held to mean, as contended by appellant, that the mortgagee's share of the loss is diminished by any other or additional insurance, in the proportion that his insurance bears to the whole insurance upon the property, then the statement at the head of the contract that the mortgagee's interest "shall not be invalidated by any act or neglect of the mortgagor, or owner," is not true. If this contention be conceded, there is no limit of invalidation of the mortgagee's interest to which the mortgagor, or owner, may not go. His whims or his needs may be said to be the only limits. To say the mortgagee would knowingly consent in advance to such a provision in his contract would be to charge him with a carelessness and stupidity not common to those who lend money upon "gilt-edge security." It is unbelievable that the ordinary lender of money would accept security that might at any time be destroyed or rendered valueless by the mortgagor or owner, without his consent or knowledge, and yet that is what the appellant contends was done in this case.

It is said the proportion of the loss the appellee should recover is $^{3}\%_{0}$ only, for the reason that of the total insurance on the property, $6,000, $3,000 was in favor of mortgagee Bally, and $3,000 in favor of Messner, junior mortgagee. This Messner interest in the property was a separate and distinct interest from the interest of the appellee, the senior mortgagee. The Messner insurance was obtained at a later date, to indemnify his interest in the property. It was not upon the interest of the senior mortgagee nor for her indemnity, nor was it with her knowledge or consent that it was taken out. All the subsequent

insurance for Messner was the act of the mortgagor, or owner.

It is the contention of appellee that the contract, when properly construed, does not require her to prorate the loss with other insurance, unless it be insurance upon her interest in the insured property for her benefit, or prior insurance, or insurance placed thereon with her consent. This position finds support in the well-considered case of Eddy v. London Assur. Corp. 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307, wherein the court, speaking through Mr. Justice Peckham, said: "It is clear that the only object of the mortgagee is to obtain a security upon which he can rely, and this object is, of course, also plain and clear to the insurer. Both parties proceed to enter into a contract with that one end in view. In order to make it plain beyond question, the statement is made that no act or neglect of the owner with regard to the property shall invalidate the insurance of the mortgagee. When, in the face of such an agreement, entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the other insurance upon the owner's interest. This may not, perhaps, give full effect to the strict language of the apportionment, clause, but if full effect be given to that clause, and it should be held to call for the subsequent reduction of the liability of the insurers in such a case as this, then full effect is denied to the important and material, if not the controlling, clause in the contract, which provides that the insurance of the mortgagee shall not be injuriously 'impaired or affected' by the act or neglect of the owner.

Same—prorating of insurance.

As used in these mortgagee clauses, this is the meaning of the word 'invalidate.' Hastings v. Westchester F. Ins. Co. 73 N. Y. at page 149."

The remarkable thing is that, although this provision has been in use in the New York standard form of policy at least since October 9, 1894, when the Eddy decision was rendered, we have been cited to only three cases construing it, and, with considerable industry, we have been unable to find others. On October 23, 1894, just fourteen days after the Eddy decision, the United States circuit court for the eighth district, in Hartford F. Ins. Co. v. Williams, 11 C. C. A. 503, 27 U. S. App. 493, 63 Fed. 925, passed upon the identical question, taking a diametrically opposite view. The reasoning of the Williams Case is adopted and approved by the Kentucky court in Sun Ins. Office v. Varble, 103 Ky. 758, 41 L.R.A. 792, 46 S. W. 486. The Eddy Case is cited with approval by the Massachusetts court in Hardy v. Lancasheir Ins. Co. 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209.

If we were inclined to decide the question upon the weight of authority, how could we say which way the scale tipped? Two courts of high repute say the provision means one thing, and two other courts of equal dignity and learning say it means another.

At the present time no insurance policy may be written under the laws of Arizona, except on the New York standard form Civ. Code § 3440, but in 1912, when the policy in question was issued, there was no legal requirement that any particular form of policy be used. The appellant, a New York corporation, however, without legal compulsion, did use a form of policy the courts of its state, nearly a quarter of a century before, had declared protected the mortgagee from a diminution of his policy because of other insurance, and it is not unreasonable, as we see it, to assume the company, in doing so, took into con-

sideration the interpretation given this provision by the courts of New York, and proffered it to the mortgagee with that understanding of its terms and conditions. The Eddy Case was stare decisis of the question in New York, and it is not to be thought appellant would seek or desire a different construction for other states in which it does business, and thus have a policy meaning one thing in New York and another thing outside of New York. The more rational view is to assume that appellant did not wish a contract of insurance other than the adjudicated standard form, or else it would have employed different language to express its agreement, since it was free to do so at the time this policy was issued. Over and over it has been decided that the intention of contracting parties, if ascertainable, must prevail. This rule is fundamental and controlling. However, another rule especially apropos to insurance policies is that, when the language used to express intent is susceptible of more than one meaning, it should be given that meaning most favorable to the insured. "Any doubtful terms are always construed in favor of the insured." Gazzam v. German Union F. Ins. Co. 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C, 362.

We confess that it is not clear to us what is meant by the insertion of the two apparently contradictory provisions in the mortgage clause we have been discussing. We think the view of the New York court is entirely reasonable, and, besides, it has the merit of justice and common sense on its side, and we, therefore, adopt it.

The appellee was allowed an attorney's fee of $200, and this, it is contended, was error. Subsequent to the dates of the policy and the mortgage clause, in May, 1913, § 3441, Civil Code, went into effect. In this section, among other things, it is provided: "In all cases where a loss occurs and the fire insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy in addition to the amount of the loss, 15 per cent damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss."

It was by virtue of this authority that the court assessed an attorney's fee. It is contended the law, when applied to a pre-existing contract, impairs the obligation thereof, in violation of art. 1, § 10, Constitution of the United States, and art. 2, § 25, Constitution of Arizona. It has been decided several times that laws of the import of § 3441, supra, when applied to contracts entered into at a date previous to their enactment, did not deny the equal protection or the due-process clauses, as contained in the 14th Amendment of the Federal Constitution. Supreme Ruling, F. M. C. v. Snyder, 227 U. S. 497, 57 L. ed. 611, 33 Sup. Ct. Rep. 292. The statute, when applied to contracts antedating its enactment, as was done in this case, is clearly retroactive, but that, in itself, does not make it bad. It must, in addition to being retroactive, change the nature and legal effect of the contract before it can be said to impair the contract. The law considered in the Synder Case, supra, authorized the assessment of an additional 25 per cent, when it was made to appear that the insurance company's refusal to pay had inflicted additional expense, loss, and injury, and that such refusal was not made in good faith. This, as applied to pre-existing contracts, was held not to impair them. It was said: "The statute is aimed, not at the rights secured by the contract, but at the dishonest methods employed to defeat them. The additional liability is attached to bad faith alone. . . . Neither the contract, nor the existing law which entered into it, contemplated contests promoted in bad

Constitutional law—retroactive statute—impairing obligation of contract.

faith, or justified the infliction of loss by such means. The state was entitled at all times to take proper measures to prevent the perversion of its legal machinery, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be availed of bona fide."

Our statute does not limit the right to recover damages and attorney's fees to refusals to pay, made in bad faith. It applies to all cases, whether the resistance be honest or dishonest, upon sufficient reason or without reason. The damages and attorney's fees are allowed "as a mere consequence of success in the suit." Mr. Justice Hughes, who wrote the opinion in the Snyder Case, distinguished it from the case we have when he said: "Nor does the statute permit a recovery of expenses or added damages as a mere consequence of success in the suit. The question whether the state may so provide as to prior contracts is not before us, and we express no opinion upon it."

The question which the court, in the Synder Case, refused or declined to decide, is squarely presented to us for decision. It is evident we cannot justify the imposition of damages or attorney's fees as a punishment for bad faith in refusing payment, for our law does not place the right upon that ground. The right to impose these burdens upon an insurance company that refuses payment of loss for good reason is just as absolute as if it refused payment for no reason whatever. If this may be done, it is because the insurance company is engaged in a business of such general and public concern as to permit the police power of the state to be invoked in aid of the rights and duties growing out of the relation of insured and insurer. This has been directly recognized as a state function in liability insurance, in life insurance as affecting our Army and Navy, and in marine insurance. Thus, the state has actually taken hold of the insurance question, and, in some measure and for some purposes, assumed the duty of its administration. Indeed, when laws allowing damages or attorneys' fees against insurance companies and railroad companies have been attacked, as denying equal protection of the law, the courts have justified such laws, under the police power. In Alliance Co-op. Ins. Co. v. Corbett, 69 Kan. 564, 77 Pac. 108, the court, after citing cases, said: "The doctrine of those cases is that attorneys' fees may be imposed upon a delinquent company under the police power of the state, as a kind of penalty incurred in the conduct of business affected with a public interest, and its correctness is no longer open to debate."

All contracts are entered into with the understanding that the reserve power of the state to pass laws for the general welfare may be invoked at any time, and therefore, if the legislature, in the proper exercise of that power, is convinced that the public good demands that an insurance company, unsuccessfully resisting payment of losses, should be penalized in damages or attorneys' fees, we see no constitutional objection to their doing so. The highest court of one state has, without discussion, and as a matter of course, given retroactive effect to a statute authorizing the assessment of an attorney's fee against insurance companies that unsuccessfully resist payment of loss. American F. Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068; Hanover F. Ins. Co. v. Gustin, 40 Neb. 828, 59 N. W. 375.

Same—due process.

We have come to the conclusion that the judgment of the lower court should be affirmed; and it is accordingly so ordered.

Franklin, Ch. J., and **Cunningham**, J., concur.

ANNOTATION.

Prorating provisions as applying to mortgagee.

Since insurance policies are merely contracts, the question whether insurers issuing policies covering the interest of mortgagees can successfully claim the right to prorate with other policies depends upon the wording used by the parties in the policy. The prorating clauses are not uniform. Some provide, in substance, that the insurer shall not be liable for a greater proportion of a loss than the amount insured by the policy bears to the whole sum insured on the property. The phraseology used in other policies, however, is more specific, and provides for prorating with any insurance held by "any party, having an insurable interest in the property."

It will be noted that the court in the reported case (GERMANIA F. INS. CO. v. BALLY, ante, 488), reached the conclusion that a provision in a mortgagee clause that, in case of other insurance upon the property, the company should be liable only for a pro rata share of the whole amount of insurance issued to or held by any party having an insurable interest in the property, did not require a prorating with insurance subsequently procured without the senior mortgagee's knowledge, by a grantee of the mortgagor, to secure a second mortgage to the latter, there being another provision in the mortgagee clause, to the effect that the insurance as to the interest of the mortgagee should not be invalidated by any act of the mortgagor.

In two cases involving like provisions, however, a contrary result has been reached.

Thus, in Hartford F. Ins. Co. v. Williams (1894) 11 C. C. A. 503, 27 U. S. App. 493, 63 **Fed.** 925, where the mortgagee clause was in the same form as that involved in the BALLY CASE, it was held that the insurer was entitled to prorate with other policies subsequently taken by the mortgagor on his interest. The court said: "The language employed in the mortgage clause, that the insurer 'shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein,' seems to us to have been inserted ex industria for the purpose of making it clear that the mortgagee's policy was entitled to prorate with policies covering the insured property that, at the time of the loss, might be held by any person whomsoever, who had an insurable interest in the property. We can conceive of no other object that the parties could have had in using the words, 'issued to or held by any party or parties having an insurable interest therein,' unless it was to avoid the very construction of the clause which the circuit court appears to have adopted. In the absence of the words last quoted, it might, no doubt, be fairly argued that it was simply the intention of the parties to reserve the right to prorate with other policies procured by the mortgagee for the protection of his interest, but that construction of the clause seems to us to be inadmissible, in view of the language used, which expressly extends the right to prorate, to policies 'issued to any party or parties having an insurable interest' in the property. As before remarked, the concluding words of the paragraph seem to have been added, out of abundant caution, that there might be no ground upon which to insist that the right to prorate was limited to policies held by the mortgagee, or for his benefit. It is urged, however, by counsel for the defendants in error, that the foregoing view destroys the efficacy of the first paragraph of the mortgage clause, which declares 'that this insurance as to the interest of the mortgagee or trustee . . . shall not be invalidated by any act or neglect or the mortgagor or owner of the property insured,' because it puts it in the power of the mortgagor, by taking out additional insurance, to lessen the amount which the mort-

gagee might otherwise have recovered. It is doubtless true that the construction above intimated lessens the scope that might otherwise be given to the first paragraph of the mortgage clause, but that it destroys its efficacy as a protection to the mortgagee cannot be admitted. It is obvious that the paragraph in question operates to protect the mortgagee from many acts of the mortgagor, which would otherwise render the insurance, as a whole, utterly void, even if it be conceded that, under the construction above given, not only the mortgagor, but third parties, have it in their power to lessen, to some extent, the amount that may be recovered on the mortgagee's policy. In construing a contract like the one now in hand, it is our duty to look to all of the provisions of the agreement, and to give effect to what seems to have been the obvious intent and meaning of the parties. We would not be justified in ignoring an agreement in one part of the instrument, which is as clearly expressed as language could well express it, merely because it limits to some extent the scope of general language employed in another part of the instrument. It is very common, in the construction of contracts and statutes, to restrict the meaning of general words and phrases, when it is plain to be seen, from particular provisions of the contract or statute, that they were not intended to have the broad signification of which they are fairly susceptible. In the case at bar, the first stipulation contained in the mortgage clause, 'that this insurance as to the interest of the mortgagee or trustee . . . shall not be invalidated by any act or neglect of the mortgagor or owner of the property,' is limited and controlled, in our judgment, by the more particular provision with respect to prorating in case of loss, which declares in very specific terms, as we think, that the right to prorate shall extend to and include all policies covering the particular property, that are held by any party or parties having an insurable interest therein."

And in Sun Ins. Co. v. Varable (1898) 103 Ky. 758, 41 L.R.A. 792, 46 S. W. 486, a like conclusion was reached, the court holding that the provision that the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagor or owner of the property insured was limited by the provision that the insurer should not be liable for a greater portion of any loss than the sum insured bore to the whole amount of insurance on the property, "issued to or held by any party or parties having an insurable interest therein," and that, accordingly, a policy insuring the mortgagee's interest should prorate with other policies, obtained by the mortgagor.

Apparently but one other case has involved a policy containing provisions the same as those in the preceding cases, and the decision in that case was governed by the circumstance that the policy containing that provision, and the policy with which the right to prorate was claimed, were issued on the same day by the same company.

In the case referred to, Crow v. Greenwich Ins. Co. (1892) 66 Hun, 54, 20 N. Y. Supp. 753, the defendant company, on the same day, issued a policy insuring a mortgagor alone, and another containing a provision making it payable to the mortgagee as his interest might appear, and providing that, as to the mortgagee's interest, it should not be invalidated by any act of the mortgagor, and also containing a clause that, in case of other insurance upon the property, the company should not be liable "for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance upon said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise." Upon these facts, it was decided that the issuing of the two policies by the defendant constituted but one transaction, the object of which was to secure the mortgagee in the first instance, and, in the second, the mortgagor; and that it could not be successfully argued that the in-

surer intended to allow the mortgagor to take out insurance that would jeopardize or lessen the amount agreed to be paid by the mortgagee, and that, consequently, the defendant could not apportion the loss between the two policies. The court stated that, if the mortgagor had taken a policy on the same day with another company, without the defendant's knowledge, there might be force in the argument that the defendant would be obliged to pay the mortgagee, under the policy in suit, only that proportion which the amount of its policy bore to the whole amount insured; but that this was not true under the facts of the case.

The provisions contained in the policy involved in Hardy v. Lancashire Ins. Co. (1896) 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209, were somewhat distinctive. In that case, it was held that the rights of mortgagees under a policy taken by the mortgagor, payable to the mortgagees as their interest might appear, and providing that they should not be affected by any act of the mortgagor to which they did not consent, were not affected by additional insurance taken by the mortgagor on his interest without their knowledge, although the policy also provided that, in the event of other insurance, "the insured" could recover only pro rata, and a rider attached to the policy, permitting other insurance, made a similar provision as to pro rata liability, and added: "Whether such other insurance, applies in the same manner or not." The court took the view that the other insurance, in such case, affected only the insured, and not the mortgagee, and that the phrase, "whether such other insurance applies in the same manner or not," meant whether the other insurance covered all of the enumerated articles mentioned as being insured or not, in the same manner as the insurance under that policy, and that the phrase, "other insurance permitted," meant, permitted on the mortgagor's interest.

In Scottish Union & Nat. Ins. Co. v. Warren Gee Lumber Co. (1918) — Miss. —, 80 So. 9. It was held that § 2592 of the Code, applied to a mortgagee, and that, where there had been a total loss, § 2596 of the Code, providing that, in case of other insurance, the insurer should not be liable for a greater portion of any loss than the sum thereby insured bore to the whole amount of insurance on the property, "issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise," was inapplicable, the latter section including a proviso that nothing therein shall be construed to modify the provisions of the former section.

Under a provision that the insurer shall not be liable for any greater proportion of a loss than the amount insured by the policy bears to the whole sum insured on the property, with the usual mortgagee clause providing that the mortgagee's interest shall not be invalidated by any act of the mortgagor, the mortgagee will not be required to prorate with another policy taken by the mortgagor on his interest, without the mortgagee's knowledge or consent. Hartford F. Ins. Co. v. Olcott (1881) 97 Ill. 439; Eddy v. London Assur. Corp. (1894) 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307.

There is, obviously, some ground for a distinction favorable to the mortgagee between a pro rata provision in this form, and one which, like that involved in the reported case, and other cases previously considered, specifically includes insurance issued to or held by "any party having an insurable interest in the property."

In Eddy v. London Assur. Corp. (N. Y.) supra. The court said: "Where the company agreed that the mortgagee's insurance should not be 'invalidated' by any act or neglect of the owner of the property, it was not intended to limit the application of that word to a case where the whole policy would otherwise be rendered invalid. The plain and obvious meaning of the language is that the insurance of the mortgagee should not be affected, or in any wise impaired or lessened by any act or neglect of the owner. Although contained in the same policy

issued to the owner, yet the insurer and the mortgagee were nevertheless entering into a perfectly separate contract of insurance, by which the mortgagee's interest alone was to be insured, and it would be most natural to provide that no act or neglect of the owner should invalidate, that is, impair, any portion of the insurance thus separately secured. Can it for a moment be supposed that a mortgagee would, otherwise, ever consent to such a contract? His desire is to obtain security, and to that end he insured his interest in the property. Would he knowingly consent that this security should be liable to be wholly frittered away and made valueless by the action of the owner, unknown to him, in procuring insurance upon the owner's interest in the property? Would any sane man agree to hazard his security in such a way? Would he agree that the value of his security should depend upon the acts of a third party, over whom he had no control and of whose acts he might be wholly ignorant? The statement of the proposition is its best refutation. . . . By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy, which, from their nature, would properly apply to the case of an insurance of the mortgagee's interest, would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee must be regarded as ineffective, and inapplicable to the case of the mortgagee. So, when the agreement in regard to contribution, contained in the body of the policy issued to the owner, is compared with the specific statement in the mortgage clause, that his insurance shall not be invalidated by any act or neglect of the owner, we can only give the latter due force by holding that the insurance of the mortgagee is not, in effect or substance, to be even partially invalidated, i. e., reduced in amount, and to that extent impaired or weakened by any act of the owner unknown to the mortgagee. In such case, the general agreement in the body of the policy as to contribution does not, and was not, intended to apply. If it did, then the special and particular contract in the mortgagee clause would be of no effect. If the two are inconsistent, the special contract, particularly relating to the mortgagee's insurance, must take precedence over the general language used in the policy issued to the owner. For these reasons, the claims of the insurers for a deduction in the amount of their liability cannot be allowed."

And in Hastings v. Westchester F. Ins. Co. (1878) 73 **N. Y.** 141, an indorsement made on a mortgagor's policy, making it payable to a mortgagee, and providing that the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the owner of the property insured, and further providing that the insurer should be subrogated to all rights of the mortgagee, whenever it should pay him a loss, but that such subrogation should not impair the right of the mortgagee to recover the full amount of his claim,—was held to create a new contract with the mortgagee, by which he was recognized as a separate party, having distinct rights, and entitled to receive the full amount of the insurance, without any regard to the owner of the property; and it was consequently held that the insurer was not entitled to the benefit of a condition contained in a policy obtained by the mortgagor, without the knowledge of the mortgagee or insurer, which provided that, in case of other insurance, the insured was entitled to recover no greater proportion of the loss sustained than the sum insured bore to the whole amount insured.

And in Johnson v. North British Ins. Co. (1872) Holmes, 117, **Fed.** Cas. No. 7,400, where a policy issued to a mortgagee provided that the insured should not be entitled to recover of the insurer any greater proportion of the loss than the amount thereby insured bore to the whole sum insured on the property, the object of such provision

was held to be to guard against a double insurance of the same interest, and it was held to refer to other insurance of the same person, or of the same interest, and that it did not apply to separate insurance by a mortgagor or mortgagee, and that, consequently, the policy could not, as against the mortgagee, be held to prorate with other policies procured, without the mortgagee's knowledge, by the mortgagor on his interest, and made payable to the mortgagee as his interest might appear.

And there is a dictum in Traders' Ins. Co. v. Pacaud (1894) 150 Ill. 245, 41 Am. St. Rep. 355, 37 N. E. 460, where the policy provided that, in case of other insurance, a recovery should be had only pro rata, that, where a mortgagor and mortgagee insure their interests, the insurance obtained by one has no connection with that obtained by the other, and that the insurers have no right of apportionment.

In some cases, where the policies insured thereon," and also provided that contained provisions involving the usual phraseology, it has been held that the insurer was not entitled to prorate with policies taken on the property by other mortgagees.

Thus, where a policy issued to a mortgagor and payable to the mortgagee provided that, "in case of any other insurance upon the property hereby insured, . . . the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured, thereon," and also provided that "no sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss," it was held that it was not intended that the mortgagee should be affected by the execution of a second mortgage, and that the insurer was not entitled to prorate with a policy obtained by the second mortgagee on his interest. City Five Cent. Sav. Bank v. Pennsylvania F. Ins. Co. (1877) 122 Mass. 165.

And in Fox v. Phenix F. Ins. Co. (1864) 52 Me. 333, a provision of a policy that, "in a case of any other contract of insurance upon the property, . . . the assured shall not, in case of loss or damage, be entitled to recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured," was held to refer to other insurance by the same person, or other insurance of his interest, and it was therefore decided that an insurer issuing a policy containing such a provision, to a mortgagee, was not entitled to prorate with a policy obtained by another mortgagee on his interest in the same property.

Where, however, several policies insuring a mortgagee's interest provide for prorating, the companies issuing them are entitled to prorate with each other, since this was the contract between the mortgagee and the insurers. Hartford F. Ins. Co. v. Olcott (1881) 97 Ill. 439. J. T. W.

WILL BLACKWELL et al., Plffs. in Err.,

v.

STATE OF FLORIDA.

Florida Supreme Court—July 27, 1918.

(— Fla. —, 79 So. 731.)

Jury — disqualification.

1. One who contributes to a fund to employ an attorney to assist in the prosecution of a person charged with an offense is disqualified to sit as a juror on his trial for such offense.

[See note on this question beginning on page 519.]

Headnotes by BROWNE, Ch. J.

Appeal — venue — refusal to change.

2. Where it is alleged, in an affidavit of the defendant in a criminal case, in support of a motion for a change of venue, that the defendant is odious to the people of the county, that the prejudice against him is very great, and that a fund had been subscribed to by the citizens of the county, and collected by a deputy sheriff, to employ additional counsel to assist in the prosecution of the defendant, and where two of the attorneys for the defense swear that, on account of the vast and powerful influence of the sheriff, the people of the county were greatly prejudiced against the defendants, and that the sheriff had proclaimed his belief in the guilt of the prisoners, and thereby caused the people generally to hate and despise the defendants, and believe them guilty, and these allegations are not traversed by the state, it was reversible error to refuse to grant a change of venue.

Venue — change — discretion.

3. Where an application for a change of venue is based on the prejudice of the judge against the defendants, no discretion is vested in the judge to hear and determine the question of whether or not he is prejudiced.

Appeal — venue — public clamor.

4. Where it is alleged, in an affidavit in support of a motion for change of venue on the grounds of the prejudice of the judge against the defendant, that the judge "yielded to public clamor," and called a special term of the court a short time before the regular term of the court would convene, and that in doing this he acted "solely at the behest of public sentiment," and that he did this without any other and further reason than that the "people of the county demanded speedy justice," it was reversible error to refuse the motion.

Appeal — remarks of counsel.

5. Remarks made by counsel in the presence of the jury, which would naturally tend to influence their minds to the prejudice of the defendants, when called to the attention of the court, should be stricken from the record, and the jury admonished that they should give no consideration to such remarks; and the refusal of the court to do so is reversible error.

Same — reference to appellate court.

6. It is improper for counsel, in his argument to the jury, to say: "If there is any error committed in this case, the supreme court, over in the capital of our state, is there to correct it, if any error should be done," as the effect of this would be to cause the jury to lessen their estimate of the weight of their responsibility, and the refusal of the court to strike the same from the consideration of the jury is reversible error.

Same — shifting responsibility.

7. Language used by counsel in his argument to the jury, tending to influence them to shift the burden of their responsibility from themselves to the supreme court, is improper, and when called to the attention of the trial judge should be stricken from the consideration of the jury; and the refusal to do so is reversible error.

Same — improper matters.

8. Remarks made by counsel in his argument before the jury, prejudicial to the defendants and concerning matters which are not proper for the jury to consider when they retire to deliberate upon their verdict, should be stricken by the trial judge, and the refusal to do so, when brought to his attention, is reversible error.

(Whitfield, J., and Simmons, Circuit Judge, dissent.)

ERROR to the Circuit Court for Okaloosa County to review a judgment convicting defendants of murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **H. S. Laird, L. W. Nelson, W. W. Clark,** and **W. J. Rice** for plaintiffs in error.

Messrs. **Van C. Swearingen,** Attorney General, and **C. O. Andrews,** Assistant Attorney General, for the State:

It was not error to deny defendant's motion for a change of venue.

Keen v. Brown, 46 Fla. 487, 35 So. 401; Curry v. State, 17 Fla. 683; Williams v. Robles, 22 Fla. 95; Robertson v. State, 64 Fla. 437, 60 So. 119; Roberts v. State, 72 Fla. 132, 72 So. 649; Conn v. Chadwick, 17 Fla. 429; 15 R. C. L. 550, § 18; Crawford v. Ferguson, 5 Okla. Crim. Rep. 377, 45 L.R.A.(N.S.) 519, 115 Pac. 278.

In the matter of impaneling a jury, the trial court's discretion is one involving the right to reject, and not the right to select.

Peadon v. State, 46 Fla. 124, 35 So. 204; Walsingham v. State, 61 Fla. 67, 56 So. 195.

It was not error to excuse the juror N. A. Sapp for cause, over the objection of the defendants.

Olive v. State, 34 Fla. 203, 15 So. 925; Metzger v. State, 18 Fla. 481.

The bottle of poison was admissible for inspection by the jury, for the purpose of having such weight as the jury saw fit to give it.

Presley v. State, 63 Fla. 37, 57 So. 605; Wallace v. State, 41 Fla. 547, 26 So. 713.

Browne, Ch. J., delivered the opinion of the court:

Will Blackwell and Robert Blackwell, brothers, were jointly indicted in Okaloosa county in two separate indictments, for the murder of M M. Davis and his wife Nancy Davis, and on May 7, 1917, were put upon trial under the indictment charging them with the murder of Nancy Davis. During the course of the trial the defendant Will Blackwell escaped from custody, thereby necessitating an order of mistrial. After a lapse of about three weeks he was recaptured, and on July 2, 1917, the defendants were placed on trial for the murder of M. M. Davis, were convicted of murder in the first degree, and sentenced to death. The case comes here for review on writ of error.

There are twenty-three assignments of error, some of which have been abandoned, and others it will not be necessary for us to consider. The second assignment is that the court erred in denying defendants' motion for a change of venue. The grounds of the motion for a change of venue are as follows:

"(1) That they fear that they will not receive a fair trial in the circuit court of the first judicial circuit of Florida, in and for the county of Okaloosa, or in any other county within said circuit, on account of the prejudice of the judge of said court against them, the said Will Blackwell and Robert Blackwell.

"(2) On account of the adverse party, to wit, the state of Florida, by and through its officers, namely, the sheriff and his deputies, having an undue influence over the minds of the inhabitants of Okaloosa county, Florida.

"(3) Because the applicants, the said Will Blackwell and Robert Blackwell, are so odious in the minds of the people of Okaloosa county, Florida, and the adjoining counties to Okaloosa county, Florida, in the first judicial circuit of Florida, on account of the rumors and reports of their guilt of the crime with which they are charged, that it will be impossible for them, or either of them, or that they fear it will be impossible for them, or either of them, to obtain a fair and impartial trial in said court."

Both the defendants made affidavits in support of the motion, and Mr. Laird and Mr. Rice, attorneys for the defendants, swore that the crime charged, the unprovoked and deliberate murder of a very old man and his aged wife, was of such heinous nature that the citizenship of the county must necessarily be wrought up to a frenzy and great anger towards anyone so unfortunate as to be charged with it; that the defendants were confined in jail in Pensacola, and were not brought into the county in which they were to be tried until 9 o'clock in the morning of the day when the motion was made; that after the prisoners were brought into court, and arraigned, the attorneys for the defense were given fifteen minutes to inspect the indictment and confer about the case; that, after the presentation of their motion for a change of venue, they were given until 2 P. M. of the same day in which to prepare affidavits in support of their motion; that the defendants during that time were handcuffed together and closely guarded, so that they nor either of them could talk with anyone about

the case; that they had no kinsfolk or friends to go out and see anyone and get affidavits for them. These attorneys, officers of the court, also swore that, to their certain knowledge, the sheriff of the county was a very popular man, of vast and wonderful influence, who had publicly proclaimed on many different occasions that the defendants were guilty, and in this way he had exercised a wonderful and undue influence over the minds of the mass of the citizens of the county, and had aided in causing the people generally in the county to hate and despise the defendants, and believe them guilty. They also swore that they believed that, if they were given a reasonable time to go out and see the people and talk with them, they could secure a very large percentage of reputable citizens of the county to make affidavits to the same effect as their affidavits. Against these specific allegations of fact the state produced an affidavit by the clerk of the circuit court, who stated that he had talked with the people residing in almost every section of Okaloosa county, and that in his opinion the defendants could receive a fair and impartial trial in that county. Mr. J. H. Richburg and Mr. Sutton, the sheriff, in their affidavits, stated that in their opinions the defendants could get a fair and impartial trial in the county. Mr. Sutton did not deny the allegations in the affidavits of Mr. Laird and Mr. Rice as to his great influence in the community, or that he had proclaimed in all parts of the county his belief in the guilt of the prisoners, and that his attitude towards them had aided in causing the people generally in the county to hate and despise the defendants, and believe them guilty.

The allegations in the affidavit of the defendants that they were odious to the people of Okaloosa county, that the prejudice against them was very great, that a fund had been subscribed to by the citizens of the county and collected by one Moore, a deputy sheriff, to employ additional counsel to assist the state attorney to prosecute the defendants, and the allegations in the affidavits of Mr. Laird and Mr. Rice that, on account of the vast and wonderful influence of the sheriff, the people of the county were greatly prejudiced against the defendants, and that the sheriff, by proclaiming his belief in the guilt of the prisoners, had caused the people generally to hate and despise the defendants, and believe them guilty, were not traversed by the state, and the only thing before the court against these very strong and positive declarations, showing such prejudice as would preclude their obtaining a fair and impartial trial in the county, were the statements of three persons that, in their opinion, the prisoners could get a fair and impartial trial in the county.

The affidavits of the defendants and Mr. Laird and Mr. Rice contain allegations of fact upon which they base their opinions that a fair and impartial trial could not be had, and against these were placed the mere opinions of three persons that the prisoners could get a fair and impartial trial. Not one denies the allegations of fact in the affidavits produced by the prisoners. If, as stated in these affidavits, the sheriff was "a popular man in the county," and "of vast and wonderful influence," and had "talked and publicly said on many different occasions that the defendants were guilty," and that "he had thereby caused the people of the county to hate and despise the defendants, and believe them to be guilty," and a fund had been "solicited from the people of the county by a deputy of the sheriff, for the purpose of employing counsel to assist in the prosecution" of the defendants, which, as the record shows, was subscribed to by a number of persons, and that three of those on the special venire were subscribers to the fund, can it be said that the defendant could obtain a fair and impartial

Appeal—venue—refusal to change.

trial, in the face of such conditions? As the court below decided that question in the affirmative, and as a jury was obtained, each member of which swore that he was unprejudiced, and as the case will have to be reversed on other grounds, we are not inclined to disturb the court's conclusion upon that point.

The application for a change of venue contained the further ground of the prejudice of the judge. This is a very serious charge, and one not apt to be lightly made. The records of this court do not show that this provision of the law has ever before been invoked by a defendant in a criminal proceeding. The statute seems to contemplate that all that it is necessary for a defendant in a criminal case to do is to make affidavit that the judge is prejudiced against him, and it then becomes the duty of the judge to transfer the cause to the next nearest circuit.

The sections of the law governing changes of venue are as follows:

"Judges of all courts in this state shall have power and it shall be their duty to grant changes of venue of all cases pending before them, civil or criminal, under the circumstances and in the manner hereinafter provided by this article." Gen. Stat. 1906, § 1469.

"Such change shall be granted if either party in any civil case, or the defendant in any criminal case, shall make application therefor on oath stating that he fears that he will not receive a fair trial in the court where the suit is pending, on account of the prejudice of the judge of said court against the applicant or in favor of the adverse party, or on account of the adverse party having an undue influence over the minds of the inhabitants of the county or justice's district in which the case is pending, or on account of applicant being so odious; such application shall fully and distinctly set forth the facts upon which the same is founded." Gen. Stat. 1906, § 1471.

"In all applications for change in venue, except when made upon the grounds of prejudice of the pending judge, the adverse party shall have the right to traverse the allegations of the application, and the court shall hear the evidence produced by either party and shall decide the matter accordingly." Gen. Stat. 1906, § 1474.

"Whenever it shall be made to appear to the satisfaction of the presiding judge of any of the circuit courts of this state that the venue of any cause, then pending in such court, should be changed either because a fair and impartial trial cannot be had in the county where the crime was committed, or because it is impracticable to get a qualified jury to try the case in the county where the crime was committed, or where it appears from the examination of the books of registration of the county, that there are not a sufficient number of registered voters to form a grand and petit jury, it shall be in the power and discretion of such judge to change the venue of such case, from the circuit court of the county where such cause is at the time pending to the circuit court of any other county within the same circuit." Gen. Stat. 1906, § 3997.

Section 1471 contains three separate grounds for a change of venue —the prejudice of the judge against the applicant or in favor of the adverse party; the undue influence over the minds of the inhabitants of the county, by the adverse party; and the odiousness of the applicant. After enumerating these grounds, the statute provides that the applicant "shall fully and distinctly set forth the facts upon which the same is founded." It seems quite clear that it is the intention of the law that no discretion be left with the judge when the application is based upon his prejudice.

In the case of State v. Grinstead, 10 Kan. App. 78, 61 Pac. 976, the court, in discussing the mental attitude of a trial judge whom the defendant in a criminal action charged with prejudice, said: "He may have believed that he could act

without bias or prejudice in the trial, but it would be an experiment dangerous to the rights of the defendant to permit him to make the effort."

That was a case where the defendant was on trial for criminal libel. In the instant case, the court was experimenting with the lives of two men, which were forfeited by the jury.

In Indiana, the prejudice of the judge is made a ground for a change of venue, and in a long line of decisions it is held that, when an affidavit is made charging the trial judge with prejudice, it is imperative for him to grant the change. Witter v. Taylor, 7 Ind. 110; Shaw v. Hamilton, 10 Ind. 182; Shattuck v. Myers, 13 Ind. 46, 74 Am. Dec. 236; Goldsby v. State, 18 Ind. 147; Mershon v. State, 44 Ind. 598; Manly v. State, 52 Ind. 215.

Venue—change—discretion.

But in the instant case the defendants went further than was apparently necessary, and stated "that the judge of the said county, without other or further reason than that the people of the county of Okaloosa demanded speedy justice and no delays of the law, acting at the behest of public sentiment, has called this special term of court to try the said defendants, when, according to the statutes of the state of Florida, the regular fall term of said court would commence on the last Monday of August of this year."

This is a charge that the judge, in calling the special term, acted at the behest of public sentiment, and without any other or further reason than that the people of the county demanded "speedy justice." It is clear that what was meant by this statement is that the people demanded the conviction of the defendants, and the court yielded to that demand. We cannot devest ourselves of the knowledge which we possess that people do not demand a speedy trial of persons for the purpose of acquitting them, nor does the demand for speedy trials exist in communities where there is no strong feeling against men charged with crime, and, however just the public sentiment may be which demands the speedy trial and conviction of persons believed to be guilty of the commission of heinous offenses, the courts must be free from the influence of hostile public sentiment.

This court has recognized that the commission of a heinous offense is likely to arouse excitement, indignation, and prejudice against a person accused of the crime, and that a jury may be affected thereby, if the trial takes place within a short time thereafter.

The judgment in the case of Rice v. State, 35 Fla. 236, 48 Am. St. Rep. 245, 17 So. 286, was reversed on the evidence which the court said was contradictory and inconsistent, and also said: "This view is also influenced to a considerable extent by the fact that the trial was had within four days of the alleged perpetration of the offense charged, which is so likely to arouse excitement, indignation, and prejudice against the accused."

The crime for which the Blackwell brothers were tried was a most revolting one. An old man of about ninety years of age and wife over seventy had been brutally murdered, for no apparent reason, although an effort was made on the trial to prove that they were murdered for their money, which, it was claimed, one of the defendants knew was carried in a belt around the waist of one of the murdered couple. About $400 was found on their persons after their death, and no satisfactory reason appears in the testimony why the murderers, if robbery was the motive, did not accomplish their purpose.

The defendants were indicted on the 30th of April, 1917, arraigned on May 1st, and the cause set down for trial six days thereafter. On this day the defendant Will Blackwell escaped. He testified on the trial that, being acquainted with the strong public sentiment in the coun-

ty against him, and having failed to obtain a change of venue or continuance until public feeling might subside, he knew it would be impossible for him to get a fair trial, and that he bribed the detective and deputy sheriff to permit him to escape. He swore that he unlocked the handcuffs with keys furnished him by the detective. This is denied by the officers, who say that he slipped his hands out of them. Will Blackwell, on the trial, challenged this statement, and asked that the handcuffs be produced before the jury, to show that it would be impossible for him to slip his hands through them. This was not done.

He was recaptured in the latter part of May, and a special term of court was called for the 2d of July to try the cause.

The revolting crime, the escape of one of the prisoners, and the efforts made to recapture him by the use of dogs obtained from various persons in the county, all tended to give great publicity to the offense, and to cause public sentiment to run high against the persons charged with the crime. In this state of the public mind, of which it is charged the circuit judge had knowledge, he called a special term of court to try the prisoners, although time for convening the regular term of court for Okaloosa county was only a short time off.

It is apparent and quite natural that a strong public sentiment, hostile to the defendants, existed in Okaloosa county, and that their speedy trial was demanded by the people, in order that they might be punished for the crime they were charged with having committed, and the defendants and their attorneys alleged in their affidavits that the circuit judge, without other or further reasons, yielded to public clamor, and called the special term to try the prisoners.

Appeal—venue—public clamor.

As was said in the case of State v. Grinstead, supra, the circuit judge may have "believed that he could act without bias or prejudice on the trial," but the defendants did not believe that he could, and they gave what seem to us to be sufficient reasons for their belief, and the court erred in refusing the motion for a change of venue.

The sixth and seventh assignments of error relate to the rulings of the court below in excusing certain jurors upon the challenge of the state for cause.

It may be that these veniremen were qualified, and should not have been excused; but as the trial court has a large discretion in the matter of excusing jurors, and as it does not appear that, because this was done, the defendants were finally forced to accept objectionable jurors, we find that these assignments are not sustained.

The eighth assignment is predicated on a remark of the assistant state attorney in the examination of a juror on his voir dire, who was being interrogated about his mental attitude on the question of finding a verdict of guilty where the penalty is hanging, when the following occurred:

Q. I mean, have you any prejudice against bringing in a verdict of guilty, where the penalty is hanging?

A. There is nothing to prevent it, if they are guilty, as far as that is concerned.

Q. If they are guilty, you would have nothing to do with the penalty. That is up to the judge.

A. Yes; that is up to the judge.

Q. And the pardoning board?

Mr. Laird: We object to the remark of the counsel that it is up to the pardoning board.

Court: I think he has a right to ask the question.

Mr. Laird: We object to the statement here at this time that it will be up to the pardoning board.

Court: The objection is overruled.

Mr. Laird: The defendants except.

The assistant state attorney must have deemed it in the interest of the prosecution for him to state in the presence of the veniremen, from whom the jury to try the prisoners was to be chosen, that the future action of the board of pardons was entitled to consideration by them, else the question would not have been asked, and the court would not have refused to strike it from the record on motion of defendants' counsel. If it had been a mere irrelevant remark, not introduced to have any effect on the minds of the jury, the lower court would have stricken it from the record. It must, therefore, be accepted that the assistant state attorney had a reason for putting the probable action of the board of pardons before the jury, and the judge considered the reason a good one, and by his ruling gave it the force and weight of his approval.

It is argued by the defendants that the purpose of the statement by the state attorney was to bring to the attention of the jurors the fact that the board of pardons had recently commuted to life imprisonment the sentence of the two prisoners, who had been sentenced to death for a murder committed near the scene of the Davis murder. If so, it was an improper remark, and should have met with the condemnation of the judge.

Same—Improper matters.

If, however, it was the assistant state attorney's purpose to fix in the minds of the jurors the thought that, if they erred in finding a verdict of guilty, the board of pardons might or would correct it, it was even more objectionable. That that thought was probably in the mind of the assistant state attorney seems probable from the error complained of in the twenty-second assignment, which, like that in the eighth, is predicated upon the refusal of the trial judge to strike from the record an objectionable remark by the assistant state attorney, by which he called to the attention of the jury that, if they made a mistake in the verdict, some other tribunal could correct it.

Appeal—Remarks of counsel.

In the bill of exceptions the following facts appear:

The assistant state attorney, in the course of his argument to the jury, said: If there is any error committed in this case, the supreme court, over in the capital of our state, is there to correct it, if any error should be done.

Mr. Laird: If the court please, we object.

Mr. Stokes: He brought it out.

Mr. Laird: I said he always did make that argument, and I didn't think the court would permit him; it is an unfair argument to the jury.

The Court: I think it is legitimate argument, after what has been said by counsel on the other side.

Mr. Laird: Note an exception.

The purpose and effect of this remark was to suggest to the jury that they need not be too greatly concerned about the result of their deliberations, because, if they committed an error in forfeiting the lives of the prisoners, the supreme court could correct it. To this remark the court not only gave its approval by overruling the objection of the defendants, but he gave it his sanction by the statement: "I think it is legitimate argument, after what has been said by counsel on the other side."

In the case of Newton v. State, 21 Fla. 53, this court said: "If the remarks so made by counsel were pertinent in argument, they are proper for the consideration of the jury when they have retired to deliberate upon their verdict."

The court in that case also said: "It has been said with truth that the comments and arguments of counsel in the progress of a trial before a jury are controllable in the discretion of the judge who presides; it is, however, a judicial discretion, and if used to the injury of either, and it so appears properly in the record, an appellate court may and should revise and control it."

The court, in refusing to strike

the remark of the assistant state attorney as to the existence of a supreme court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the supreme court. This court will not shirk that responsibility, but will condemn such a proceeding, and declare that the remark of the assistant state attorney was improper, and the refusal of the trial judge to strike it from the consideration of the jury was prejudicial error.

Same—reference to appellate court.

Same—shifting responsibility.

The eighteenth and nineteenth assignments of error are predicated upon the admissibility of evidence.

John Helvenston, a witness for the state, testified that, about two years before the Davis murder, a man by the name of Saunders sold three steers to a Mr. Adams; that Saunders kept a dog, and Will Blackwell asked him to kill it, so he could go to Saunders' place. Witness stated that he told Will Blackwell that he had killed several dogs, and that he did not much mind killing a no-account dog. This testimony was clearly irrelevant, but was not objected to by counsel for the defendants when offered. We make no criticism of counsel for his failure to object to this testimony as irrelevant. The record shows that a mass of irrelevant testimony was admitted, to which, in the earlier part of the trial, the defense interposed about fifty objections, and, with the exception of one or two, they were overruled by the court. Such testimony in no wise bore upon the issue being tried, and served only to encumber the record; and the attorneys for the defense may have deemed an effort to exclude it unnecessary.

The witness was then asked this question: "Did he send you anything?" To which he replied: "Well, he sent me a bottle of poison. I say poison; he sent it; I couldn't say what it was."

He further testified that Mr. Robert Blackwell gave him what he called "the poison," and that he kept the package, and when called on by the state he produced it, and was told to show it to the jury. It was then offered in evidence by the assistant state attorney, and Mr. Laird, the counsel for the defendants, objected to its introduction, and moved to strike the testimony of the witness in relation to this transaction as irrelevant and immaterial, and because it was not shown " to have any connection with the Davis murder, or this case." The court denied the motion to strike, and overruled the objection to the introduction of the bottle in evidence, and permitted it to be introduced and shown to the jury. It developed on further examination of this witness that a young woman lived in the house with old man Saunders and his wife, and it appeared that Will Blackwell desired to visit her.

The entire testimony of this witness was improper and irrelevant, and as its purpose and effect was to prejudice the jury against the prisoners about transactions that occurred about two years before the Davis murder, and had no connection with the case, the court erred in refusing to strike the testimony and permitting the bottle alleged to contain poison to be introduced in evidence.

The twenty-third assignment of error is predicated upon the court's refusal to grant a new trial, the fifth ground of which was the denial of the motion for a change of venue.

We have discussed the showing made by the defendants in their application for the change of venue; but if the court, in the exercise of its discretion, was not convinced,

from the affidavits offered at the time the motion was made, that the motion should be granted, there developed in the course of the trial strong circumstances in support of the defendants' motion, which the court should have taken into consideration in determining this ground of the motion for a new trial.

In the examination of the jurors it developed that a fund had been subscribed by a number of citizens in the county, to employ an attorney to prosecute the case against these defendants, and that the assistant state attorney, who conducted the case for the state, was the person so employed.

While this point was not saved by the plaintiffs in error , we think the question involved should be decided by this court, as it may arise in another trial of these defendants.

There is some conflict of authorities on whether or not a contributor to a fund to apprehend and prosecute a certain class of violators of law is disqualified to sit as a juror on the trial of a person for an offense of the class, to the fund for the prosecution of which he was a contributor; but reason and justice seem to be on the side of the courts that hold that such a person is disqualified. It was so held in Jackson v. Sandman, 64 Hun, 634, 45 N. Y. S. R. 633, 18 N. Y. Supp. 894; Respublica v. Richards, 1 Yeates, 480, and State v. Fullerton, 90 Mo. App. 411. In Com. v. Livermore, 4 Gray, 18, the court said: "We deem it to be our duty, however, to say that, in our judgment, the members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, cannot be held to be indifferent, and therefore ought not to be permitted to sit as jurors in the trial of a cause in which the question is whether the defendant shall be found guilty of violating that law."

In an early English case it was held that, when a prosecution was instituted by the Society for the Suppression of Vice, the defendant was entitled to be furnished with a list of the persons who were members of the society, so that, on the call of the panel of the jurors, anyone who admitted he was a member of the society might be set aside. Reg. v. Nicholson, 8 Dowl. P. C. 422, 4 Jur. 558.

As this precise question, however, is not involved here, we do not pass on it at the time. The question now presented, the qualification as a juror of a person who has contributed to a fund to employ an attorney to assist in the prosecution of the identical person charged with the offense, is a much stronger one. A person who employs or contributes money for the employment of an attorney to represent one side of a cause, must necessarily believe in the justice of that side which he so greatly desires to have prevail that he is willing to contribute money towards its success, and is not unbiased or without prejudice. One of the surest tests of a man's belief in and devotion to a cause is his willingness to contribute money for its success, and it would be a mockery of justice to permit such a person to insure that success by serving as a juror in the cause.

Jury—disqualification.

In the case of State v. Moore, 48 La. Ann. 380, 19 So. 285, the court said: "In the attitude of the contributor, it must seem difficult to maintain his fitness as a juror in a case, the prosecution of which has enlisted his zeal, so distinctly manifested by his money contribution."

See State v. Sultan, 142 N. C. 569, 54 S. E. 841, 9 Ann. Cas. 310. See, also Boyle v. People, 4 Colo. 176, 34 Am. Rep. 76; Starke v. State, 17 Wyo. 55, 96 Pac. 148, 17 Ann. Cas. 222.

A number of veniremen admitted having subscribed to the fund, and one of them was permitted to serve on the jury. This was brought to the attention of the court by the defendants during the progress of the trial, by a motion for a mistrial,

which was denied. A motion for a mistrial was also made on the ground that two of the jurors, who had sworn on their voir dire that they had formed or expressed no opinion of the guilt or innocence of the accused, and could give them a fair and impartial trial, had stated that they had kept up with the case, and that, if the evidence was as reported, that they (referring to the defendants) "should hang, and that they should be convicted."

There were about 100 veniremen examined before a jury was obtained, more than a third of whom admitted that they had formed or expressed opinions concerning the guilt or innocence of the accused.

On the examination of venireman A. A. Allen, he swore as follows:

Well, of course, the general rumor of the settlement, the whole case was going against them.

Q. According to the rumor of the settlement, the whole case was going against them?

A. Yes, sir.

Q. Well, did you believe the general rumor of the settlement?

A. I had to; it was the general rumor.

Q. Then you had formed an opinion as to the guilt or innocence of these men?

A. Yes, sir.

One of the purposes of a motion for a new trial is to afford an opportunity for the trial judge to correct any prejudicial error which he may have committed in the progress of the trial of a cause. If the judge was not satisfied from the uncontradicted array of facts contained in the affidavits offered by the defendants to show prejudice in the county, the developments in the examination of veniremen, and the matters brought to his attention during the trial of the cause, were sufficient to carry conviction that the change of venue should have been granted, and the motion for a new trial that contained this ground was improperly denied.

After a most careful examination of the testimony, we are unable to say that the verdict could properly have been found, notwithstanding the errors that we have discussed. The nature and character of the testimony and the conduct of the trial make it extremely problematical.

Without the testimony of Mrs. Eliza Atwell, the state's case would have fallen to the ground, and, even if it be accepted as true, she does not say that either of the Blackwells admitted to her that they had killed the Davises. Her only direct testimony on that point is that Will Blackwell said to her: "We have killed old man Bud Davis," and that she said to him: "Will, you didn't do that?" and he replied: "No, I didn't; but the boys did."

This witness and her daughter Fannie testified at the coroner's inquest, and established a complete alibi for Will Blackwell. She swore that he had been rooming and boarding with her for a year before the murder, and was at her home, about 25 miles from the scene of the murder, at an hour that made it impossible for him to have been there on that night. She said he had been away all that day, and brought back three small fish, which she cleaned and put away, but that a cat got them; she told him this the next day at dinner time, when he asked about them. She testified at the coroner's inquest that, when Will Blackwell came home, about half past 7 or 8 that night, his clothes were wet from a drizzling rain that was falling, and that she went into the room occupied by a man named Babcock to get him some dry clothing. This she denied on the trial; but her former testimony was corroborated by Babcock, who testified that she came to his room and told him that she came to get some dry clothing, which was in there. He said he heard the conversation at dinner time the next day about the cat getting the fish; he further testified that he heard a man in conversation with her about 8 or 9 o'clock on the night of the

murder, and the next day, when he heard Will Blackwell talking, he recognized his voice as like that of the person whom he heard talking the night before. Fannie Atwell testified before the coroner's inquest to the same effect as her mother. Both of them on the trial repudiated their former testimony, and gave most damaging testimony against the defendant Will Blackwell. About a week after the arrest of Will Blackwell, Eliza Atwell was locked up on the charge of being an accessory to the murder, was kept in jail three weeks and released on bail, and had not been placed on trial at the time the Blackwells were tried. Both Eliza and Fannie Atwell brazenly claimed on the trial to have committed perjury at the coroner's inquest. Fannie Atwell says she swore to lies because her mother told her to do so, and the mother says that she swore to lies because Will Blackwell had threatened her. She attempts to justify her alleged perjury at the coroner's inquest by saying that she did it in "self-defense," and that she was afraid to tell the truth at the inquest, but was not afraid on the trial, because Will Blackwell was in jail, and she had protection. She admits, however, and it is a fact, that Will Blackwell was in jail at the time she testified before the coroner. She attempts to reconcile the absurdity of her reason for changing her testimony by saying that he told her that the "other boys would make it bad for her." There is nothing in the record to show who these imaginary boys were, nor that their ability to do her harm was not as great at the time of the trial as when she testified at the coroner's inquest.

A. J. Melvin testified that he saw Robert Blackwell on a railway train at Holts, bound for Pensacola, about 7:30 P. M. on the night of the murder, which, made it impossible for him to have been present and participating therein.

Mrs. Erin Settles testified that Will Blackwell was at her house about 22 miles from the scene of the murder, the night it was committed. She and Melvin were arrested for perjury in the presence of the jury and before a warrant had been issued for them. The purpose of these spectacular arrests was to discredit these witnesses with the jury.

Several days after the arrest of Melvin, he had a change of heart, and came back into court and repudiated his former testimony.

Matthew Wilson and Jim Sellars, witnesses subpœnaed for the defendants, were arrested and put in jail, charged with being accessories to the murder. Sellars was kept in jail until he was taken to court to testify, when he contradicted the testimony of Robert Blackwell, who said that he had occupied a room with Sellars in Pensacola on the night of the murder. Matthew Wilson, on several occasions while in jail, denied to the detective, Moore, having seen Will Blackwell after his escape. After being in jail several days, and holding several conversations with the detective, he had one with him and Mr. Sutton, and he says: "They told me if I would tell just exactly how it was, they would turn me out;" and he then went into court and testified that he had seen Will Blackwell and had conversations with him, in which Blackwell made damaging admissions to him.

The method resorted to in this case of putting witnesses in jail on charges of perjury, or of being accessories to a murder, in order to make them tell the truth, is fraught with the danger that persons who need this spur to their veracity may be willing to swear falsely to save themselves. Torture was anciently applied to prisoners to make them confess their guilt, but it is not now often openly resorted to, as experience proves that men will confess to crimes they did not commit to free themselves from pain. Much more readily will a person in great fear for himself implicate another to save himself.

The effect of these arrests was to strike terror to the hearts of all these persons, and the vague intangible fear of some imaginary "boys," that Eliza Atwell said was her reason for committing perjury before the coroner, was far less potent than the present impending danger of a prosecution as accessory to a murder, where public sentiment ran high, and where the terror of such a situation was accentuated by incarceration in jail. Eliza Atwell recanted through fear of something which existed to the same extent when she testified on both occasions, and Melvin recanted because of a change of heart and the promptings of a sensitive conscience. While moral suasion of a bleeding conscience may, perhaps, sometimes cause the wicked to recant, imprisonment and danger of conviction for perjury, or as accessory to a murder, are much more powerful influences. In such a plight, Galileo recanted, and the record in this case does not disclose that Eliza Atwell, A. J. Melvin, and Matthew Wilson were superior in mind, character, conscience, courage, or morals to the great astronomer.

Mrs. Erin Settles was subsequently tried and convicted of perjury, committed when testifying for the defendants in this cause. She did not recant, and subsequently, when testifying in her own behalf, she stated that, while she might have been mistaken about the night when Blackwell was at her house, she still believed that it was on the night that the Davises were killed. Her conviction was affirmed by this court, and the writer of this opinion concurred in it, because the testimony was conflicting and, the jury having found against her, he was reluctant to disturb the verdict. If the record in the instant case had been before the court at the time Mrs. Settle's case was disposed of, the writer of this opinion would not have concurred in that judgment.

The record in this case bristles with statements and proceedings prejudicial to the defendants, which in the aggregate amounted to a denial of such a fair and impartial trial as every person is entitled to under the Constitution.

While we will not undertake to recite all the improper remarks and proceedings that appear in the record, we will advert to some of them. On cross-examination, Sheriff Sutton was asked if he had not repeatedly said he would "break their necks," to which he replied: "Well, I said, if the law said so." He also volunteered the information that he said he "had the evidence."

On redirect examination the following testimony was placed before the jury by the assistant state attorney:

Mr. Stokes: Q. You said you thought you had the evidence to do so?

A. Yes, sir.

Q. You still think so?

A. Yes, sir.

Q. You still think you have the evidence before the jury?

A. Yes, sir.

Although there was no objection by the defense to this opinion of the sheriff that there was sufficient evidence before the jury to convict the prisoners, it was so flagrantly improper that it should have been stricken by the court of its own motion. But it remained in, and the jury carried with them into the jury room the opinion of the sheriff, who is a man of great influence in the county, that there was sufficient testimony before them upon which to find a verdict of guilty.

On the trial, a motion was made to have the shackles removed from the prisoners while in the courtroom on trial, and for the appointment of an elisor to take charge of them, because of the bitter feeling of the sheriff towards them, and their fear of him. To this Mr. Stokes objected, announcing in the presence of the jury: "We want no more escapes." At this time there was no testimony before the jury

that Will Blackwell had escaped, or attempted to escape. When Will Blackwell testified about being at a place in the vicinity of the scene of the murder, some time before, Mr. Stokes asked him: "Did you tell him that you were campaigning, when you were working for Mr. Knott?" We are not without knowledge that during the greater part of 1916 this state had gone through one of the hottest political contests that had been waged since the days of reconstruction, and feeling ran high between the supporters of two contesting candidates for governor, one of whom was Mr. Knott. The fact that Will Blackwell was a supporter of Mr. Knott was twice brought to the attention of the jury by the assistant state attorney. It was not necessary to comment on the purpose or possible effect of twice injecting this into the testimony. Will Blackwell was asked at whose house he stayed on a certain night after his escape, and he replied: "I can't tell on my friends." He was then told by the court: "Answer the question," to which he replied: "I can't answer the question. I can't tell on my friends. I would rather go to jail, and stay there, before I would do that." At another period in his testimony he again stated: "I told you I wouldn't tell on my friends." The assistant state attorney then invoked the aid of the court to require him to betray his friends, and the judge replied: "The court can't do anything more than put him in jail, and he is already in jail." Blackwell then said: "The jail is his strongest weapon;" and the assistant state attorney said: "No, the strongest weapon is the gallows." At another point in the taking of the testimony, the court, in overruling an objection by the state to testimony in behalf of the defendants, said: "It can go in for what it is worth." This remark by the court tended to discredit the testimony in the minds of the jury.

Robert Blackwell testified that Jim Sellars occupied a room with him in Pensacola the night of the murder, and on cross-examination of the former the assistant state attorney asked him: "Do you know that Sellars was suspected of being the third man with you and Will?" and, "Do you know that Sellars had a bad reputation?" Sellars, after being incarcerated as an accessory to the murder, testified in behalf of the state.

In the examination of Will Blackwell, he was asked by the assistant state attorney: "Were you in jail for poisoning a man in Tennessee?" "Weren't you in jail for selling whisky?" "Did you steal that pistol from Mr. A. F. J. Smith, at Holts?"

Blackwell answered these questions in the negative, and no testimony was offered by the state to contradict him, or in support of the insinuations contained in the questions.

When the physician, who examined Will Blackwell's physical condition, testified that he had only "one lung, and that his heart was bad," the assistant state attorney said to him, in the presence of the jury: "You didn't examine his conscience, while you were examining his physical condition?" This statement, and one or two other improper ones made by the assistant state attorney, tending to prejudice the jury against the prisoners, were stricken from the record after the harm had been done; but at no time did the judge admonish the assistant state attorney about the impropriety of such remarks, and instruct him to discontinue them.

The record contains about 1,200 pages of testimony, the greater part of which consists of irrelevant and immaterial matter. On the part of the state there was a very considerable portion that was not properly in cross, but was admitted over the objection of the defense; but when Will Blackwell asked one of the state's witnesses, on a cross-examination, a question which he thought might be helpful to his defense, it was objected to by the state as not "properly in cross," and the court

sustained the objection. When Will Blackwell was on the stand in his own behalf, he was interrogated by one of the jurors about his escape, and in giving his explanation of it he said: "After they made the proposition to me in Pensacola, I knew, if I couldn't get a change of venue, the conditions were such I didn't have no chance to have a fair trial, and I knew it. I knew I couldn't possibly have a fair trial; they forced me to trial without any chance to make my defense—without any witnesses. I thought Mrs. Atwell was going to be a witness all the time until I came up here and was arraigned. I saw I was going to be convicted. I thought before that she was going to be a witness for me, and I knew I could not be convicted with three witnesses in my own home to swear—"

He was then interrupted by the assistant state attorney, who said the defendant might reserve his argument until all the evidence was in, and the court of its own motion said to the prisoner: "Just answer the question."

Throughout the trial the greatest latitude was allowed the assistant state attorney, but the defense was held to the strict rules of evidence and procedure.

We consider it necessary to call attention to these matters, so that another trial of the defendants may be free from similar improprieties.

The judgment is reversed and a new trial awarded.

Taylor and **Ellis**, JJ., concur. **West**, J., disqualified.

Simmons, Circuit Judge, dissenting:

The first error found by the majority is developed under the second assignment, which questions the refusal of the court below to grant a change of venue. The motion for a change of venue was based upon the alleged prejudice of the presiding judge, and the ill repute of the defendants in Okaloosa county. This motion was made under the provisions of § 1471 of the General Statutes of 1906, which provides that the opposite party may deny the truth of any allegation of the motion, except the allegation that the trial judge is prejudiced, when such allegation is made.

The state did traverse the truth of the allegation that the defendants were so odious in Okaloosa county as to prevent them from securing an impartial jury. The court took testimony upon the issue thus made, and decided against the defendants. The testimony amply sustained this decision, and its correctness was further attested by the procurement of a jury of twelve good and lawful men, accepted by both parties. Roberts v. State, 72 Fla. 132, 72 So. 649.

The statute under consideration concludes with these words: "Such application shall fully and distinctly set forth the facts upon which the same is founded."

In other words, it is not sufficient merely to say that the defendant is odious, or that the presiding judge is prejudiced. These statements would be mere conclusions. The facts must be stated, so that the court may intelligently pass upon the motion. Otherwise, a defendant charged with a serious offense, or even a hard-pressed defendant in a civil suit, might trifle with the court and the law, and bandy the case around from court to court, in the hope that time and circumstance might mitigate the inclemency of his plight.

Defendants' counsel recognized this principle of law, and undertook to state the facts upon which the allegation of the judge's prejudice was based. These facts are stated as follows: "That the judge of the said court, without other or further reason than that the people of the county of Okaloosa demanded 'speedy justice' and no delay of the law, acting at the behest of such public sentiment, has called this special term of court to try the said defendants, when, according to the statutes of the state of Florida, the regular fall term of said court would

commence on the last Monday in August of this year."

Section 1471 of the General Statutes of 1906, supra, requires that the facts showing the judge's prejudice must be set forth. If the sworn application for change of venue states facts which, if true, would require a change of venue, these facts cannot be disputed; but if the facts stated are not sufficient, admitting their truth, to require a change of venue, the trial judge may ignore them. Therefore, the facts set forth in the above quotation are admitted, and the question is: Do these admitted facts show the presiding judge to be disqualified, by reason of prejudice against the defendants?

Section 1813 of the General Statutes of 1906 provides as follows: "The judges of the circuit courts are authorized to order and hold extra and special terms of said courts whenever in their judgment the public welfare and the cause of justice require the same."

Did the judge in the case at bar act from any other motive than that here set forth by the legislature? Comparing the language of the application for a change of venue with this last-quoted statute, it seems to me that the phrases "the public welfare" and "no delays of the law" are closely akin, as also often may be "the cause of justice" and "speedy justice."

A revolting crime had been committed in Okaloosa county, and the people very naturally demanded "speedy justice." They wanted a grand jury impaneled, in the first place, while all the evidence was available; and at the time the special term of court was called they very naturally wanted the case tried, before one or both of the defendants had further opportunity to escape, as one of them had done at the former trial. That the presiding judge knew of these public sentiments, and was influenced by them in calling a special term of the circuit court, is not equivalent to prejudice against the defendants personally.

In the case of Purvis v. Frink, 55 Fla. 715, 46 So. 171, this court said the statute here under consideration "must be construed to mean that the prejudice which will disqualify a judge must be a prejudice against a party to the cause, and not a prejudice based upon the possible incidental opinions and views." "Prejudice," in the sense in which the word is employed here, means such a state of mind of the presiding judge that it may be said he has prejudged the case, and come to the conclusion that the defendant is guilty. The mere fact that he has been influenced by outraged public sentiment in the calling of a term of court to try parties accused of horrible crime does not, by any manner of means, show that he has prejudged the case and reached the conclusion that the defendants were guilty of that crime.

The majority opinion holds that, when a circuit judge convenes his court in special session for the purpose of trying a defendant accused of a revolting crime, he thereby manifests such a prejudice as disqualifies him, and sends the case to another county for trial. For the reasons already stated, I cannot concur in this holding. As I have pointed out, the legislature has provided for such special terms, and, so far as I am able to ascertain, the convening of them has never before been held to prove the prejudice of the presiding judge.

The further holding that the application for change of venue, on the ground that the presiding judge is prejudiced against the applicant, need state nothing further than the conclusion that he is prejudiced, considered in conjunction with § 3998 of the General Statutes of 1906, which provides for additional changes of venue on the same ground, will, in my opinion, so ensnare the feet of justice that swift legislative action will be necessary to save the courts from disrespect and ridicule. In the case of Purvis v. Frink, supra, the application for change of venue stated that the judge was prejudiced, and under-

took to state facts showing that he was prejudiced; but this court held that the showing of fact was not sufficient to support the general allegation. In the body of the opinion in that case these words appear: "It will be observed that the application for change of venue nowhere alleges any facts tending to show any prejudice on the part of the circuit judge. . . ."

And, in a brief concurring opinion, Mr. Justice Taylor pointedly states the matter thus: "The application for change of venue states, in general terms, the legal conclusion that the judge is prejudiced; but when the facts are stated that comprise this alleged prejudice, they do not even tend to show any prejudice on the judge's part. . . ."

Men accused of crime ought not to be illegally tried and convicted to save them from a mob, nor should any man be tried by a prejudiced judge; but a judicial holding that a special term of court cannot be called without disqualifying the judge who calls it from trying defendants, accused of heinous crimes, and that the defendant may transport his case from court to court upon his bald, unsupported, and unexplained statement that the several presiding judges before whom he comes are prejudiced against him, can but add to the public impatience of the law's delays, and cause fresh outbreaks of mob violence.

The several remarks in reference to the pardoning board and the supreme court injected into the case by the assistant state attorney, were indecorous and irrelevant, to be sure; but I cannot hold as fatal error the refusal of the presiding judge to strike them. Every normal man in the state knows that there is a supreme court and a pardoning board, and that practically all capital cases are reviewed by both of these tribunals; and a reminder of their existence could not have materially influenced the jury in the performance of their sworn duty.

As to the testimony of John Helvenston concerning old man Saunders and his dog, it is a close question whether it might merely show a tendency of the defendants to commit violence against old people having money, which would be improper evidence, or whether it might have gone to show a general plan and purpose to commit several such crimes; this latter, especially, in view of overwhelming testimony that Will Blackwell had tried to enlist the help of several other men, at different times, in violently taking money from old people, including the Davis couple, for whose murder he was on trial. As an abstract proposition of law, evidence going to show the tendency of the defendant to commit crimes similar to the one for which he is on trial is improper. Whart. Crim. Ev. 10th ed. p. 247, and cases there cited. But there are some notable exceptions to this rule, and one of those exceptions was elucidated by this court in the case of Wallace v. State, 41 Fla. 547, 26 So. 713. In this case Mr. Justice Carter, after stating the rule, proceeds as follows: "All the authorities concur in the view that evidence of defendant's acts prior or subsequent to the alleged offense, which logically tend to prove the criminal intent, or guilty knowledge, where they are material, is admissible; and, likewise, where the crime in question is one of a system of criminal acts occurring so near together in point of time, and so nearly similar in means, as to lead to the logical inference that they are all mutually dependent and committed in pursuance of the same deliberate criminal purpose, and by means planned beforehand, evidence of such other acts is admissible, even though those acts amount to another criminal offense."

See Presley v. State, 63 Fla. 37, 57 So. 605.

But, even admitting that this particular testimony was irrelevant, all the sting was taken out of the error, when, as stated in the majority opinion, it developed that Will Blackwell probably wanted the dog killed, so

that he could go to see a young woman living in the Saunders house.

The majority opinion seems to have been largely influenced by the general attitude of the judge and state attorney during the trial of the case, and a number of instances are pointed out as amounting to unfairness. The assistant state attorney, who had active charge of the case, was evidently convinced beyond doubt of the guilt of the defendants, and he prosecuted them with zeal and vigor. In the heat of the contest, he said and did many things that he ought not to have said and done, and that he probably would not have said and done in calmer moments; some of these things being pointed out in the majority opinion. It is also true that the presiding judge was strikingly lenient with the acting state attorney in his rulings, and that, of many points where he had discretion he exercised it in behalf of the prosecution. But I do not believe it can be said that he abused his discretion to such a point that the defendants were thereby injured.

The general attitude of the judge and state attorney may not support an assignment of error, nor is there any attempt to assign it as error. And, as I understand it, the province of this court is to review cases only upon assignments of error.

It is also true, that the testimony was conflicting, as is to be expected in cases of this kind; but the law constitutes the jury the judge of conflicting testimony, and a jury has exercised that function in this case. The verdict of guilty is supported by evidence which the jury had the right to consider, to the exclusion of all other.

Unless wholesale perjury has been committed on behalf of the state, Will Blackwell's guilt appears to be established beyond a reasonable doubt. A jury who saw the witnesses and heard them testify decided that Robert Blackwell also was guilty, and there was testimony legally sufficient to support this decision, which has also been approved by the presiding judge in denying the motion for new trial, one ground of which is that the verdict is not supported by the evidence.

For these reasons, I cannot concur in the majority opinion.

Whitfield, J., concurs.

ANNOTATION.

Contributing to fund for prosecution as disqualifying juror.

Contributions for prosecution of particular case.

It will be noted that in the reported case (BLACKWELL v. STATE, ante, 502) the court makes a distinction between contributors to a fund to apprehend and prosecute a certain class of violators of the law, and contributors to a fund to employ an attorney to assist in the particular prosecution in which the question of disqualification arises. There is some conflict in the cases; but a failure on the part of courts and writers to keep this perfectly logical distinction in mind has sometimes created an appearance of a greater conflict than, in fact, exists. There are few reported cases dealing with the question of contributors to a fund for the prosecution of the particular case in which the question of disqualification arises, but such of the cases as have passed on this question consistently hold that the juror is disqualified, and it is reasonable to suppose that the question has not appeared oftener in the reports, because of a general recognition of the impropriety of permitting such contributors to serve on the jury.

Thus, in Dumas v. State (1878) 62 Ga. 58, where the juror's uncle was a county commissioner, and had taken part officially in promoting the prosecution, by voting county funds to pay a reward for the prisoner's apprehension, and by aiding in the employment of counsel, and in the preparation of the case, the court held that, as it was not his official duty to so act, he must

be treated as a volunteer prosecutor in his private capacity, and that, while this was not reprehensible, he and his near relations were incompetent as jurors. So, where the liquor question had been the subject of public discussion, party organization, and contest at the polls, a person who had contributed money for the prosecution of violations of the Liquor Laws, including defendant's case, was held disqualified in State v. Moore (1896) 48 La. Ann. 380, 19 So. 285; and there is a similar holding in BLACKWELL v. STATE, where the juror had contributed to a fund to employ an attorney to assist in prosecuting defendant. It was likewise held in Jackson v. Sandman (1892) 64 Hun, 634, 45 N. Y. S. R. 633, 18 N. Y. Supp. 894, that persons who had contributed money to prosecute an action for a penalty for the illegal sale of liquor, and other similar actions, and for the procurement of testimony, were disqualified, especially where they were to assist in paying the costs if plaintiff was defeated, and thus had a pecuniary interest in the result of the action.

The reason for holding such contributors disqualified is well stated in BLACKWELL v. STATE, and in the quotation therein from State v. Moore (1896) 48 La. Ann. 380, 19 So. 285.

With respect to contributors of this character, see also Com. v. O'Neil (1856) 6 Gray (Mass.) 343; State v. Hoxsie (1885) 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059; Taul v. State (1901) — Tex. Crim. Rep. —, 61 S. W. 394; Dodd v. State (1904) — Tex. Crim. Rep. —, 82 S. W. 510, where the court, in holding that jurors were not disqualified by contributions of a general character, apparently attached some weight to the fact that it was not claimed that they contributed anything, or had become obligated to contribute anything, in the particular case. In the Massachusetts case, it is, however, doubtful whether the court intended to make any distinction between contributions generally, and contributions with reference to the particular case. The jurors, as members of a league, were liable to assessment for expenses incurred, to the extent of their subscriptions, and the court said that, so far as appeared, they might already have paid the full amount subscribed, and were without the smallest pecuniary interest in the event of the prosecution; and the case has generally been understood to make a distinction, dependent on whether the contribution had already been paid, or was still to be paid; but, unless the contributor's liability is, in some degree, dependent on the outcome of the prosecution, it is hard to see how there is any substantial basis for this attempted distinction.

There are a number of Texas cases which have sometimes been regarded as creating a conflict with respect to this class of contributions. See Heacock v. State (1882) 13 Tex. App. 97; McInturf v. State (1886) 20 Tex. App. 335; Moore v. State (1896) 36 Tex. Crim. Rep. 574, 38 S. W. 209; McGee v. State (1897) 37 Tex. Crim. Rep. 668, 40 S. W. 967.

The statute involved in these cases disqualified persons related to any private prosecutor, within the third degree; and it was held in those cases that persons subscribing money to aid in defendant's prosecution were not private prosecutors, within the statute. The question arose in each case over defendant's demand that he be furnished with a list of the contributors, and it is expressly stated, in two of the cases, that the list was desired to enable him to challenge those related to such contributors, and in none of the cases does it appear that any contributor sat on the jury, while in some of them defendant was afforded an opportunity of questioning the jurors concerning such contributions. The only one of the cases in which the court uses any language tending to support the view that such contributors are qualified is the Heacock Case (Tex.) supra, where the court, after holding that a contributor was not a private prosecutor, said: "A person might furnish money to aid in the enforcement of the law against a suspected criminal, and yet be perfectly impartial in respect to the accused party. He might not even know the suspected party, or the crime with

which such party is charged, or any of the facts connected with the case. Of course, if, in connection with the fact that he had rendered pecuniary aid to the prosecution, it was shown that he entertained a prejudice against the accused, or had established in his mind a conclusion as to his guilt, he would be disqualified to serve as a juror in the case. But this disqualification would be on other grounds than that the pecuniary aid extended to the prosecution by him rendered him a private prosecutor." On the other hand, the court said in the Moore Case (Tex.) supra, that it would have been competent for the defendant, in testing the jurors, to have shown by them, or otherwise, that they were interested in the prosecution of the case. The most that can be said for these cases is that they do not hold such contributors disqualified. They certainly do not expressly hold that they are qualified.

One who merely loans money to another for the purpose of paying counsel to assist the solicitor general in the prosecution of one charged with murder is not, however, disqualified, where he has no interest in the prosecution, and is not otherwise disqualified. Bird v. State (1914) 142 Ga. 596, 83 S. E. 238, Ann. Cas. 1916C, 205.

It is error to refuse to allow a juror to be asked whether he was a member of a committee connected with the arrest of defendant and his imprisonment for some time without a warrant, and whether there was not an agreement between the members of the committee to indemnify each other against any prosecution based on such arrest and imprisonment, and whether the jurors did not consider defendant's conviction necessary to his and his associates' protection. Fleming v. State (1858) 11 Ind. 234.

Contributions without reference to particular prosecution.

By the weight of authority, persons contributing money for the prosecution of offenses of a particular class, or who are members of or contributors to the funds of an association, or league, organized to assist in detecting and prosecuting offenses of a particular class, as violations of the Liquor Laws, cattle stealing, etc., or offenses, generally, in a particular locality, are not thereby disqualified in a prosecution of the character involved, where the league, or association, of which they are members, is not actively participating in the prosecution. Guy v. State (1903) 96 Md. 692, 54 Atl. 879; Dodd v. State (1904) — Tex. Crim. Rep. —, 82 S. W. 510; Deadweyler v. State (1909) 57 Tex. Crim. Rep. 63, 121 S. W. 863; Starke v. State (1908) 17 Wyo. 55, 96 Pac. 148, 17 Ann. Cas. 222; State v. Hoxsie (1885) 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059.

See however Com. v. Livermore (1855) 4 Gray (Mass.) 18, where the court said that, in its judgment, the members of any association of men combined for the purpose of enforcing or withstanding the enforcement of a particular law, and binding themselves to contribute money for that purpose, could not be held indifferent, on a trial for violating such law. The court, however, declined to pass on the competency of a member of a league which, as the juror understood, was organized to prosecute violations of the Liquor Laws, and made assessments on its members for that purpose, because the court had no knowledge of the assumed obligations of the members, other than the juror's understanding thereof.

And in Com. v. Burroughs (1887) 145 Mass. 242, 13 N. E. 884, where the trial court refused to permit questions as to whether the jurors were members of or contributors to any league, or association, for the enforcement of the Liquor Laws, this court apparently adopted the rule that such membership does not, in itself, disqualify the jurors, as it said that it would have been necessary to supplement the answers to such questions by evidence that the league or association had, through some of its agents, initiated or was conducting the prosecution.

In Wilburn v. Territory (1900) 10 N. M. 402, 62 Pac. 968, 14 Am. Crim. Rep. 500, where a challenge on the ground under consideration was overruled, it was said that the trial court's action rested upon a sound discretion,

and was warranted by the evidence, but it is not clear whether this means that the court, in its discretion, might hold the jurors qualified notwithstanding such membership, or contributions, or whether it merely means that it was for the court to determine the facts as to such membership, or contributions.

In Guy v. State (1903) 96 **Md.** 692, 54 Atl. 879, where contributions to the funds of a league organized to enforce a Local Option Law were under consideration, the court stated the reason for holding that such contributions do not disqualify, as follows: "The purposes of the league were identical with those which the law imposes upon every citizen, in respect to the matters within the purview of that organization. As was said by the supreme court of Illinois in Musick v. People (1866) 40 **Ill.** 272, all members of civilized society are, in effect, members of such leagues. The fact that these two jurors had contributed or promised to contribute to the funds of the league gave them no pecuniary interest in the result of that trial, for neither the conviction nor the acquittal of the traverser would have restored the contribution already paid, nor diminished the obligation to pay the promised one."

In discussing the same question, the supreme court of Rhode Island in State v. Hoxsie (**R. I.**) supra, said: "If the question had been allowed and had been answered affirmatively, the answer would show not any personal hostility to the defendants, but only that the juror was an earnest temperance man, who had demonstrated his zeal in the cause by giving of his means to aid in the enforcement of the law against the illegal sale of intoxicating liquors. The fact that he had given money would not affect him with any pecuniary interest in the conviction of the defendants. We do not see, therefore, how he could be challenged off the jury, unless every strong temperance man is liable to be challenged off, simply because he is a strong temperance man, anxious to have the law enforced."

In Lavin v. People (1873) 69 **Ill.** 303, 1 Am. Crim. Rep. 578, the court, without determining whether membership in a society, or league, organized for the purpose of prosecuting offenses against a Temperance Law, or contributions for such purpose, would disqualify jurors, held that defendant was entitled to examine the jurors concerning such matters, with a view to calling out facts upon which to base a peremptory challenge.

—where association receiving contributions is connected with particular prosecution.

Where, however, a league organized to prosecute violators of a particular law is in control of or actively participating in the prosecution, by the employment of special counsel, its members are disqualified, though the mere fact that witnesses for the state are detectives in its employ, and laid the information before the grand jury which led to the indictment, is not such participation as disqualifies its members. Guy v. State (**Md.**) supra.

So, where the prosecution is instituted on the complaint of an agent of such a league, a member is disqualified, as he could not be indifferent as to the result, or sit unbiased in determining the guilt or innocence of the defendant upon a complaint instituted by his authorized agent. Com. v. Moore (1886) 143 **Mass.** 136, 58 Am. Rep. 128, 9 N. E. 25.

And where an alliance of this character employed the witness for the state to make the purchase of liquor charged in the information, its members, who were liable to be assessed for the purpose of carrying out the objects of the association, were disqualified, though they had not, in fact, made any such contributions. State v. Fullerton (1901) 90 **Mo.** App. 411. The court says: "The impartiality of a jury made up in whole, or in part, of persons sustaining the relation to a prosecution that the juror did in this case, would, to say the least of it, be very questionable. . . . Whatever the juror may have thought or felt as to his competency, still he may, nevertheless, have been more or less biased or prejudiced against the defendant, and therefore not impartial."

And members of a law and order league, who in joining such league obligated themselves to use all efforts in their power to secure testimony to have indictments found against persons charged with violating the Local Option Laws, and to aid and assist in the prosecution of persons so charged, and to do all in their power to secure convictions of such persons, and who contributed and promised to contribute money to be used in securing convictions, and who testified that they were ready and willing to make good their promises, and to do all in their power to secure convictions, were disqualified. Counts v. State (1916) — Tex. Crim. Rep. —, 181 S. W. 723.

But a person who, at one time, had contributed money to a society for the suppression of vice, whose agent was a witness for the prosecution, but who had contributed nothing within a year, and was not shown to be a member, was not disqualified. United States v. Borger (1881) 19 Blatchf. 249, 7 **Fed.** 193.

And, as mentioned above, it is held in Com. v. O'Neil (1856) 6 Gray (**Mass.**) 343, that members of leagues organized to prosecute violators of the Liquor Laws, whose members subscribed a certain sum to its funds, or capital, and to the extent of the subscription were liable to be assessed with expenses incurred, were not shown to be disqualified, where it did not appear that they were under any obligation to contribute anything for the prosecution of the particular case, and, as far as appeared, might already have paid the full amount subscribed. The complaint in this case was made by an agent of the association, employed by it for that purpose, and was prosecuted at the expense of the association.

This note does not cover the question of disqualification by reason of membership in an organization for the suppression of crime, or the prosecution of offenders where no contributions by the juror are involved. On this point, however, see Conners v. United States (1894) 158 **U. S.** 408, 39 L. ed. 1033, 15 Sup. Ct. Rep. 951; Boyle v. People (1878) 4 **Colo.** 176, 34 Am. Rep. 76; Musick v. People (1866) 40 **Ill.** 268; State v. Wilson (1859) 8 **Iowa,** 407; State v. Flack (1892) 48 **Kan.** 146, 29 Pac. 571; State v. Mann (1884) 83 **Mo.** 589; Scott v. Chope (1891) 33 **Neb.** 41, 49 N. W. 940; State v. Sultan (1906) 142 **N. C.** 569, 54 S. E. 841, 9 Ann. Cas. 310; Respublica v. Richards (1795) 1 Yeates (**Pa.**) 480; Reg. v. Nicholson (1840) 8 Dowl. P. C. (**Eng.**) 422, 4 Jur. 558.

There are also excluded from this note questions as to disqualification by reason of prejudice against crime in general, or the particular crime involved, disqualification by reason of participation in the prosecution otherwise than by making contributions, and disqualification of grand jurors.

A. McT.

S. W. REYNOR

v.

A. D. MACKRILL, Appt.

Iowa Supreme Court—October 3, 1917.

(— Iowa, —, 164 N. W. 335.)

Brokers — able customer defined.

1. To be able to buy, a customer produced by a broker must actually have the money to make the cash payment, and be in shape financially to meet any deferred payments.

[See note on this question beginning on page 528.]

Same — failure to give notice of customer.

2. Failure to give the owner notice of the securing of a customer by a broker will not defeat a recovery for commissions if all was accomplished that could have been accomplished by such notice, and the parties came together and negotiated the sale.

Same — expiration of time limited — effect.

3. The expiration of the time allowed a broker for selling real estate at the time he tenders a customer does not deprive him of a commission if the owner consummates the contract as though the time had not expired.

Same — sale after breaking of negotiations — right to commission.

4. A broker is entitled to a commission on a sale effected by the owner to the person produced by the broker after the breaking of the original negotiations, if the break was a mere subterfuge and the sale was in fact brought about by what the broker had done.

Same — willing customer defined.

5. A willing customer, within the rule entitling a broker to a commission for producing a willing customer, is one who is willing to purchase on the terms offered.

APPEAL by defendant from a judgment of the District Court for Jones County in favor of plaintiff in an action brought to recover a commission alleged to be due under a contract to obtain a purchaser for certain land. *Affirmed.*

Statement by **Salinger, J.**:

Suit for commission alleged to be due for complying with a written contract to obtain a purchaser for land, and securing a contract of sale. The answer is that plaintiff made no sale, and produced no buyer who ever bought, so as to meet the contract; that the one tendered did not have the means to buy, and that, after extensive negotiations and efforts to sell, this person tendered, a Mrs. Blankenburg, failed to buy, and the negotiations were abandoned; that on account of all this, defendant was compelled to procure a loan on the land to meet a payment due, and compelled to lease the farm; that thereafter he himself sold the farm, and deeded it to Mrs. Blankenburg, in which sale plaintiff in no manner assisted or aided, wherefore defendant is in no manner indebted to plaintiff. Plaintiff had judgment upon verdict, and defendant appeals.

Messrs. M. W. Herrick and B. E. Rhinehart, for appellant:

In order to entitle a person to recover upon a contract, it is incumbent upon him to show that he has performed the contract in accordance with its conditions.

Jackson v. Creswell, 94 Iowa, 713, 61 N. W. 383; Barnes v. Rawson, 111 Iowa, 426, 82 N. W. 947; Connor v. Trapp, 127 Iowa, 742, 104 N. W. 333; Miller v. Mason City & F. D. R. Co. 132 Iowa, 412, 108 N. W. 302.

Where the contract is that a purchaser is to be found within a fixed time, who is to buy at a specified price, it is incumbent on the agent, in order to earn his commission, to produce a purchaser within the stipulated time, who is ready, able, and willing to buy at the price agreed upon.

Ryan v. Page, 134 Iowa, 60, 111 N. W. 405.

There should be no recovery of commission for effecting a sale of land, where the agent fails to show that he made or negotiated a sale in accordance with the contract.

Hurd v. Neilson, 100 Iowa, 555, 69 N. W. 867; Smith v. Allen, 101 Iowa, 608, 70 N. W. 694.

Where the contract of sale is to be drawn and approved by the owner, it is not enough to entitle the agent to a commission that he found a purchaser. The principal may refuse to carry out the sale.

Goin v. Hess, 102 Iowa, 140, 71 N. W. 218; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724; Felts v. Butcher, 93 Iowa, 414, 61 N. W. 991.

While, as a general rule, an agent's commission is earned as soon as he finds a purchaser able and willing to buy on the terms proposed, yet, if it appears that the sale fell through because of some fault of the intended purchaser, no commission is earned, for then the agent has failed to furnish a

purchaser willing to accede to the proposed sale.

Rounds v. Alee, 116 Iowa, 345, 89 N. W. 1098.

It was the duty of the trial court to instruct the jury as to what constitutes a person ready, able, and willing to purchase, and it should have instructed the jury that it required a person who actually had the money to meet the cash payment, and that it did not mean one who might have property upon which he could raise the necessary money.

Jones v. Ford, 154 Iowa, 554, 38 L.R.A.(N.S.) 777, 134 N. W. 569.

Plaintiff was bound by the written contract and must show compliance therewith.

J. A. Dean & Son v. Goodrich, 160 Iowa, 98, 140 N. W. 435; Hill v. Dakin, 162 Iowa, 103, 143 N. W. 821; Osborne v. Dannatt, 167 Iowa, 615, 149 N. W. 913.

It was incumbent upon plaintiff, in order to be entitled to a commission, to notify the defendant, within the time specified in his contract, that a valid contract might be entered into between the vendor and the proposed purchaser.

Beamer v. Stuber, 164 Iowa, 309, 145 N. W. 936; Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326; McDermott v. Mahoney, 139 Iowa, 292, 115 N. W. 32, 116 N. W. 788; McGinn v. Garber, 125 Iowa, 533, 101 N. W. 279.

Messrs. **Remley & Remley**, for appellee:

Defendant, by selling the land to the purchaser procured by plaintiff, and receiving not only the price at which he authorized plaintiff to grant the purchaser, but $1,000 more, was not in position to contest the question that the purchaser procured by plaintiff was ready, able, and willing to buy the land.

Elwood-Emerson Land Co. v. Bleasdale, — Iowa, —, 139 N. W. 554; Ketcham v. Axelson, 160 Iowa, 457, 142 N. W. 62.

By the contract, plaintiff was not required to complete a sale, but only to find a purchaser.

Whitehouse v. Gerdis, 95 Neb. 228, 145 N. W. 338.

Salinger, J., delivered the opinion of the court:

I. Plaintiff wrote defendant that, if he wished plaintiff to try and sell, plaintiff would try for another month on terms previously talked, and "if I can sell the farm for $40 per acre, you will give me $500 for making the deal. I think I can sell the farm inside of five weeks for $40 an acre." Defendant answered: "If you can sell that place at $40, please let me know, and I will send contract. So please let me know." As a witness, plaintiff testifies defendant asked that plaintiff let him know if plaintiff got a purchaser, and defendant said that he would send the contract.

A point is made of its being necessary, both in law and under the contract, that the owner should be notified that the agent had a customer, and of the terms proposed by him, so that the owner might, if he elected, enter into a binding contract. If that be a requisite, it was met. The proposed buyer, Mrs. Blankenburg, and the owner, and the agent, met; the owner was advised that this woman was such purchaser, the terms were fully talked over, and the buyer advised the owner she was there to close up. The jury could find the owner agreed, and said: "All right, go down and draw up the contract;" that the buyer and seller directed what should be put into the contract; that work on writing up the contract was entered on; and that, while it was not finished because the owner left to get an abstract, it was being written up while he was away for that purpose. This was on February 20th. Defendant says he stated the agent had done nothing, and he (plaintiff) was there to sell in person, and that they were together to make a contract, if they could get together. The jury could find that the terms had been talked over in January, and agreed to on this February 20th, and the deal was to be completed at Davenport the next morning; that defendant said that if plaintiff had sold the farm by the middle of January he would have been in time. It could find that defendant complained of the delay, and at least intimated that this delay had greatly inconvenienced him; that he said the contract had expired long ago, and that he would not go ahead with a new deal unless

he got more than the original terms. Plaintiff conceded that the contract time had expired.

It is questionable whether the answer raises the issue of want of notice. Be that as it may, the expiration of the contract time and failure to give notice must not be confused with the claim that the agency was at an end when plaintiff acted. Assume defendant was justified in not dealing because the contract time had expired, that does not make the position tenable that there is no liability because there was a failure to give notice to the owner. Whatever, other defenses defendant may have, failure to notify, where everything the notice could accomplish was effected without the giving of such notice, is not a tenable defense. The citations which plaintiff presents in support of her position are:

Brokers—failure to give notice of customer.

Beamer v. Stuber, 164 Iowa, 312, 145 N. W. 937. It holds: "It is not enough that a parol offer to buy be made to the agent. The proposition should be to the principal, to the end that the Statute of Frauds may be obviated, by reducing the agreement to writing. . . . This does not necessarily mean that the offer shall be made . . . by the purchaser to the seller, but that it shall be made in such circumstances that the latter may then exact . . . a binding contract, if he so elects. There is no reason why the agent of the seller may not communicate to him an offer of purchase, and, if the proposed purchaser is immediately accessible so that a written contract then and there may be executed, and he is ready, willing, and able to consummate the deal, this is enough."

This opposes rather than supports appellant.

McDermott v. Mahoney, 139 Iowa, 292, 115 N. W. 32, 116 N. W. 788, gives no support, nor McGinn v. Garber, 125 Iowa, 533, 101 N. W. 279. Flynn v. Jordal, 124 Iowa, 457, 100 N. W. 326, decides that an agent, to earn his commission for services in finding a purchaser of land, where the sale is not consummated, must procure a valid obligation to buy and tender it to the vendor, or bring the parties together so that the sale may be made if the vendor elect, and that there is the right to withdraw an offer before it is accepted; but if the proposed buyer takes his money from the bank and advises, upon acceptance, that he has given up taking the land, or, in the absence of such advice, a reasonable time has elapsed wherein to accept, the contract binds neither party, and there can be no recovery unless it is made to appear that the proposed buyer was ready, willing, and able when the contract was tendered.

J. A. Dean & Son v. Goodrich, 160 Iowa, 98, 140 N. W. 435, gives no support, so of Hill v. Dakin, 162 Iowa, 103, 143 N. W. 821. Both but hold that the contract made must be performed. And all that Osborne v. Dannatt, 167 Iowa, 615, 149 N. W. 913, decides is that, where a petition based on a commission contract which provides for sale within a specified time fails to plead performance within that time, and sets up no facts to avoid such provision, it is demurrable. The point to Felts v. Butcher, 93 Iowa, 414, 61 N. W. 991, is that the petition declares upon a sale made, whereupon commission may not be recovered merely for negotiations for a sale, and that the only contract made was one that neither buyer nor seller could enforce.

II. Since the time fixed for the duration of the contract had expired on February 20th, the defendant was at liberty to refuse the sale his agent tendered. He saw fit to go on, as though the contract time had not elapsed. If waiver is involved, none was pleaded. But there was no objection to testimony addressed to showing that the negotiations went on as if they were being conducted during the life of the contract. It there-

Same—expiration of time limited—effect.

fore becomes a material question why no sale was effected. On this head, the jury could find that a sale and its terms were fully agreed to; that defendant refused to consummate it, either because he objected to paying the agreed commission, or because of some act or omission on his part which was unjustified.

The jury could find that failure of defendant to furnish abstract caused some delay; that the buyer wanted one at once, so that it might be examined at once; that Milan told them it was at his sister's; that defendant told the proposed buyer that he would send the abstract right down; that it was arranged it should be brought to Onslow the next day, or sent by mail to that place; that on the next morning defendant told the customer there was a slight flaw in the abstract; that it would take some time to correct it; that he could probably deliver it in two or three weeks; that the buyer waited two weeks, and then telegraphed to South Dakota for the abstract, got it later, and then turned it over to her attorneys. The jury could find there was to be $500 paid down, and the balance on March 1st, or as soon as the abstract could be brought down to date, and that the customer had a certified check of $500 ready whenever a merchantable title was shown by the abstract. It appears defendant had need of his money by March 1st, that plaintiff knew this, and that the buyer was in need of closing by March 1st.

We are told that while, as a general rule, the commission is earned as soon as a buyer who is able and willing to buy on the terms proposed is tendered, this is not so if the sale fails through some fault of the buyer. The support claimed in Rounds v. Alee, 116 Iowa, 345, 89 N. W. 1098. But the proposition would seem to need no support. The difficulty is that the proposition is sound, but does not determine the controversy we have for settlement.

III. The owner later sold the land to the same person who was the proposed buyer at the time when the negotiations were abortive. The jury could find that this sale was a mere subterfuge, and, in fact brought about because of what the agent had done. This suffices, though the verdict might not have been disturbed had it been found, instead, that the sale was utterly independent of anything done by the agent, and that, therefore, no commission was due him.

Same—sale after breaking of negotiations—right to commission.

IV. Mrs. Blankenburg said, over objection, she was able to pay over the price and always was ready, had made arrangements to pay for the land when she agreed to buy; that the money was ready for her, was at her command; that she always looked out so that, if she had to pay cash, she knew where she could get the money, and it was ready for this deal; she was able to pay the full amount on February 20th, and she states how arrangement therefor was effected. It may be conceded this is somewhat shaken by cross-examination and counter testimony. But enough remains to make her ability a fair jury question. There is ample testimony to sustain a verdict finding that she was willing to buy.

V. It is urged that the court should have instructed as to what constitutes a ready, able, and willing buyer, and the definition should have been that he is one who actually has the money to meet the cash payment, and not merely one who might have property upon which he could raise the necessary money. The support claimed is Jones v. Ford, 154 Iowa, 554, 38 L.R.A. (N. C.) 777, 134 N. W. 571. The court charged correctly that: "To be able means that the purchaser must have the money at the time to make any cash payments that are required in order to meet the terms of the seller, and does not simply mean that the purchaser have property upon which he could raise the amount of money neces-

Same—able customer defined.

sary; but, as stated, he must actually have the money to meet the cash payment, and be in shape financially to meet any deferred payments."

Same—willing customer defined.

It charged correctly that to be willing "means to be willing to make the purchase upon such terms." This, as said, is correct, though it is held in McGinn v. Garber, 125 Iowa, 535, 101 N. W. 279, that, though there be general testimony that the money to make the cash payment was on hand, if it does not appear the buyer owns property out of which a judgment for the purchase price can be enforced, there is a failure of proof as to sufficient financial ability. For, in McDermott v. Mahoney, 139 Iowa, 306, 115 N. W. 32, 116 N. W. 788, where a proposed buyer testified generally that he was able to buy, that he could, within a day or two, have raised the money to make the necessary cash payment if the owner had not refused to sell, and it appears that there was issue on performing by a specified time, and at the time at which the ability was questioned, the agent still had ten days to perform, it is held that, in these circumstances, neither immediate ability, nor tender, nor actual possession of enough cash to tender or in readiness to tender, are material.

VI. The abstract proposition that it is error and presumptively prejudicial to instruct on an issue, upon which there is no evidence, and that instructions should not be based on a theory not presented by plea or proof, is not to be doubted, and we give the citations in support no investigation. The difficulty is that here it is no more than an abstract proposition. So of the proposition that, where the contract of sale is to be approved by the owner, finding a buyer is not enough, and "the principal may refuse to carry out the sale." And so of the statement that one may not recover on contract unless he shows that he has performed in accordance with its conditions.

We find no prejudicial error, and the judgment below must be affirmed.

Gaynor, Ch. J., and **Ladd** and **Evans**, JJ., concur.

ANNOTATION.

What constitutes ability to pay within rule as to broker's right to commissions.

This note, being confined to the question, What amounts to ability to pay? is not concerned with the effect of inability to pay. It may be observed, however, incidentally, that there is some difference of opinion as to that question, where the purchaser procured by the broker has been accepted by the employer, and has entered into a binding contract with the latter.

While there is no dispute as to the general principle that, to entitle a broker to commissions, he must furnish a buyer who is ready, able, and willing to make the purchase, on the terms offered by the owner, the cases passing upon what constitutes ability to pay on the part of a proposed purchaser involve such a variety of circumstances that it is difficult to deduce general rules from them.

It may be said, in general, that a proposed purchaser is not able, when he is depending upon third parties who are in no way bound to furnish the funds, to make the purchase. McGavock v. Woodlief (1858) 20 How. (U. S.) 221, 15 L. ed. 884; Robertson v. Allen (1911) 107 C. C. A. 254, 184 Fed. 372; Mattingly v. Pennie (1895) 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Birnbaum v. Unger (1912) 135 N. Y. Supp. 1; S. V. Thompson Co. v. Goldman (1912) 51 Pa. Super. Ct. 632.

Thus, where the customer did not claim that he himself had any property or means adequate for purchasing the stock in question, but said that he

was making the purchase on behalf of a syndicate, and expected to obtain the necessary funds from that syndicate, and his testimony, taken most favorably for the plaintiff, was that he had never had the money in his hands, that no persons had ever actually subscribed the money, but that through the syndicate he would have been prepared, when the time arrived to complete the purchase, to find the money required, it amounted to nothing more than a statement of his belief that persons not bound by contract to do so would have advanced the money, and was not such evidence as would justify the jury in finding that he had the ability to pay. Mattingly v. Pennie (1895) 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

And, where the supposed purchaser was an irresponsible insolvent, it is no answer to say that another person was interested with him as purchaser, where it is shown that such third person was in no wise bound to the vendors as a purchaser. Robertson v. Allen (1911) 107 C. C. A. 254, 184 Fed. 372.

So, where the owner of property authorized brokers to sell it for cash, he was not obliged to wait an indefinite time to allow a purchaser proposed by the brokers to borrow the money, and, in the meantime, not sell his property if another purchaser appeared. S. V. Thompson Co. v. Goldman (1912) 51 Pa. Super. Ct. 632.

So, in McGavock v. Woodlief (1858) 20 How. (U. S.) 221, 15 L. ed. 884, the broker was held not entitled to his commissions, where the conditions for the sale of a plantation were to be the payment of $130,000, of which $20,000 was to be paid in cash and the remainder in five equal annual instalments, and the offer to purchase was by means of the application of certain notes, and it was not shown that the vendor agreed to the change of conditions, or, if he had, that they could or would have been carried into effect by the third persons, whose notes were to be given, and there being no evidence of ability to pay the $20,000 cash, so that the fulfilment of the agreement, even upon the changed conditions, was conjectural.

And, before a broker can recover in an action for commissions in procuring a loan of money, he must show that he had procured a person able, ready, and willing to make the loan, and a showing that the party who was to make the loan was an attorney, and did not have the funds in his possession, but that a client would send him a check, was insufficient. Birnbaum v. Unger (1912) 135 N. Y. Supp. 1.

It has also been held that a purchaser was not able to pay when he depended upon making the money for the purchase price out of a sale or loan on the property, after securing title.

Thus, where the testimony of the proposed purchaser tended to negative the idea that he was himself financially able to perform the contract, but that, on the contrary, he relied on his ability to effect a sufficient number of sales of parcels of the property, during the life of the option which he proposed, to enable him to make the first payment, there was not sufficient showing of the furnishing of a purchaser financially able to make the purchase. Fox v. Denargo Land Co. (1906) 37 Colo. 203, 86 Pac. 344.

And, where a broker was authorized to sell land for cash only, the production of a customer who had in turn arranged to sell the land to a third person, who was to pay half cash and the balance in notes, the first customer intending to convert such notes into cash so as to be able to pay the full purchase price in money, was not compliance with the terms of sale. O'Brien v. Gilliland (1893) 4 Tex. Civ. App. 40, 23 S. W. 244.

But, if the purchaser has made arrangements so that the money will be forthcoming at the moment the deed is passed to him, there is no reason why he may not truly be said to be ready, able, and willing to complete the deal, although a part of the money comes from one who, at the same moment, receives a mortgage of the premises. McCabe v. Jones (1910) 141 Wis. 540, 124 N. W. 486.

Whether the production of a pur-

chaser who does not have the cash in hand, but has sufficient resources to enable him to raise it, will entitle the broker to commission, necessarily depends largely upon the terms of sale.

Thus, where an owner of property offered a commission to a broker to sell it, if the broker would produce a purchaser with $10,000 cash the next morning, the broker did not comply with the offer, so as to be entitled to commissions, by producing a customer who offered to purchase the property, and could raise the $10,000 on property he owned, in about thirty days' time. Mullenhoff v. Gensler (1891) 39 N. Y. S. R. 441, 15 N. Y. Supp. 673.

And where the contract with the broker provided for a sale of the property for "all cash over the encumbrance," the proof must show that the proposed purchaser had the cash in hand; and evidence that he had an abundance of property out of which the required payment might be made is not sufficient. Watters v. Dancey (1909) 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430.

But under a contract to sell property for $7,000, on terms of $1,000 cash and the balance on time, the production of a customer who had $900 cash in his pocket, and was the undisputed owner of property worth six or seven thousand dollars, was such a compliance with the terms as would entitle the broker to his commissions, especially where, at the time the purchaser was produced, the owner made no claim that the purchaser was unable to pay for the property, but based her refusal on other grounds. Garrisi v. Kass (1918) — Mich. —, 167 N. W. 833.

And, on an issue between a vendor and a broker, as to whether the broker had furnished a purchaser ready, willing, and able to purchase, a verdict for the broker should be sustained, where there was enough evidence to sustain the finding that the purchaser was able to raise the money necessary to complete the purchase, and it was not necessary to show an actual tender of the cash, or that the purchaser had it in his possession in readiness to make a tender, if required. McDermott v. Mahoney (1908) 139 Iowa, 292, 115 N. W. 32, 116 N. W. 788.

The proposed purchaser should generally have sufficient financial ability, not merely to make the initial payment, but to complete the contract of purchase according to its terms. Shaw v. Chiles (1911) 9 Ga. App. 460, 71 S. E. 745; Smith v. Penn (1909) 151 Ill. App. 155; Jones v. Ford (1912) 154 Iowa, 549, 38 L.R.A.(N.S.) 777, 134 N. W. 569; Iselin v. Griffith (1884) 62 Iowa, 668, 18 N. W. 302; Herron v. Cameron (1911) 144 App. Div. 43, 128 N. Y. Supp. 871.

That the duty to procure a purchaser who is willing and able to perform is not complied with by merely presenting one who is able to put up a forfeit, but is otherwise financially unable to carry out the contract. Smith v. Penn (1909) 151 Ill. App. 155.

And in Jones v. Ford (1912) 154 Iowa, 549, 38 L.R.A.(N.S.) 777, 134 N. W. 569, the court said that the trial judge properly instructed the jury that "to be able" does not simply mean that the purchaser have property upon which he could raise the amount of money necessary, but that he must actually have the money to meet the cash payment, and be in shape, financially, to meet any deferred payment.

While in Shaw v. Chiles (1911) 9 Ga. App. 460, 71 S. E. 745, it was held that the term "able," in a Code provision that the broker's commissions are earned when, during the agency, he finds a purchaser ready, willing, and able to buy, means financially able to make the purchase, and not merely able to make the cash payment required, and able to execute the necessary papers evidencing the deferred payment.

And an offer from one who was without means and not in a position to comply with the terms of the sale, and against whom a claim for damages resulting from breach of the contract of purchase could not be enforced, should not be considered a performance of the broker's undertaking to negotiate a sale. Iselin v. Griffith (1884) 62 Iowa, 668, 18 N. W. 302.

And where defendant desired a ten-

ant for her property, who would erect a twelve-story building thereon, paying part of the cost, the lease to extend for a period of twenty-one years, at an annual rental of $50,000, the furnishing of a proposed lessee who was owing over $150,000, consisting in part of judgments whereon execution had been returned unsatisfied, and who had no property, real or personal, and no income or salary whatever, and who was threatened with receivership, was not a compliance with defendant's desire for a tenant financially responsible, and with enough money to enable him to carry out his engagement with defendant. Herron v. Cameron (1911) 144 App. Div. 43, 128 N. Y. Supp. 871.

But where the customer produced by the broker had sufficient money to make the cash payment, and was of sufficient responsibility to have raised the remainder within the time required, the fact that he did not have the full amount at the time the cash payment was to be made is immaterial. Levy v. Ruff (1893) 4 Misc. 180, 23 N. Y. Supp. 1002.

And where the terms of a proposed sale of land are the payment of one third in cash and the balance in notes, it is not necessary that the purchasers should, in addition to making the cash payment, be of such financial responsibility that their notes for the balance would be good and collectable, irrespective of the lien on the land. Clark v. Wilson (1906) 41 Tex. Civ. App. 450, 91 S. W. 627.

When a contract has been made, the ability of the purchaser to pay is to be tested by his ability to respond in damages if he fails to complete the contract of purchase. Goldsberry v. Eades (1912) 161 Mo. App. 8, 142 S. W. 1080; Chipley v. Leathe (1894) 60 Mo. App. 15; Love v. Owens (1888) 31 Mo. App. 501. See also Hayden v. Grillo (1889) 35 Mo. App. 647.

Thus, in Love v. Owens (1888) 31 Mo. App. 501, the court said: "To permit the seller to escape his liability to the agent, merely because he is willing to let the purchaser go rather than bring a suit on the valid contract, would be to encourage injustice, and open up the way for the purchaser and vendor to get off, merely by the one failing to comply voluntarily with his written compact, and the other to enforce it, the one forfeiting merely his first payment, and the other pocketing it, leaving the agent without redress for the wrong done him."

And where the proposed purchaser refused to complete the transaction for the sale of property, although the vendor was ready and willing to perform his part, the broker was not entitled to his commissions, where there was no evidence tending to show that the proposed purchaser owned or had any property out of which a judgment for the purchase price could have been enforced. McGinn v. Garber (1904) 125 Iowa, 533, 101 N. W. 279.

But in Dent v. Powell (1895) 93 Iowa, 711, 61 N. W. 1043, it was held that to entitle the broker to commissions, where the proposed purchasers refused to complete the sale, it will not answer to say that, although they did not have the money, they had property from which it could have been realized; as the vendor could not be compelled to resort to litigation in order to procure the money.

In Pugh v. Christensen (1917) 166 Wis. 568, 165 N. W. 294, where brokers engaged to secure a customer for their principal, who would purchase her farm or exchange other property, free from encumbrance, for it, and secured a customer with whom a contract was made, who, to their knowledge, but without the knowledge of their principal, was unable to clear his property from encumbrance within the time required unless he could procure a loan on the principal's property, which loan the brokers agreed to, but failed to procure for him, so that he was unable to complete the exchange, it was held that they were not entitled to their commission, the court apparently regarding either the bad faith involved, or the failure to procure a customer able to perform the contract, as sufficient to prevent its recovery.

When the person furnished by the broker has, in fact, performed the contract, the question of his primary responsibility is eliminated. Wright v.

Brown (1896) 68 Mo. App. 577; Glade v. Eastern Illinois Min. Co. (1907) 129 Mo. App. 443, 107 S. W. 1002; Brand v. Nagle (1907) 122 App. Div. 490, 107 N. Y. Supp. 156; Trent Trust Co. v. McFarlane (1913) 21 Haw. 435.

So, where the broker furnished a purchaser who did in fact purchase the property on the terms required, the fact that he had a part only of the purchase money in cash, and was compelled to borrow the balance, and secure payment of the same by mortgage on the property purchased, did not negative the idea that he was able to purchase. Elwood-Emerson Land Co. v. Bleasdale (1913) — Iowa, —, 139 N. W. 554.

And where, by the conditions of sale, the purchasers were to give a satisfactory bond and execute a deed of trust, and the customers offered either did or were ready to do both, the fact that they were insolvent was immaterial. Ross v. Fickling (1897) 11 App. D. C. 442.

And in a suit by brokers for commissions for furnishing to defendant parties who would pay defendant a certain sum for an interest in a business, and provide him with working capital of a certain amount, where it appeared that defendant had made a definite agreement with the parties furnished, by which such parties were to form a syndicate, made up of themselves and such others as could be found to agree to furnish the money, but the deal fell through because of additional demands by defendant, it was no longer a question whether the parties furnished by plaintiff could themselves, out of their merely individual resources, furnish the necessary money, if, in fact, they could obtain it. Hutchinson v. Plant (1914) 218 Mass. 148, 105 N. E. 1017.

It is not necessary that the buyer should be able to perform at the time fixed for signing the contract, but only at the time which should then be fixed for the passing of title. Jaffe v. Nagel (1909) 114 N. Y. Supp. 905.

Where one of the terms of sale was a cash payment of $25,000, and the testimony showed that the assets of the proposed purchaser consisted of a stock of groceries, the value of which was not shown, and a cause of action for ten or twelve thousand dollars against third parties for money loaned, and that he had no funds in his possession, the production of a purchaser able to purchase on the owner's terms was not proven. Schnitzer v. Price (1907) 122 App. Div. 409, 106 N. Y. Supp. 767.

Where the evidence showed that the broker through whom the transaction was carried on never had the money turned over to him by the purchaser, for the purpose of making the cash payment required by the contract, so that he never did have the money in his possession ready to pay over upon execution of the contract, the terms of which, as drawn, acknowledged the receipt of such payment, the broker was not entitled to recover, upon refusal of the vendor to complete the contract. Neiderlander v. Starr (1893) 50 Kan. 766, 32 Pac. 359.

And where the evidence showed that, at the time for payment of the residue and delivery of the deed, the purchaser asked for more time to obtain the money, and the owner held himself in readiness to complete the sale for four weeks thereafter, but the purchaser did not obtain the money and complete the purchase, it was sufficient, in the absence of anything to the contrary, to warrant a finding that the purchaser was not of sufficient pecuniary ability to consummate the purchase. Butler v. Baker (1892) 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019.

R. L. S.

WILLIAM H. McELWAIN
v.
UNION PACIFIC RAILROAD COMPANY, Appt.

Nebraska Supreme Court—July 10, 1917.

(101 Neb. 484, 163 N. W. 845.)

Carrier — notice of claim — necessity.

1. Where the bill of lading provides that, as a condition precedent to the right to recover "damages for loss of or injury to" live stock, the shipper shall give notice in writing of his claim therefor, notice is not required where the claim is solely for damages sustained by the loss of a favorable market, and for shrinkage in weight and expense of feeding at destination while awaiting the next market; such damages being caused by reason of delay in transportation.

[See note on this question beginning on page 538.]

Evidence — burden — delay in transportation.

2. Where there is proof that an unreasonable time was consumed in transporting the shipment, the burden is on the carrier to prove that the delay was not caused by its negligence, though the owner of the live stock accompanied the shipment.

Same — opinion — shrinkage in cattle.

3. Opinion testimony of qualified witnesses that cattle held at destination two days before selling will probably shrink in weight 3 per cent may be admissible to prove a claim for shrinkage after arrival, where the weight of the cattle on arrival at destination, and before watering and feeding, and their selling weight, tend to show that the cattle did not "fill" the usual amount.

Headnotes by LETTON, J.

(Hamer, J., dissents.)

APPEAL by defendant from a judgment of the District Court for Merrick County in favor of plaintiff in an action brought to recover damages for losses sustained by the alleged wrongful delay in the transportation of live stock. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Edson Rich, A. G. Ellick, and Thomas W. Bockes,** for appellant:

In an action to recover damages to a shipment of live stock in transit, which were accompanied by the owner, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence.

Chicago, B. & Q. R. Co. v. Williams, 61 Neb. 609, 55 L.R.A. 289, 85 N. W. 832; Chicago, St. P. M. & O. R. Co. v. Schuldt, 66 Neb. 43, 92 N. W. 162; Cleve v. Chicago, B. & Q. R. Co. 77 Neb. 166, 124 Am. St. Rep. 837, 108 N. W. 982, 15 Ann. Cas. 33, 20 Am. Neg. Rep. 616, 84 Neb. 158, 120 N. W. 959.

By the passage of the Carmack Amendment to the Interstate Commerce Act, Congress assumed jurisdiction over the interstate shipment of property; and the rights and liabilities of the parties to such shipments are to be determined by the acts of Congress, the bills of lading, and the decisions of the Supreme Court of the United States.

Baldwin v. Chicago, R. I. & P. R. Co. 173 Iowa, 524, L.R.A.1916D, 335, 156 N. W. 17; Adams Exp. Co. v. Croninger 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Atchison, T. & S.

F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555.

A provision in a bill of lading for an interstate shipment of live stock, which requires the shipper to give notice in writing to the nearest agent of the carrier, before removal of the live stock or mingling it with other stock, is valid, and the shipper cannot recover without proof of such notice.

Baldwin v. Chicago, R. I. & P. R. Co. supra; Clegg v. St. Louis & S. F. R. Co. 122 C. C. A. 273, 203 Fed. 971; Kidwell v. Oregon Short Line R. Co. 125 C. C. A. 313, 208 Fed. 1; Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556; Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Cohen v. Minneapolis, St. P. & S. Ste. M. R. Co. 162 Wis. 73, 155 N. W. 945.

Compliance with the provisions of the bill of lading, under which plaintiff's shipment moved, could not be waived by the defendant or its connecting carriers.

Clegg v. St. Louis & S. F. R. Co. 122 C. C. A. 273, 203 Fed. 971; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.

In order to recover damages for an alleged shrinkage in the weight of cattle, alleged to have been caused by delay in their transportation on the part of a common carrier, the fact that there was a shrinkage of weight must be proved by competent evidence, and cannot be established by mere opinion evidence.

Underwood v. Chicago & N. W. R. Co. 100 Neb. 275, 159 N. W. 408.

Messrs. **Elmer E. Ross** and **Prince & Prince**, for appellee:

A provision in a bill of lading for an interstate shipment of live stock, requiring the shipper to give notice in writing to the nearest agent, etc., has no application to a claim for damages resulting to said stock from delay in shipment, which are unknown and cannot be ascertained at the time of delivery, but depend upon the conditions subsequent to delivery, whether or not damages have been sustained.

Gault v. Atchison, T. & S. F. R. Co. 92 Kan. 464, 139 Pac. 1014; Eoff v. Scullin, 120 Ark. 452, 179 S. W. 663, 4 R. C. L. 991; Cohan v. Minneapolis, St. P. & S. Ste. M. R. Co. 162 Wis. 73, 155 N. W. 945; Rice v. Kansas P. R. Co. 63 Mo. 314; Oxley v. St. Louis, K. C. & N. R. Co. 65 Mo. 629; Kramer v. Chicago, M. & St. P. R. Co. 101 Iowa, 178, 70 N. W. 119, 1 Am. Neg. Rep. 229; Houtz v. Union P. R. Co. 33 Utah, 175, 17 L.R.A.(N.S.) 628, 93 Pac. 439.

The same degree of care on the part of the carrier is required, whether the shipper accompanies the stock or not; but, where he does, the burden is then upon him to show that any damage sustained during the course of transportation was not caused by his own fault in loading or caring for the shipment.

Colsch v. Chicago, M. & St. P. R. Co. 149 Iowa, 176, 34 L.R.A.(N.S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, 915; Nelson v. Chicago, B. & Q. R. Co. 78 Neb. 57, 110 N. W. 741; Atchison, T. & S. F. R. Co. v. Word, — Tex. Civ. App. —, 159 S. W. 375; Chicago, B. & Q. R. Co. v. Williams, 61 Neb. 608, 55 L.R.A. 289, 85 N. W. 832; Denman v. Chicago, B. & Q. R. Co. 52 Neb. 143, 71 N. W. 967; Bosley v. Baltimore & O. R. Co. 54 W. Va. 563, 66 L.R.A. 871, 46 S. E. 613; Wilke v. Illinois C. R. Co. Ann. Cas. 1913E, 315, note; Yazoo & M. Valley R. Co. v. Blum, 88 Miss. 190, 10 L.R.A.(N.S.) 422, 40 So. 748; Daoust & Welch v. Chicago, R. I. & P. R. Co. 149 Iowa, 650, 34 L.R.A.(N.S.) 637, 128 N. W. 1106; Hutchinson, Carr. 4th ed. § 496.

Witnesses for plaintiff were properly confined to the shrinkage of weight under consideration; and, in testifying concerning this, they gave their evidence not as mere opinion evidence, but from their own knowledge, gained from actual observation, and also from their long experience in handling and dealing in live stock,—an experience which constitutes them experts concerning such matters.

Anderson v. Chicago, B. & Q. R. Co. 84 Neb. 311, 113 Am. St. Rep. 626, 120 N. W. 1114; Hespen v. Union P. R. Co. 82 Neb. 495, 118 N. W. 98; Union P. R. Co. v. Thompson, 75 Neb. 464, 106 N. W. 598.

Letton, J., delivered the opinion of the court:

Plaintiff recovered judgment for damages caused by delay in the transportation of live stock, and defendant appeals.

Defendant contends that the instructions ignore the following provision of the bill of lading: "The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing of his claim therefor to some officer of said carriers, or to their nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock, and present a formal statement of his claim, duly verified, to said carriers, within sixty days thereafter."

Plaintiff concedes the validity of this provision, but contends that it is not applicable to claims for damages not accruing during transportation. In the petition it is alleged that, if there had been no delay in the transportation, the cattle would have arrived in Chicago in time for the market of Monday, December 2; that, owing to the negligence of defendant they arrived there too late for the Monday market; that there was no satisfactory market Tuesday, for the class of cattle which plaintiff had shipped, and the cattle were sold Wednesday, for less than plaintiff would have received had they arrived Monday. He claims damages for the loss of the Monday market, for shrinkage in the cattle while in the stockyards from Monday afternoon until Wednesday, and for feeding expense for the two days.

Provisions in a bill of lading, in cases where there is a reasonable doubt as to their meaning, are to be construed most strongly against the carrier. 10 C. J. 181, 194. Was plaintiff required by the provisions of the bill of lading, to give notice of his claim? The following statement of the law is pertinent to this inquiry: "If, because of wrongful delay, the shipment sustains physical injury and, in consequence, a depreciation in value, a provision in the contract of shipment requiring notice of claim for damages for loss or injury to the shipment is applicable. . . . On the other hand, it is very generally held that a stipulation for notice of this character applies only to a loss of or physical injury to a shipment of dead freight, or to injury to a shipment of live stock, caused by delay and consequent depreciation in value. In other words, where the shipper suffers special damages because of wrongful delay, no compliance with the stipulation is necessary to entitle him to recover for such special damages, and the reason is that the notice would be useless in determining the amount of such loss. In conformity with this principle, it has uniformly been held that a stipulation that notice of damages should be a condition precedent to recovery for any injury to the shipment during transportation has no application to damages caused by the loss of market, to loss resulting from a decline in the market value of the shipment, or to the expense of feeding stock, resulting from delay in transportation. And no notice is necessary to authorize the recovery of damages from shrinkage, resulting from the holding of the cattle after transportation was completed, due to the loss of market. . . . Nevertheless, it has been held that, where the provision requiring notice is not confined to loss of or injury to live stock covered by the contract, but expressly includes damages for delay, it must be construed as including a loss sustained by a decline in the market; and that a provision in a bill of lading, to the effect that claims for loss, damage, or delay must be made in order to render the carrier liable, was not limited to claims for damages to the goods shipped." 10 C. J. 334.

Plaintiff's claim was not a claim for "damages for loss of or injury to" the stock, and notice was not re-

quired by the bill of lading. Gault v. Atchison, T. & S. F. R. Co. 92 Kan. 464, 139 Pac. 1014; Elliott v. Chicago, M. & St. P. R. Co. 38 S. D. 371, 161 N. W. 347.

Carrier—notice of claim—necessity.

It is also contended that instructions relating to the burden of proof are erroneous. After instructing that, in order to recover, plaintiff must prove by a preponderance of the evidence that "an unreasonable delay in the transportation of said cattle occurred, on account of the negligence and carelessness of defendant or connecting carriers, and without fault of the plaintiff," the court also instructed that "when the evidence discloses that an unreasonable length of time has been consumed in the transportation of live stock, and the carrier seeks to justify the same, then, as to such justification, the burden of proof devolves upon it, to show by a preponderance of the evidence that said delay in transportation was not caused by its own carelessness or negligence."

Defendant argues that, since the owner accompanied the shipment, the burden is on him to prove that the loss complained of was occasioned by the carrier's negligence. Cleve v. Chicago, B. & Q. R. Co. 77 Neb. 166, 124 Am. St. Rep. 837, 108 N. W. 982, 15 Ann. Cas. 33, 20 Am. Neg. Rep. 616. In the case cited it was held that, "where, by contract, the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier raises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained, was occasioned by the negligence of the carrier," and a judgment against the carrier was reversed, since there was no competent evidence tending to show that more time was consumed in transporting the shipment than was reasonably necessary. The instruction assailed does not conflict with the rule announced in the foregoing case. Where the evidence shows that an unreasonable time was consumed in transporting the shipment, the carrier will be liable for resulting damages, whether the shipper did or did not accompany the shipment, unless it is shown that the delay was within the exceptions qualifying the carrier's general liability; the cause of the delay being a matter peculiarly within the knowledge of the carrier.

Evidence—burden—delay in transportation.

It is contended that the court erred in admitting opinion evidence to prove alleged shrinkage in weight of the cattle while being held at the stockyards in Chicago. The aggregate weight of the cattle when weighed on the railroad scales, on their arrival at Chicago, and before watering, was 255,200 pounds. Their selling weight Wednesday morning was 256,410 pounds. Witnesses for plaintiff, experienced in the live stock business, testified that the cattle ought to "fill" 3 to 4 per cent, when watered and sold on their arrival. A witness called by the defendant, who had been engaged in the live stock business in Chicago for nearly thirty years, on cross-examination, and without objection, testified to the same effect. There was a conflict in the evidence as to whether cattle held over from Monday to Wednesday, under circumstances such as were in evidence, would shrink in weight; but the contention of plaintiff is supported by sufficient competent evidence that such cattle would shrink about 3 per cent in weight. In other words, while the actual weight of the cattle on the cars at destination, and their weight when sold two days later, might be the same, if properly filled and taken care of, the cattle should weigh 3 per cent more than when on the cars; the weight when sold, in this case, being 6,465 pounds less than it would have been if the cattle had filled 3 per cent on arrival. There is no proof as to the amount of feed furnished during this delay, and it is not contended it was insufficient.

Defendant cites Underwood v. Chicago & N. W. R. Co. 100 Neb. 275, 159 N. W. 408, in which it was stated in the syllabus: "The fact that there was a shrinkage of weight must be proved by competent evidence, and cannot be established by mere opinion evidence."

This was correct as applied to the facts in that case, but is not correct as a general rule. In that case the weight of the cattle at the point of origin and destination was the same. The selling weight showed that the cattle had filled a little over 65 pounds a head on an average, which met the requirements indicated by the testimony on behalf of plaintiff. Under such evidence, opinion evidence that cattle, when held over one day, would shrink 30 pounds a head, was insufficient to support a finding of such a shrinkage, since the other evidence conclusively showed that there had been no shrinkage. In the present case, since the cattle at destination did not "fill" to the usual amount, it was proper to show by stockmen that cattle being held for two days at destination would probably shrink 3 per cent.

Same—opinion—shrinkage in cattle.

The judgment of the District Court is affirmed.

Sedgwick, J., not sitting.

Hamer, J., dissenting:

I am unable to agree with the views expressed in the majority opinion. In the first paragraph of the syllabus it is held: "Where the bill of lading provides that, as a condition precedent to the right to recover 'damages for loss of or injury to' live stock, the shipper shall give notice in writing of his claim therefor, notice is not required where the claim is solely for damages sustained by the loss of a favorable market, and for shrinkage in weight and expense of feeding at destination while awaiting the next market, such damages being caused by reason of delay in transportation."

The views of the court as expressed in the body of the opinion support the syllabus. The provision in the bill of lading reads: "The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing of his claim therefor to some officer of said carriers, or to their nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock, and present a formal statement of his claim, duly verified, to said carriers, within sixty days thereafter."

It might be all right to hold that notice is not required where the claim is solely for damages sustained by the loss of a favorable market, and expense of feeding at the destination, provided the same are caused by an unnecessary delay in transportation. The weight of the cattle, immediately upon their arrival at their destination, and before eating, drinking, and filling to their usual condition, as nearly as may be, would not be their proper weight. The opinion testimony concerning what the cattle would shrink in two days further complicates the matter. There is no proper starting point shown by the evidence in the case. The testimony of the witnesses as to what might be the shrinkage of the cattle in two days gets nowhere. It is a projected view, having no relation to the case, and no connection with it. Undoubtedly, there was shrinkage during the transportation of the cattle, and it was that shrinkage to which the bill of lading refers; but the defendant company could not properly be held liable for that, and that is mixed with the estimated shrinkage of two days, as related by the opinion witnesses, and both kinds of shrinkage are together,—that on the trip, and that after the cattle arrived at the end of the trip,—and therefore they are inseparable, and each by itself is unascertainable. This must have been prejudicial to the interests of

the defendant at the time of the trial.

It is, without doubt, dangerous to the due administration of justice, to make claims for damages because of other things than injury to the live stock shipped, and then to consider the whole together. Besides, no satisfactory reason is offered for not giving the notice. When the cattle arrived at their destination the shrinkage of the trip had occurred, and it was then ready to be investigated. The notice should then have been given, before the accumulation of further acts to obscure the view of the subject. The weight of the cattle immediately upon their arrival at Chicago, and before being fed or watered, was 255,200 pounds, and, when sold on Wednesday morning afterwards, they weighed 256,410 pounds. The opinion witnesses were brought in to show that the weight of the cattle, when sold, was 6,465 pounds less than it would have been, if the cattle had been properly cared for, and had been properly filled on arrival. The problem presented was incapable of exact demonstration, and no one may know that this testimony enabled the court to reach a correct result. It is conceded, in the majority opinion, that the case cited by the defendant railroad company (Underwood v. Chicago & N. W. R. Co. 100 Neb. 275, 159 N. W. 408) was right in that case, "but is not strictly correct as a general rule." I think it is preferable to look for a *general rule*. In that case the "fill" is claimed to have amounted, on the average, to 65 pounds to each steer, and, in that case, the weight of the cattle at the destination and "point of origin" was the same, and when the court saw there had been no shrinkage, the opinion evidence that the cattle, when held over one day, would shrink 30 pounds to the head, was held insufficient to support a finding of shrinkage, in the face of competent evidence that there had been no shrinkage.

Petition for rehearing denied.

ANNOTATION.

Provision in carrier's contract requiring notice of damage or loss, as applicable to loss of market due to delay.

While courts, in discussing this question, may at times have used language, by way of argument, which would apparently deny the applicability of provisions for notice, however broad their language, to claims for damages from the loss of market, or decline in market, during delay in transportation, it is clear that the question depends upon the language of the particular provision. It is manifest that such must be the case unless such stipulations, in language sufficiently broad to include such claims, are to be held invalid, as applied to claims of this character. No case holding the stipulation invalid, as applied to such claims, has been found.

The stipulation which has been most often involved in controversy provides for notice of claims for "loss of or injury to" the property shipped. It is well settled that this does not embrace damages caused by a falling market, where the shipment is delayed. Estes v. Denver & R. G. R. Co. (1911) 49 Colo. 378, 113 Pac. 1005; Kramer v. Chicago, M. & St. P. R. Co. (1897) 101 Iowa, 178, 70 N. W. 119, 1 Am. Neg. Rep. 229; Atchison, T. & S. F. R. Co. v. Poole (1906) 73 Kan. 466, 87 Pac. 465; Missouri, K. & T. R. Co. v. Fry (1906) 74 Kan. 546, 87 Pac. 754; Cornelius v. Atchison, T. & S. F. R. Co. (1906) 74 Kan. 599, 87 Pac. 751 (overruling Atchison, T. & S. F. R. Co. v. Means (1905) 71 Kan. 845, 80 Pac. 604 where the court apparently overlooked the distinction between loss of and injury to cattle during transportation, and loss of a market, or losses arising after delivery, and resulting from the negligence of the carrier); Missouri, K. & T. R. Co. v. Frogley (1907) 75 Kan. 440, 89 Pac. 903; Darling v.

Atchison, T. & S. F. R. Co. (1907) 76 **Kan.** 893, 93 Pac. 612, 94 Pac. 202; Missouri, K. & T. R. Co. v. Fry (1908) 79 **Kan.** 21, 98 Pac. 205; Hayes v. Missouri, K. & T. R. Co. (1911) 84 **Kan.** 1, 113 Pac. 421; Wright v. Chicago, B. & Q. R. Co. (1906) 118 **Mo. App.** 392, 94 S. W. 555 (distinguishing Hamilton v. Wabash R. Co. (1899) 80 **Mo. App.** 597, and Smith v. Chicago, R. I. & P. R. Co. (1905) 112 **Mo. App.** 610, 87 S. W. 9, cited infra, because of the different language used); Libby v. St. Louis, I. M. & S. R. Co. (1909) 137 **Mo. App.** 276, 117 S. W. 659; MCELWAIN v. UNION P. R. Co. (reported herewith) ante, 533; Jett v. Southern R. Co. (1914) 130 **Tenn.** 237, 169 S. W. 767; Pecos & N. T. R. Co. v. Evans-Snyder-Buel Co. (1906) 100 **Tex.** 190, 97 S. W. 466, affirming (1906) 42 Tex. Civ. App. 60, 93 S. W. 1024; Southern Kansas R. Co. v. Curtis Bros. (1906) 44 **Tex.** Civ. App. 477, 99 S. W. 566; Panhandle & S. F. R. Co. v. Bell (1916) — **Tex.** Civ. App. —, 189 S. W. 1097.

See also Louisville & N. R. Co. v. Bell (1891) 13 **Ky.** L. Rep. 393, and Louisville & N. R. Co. v. Smith (1893) 14 **Ky.** L. Rep. 814, where a stipulation of this kind is held inapplicable to a claim for unreasonable delay in transporting and delivering stock; but it is not stated whether any loss of a market was involved.

As said in Estes v. Denver & R. G. R. Co. (**Colo.**) supra: "The evident purpose of the provisions of ¶ 7, with respect to notice, was to afford the carrier an opportunity to examine the cattle before they were commingled with other stock; in order that, by such inspection, unfounded claims for injuries might be detected, or the extent of such injuries ascertained. From a reading of the paragraph, it is clear that the claim specified, of which notice is to be given, is confined to loss or injury to stock during transportation. Damage resulting from a decline in the market price is an entirely different matter. For loss thus occasioned, there is no necessity for the examination of a shipment of cattle before they are slaughtered or intermingled with other stock. Such damage can only be ascertained from other sources; and a fair construction of the paragraph establishes beyond question that a loss caused by a falling market is not embraced within its terms requiring notice. In brief, the notice required is limited to damages for physical injuries to the stock."

And in Jett v. Southern R. Co. (1914) 130 **Tenn.** 237, 169 S. W. 767, the court says that there would be no reason for applying the provision to damages occasioned by a fall in the market, as market fluctuations of well-known commodities are matter of record, and the carrier may make investigations and protect itself at one time as well as another, against claims so arising.

In Darling v. Atchison, T. & S. F. R. Co. (1907) 76 **Kan.** 893, 93 Pac. 612, 94 Pac. 202, where the notice was required before the removal of the stock shipped from the place of destination, the court says, as a reason for holding the provision inapplicable, that it would be impossible to give the notice, as required, with respect to damages from loss of market.

A provision for notice of any claim "for any loss or injury to said cattle, resulting from carrier's negligence as aforesaid, including delays," does not embrace the loss of a market and the subsequent decline of the market price. Missouri, K. & T. R. Co. v. Fry (1906) 74 **Kan.** 546, 87 Pac. 754. The court says: "It is not clear just what is meant by the words 'including delays,' unless they are used in reference to the physical condition of the stock, as affected by delays. The purpose cannot be said, with reason, to be to provide for notice of a loss resulting from a decline in the market, for it would be manifestly unreasonable to require the shipper to give notice of something which might or might not happen, depending upon a variety of circumstances and conditions, which he could not judge of until after his interests might require the removal of the stock from the pens at destination. He might see fit, before the market of the next day, to ship his stock back home, or to some other market, and yet not lose his right to maintain an action for any damage

resulting from a decline in the market, and caused by the company's negligent delay. The contract provides that the notice shall state the place and nature of the injuries, 'to the end that they may be fully and fairly investigated.' The reasons for such notice are obvious when applied to injuries received by cattle in transportation, as was held in Sprague v. Missouri P. R. Co. (1885) 34 Kan. 347, 8 Pac. 465, and Goggin v. Kansas P. R. Co. (1874) 12 Kan. 416, but are absolutely wanting when applied to a loss resulting from a decline in the market price."

So, a provision for notice of "loss or damage of any kind to the property" does not cover damages from a change in the market. Leonard v. Chicago & A. R. Co. (1893) 54 Mo. App. 293; D. Klass Commission Co. v. Wabash R. Co. (1899) 80 Mo. App. 164; Loeb v. Wabash R. Co. (1904) — Mo. App. —, 85 S. W. 118.

A provision for notice, as a condition precedent to a claim for "damages or any loss or injury to live stock covered by this contract," is likewise inapplicable to such damages. Aull v. Missouri P. R. Co. (1909) 136 Mo. App. 291, 116 S. W. 1122.

But see Smith v. Chicago, R. I. & P. R. Co. (1905) 112 Mo. App. 610, 87 S. W. 9, where the court, without any discussion, applied a provision in these terms to a claim for damages caused by a delay in moving a shipment of hogs to the stock pens at destination, during which the market declined.

In Johnson v. Missouri, K. & T. R. Co. (1905) 107 App. Div. 374, 95 N. Y. Supp. 182, followed in Frey v. New York C. & H. R. R. Co. (1906) 114 App. Div. 747, 100 N. Y. Supp. 225, the contract provided that the carrier should not be liable for any loss of or damage to the property from certain causes; that it should not be liable for loss or damage not accruing on its own portion of the through route, and that claims for "loss or damage" must be made within a specified time. The court held that the words "loss or damage" were used in the same sense in all three places, and referred to loss of or damage to the property; and, hence, that the requirement for notice was inapplicable to damages resulting from a falling market.

Provisions for notice, the exact language of which is not stated, are also held inapplicable to such claims in Ray v. Missouri, K. & T. R. Co. (1913) 90 Kan. 244, 133 Pac. 847; Riddler v. Missouri P. R. Co. (1914) 184 Mo. App. 709, 171 S. W. 632; St. Louis, I. M. & S. R. Co. v. Hurst (1911) — Tex. Civ. App. —, 135 S. W. 599; Houtz v. Union P. R. Co. (1908) 33 Utah, 175, 17 L.R.A.(N.S.) 628, 93 Pac. 439.

In the last-mentioned case, the court says: "The reasons for such a conclusion are that 'agreements of this character are viewed with some strictness by the law, and, unless the exemption from liability is clearly expressed, it should not be allowed,' . . . and that such a loss was not fairly contemplated by the parties, and was not reasonably included within the terms of the stipulation."

But a provision for notice of any claim "for damages for delay, loss, or injury to live stock" has been applied to claims of this character. St. Louis & S. F. R. Co. v. Pearce (1907) 82 Ark. 353, 118 Am. St. Rep. 75, 101 S. W. 760, 12 Ann. Cas. 125; St. Louis & S. F. R. Co. v. Puckett (1907) 82 Ark. 603, 101 S. W. 762; St. Louis & S. F. R. Co. v. Zickafoose (1913) 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717. In this last case the court points out the difference between such a provision, and a provision referring to "loss or injury to the shipment."

And such a provision has been upheld as reasonable and valid, in a case where the damages claimed included damages for a decline in the market, during a delay in transportation and delivery. Shelton v. St. Louis & S. F. R. Co. (1908) 131 Mo. App. 560, 110 S. W. 627.

So, noncompliance with a provision requiring the presentation of claims for "loss, damage, or detention" has been held to defeat a recovery of damages, caused by a delay and a decline in the market. Kalina v.

Union P. R. Co. (1904) 69 Kan. 172, 76 Pac. 438 (distinguished in Atchison, T. & S. F. R. Co. v. Poole (1906) 73 Kan. 466, 87 Pac. 465, and in Cornelius v. Atchison, T. & S. F. R. Co. (1906) 74 Kan. 599, 87 Pac. 751, because of the different language of the stipulation). It should be noted, however, that the stipulation in Houtz v. Union P. R. Co. (Utah) supra, where a contrary conclusion was reached, was probably similar to that involved in this case.

In the Kalina Case (Kan.) supra, it was argued that the loss could not be ascertained until after sale of the cattle, and that the carrier was not injured by the failure to make timely claim; but the court said that it was a sufficient answer to this argument that the contract, in terms, conditioned the right to recover on the timely making of the claim, and that such contract was within the power of the parties to make.

So, a provision for notice of any claim for damages which might accrue to the shipper of live stock, under the contract, required notice of a claim for damages from a decline in the market. Hamilton v. Wabash R. Co. (1899) 80 Mo. App. 597.

A. McT.

DAVID REA and Wife, Appts.,

v.

TACOMA MAUSOLEUM ASSOCIATION, Respt.

Washington Supreme Court (In Banc)—August 27, 1918.

(— Wash. —, 174 Pac. 961.)

Nuisance — mausoleum — injunction.

The erection within a few feet of a dwelling house of a mausoleum for the burial of the dead cannot be enjoined as a nuisance, although its presence will cause the inmates of the dwelling unpleasant thoughts and injuriously affect the value of the property, if there will be no fumes or drainage to affect the physical senses or health of those in the neighborhood.

[See note on this question beginning on page 546.]

APPEAL by plaintiff from a decree of the Superior Court for Pierce County in favor of defendant in a suit to enjoin the construction of a mausoleum. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Gordon & Easterday, and Carroll A. Gordon, for appellants:

Plaintiffs are entitled to an injunction.

Shepard v. Seattle, 59 Wash. 363, 40 L.R.A.(N.S.) 647, 109 Pac. 1067; Everett v. Paschall, 61 Wash. 47, 31 L.R.A.(N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128; Densmore v. Evergreen Camp, 61 Wash. 230, 31 L.R.A. (N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206; Humphrey v. Front Street M. E. Church, South, 109 N. C. 132, 13 S. E. 793; Newark v. Watson, 56 N. J. L. 667, 24 L.R.A. 843, 29 Atl. 487; Coates v. New York, 7 Cow. 585; Scovill v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479.

Even if one comes to an existing and continuing nuisance, that does not debar him, in legal proceedings for harm from it or to restrain it.

Richards v. Ohio River R. Co. 56 W. Va. 596, 49 S. E. 385; 2 Jaggard, Torts, 774; 1 Wood, Nuisances, §§ 76 & 802; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; Van Fossden v. Clark, 113 Iowa, 86, 52 L.R.A. 279, 84 N. W. 989; Laflin & R. Powder Co.

v. Tearney, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 34, 23 N. E. 389; Seifried v. Hays, 81 Ky. 377, 50 Am. Rep. 167; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397; Baltimore v. Fairfield Improv. Co. 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081; 21 Am. & Eng. Enc. Law, 691; 29 Cyc. 1236.

Messrs. **Fletcher & Evans**, for respondent:

The erection of the building in question cannot be enjoined as a nuisance.

Dunn v. Austin, 77 Tex. 139, 11 S. W. 1125; Elliott v. Ferguson, 37 Tex. Civ. App. 40, 83 S. W. 56; Wahl v. Methodist Episcopal Cemetery Asso. 197 Pa. 197, 46 Atl. 913; Upjohn v. Board of Health, 46 Mich. 542, 9 N. W. 845; Braasch v. Cemetery Asso. 69 Neb. 300, 95 N. W. 646, 5 Ann. Cas. 132; Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826; Ballentine v. Webb, 84 Mich. 38, 13 L.R.A. 321, 47 N. W. 485; Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490; Woodward v. West Side Mill Co. 43 Wash. 308, 86 Pac. 579; DeKay v. North Yakima Valley R. Co. 71 Wash. 648, 129 Pac. 574; Crawford v. Central Steam Laundry, 78 Wash. 355, 139 Pac. 56; Mahoney Land Co. v. Cayuga Invest. Co. 88 Wash. 529, L.R.A.1916C, 939, 153 Pac. 308, Ann. Cas. 1916C, 1234.

Parker, J., delivered the opinion of the court:

The plaintiffs Rea and wife seek an injunction against the defendant mausoleum association, enjoining it from erecting and maintaining upon its land near their residence an addition to its present mausoleum. Trial upon the merits in the superior court for Pierce county resulted in judgment denying to the plaintiffs the relief prayed for, from which they have appealed to this court.

Appellants have, for several years, owned and occupied their present home in Tacoma, consisting of three lots, each 25x120 feet in area, with a dwelling house thereon. The north line of their premises is the width of two lots, 50 feet, south of and parallel with the south boundary of Oakwood Cemetery, which had been established and maintained for many years. Several years ago respondent acquired land within the cemetery, bordering on its southerly boundary, opposite appellants' premises. In the year 1911, it completed on this acquired land a mausoleum, in which it had deposited from time to time dead bodies, maintaining the same as a place of permanent sepulture. The south wall of the mausoleum is just within the south boundary of the land acquired by respondent from the cemetery, and the southeast corner thereof is north and a little west of appellant's house, about 65 feet distant therefrom. The mausoleum is 70x120 feet upon the ground, is 30 feet high, and contains 864 crypts, nearly all of which have been sold, and a large number of which are already occupied. Since building its mausoleum, respondent has acquired four lots approximately 50x260 feet in area, lying east and west along the south boundary of the land acquired by it from the cemetery, the easterly 120 feet of which lies immediately north of appellants' premises. On these lots it proposes to erect an addition to its mausoleum, containing 1,050 crypts, of substantially the same character as the present one, covering an area 50x215 feet, the south wall of which will be within an inch or two of the entire north boundary of appellants' premises. It is the erection and maintenance of this addition which is sought to be enjoined, no complaint being made against the maintenance of respondent's present mausoleum. The outer walls of this addition, like the present structure, will be constructed of solid concrete 8 inches thick. They will have no openings, except possibly one door in the easterly end wall. The crypts will be constructed in sections inside of the outer walls, of the same material, but reinforced with iron rods, so that each section will form a solid mass of reinforced concrete crypts, without any vacant spaces therein other than the crypts themselves. They will be of such strength, as described by the con-

tractor, that "you could take a section of these crypts and tumble them down the side of a mountain, and they would not break apart." The walls of the sections of the crypts will be 6 inches thick, and the southerly wall of the southerly section will be 4 inches from the southerly outer wall of the addition, so that between the southerly end of the crypts in that section and the southerly side of the outer wall there will be the two walls and the air space, occupying in all a width of about 20 inches. As each body is placed in a crypt, the opening will be filled and sealed with concrete, so that each casket and body will be immediately surrounded by solid concrete walls 6 inches thick. The crypt will then be air tight, except that small pipes will lead from each crypt to a common opening through and above the roof of the building. The record all but conclusively shows that the sanitation of this addition, like that of the main structure, will be practically perfect; so that no fumes or drainage whatever will escape therefrom, which will be in the least detrimental to the health of the appellants, or others living in the neighborhood, or offensive to their physical senses. The south wall of the addition will be about 20 feet from appellants' house, and about 12 or 14 feet from the extreme northerly edge of a porch thereto. The construction of this addition will not be in violation of any statute of the state, or ordinance of the city of Tacoma relating to cemeteries or other places of sepulture.

The facts shown by this record, we think, render it clear that our problem is reduced to this: Are appellants entitled to injunctive relief, restraining the construction and maintenance of this proposed addition to respondent's mausoleum, merely because of the fact that it is to become a place of permanent sepulture so near to their residence, when it will not, by the emission of fumes or drainage effect the physical senses or health of appellants, or others residing equally near to it? That is, are the mere claimed unpleasant thoughts which its presence constantly suggests, though such effect of its presence may lessen the market value of appellants' premises, such as to entitle them to the relief prayed for? The authorities seem to hold, with practical unanimity, that cemeteries as places of permanent sepulture for the dead are not nuisances per se, and this, it seems to us, must also be the law with reference to permanent sepulture in a mausoleum, built above the ground, when such mausoleum incloses bodies with equal security as by ordinary interment in the earth. A mausoleum would seem to be no more suggestive of the presence of the dead than the ordinary tombstones so common in our cemeteries. In 5 R. C. L. 235, the learned editors state the general rule of nuisance as applied to cemeteries as follows: "As public cemeteries for the orderly and decent sepulture of the dead, are necessary requirements for all populous communities private convenience must yield to the convenience of the public in fixing sites for them, and the courts should be particularly careful not to interfere to prevent such establishments, unless the mischief be undoubted and irreparable. The decided weight of authority may be said to be to the effect that a cemetery is not per se a nuisance."

Nuisance—mausoleum—injunction.

In Ellison v. Washington, 58 N. C. (5 Jones, Eq.) 57, 75 Am. Dec. 430, it is said: "If the grounds be arranged and drained, and the burial of the dead be conducted as elsewhere in such establishments, we incline decidedly to the opinion it will not be a nuisance, either public or private. The word nuisance is, of course, used here in its legal sense, and is confined to such matters of annoyance as the law recognizes, and gives a remedy for. The unpleasant reflections suggested by having before one's eyes constantly

recurring memorials of death is not one of these nuisances. Mankind would, by no means, agree upon a point of that sort, but many would insist that suggestions thus occasioned would, in the end, be of salutary influence. The death's-head is kept in the cell of the anchorite, perpetually before his eyes as a needful and salutory monitor. The nuisance, which the law takes cognizance of, is such matter as, admitting it to exist, all men, having ordinary senses and instincts will decide to be injurious."

In Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315, in a decision which has become a leading one upon this subject, Judge Virgin, speaking for the court touching the right of the plaintiff to injunctive relief against the maintenance of graves close to and in plain sight of his residence, said: "The new cemetery was tastefully graded and suitable headstones erected at the several graves, the nearest being about 40 feet from and opposite to the window of the plaintiff's sitting room, and also in plain view from his front windows and door. As first located, the graves were only visible from the back rooms of his house. The plaintiff claimed this new graveyard to be a nuisance, for the reason that its proximity and relative position render his residence uncomfortable and the enjoyment of his property disagreeable, and that it has rendered the water in his well unpalatable and unwholesome, and has lessened the market value of his property."

After holding that the evidence failed to show cause for relief upon the ground of contaminating the water in plaintiff's well, the court further said: "Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff's premises, and the consequent depreciation of the market value of his property. For a repository of the bodies of the dead is, as yet, indispensable, and, wherever located, it must, ex necessitate, be in the vicinity of the private property of someone who might prove its market value injuriously affected thereby. New Orleans v. St. Louis's Church, 11 La. Ann. 244. But, assuming that the jury in respect to these matters, found in behalf of the defendants, and concluded that there was no injury to the plaintiff's property, or to his physical health or comfort, and based their verdict solely upon the ground that, on account of its relative position with the plaintiff's house, the cemetery inevitably meets his immediate view whenever he looks from the north window of his sitting room, or steps from his door, and that thereby the comfortable enjoyment of his dwelling house is interfered with, then the defendants contend that the verdict is against law, upon the ground that such discomfort is one purely mental, and is not a cause of action. It cannot be doubted that the law recognizes that to be a nuisance which is naturally productive of sensible personal discomfort, as well as that which causes injury to property. St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642, 11 Eng. Reprint, 1483, 35 L. J. Q. B. N. S. 66, 11 Jur. N. S. 785, 12 L. T. N. S. 776, 13 Week. Rep. 1083, 11 Mor. Min. Rep. 50, 25 Eng. Rul. Cas. 144. But it must injuriously affect the senses or nerves. Thus, sound, whether caused by a locomotive blowing off steam, the ringing of bells, or the barking of dogs, whenever it becomes sufficient to injuriously affect residents in the neighborhood, is actionable. First Baptist Church v. Schenectady & T. Railroad Co. 5 Barb. 79, and cases there cited. To become actionable, the effect of sound must be such as naturally to interfere with the ordinary comfort, physically, of human existence, and the inconvenience must be 'something more than fancy, delicacy, or fastidiousness.' Cooley, Torts, 600. Cemeteries are not, necessarily, even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or

excited fancy or imagination they become unpleasant, and induce mental disquietude from association, exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both when merely fanciful. The human contents of these graves cannot, as they lie buried there, offend the senses in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them. If this burial ground is, under the circumstances, a private nuisance, then it is also a public nuisance to every traveler who passes on that road."

No decision has been called to our attention wherein any court has awarded injunctive relief, rested upon the sole ground of the mere presence of a cemetery or other place of sepulture, unattended by injurious or offensive drainage or fumes, sensible to the complaining party, and our own search leads us to believe that no such decisions have been rendered. Among the decisions holding in harmony with those above quoted from, we note the following: Lambert v. Norfolk, 108 Va. 269, 17 L.R.A.(N.S.) 1061, 128 Am. St. Rep. 945, 61 S. E. 776; Dunn v. Boston, 77 Tex. 139, 11 S. W. 1125; Elliott v. Ferguson, 37 Tex. Civ. App. 40, 83 S. W. 56; Woodstock Burying Ground Asso. v. Hager, 68 Vt. 488, 35 Atl. 431; Clinton Cemetery Asso. v. McAttee, 27 Okla. 160, 31 L.R.A. (N.S.) 945, 111 Pac. 392; Musgrove v. St. Louis's Church, 10 La. Ann. 431; Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490. In the last-cited case this view of the law was applied to an undertaking establishment.

The following decisions, read superficially, might seem to lend some support to the contention of counsel for appellants, but, when critically examined, they will each be found to involve the emission of fumes or drainage, affecting the physical senses of those in the neighborhood: Clark v. Lawrence, 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec. 241; Jung v. Neraz, 71 Tex. 396, 9 S. W. 344; Bellevue Cemetery Co. v. McEvers, 168 Ala. 535, 53 So. 272; Lowe v. Prospect Hill Cemetery Asso. 58 Neb. 94, 46 L.R.A. 237, 78 N. W. 488.

Counsel for appellants rely upon the following of our own decisions; Shepard v. Seattle, 59 Wash. 363, 40 L.R.A.(N.S.) 647, 109 Pac. 1067; Everett v. Paschall, 61 Wash. 47, 31 L.R.A.(N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128; Densmore v. Evergreen Camp, 61 Wash. 230, 31 L.R.A.(N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206. The Shepard Case involved only the power of the city of Seattle to pass and enforce an ordinance regulating the location and maintenance of private hospitals and sanitariums, within the city, it being held that the city had such power as applied to the location and maintenance of private sanitariums for the treatment of inebriates and persons suffering from insanity. The Everett Case involved the right to injunctive relief as against the maintenance of a private sanitarium for the treatment of persons afflicted with tuberculosis. Relief was granted, as prayed for, upon the theory that the fear of the public generally, not of the plaintiff in particular, of infection from such an institution of those living near it, was sufficient to entitle the plaintiff to relief under the facts of that case. It was not a question of mere fear or mental unpleasantness, apart from fear of physical infection of disease. The Densmore Case involved the right of the plaintiff to injunctive relief, as against the maintenance of an undertaking establishment very close to his residence. That decision may seem to contain observations lending some support to the contentions of counsel for appellants, but, when critically read, we think it will be found not to rest upon the mere unpleasantness attending the close proximity of dead bodies, but also upon the fact, as therein stated, that

"there is evidence tending to show that noxious odors, gases, especially those arising from the deodorants used in cleansing the premises, would permeate the homes of respondents; that there is danger of infection and contagion from the proximity of the morgue, and the possibility of flies passing from one place to the other."

We think that neither of these of our decisions is controlling in this case.

There are other intervening plaintiffs and appellants in this case, owning premises near the proposed addition to respondent's mausoleum. We have referred to Rea and wife as though they were the only parties in the case, merely for convenience of expression. What we have said touching the claimed rights of Rea and wife also disposes of the contentions of the other appellants, adversely to them.

The judgment is affirmed.

Main, Ch. J., and Mount, Mitchell, Tolman, and Holcomb, JJ., concur.

ANNOTATION.

Mausoleum as nuisance.

Aside from the reported case (REA v. TACOMA MAUSOLEUM ASSO. ante, 541), there seems to be only one other decision determining the nature of a mausoleum or tomb as a nuisance, viz.: Barnes v. Hathorn (1866) 54 Me. 124. The holding of that case to the effect that a private tomb for the reception of dead bodies, though not a nuisance per se, may become so, where it is conducted in such a manner, and so close to a residence, as to endanger the health and comfort of the occupants, is not necessarily inconsistent with the ruling in the reported case. Both decisions are based on the well-recognized rule that a cemetery is not a nuisance per se, but that the question whether a particular cemetery is a nuisance must be determined by the facts and circumstances of each case; and, unless it is shown to be a nuisance in fact, its establishment or maintenance will not be enjoined. In the reported case (REA v. TACOMA MAUSOLEUM ASSO.), it is held that a mausoleum built of concrete, of sufficient thickness to prevent all danger of the escape of fumes or drainage, does not constitute a nuisance, though within 20 feet of an adjoining residence.

In Barnes v. Hathorn (Me.) supra, which was an action for damages for maintaining a private tomb in close proximity to the plaintiff's residence, and in such a manner as to constitute a nuisance, it appeared that the tomb, constructed of brick, with ventilators at each end, had been built within 44 feet of the plaintiff's house, and nine bodies deposited therein; that such an effluvia was emitted from them that his house became unwholesome, and, after an examination of the premises by physicians, the defendant caused them to be removed from the tomb, which remained unoccupied for a period of six years, when a single body was placed in it. Holding that the evidence was sufficient to call for a submission of the case to the jury, and that a nonsuit was improperly ordered, the court said: "A man may have a legal right to build such a tomb on his own land, as a general proposition. It is not, in itself and inherently, a nuisance to his neighbors. If a nuisance at all, it becomes so from its locality or other extraneous facts. . . . On the facts stated, this particular tomb was, at one time, beyond dispute, a very serious nuisance, when it 'was occupied by nine dead bodies, which emitted such an effluvia as to render the plaintiff's house unwholesome;' and, after an examination of the premises by several physicians, all the bodies were removed. It could hardly be questioned that it was then a nuisance. But the defendant says that, after these bodies were removed, it ceased to be of such a character. . . . But it seems, after six years from the time of removal, the defendant again opens the tomb

and commences the deposit of deceased friends anew. One such body had been thus placed in the tomb, before this action was brought. This act would seem to indicate an intention to again use it for the place of interment of her family. Now, considering the result stated as having been produced by the former occupation, might not a man of ordinary firmness and judgment be reasonably apprehensive of danger? In addition to this, we have the testimony of the physicians called on the trial, that any emission from dead bodies in that tomb might be injurious to health, bodily and mentally. It had proved so before, and might again. A single body might not be so liable to create deadly or noxious effluvia as a larger number. But it would be of the same general character, and might, of itself, prove uncomfortable, if not positively unhealthy. The defendant made no disavowal of an intention to place other bodies there." M. B.

STOCKYARDS LOAN COMPANY, Plff. in Err.,
v.
JAMES NICHOLS et al.

U. S. Circuit Court of Appeals, 8th Circuit—April 9, 1917.

(156 C. C. A. 209, 243 Fed. 511.)

Chattel mortgage — cattle — increase and accretions.

1. A chattel mortgage given by the owner of a number of cattle to secure a loan to purchase additional cattle, which purports to cover certain animals together with all increase thereof and accretions thereto, will include animals purchased as additions to the herd.

[See note on this question beginning on page 554.]

Same — after-acquired property — lien.

2. The lien of a mortgage may be made to attach to after-acquired property from the time of its acquisition, under a statute providing that an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien.

Notice — failure to inquire — effect of statute.

3. Notice that one had given a mortgage on cattle he was buying is sufficient to bind one subsequently purchasing them from him, under a statute providing that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

Appeal — questions open — failure to make proof after adverse ruling.

4. In an action to recover possession of after-acquired cattle, under a chattel mortgage, defendant cannot take advantage of failure of proof of ownership and affixing of the brand, after a ruling by the court that the mortgage did not cover after-acquired property.

Statute — revision — omission of words — effect.

5. One purchasing with knowledge of a defectively recorded chattel mortgage is not protected, as against the mortgagee, by the fact that in revising the statute the words "good-faith" were omitted in the provision that a mortgage of personal property is void as against purchasers of the property in good faith, for value, unless properly recorded, where the words are retained in other portions of the statute relating to such mortgages, such as the time in which they expire if not refiled.

Evidence — improperly filed chattel mortgage.

6. Evidence of an improperly filed chattel mortgage is admissible in an action to recover the property from one who purchased it from the mortgagor with actual notice of the mortgage, since the jury might find that, know-

ing of the mortgage, the purchaser should have inquired at the office of the register, where he would have learned its terms.

Replevin — against whom lies.

7. Replevin will not lie against one not in possession of the property sought.

ERROR to the District Court of the United States for the Eastern District of Oklahoma (Campbell, District Judge), to review a judgment in favor of defendants in an action brought to recover possession of certain cattle. *Affirmed* as to defendant Nichols. *Reversed* as to other defendants.

The facts are stated in the opinion of the court.

Argued before Hook and Stone, Circuit Judges, and Munger, District Judge.

Messrs. **B. F. Deatherage** and **Robert F. Blair**, for plaintiff in error:

Plaintiff having proved that the defendant Miller had actual notice that the cattle in controversy were being bought by defendant Nichols with the money which he had borrowed from the plaintiff upon them, the court erred in refusing to permit plaintiff to introduce in evidence its Exhibits No. 3 and No. 4, and in refusing to submit the question of notice to the jury.

Lohman v. Stockyards Loan Co. 156 C. C. A. 215, 243 Fed. 517; Cooper v. Flesner, 24 Okla. 47, 23 L.R.A.(N.S.) 1180, 103 Pac. 1016, 20 Ann. Cas. 29; Thomas v. Huddleston, — Okla. —, 164 Pac. 106; Gibson v. Linthicum, 50 Okla. 181, 150 Pac. 908; Strahorn-Hutton-Evans Commission Co. v. Florer, 7 Okla. 504, 54 Pac. 710; Greenville Nat. Bank v. Evans-Snyder-Buel Co. 9 Okla. 353, 60 Pac. 249; Frick Co. v. Oats, 20 Okla. 473, 94 Pac. 682; Garrison v. Street & H. Furniture & Carpet Co. 21 Okla. 649, 129 Am. St. Rep. 799, 97 Pac. 978; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623.

The lower court erred in holding that plaintiff could not recover, although defendants Miller and Briscoe had actual notice of the mortgage, unless plaintiff had proven that the cattle in controversy were owned by defendant Nichols at the time he gave the mortgage.

Lohman v. Stockyards Loan Co. supra; 3 Enc. U. S. Sup. Ct. Rep. 711; Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co. 6 Dak. 357, 43 N. W. 806; Payne v. McCormick Harvesting Mach. Co. 11 Okla. 318, 66 Pac. 287; Title Guaranty & Surety Co. v. Witmire, 115 C. C. A. 43, 195 Fed. 41; Central Trust Co. v. Kneeland, 138 U. S. 419, 34 L. ed. 1014, 11 Sup. Ct. Rep. 357; Hammond, Chat. Mortg. § 17; Holmberg v. Will, 52 Okla. 745, 153 Pac. 832; Stone v. American Nat. Bank, 34 Okla. 786, 127 Pac. 393; McFadyen v. Masters, 11 Okla. 16, 66 Pac. 284; Broyles v. McInteer, 29 Okla. 767, 120 Pac. 283; Watkins v. Crenshaw, 59 Mo. App. 183; Hickson Lumber Co. v. Gay Lumber Co. 150 N. C. 282, 21 L.R.A. (N.S.) 842, 63 S. E. 1045; Barron v. San Angelo Nat. Bank, — Tex. Civ. App. —, 138 S. W. 142; Keating v. Hannenkamp, 100 Mo. 161, 13 S. W. 89; Barton v. Sitlington, 128 Mo. 164, 30 S. W. 514; Ivy v. Pugh, — Tex. Civ. App. —, 161 S. W. 939; 16 Cyc. 689, 892; Jones, Mortg. 4th ed. §§ 172A and 173; Hogan v. Atlantic Elevator Co. 66 Minn. 347, 69 N. W. 1; Alferitz v. Ingalls, 83 Fed. 964; Demers v. Graham, 36 Mont. 402, 14 L.R.A.(N.S.) 431, 122 Am. St. Rep. 384, 93 Pac. 268, 13 Ann. Cas. 97; contra: Libert v. Unfried, 47 Wash. 186, 91 Pac. 776; Jones, Mortg. 5th ed. §§ 101, 149.

The evidence showed that at the time defendant Nichols executed said mortgage to plaintiff on January 2, 1915, he owned 170 cattle branded with a crossbar on the left side or shoulder, and that he sold 101 cattle of like kind and brand to defendants Miller and Briscoe in February, 1915, 98 of which were taken by the marshal under the writ of replevin.

Hurst v. Territory, 16 Okla. 600, 86 Pac. 280; Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 477; Rochford v. Pennsylvania Co. 98 C. C. A. 105, 174 Fed. 83; Worthington v. Elmer, 125 C. C. A. 50, 207 Fed. 306; Smith-Booth-Usher Co. v. Detroit Copper Min. Co. 136 C. C. A. 58, 220 Fed. 600; Edmisson v. Drumm-Flato Commission Co. 13 Okla. 440, 73 Pac. 958.

If plaintiff could not have the relief it sought in this action at law, then it became the duty of the lower court to permit it to so reform its pleadings that

it might have its rights determined upon their merits, to the end that there might not be a miscarriage of justice.

Whitcomb v. Shultz, 138 C. C. A. 510, 223 Fed. 268; United States use of Morris v. Richardson, 139 C. C. A. 386, 223 Fed. 1010; Collins v. Bradley Co. 227 Fed. 199; Waldo v. Wilson, 145 C. C. A. 540, 231 Fed. 655.

Plaintiff's mortgage was absolutely void as against the defendants, because the same had not been filed for record as provided by statute.

Walter A. Wood Mowing & Reaping Mach. Co. v. Lee, 4 S. D. 495, 57 N. W. 238; Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co. 6 Dak. 357, 43 N. W. 806; Payne v. McCormick Harvesting Mach. Co. 11 Okla. 318, 66 Pac. 287; Strahorn-Hutton-Evans Commission Co. v. Florer, 7 Okla. 504, 54 Pac. 710; Gibson v. Linthicum, 50 Okla. 181, 150 Pac. 908.

Use of the words, "increase thereof," would not be necessary to cover and include the annual growth of the cattle.

Northwestern Bank v. Freeman, 171 U. S. 620, 630, 43 L. ed. 307, 312, 19 Sup. Ct. Rep. 36; Pyeatt v. Powell, 2 C. C. A. 367, 10 U. S. App. 200, 51 Fed. 551.

It is the duty of the court to construe the section of the statute as if the words "in good faith" had not been omitted.

Harper v. Victor, 129 C. C. A. 423, 212 Fed. 907; Schaffer v. Muskogee County, 33 Okla. 288, 124 Pac. 1069; State ex rel. Reardon v. Hooker, 26 Okla. 460, 109 Pac. 527; Sutherland, Stat. Constr. §§ 241, 256, 260.

Messrs. **William B. Moore, W. W. Noffsinger, Y. P. Broome,** for defendants in error:

The chattel mortgage is and was an Oklahoma contract, and in construing said contract the decisions of the courts of this state should be followed.

Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109; Greenville Nat. Bank v. Evans-Snyder-Buel Co. 9 Okla. 353, 60 Pac. 249.

To cover future-acquired property the mortgage must clearly show by its own terms that this was intended by the parties.

Jones, Chat. Mortg. 3d ed. p. 187, § 173; Montgomery v. Chase, 30 Minn. 132, 14 N. W. 586; Alferitz v. Ingalls, 83 Fed. 964; Shaffer v. Pickrell, 22 Kan. 619; Brown v. Holmes, 13 Kan. 482; Kenyon v. Tramel, 71 Iowa, 693, 28 N. W. 37; Iowa State Nat. Bank v. Taylor, 98 Iowa, 631, 67 N. W. 677; Pennock v. Coe, 23 How. 117, 16 L. ed. 436; First Nat. Bank v. Erreca, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926; Litz v. Exchange Bank, 15 Okla. 564, 83 Pac. 790; Harding v. Gillett, 25 Okla. 221, 107 Pac. 665; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Garrison v. Street & Harper Furniture & Carpet Co. 21 Okla. 649, 129 Am. St. Rep. 799, 97 Pac. 978; First Nat. Bank v. McIntosh & P. Live-Stock & Commission Co. 72 Kan. 603, 84 Pac. 535; Long v. Hines, 40 Kan. 220, 10 Am. St. Rep. 192, 19 Pac. 796; Cameron v. Marvin, 26 Kan. 612; T. B. Townsend Brick & Contracting Co. v. Allen, 62 Kan. 313, 52 L.R.A. 323, 84 Am. St. Rep. 388, 62 Pac. 1008; Dayton v. People's Sav. Bank, 23 Kan. 421; George R. Barse Live Stock & Commission Co. v. Guthrie, 50 Kan. 474, 31 Pac. 1071; New England Nat. Bank v. Northwestern Nat. Bank, 171 Mo. 307, 60 L.R.A. 256, 71 S. W. 191.

The burden was upon the plaintiff to prove its case, that Nichols owned the cattle concerned herein when the mortgage was made January 2, 1915, and that the mortgage covered these specific, identical cattle. It was not sufficient that the plaintiff aroused suspicions; it must win upon the strength of its own title.

Robb v. Dobrinski, 14 Okla. 563, 78 Pac. 101, 1 Ann. Cas. 981; Martin Bros. v. Lesan, 129 Iowa, 573, 105 N. W. 996; Webber v. Read, 65 Me. 564; Myers v. Van Norman, 87 Ill. App. 500; Russell v. Amundson, 4 N. D. 112, 59 N. W. 477; Jones v. Glathart, 100 Ill. App. 630; State Bank v. City Nat. Bank, 18 Okla. 10, 89 Pac. 206; Daniels v. Taubenblatt, 120 La. 349, 45 So. 273; Peterson v. Lodwick, 44 Neb. 771, 62 N. W. 1100; Beal v. McKee, 145 Ala. 659, 39 So. 664; Westbay v. Milligan, 89 Mo. App. 294; Wilson v. Fuller, 9 Kan. 176.

The evidence showed the cattle concerned herein were in the possession of Miller and Briscoe at the time the suit was filed. Therefore, the demurrer of Nichols to the evidence was properly sustained.

Robb v. Dobrinski, 14 Okla. 563, 78 Pac. 101, 1 Ann. Cas. 981; Wails v. Farrington, 27 Okla. 754, 35 L.R.A. (N.S.) 1174, 116 Pac. 428; Ladd v. Brewer, 17 Kan. 204; Brown v. Holmes, 13 Kan. 482.

Even if plaintiff had an equitable

claim, which we deny, it could not be declared and enforced in this suit in replevin.

Pennock v. Coe, 23 How. 117, 16 L. ed. 436; Olson v. Thompson, 6 Okla. 576, 48 Pac. 184, 52 Pac. 388; Thomas v. Armstrong, 51 Okla. 203, L.R.A. 1916B, 1182, 151 Pac. 689; Calhoun v. Memphis & P. R. Co. 2 Flipp. 442, Fed. Cas. No. 2,309; Kansas City Hay Press Co. v. Williams, 51 Okla. 6, 151 Pac. 570; Penton v. Hansen, 13 Okla. 450, 73 Pac. 843; Waldo v. Wilson, 145 C. C. A. 540, 231 Fed. 654.

Munger, District Judge, delivered the opinion of the court:

The plaintiff in error brought an action in replevin against defendants in error Nichols, Miller and Briscoe, to recover possession of some cattle. At the close of plaintiff's evidence the court directed a verdict in favor of the defendants. The plaintiff claimed the right of possession because of a lien arising from a chattel mortgage, given to it by defendant Nichols. The defendants Miller and Briscoe, as partners, from whose possession the property was taken under the writ, claimed the right of possession because they had purchased the cattle of Nichols, without notice of plaintiff's claim. Nichols had borrowed about $10,000 from plaintiff on January 2, 1915, and to evidence and secure the debt he, at the same time, executed a promissory note and chattel mortgage. A copy of the mortgage was filed on January 12, 1915, with the county clerk of Cherokee county, Oklahoma, where the property was situated. By evidence and admissions on the trial, it was established that Miller and Briscoe purchased the replevined cattle from Nichols, in Cherokee county, in the early part of February, 1915. The court directed the jury to return a verdict in favor of defendants, because the mortgage did not include cattle purchased by Nichols after its date.

Portions of the mortgage relating to the description of the property encumbered read as follows, except that the word "crossbar" is substituted for the character used in the mortgage:

"One hundred fifty cows, ages from three to seven years old, all branded crossbar on left side or shoulder.

"Ninety head of three-year-old steers, branded crossbar on left side or shoulder.

"Two hundred head of two-year-old steers, branded crossbar on left side or shoulder.

"Sixty head of yearling steers and heifers, branded crossbar on left side or shoulder.

"Located in E. Crawford's pasture 4 miles northwest of Hulbert, Cherokee county, Oklahoma.

"In the event said first party owns a larger number of cattle, of like kind and description as those therein described, then said second party, or its assigns, shall have the right at any time to elect and select, from such entire number, cattle of like kinds, equal to the number, as stated in this mortgage.

"Together with all increase thereof, and accretions thereto, being all the cattle of the above description owned by said first party on his own premises, leased, loaned, or hired to him in said county of Cherokee, state of Oklahoma, it being hereby expressly stipulated and agreed, that said cattle, above described, shall be kept on feed, on said premises, separate and apart from all other cattle during the existence of this mortgage.

"The marks and brands used above to describe said cattle are the holding marks and brands, and carry the title, although said cattle may have other marks and brands. This mortgage shall also cover and include all the right, title, and interest of said party in and to the feed, pasture, feed pens, feed troughs, and water privileges used in feeding said cattle, until the indebtedness herein secured is paid in full. . . .

"The first party shall not sell or attempt to sell, except in conformity herewith, or remove or attempt to remove, from its present location in

the county aforesaid, any part of said property. . . .

"For the purpose of obtaining the money at this time loaned by the second party, and for the benefit of possible future transactions, the first party states that the said first party is the absolute and lawful owner of all of the above-described property; that the same is free from any and all encumbrances; that he has full power to sell or mortgage the same and give clear title thereto, and that all of the same is now in the possession of first party at the location above mentioned, in said county and state."

It appears that in seeking this loan the mortgagor had given a financial statement to the mortgagee, showing that he owned 170 head of cattle that were encumbered by a chattel mortgage for $2,200; and he listed his total net worth as $5,425. The loan was made by plaintiff through the agency of Mr. Waller, who was cashier of a bank at a town near to Nichols's residence. Mr. Waller testified, and from his testimony it appears that it was contemplated, that Nichols should use the money borrowed from plaintiff to buy cattle additional to the 170 head he possessed, until he should have 500 head, the number mentioned in the mortgage. In the conversation with Mr. Waller, the mortgagor outlined his plans for the purchase of more cattle, giving the names and locations of persons from whom he expected to make purchases. The word "increase," as used in mortgages of this kind, ordinarily means that which is added to the original stock by augmentation, or growth; produce; profit; interest; progeny; issue; offspring. Alferitz v. Ingalls (C. C.) 83 Fed. 964; Jones, Chat. Mortg. 5th ed. § 149; 4 Words & Phrases, 3515. The word "accretion," as defined by Webster's Dictionary, means: "Growth; organic growth; also, increase by external addition, or by accession of parts externally; and extraneous addition, as an accretion of earth."

The Century Dictionary defines it as: "The act of accreting or accrescing; a growing to; an increase by natural growth; an addition; specifically, an increase by an accession of parts externally."

The Standard Dictionary gives the definitions: "(1) Growth or formation by external additions; increase by adhesion or inclusion. (2) That which is so formed or added, an accumulation or external addition; matter added."

It will be seen that the use of the word "accretions" expresses a broader idea than is expressed by the word "increase;" it is not confined to the results of natural growth, but includes the additions of parts from without. In the mortgage in question the use of this phrase clearly expressed the idea that the mortgage should extend, not only to the offspring of the mortgaged cattle, but also to the cattle added to the herd by acquisition.

Chattel mortgage—cattle—increase and accretions.

Looking to the situation of the parties in applying the meaning of these words to their subject-matter, no construction of the mortgage other than that the word "accretions" was intended to apply to after-purchased cattle seems reasonable, when it is considered that the mortgagee knew that the borrower had only 170 head of cattle, that they were encumbered for $2,200, and that the borrower's credit rating was quite inadequate as security for the amount loaned. The purpose of the mortgage was to give security to the plaintiff, and the only way by which it could be accomplished was to have this lien extended to cattle to be purchased thereafter, with the funds advanced, until the total number mentioned in the mortgage had been acquired.

The validity of the lien thus given does not seem open to question, as § 3829, of the Revised Laws of Oklahoma of 1910, provides: "An agreement may be made to create a lien upon property not yet ac-

quired by the party agreeing to give the lien, or not yet in existence. In such case, the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest."

Same—after-acquired property—lien.

As construed by the supreme court of Oklahoma, this statute gives to the mortgagee a legal lien upon the after-acquired property, upon its acquisition by the mortgagor. Payne v. McCormick Harvesting Mach. Co. 11 Okla. 318, 66 Pac. 287; Garrison v. Street & Harper Furniture & Carpet Co. 21 Okla. 643, 129 Am. St. Rep. 799, 97 Pac. 978; Central Trust Co. v. Kneeland, 138 U. S. 414, 34 L. ed. 1014, 11 Sup. Ct. Rep. 357; Title Guaranty & Surety Co. v. Witmire, 115 C. C. A. 43, 195 Fed. 41.

After the original note and mortgage had been admitted in evidence, the plaintiff sought to prove that Miller and Briscoe had notice of its lien. Mr. Waller testified to a conversation that he had with Miller at the bank about the middle of January, 1915, and before Miller and Briscoe made their purchase from Nichols, in which Miller inquired where Nichols was "getting this money to buy cattle with." Waller informed him that he had secured a loan of $10,000 for Nichols from a Kansas City loan company. "I said I got Mr. Nichols a $10,000 loan on the cattle he is now buying. . . . Well, I said I got this mortgage on cattle he is now buying." Section 2926 of the Revised Laws of Oklahoma of 1910 is as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

Notice—failure to inquire—effect of statute.

Mr. Miller undertook an inquiry of Mr. Waller as to the source of the money which Mr. Nichols was using, evidently deeming that fact one that was important, and was informed of the loan and of the mortgage security therefor, and that the mortgage was not limited to cattle owned by Mr. Nichols at the date of its execution, but was upon cattle Mr. Nichols was then buying. In view of this evidence, there were questions to be submitted to the jury, whether Mr. Miller, thus put on guard, should not have made further inquiry before he purchased these cattle for his firm, so soon after the conversation, and whether he would not have learned of plaintiff's lien by such investigation. There was evidence to show that the cattle replevined bore the crossbar brand when they were seized in August, 1915, and that some also bore newer and later brands. The defendants question the sufficiency of the proof of identity of the cattle with those mentioned in the mortgage. They assert that there is no evidence the crossbar was Nichols's brand, or that it was placed upon these cattle by Nichols. The court had already ruled that the mortgage did not cover cattle purchased after its date, and that meant plaintiff's defeat. Hence, it was not incumbent on plaintiff to press the proof of the branding of these cattle after they were purchased, and before they were sold to Miller and Briscoe. As the mortgage covered cattle increase and cattle to be bought, although it described them as branded, it must have been in contemplation of the parties that the brand would be affixed by Mr. Nichols, after he had acquired them, and, as Miller and Briscoe may be held to knowledge of the mortgage, and that it covered after-acquired cattle, they would be bound also to know that brands need not be affixed to the cattle immediately after purchase.

Appeal—questions open—failure to make proof after adverse ruling.

The claim is made on behalf of Miller and Briscoe that the statutes of Oklahoma invalidate plaintiff's

mortgage as to them, because neither the original mortgage, nor a copy thereof authenticated by the register of deeds, was filed for record. For many years the statute of Oklahoma relating to this subject read as follows: "A mortgage of personal property is void as against creditors of the mortgagor, subsequent purchasers, and encumbrancers of the property in good faith, for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated." Snyder's Comp. Laws (Okla.) 1909, § 4422.

See Strahorn-Hutton-Evans Commission Co. v. Florer, 7 Okla. 499, 54 Pac. 710.

In 1911, the legislature of Oklahoma adopted the revision of the state statutes made by Code commissioners, known as the Revised Laws of Oklahoma, and the corresponding provision is found as a part of § 4031, but the words "in good faith" are omitted. It is contended that this change of the statutes renders void the plaintiff's mortgage, because Miller and Briscoe were purchasers from Nichols for value. The statute in question is a portion of a chapter relating to the execution, recording, and effect of mortgages upon both real and personal property. Other sections of the chapter retain the exception of actual notice as equivalent to a sufficient notice by record. Rev. Laws (Okla.) 1910, §§ 4021, 4035.

Statute—revision—omission of words—effect.

In order to ascertain the intention of the legislature in the enactment of § 4031, the court may look to each part of the statute, to other statutes upon the same or relative subjects, to the old law upon the subject, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation. Lewis's Sutherland, Stat. Constr. §§ 378, 382, 471; Endlich, Interpretation of Statutes, §§ 39, 295, 298; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; United States v. Hogg, 50 C. C. A. 608, 112 Fed. 909; Interstate Drainage & Invest. Co. v. Freeborn County, 85 C. C. A. 532, 158 Fed. 270; Hemmer v. United States, 123 C. C. A. 194, 204 Fed. 898; Harper v. Victor, 129 C. C. A. 423, 212 Fed. 903.

The remaining portion of § 4031 is as follows: "And a mortgage of personal property situated in portions of this state attached to an organized county thereof for judicial purposes, shall be void against creditors of the mortgagor, subsequent purchasers, or encumbrancers of the property in good faith for value, unless the original, or an authenticated copy thereof, be deposited and filed in the office of the register of deeds of the county to which the territory in which such property is situated is attached for judicial purposes."

If a literal interpretation is placed upon this section, an unrecorded mortgage upon personal property situated in unorganized counties is void as to purchasers in good faith, but a mortgage upon property situated in organized counties is void as to purchasers in bad faith. Section 4035 provides that a chattel mortgage shall cease to be valid as against subsequent purchasers or encumbrancers in good faith, after the expiration of three years from filing for record, unless a renewal certificate is filed. We cannot believe that the legislature of Oklahoma intended to inaugurate a new policy, or to declare that one who knew of an existing encumbrance might ignore it, and acquire property free from any lien, if he but paid some consideration to the seller. Nor was it intended that one rule should apply in organized counties, and the opposite rule in unorganized counties; nor one rule as to real-estate mortgages, and its opposite as to

chattel mortgages. The purpose of the statute was to give constructive notice to those whose dealings were in good faith, and who had no actual knowledge of the facts. The words "purchasers and encumbrancers for value," in the first portion of § 4031, are used in the same sense as the words "purchasers or encumbrancers of the property in good faith for value," in the remainder of the section. Van Rensselaer v. Clark, 17 Wend. 25, 31 Am. Dec. 280; Gibson v. Linthicum, 50 Okla. 181, 150 Pac. 908; Merchants' Nat. Bank v. Frazier, — Okla. —, 159 Pac. 647.

The plaintiff offered in evidence a certified copy of the mortgage and of the record of its filing, on the theory that the jury might find, as one reasonable act of diligence, that the inquiry should have been made at the county clerk's office by the purchasers of these cattle, after they knew that Nichols had given a mortgage upon these cattle, and had that inquiry been made they would have learned of the terms of this mortgage. The court excluded this evidence, consistently with its ruling that notice of the mortgage was of no avail, as it did not cover after-acquired property. We think this evidence was admissible, and that the demurrer of Miller and Briscoe to the evidence should have been overruled. As the action of replevin is a possessory one, and the cattle were in the possession of Miller and Briscoe, the demurrer of Nichols was properly sustained. Robb v. Dobrinski, 14 Okla. 563, 78 Pac. 101, 1 Ann. Cas. 981.

Evidence—improperly filed chattel mortgage.

Replevin—against whom lies.

For these reasons, the judgment will be affirmed as to the defendant Nichols, but as to the other defendants it will be reversed, and a new trial ordered.

ANNOTATION.

Term "increase," in description in chattel mortgage on animals, as including increase other than by generation.

As stated in the reported case (STOCKYARDS LOAN CO. v. NICHOLS, ante, 547) the word "increase," as used in chattel mortgages on animals, ordinarily means that which is added to the original stock by augmentation or growth, produce, profits, interest, progeny, issue, offspring.

A chattel mortgage on cattle, with all "increase" thereof and "accretions" thereto, is construed, in STOCKYARDS LOAN CO. v. NICHOLS, to cover not only the offspring of the mortgaged cattle, but also cattle thereafter purchased and added to the herd. The court points out that the word "accretions" expresses a broader idea than is expressed by the word "increase;" that the former is not confined to the results of natural growth, but includes the additions of parts from without. The court was also influenced by the fact that the mortgage was given upon a greater number of cattle than the mortgagor actually had in his possession, and was designed to cover cattle thereafter purchased with the funds advanced.

A different result was reached in Webster v. Power (1868) L. R. 2 P. C. 69, 5 Moore, P. C. C. N. S. 92, 16 Eng. Reprint, 450, 37 L. J. P. C. N. S. 9, where a chattel mortgage upon sheep, and their "increase," was held not to include sheep thereafter purchased and added to the flock, in substitution for those sold, but to be limited to the natural increase, or offspring, of the sheep originally mortgaged. Their Lordships, looking at the instrument and seeing that "increase" is always spoken of as the increase, not of a flock, but of those sheep which were originally the subject of the mortgage, were clearly of opinion that it must be taken to mean the natural increase, or the offspring, of those original sheep.

These are apparently the only two cases which have dealt with the ques-

tion whether the lien of a chattel mortgage, covering animals and their increase, extends to animals subsequently purchased by the mortgagor, and added to the flock, or herd.

A chattel mortgage on sheep, and the "increase thereof," does not cover the wool, the product of the sheep. Sorrello v. Sigel-Campion Live-Stock Commission Co. (1915) 27 **Colo.** App. 154, 148 Pac. 279; Libert v. Unfried (1907) 47 **Wash.** 186, 91 Pac. 776, and Alferitz v. Borgwardt (1899) 126 **Cal.** 201, 58 Pac. 460, where the court observed: "When we speak of the increase of a herd of cattle or a flock of sheep, we refer to growth of the herd or flock by addition of new members. The natural increase can only mean the addition of new members by birth. Natural increase is intended by the lease, when it speaks of the 'increase thereof.' . . . The wool does not increase the flock of sheep."

In Shoobert v. De Motta (1896) 112 **Cal.** 215, 53 Am. St. Rep. 207, 44 Pac. 487, the court expresses the view that, where the mortgagor of personal property is vested with the title and retains possession of the property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee. The court remarks: "There can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs."

The preceding quotation is cited with approval in First Nat. Bank v. Erreca (1897) 116 **Cal.** 81, 58 Am. St. Rep. 133, 47 Pac. 926, holding that the lien of a chattel mortgage on sheep does not include the wool upon the backs of the sheep at the date of the mortgage, where the instrument does not expressly cover the increase of the animals, and although California Civil Code authorizes the execution of a mortgage upon "sheep, and the increase thereof."

But a chattel mortgage of "sheep, and the increase thereof," is held in Alferitz v. Ingalls (1897) 83 **Fed.** 964, to cover the wool shorn from the sheep. The court said: "This case does not involve any question as to the lambs, the natural progeny of the sheep, but does directly present the question whether wool is included under the term, 'sheep and the increase thereof.' The owner of sheep owns all of their products and accessions, as well as all the progeny born from the parent stock. The sheep is the mother of both. Being so the owner, he can create a lien upon the products and progeny as well as the sheep. Was it necessary, in order so to do, to mention the wool grown and growing upon the backs of the sheep, or to be sheared therefrom? Was it not sufficient to use the words of the statute of California, . . . 'sheep and the increase thereof?'" (This reference is to California Civil Code, § 2955.)

This case has been disapproved in subsequent decisions. "Counsel has not found," says the court in Alferitz v. Borgwardt (1899) 126 **Cal.** 201, 58 Pac. 460, "and I venture to say cannot find, in legal literature or elsewhere (save perhaps in the mortgages of this class, and in Alferitz v. Ingalls (**Fed.**) supra), an instance where the unqualified use of the word [increase], as applied to such animals, included anything more or meant anything other than the offspring, progeny, or young of such animals."

And in Simon Vorenberg Co. v. Bosserman (1913) 17 **N. M.** 433, — A. L. R. —, 130 Pac. 438, it is stated: "Appellee urges that the word 'increase' is sufficiently broad to cover wool clipped from sheep, and cites Alferitz v. Ingalls, supra. The weight of authority, however, seems to be to the contrary."

"A construction of the word 'increase,' found in the mortgage, seems necessary," observes the court in Sorello v. Sigel-Campion Live Stock Commission Co. (**Colo.**) supra. "It has been repeatedly construed by textwriters and appellate courts in various jurisdictions, and the almost unanimous conclusion reached is that the term 'increase,' when used in chattel mortgages upon sheep and other live stock, refers exclusively to the progeny or young of such animals, and does

not include wool grown upon sheep, milk taken from cows, etc., during the life of the mortgage, and before foreclosure, or before breach of the mortgage covenants, and particularly so when the possession remains in the mortgagor under the terms thereof. We find no text-writer, and but one case, holding to the contrary, viz., Alferitz v. Ingalls (**Fed.**) supra, . . . in which an oral opinion was delivered by the trial judge. He held that the term 'increase,' in a chattel mortgage of sheep, included the wool grown on the sheep within the life of the mortgage, and before default. That case involved the construction of a chattel mortgage executed in California. It appears to stand alone, and is in direct conflict with the modern decisions of that state."

A mortgage on sheep, which, after describing them, proceeds "together with all and singular the rights, members, hereditaments, and appurtenances to the same, in any manner belonging or appertaining, including increase and all appendages thereto," includes the wool on the sheep. Hobbs v. First Nat. Bank (1897) 15 **Tex.** Civ. App. 398, 39 S. W. 331.

In Simon Vorenberg Co. v. Bosserman (**N. M.**) supra, the question whether the word "increase," in a chattel mortgage on sheep, includes the annul clip of wool from the sheep, is adverted to, but not decided, since the mortgage expressly covered the wool clipped. A. W. R.

KENTUCKY BLOCK CANNEL COAL COMPANY et al., Appts.,
v.
A. W. SEWELL et al.

U. S. Circuit Court of Appeals, 6th Circuit—March 5, 1918.

(249 Fed. 840.)

Deed — conveyance to one "and Co."

1. A conveyance to a partnership composed of two persons, under the firm name of one of them "and Co.," passes title to the partners as tenants in common.

[See note on this question beginning on page 564.]

Evidence — to show deed a lease.

2. A deed absolute of the mineral privileges in a parcel of real estate cannot be shown to be a mere mining lease by anything less than explicit testimony.

Deed — construction — reconveyance.

3. A reconveyance by one who has received a deed of all grantor's land, oil, or mineral rights in a certain county, of such land, hereditaments, or possessions in the grantor vested, in that county, reciting an intention to quitclaim to the original grantor the title to all land patented or granted by the state to him and conveyed to the present grantor, does not include the mineral rights in a parcel of land in that county granted to the original grantor by a private individual, especially where, within a month after the reconveyance, the reconveyor grants such parcel by metes and bounds and record identification to a stranger.

Adverse possession — mineral rights.

4. Where the mineral has been severed from the surface, mere possession of the surface without assertion of the mineral rights will not give title to the minerals by adverse possession.

Same — adverse claim to coal — effect on oil and gas.

5. Possession of the surface from which the mineral rights have been severed, together with an adverse claim of right to mine for coal, are not sufficient to ripen into an adverse right to the oil and gas lying beneath the surface.

Limitation of actions — effect of laches.

6. A delay of forty years by the owners of mineral rights in proceeding to establish their rights against the sur-

face owners is not such laches as will bar recovery, if there was no general or substantial development of mineral lands in the vicinity until a recent date, and plaintiffs, being nonresidents, did not learn of such development until within a year of instituting the action.

APPEAL by defendants from a decree of the District Court of the United States for the Eastern District of Kentucky (Cochran, District Judge) in favor of complainants in an action brought to quiet title to minerals on two certain tracts of land. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Argued before Knappen, Mack, and Denison, Circuit Judges.

Messrs. **S. Monroe Nickell, Finley Fogg, James Garnett** and **A. C. Van Winkle** for appellants.

Messrs. **O'Rear & Williams, Myers & Howard,** and **McGuire & McGuire,** for appellees:

The conveyance from John Sebastian to John W. Sewell & Company created the two individuals composing the partnership (John W. Sewell and Harriet M. Sewell) tenants in common under the laws of Kentucky where the land is situated.

Dumesnil v. Dumesnil, 92 Ky. 526, 18 S. W. 229; Galbraith v. Gedge, 16 B. Mon. 631; Story, Partn. § 94, p. 141; Cornwall v. Cornwall, 6 Bush, 369; Lowe v. Lowe, 13 Bush, 688; Marble v. Marble, 4 Ky. L. Rep. 360; Casky v. Casky, 5 Ky. L. Rep. 775 (abstract); Flanagan v. Shuck, 82 Ky. 617; Wilhite v. Boulware, 88 Ky. 169, 10 S. W. 629; Carter v. Flexner, 92 Ky. 400, 17 S. W. 851.

A conveyance to a partnership is a latent ambiguity which may be explained by parol evidence as to who the members of the partnership are.

Murray v. Blackledge, 71 N. C. 492; Walker v. Miller, 139 N. C. 448, 1 L.R.A.(N.S.) 157, 111 Am. St. Rep. 805, 52 S. E. 125, 4 Ann. Cas. 601; La-Fayette Land Co. v. Caswell, 59 Fla. 544, 138 Am. St. Rep. 166, 52 So. 140; Galbraith v. Tracy, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937; Goldthwaite v. Janney, 102 Ala. 431, 28 L.R.A. 161, 48 Am. St. Rep. 56, 15 So. 560.

The acts of user by one of a coal mine, to constitute limitation, must show a mining of the coal, not a casual taking at intervals by farmers for domestic use.

Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991; Gill v. Fletcher, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433; Kiser v. McLean, 67 W. Va. 294, 140 Am. St. Rep. 948, 67 S. E. 725.

Possession of the owner of the surface is also the possession of the owner of the mineral, and the owner of the surface holds the mineral in trust for its owner.

Farnsworth v. Barret, 146 Ky. 556, 142 S. W. 1049.

So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an assertion against the right.

Chase v. Chase, 20 R. I. 202, 37 Atl. 804; Abraham v. Ordway, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; Willard v. Wood, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; O'Brien v. Wheelock, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354; McIntire v. Pryor, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. Rep. 352; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Fletcher v. McArthur, 54 C. C. A. 567, 117 Fed. 393; Hodge v. Palms, 15 C. C. A. 220, 37 U. S. App. 61, 68 Fed. 63.

If the deed from M. F. Gregory to J. W. Sewell, dated February 15, 1872, is not, on its face, fairly susceptible of the construction that it conveyed only such lands or minerals as had been conveyed by deed or power of attorney to the attorney in fact, John W. Sewell, it is such an ambiguous document as admits of parol evidence to explain it.

Cleverly v. Cleverly, 124 Mass. 314; Scheible v. Slagle, 89 Ind. 323; Stout v. Weaver, 72 Wis. 148, 39 N. W. 375; Ames v. Lowry, 30 Minn. 283, 15 N. W. 247; Baucem v. George, 65 Ala. 259; Venable v. McDonald, 4 Dana, 336; Farmer v. Gregory, 78 Ky. 475; Jack-

son v. Hardin, 27 Ky. L. Rep. 1110, 87 S. W. 1119; M'Neil v. Dixon, 1 A. K. Marsh. 365, 10 Am. Dec. 740; Doe ex dem. Morton v. Jackson, 1 Smedes & M. 495, 40 Am. Dec. 107; Suffern v. Butler, 21 N. J. Eq. 410, 3 Mor. Min. Rep. 22; Fisher v. Deibert, 54 Pa. 460; Goff v. Pope, 83 N. C. 123; Chester Emery Co. v. Lucas, 112 Mass. 424, 3 Mor. Min. Rep. 343.

Knappen, Circuit Judge, delivered the opinion of the court:

Appellees, hereinafter called plaintiffs, filed bill in equity to quiet their alleged title to the minerals (coal, oil, and gas) in a tract of land in Morgan county, Kentucky, lying on both sides of the Stone Coal or Prater fork of Caney creek. They base their claim of title upon a formal conveyance of such mineral rights, made in 1865, by John Sebastian to J. W. Sewell & Company, which was a partnership composed of John W. Sewell and Harriet Sewell—father and mother, respectively, of plaintiffs, whose rights descend in equal shares to plaintiffs, their children and heirs at law. Defendants claim the property in separate parcels, tracing their alleged title to a devise by Sebastian, subsequent to his conveyance to Sewell & Company, of the fee simple in the lands to his two sons, subject only to the widow's life estate. They make defenses (1) that the alleged conveyance of the mineral rights by Sebastian to Sewell & Company was intended to be and was in legal effect merely a mining lease upon future payment of royalties; (2) that the conveyance, if effective as such, passed the legal title to John W. Sewell only; (3) that the latter sold and conveyed the mineral rights in question to Mary F. Gregory, whose claimed rights are vested in one of the defendants; (4) that defendants' title, as against plaintiffs, has been finally and effectually adjudicated in a suit in a state court of Kentucky, to which plaintiffs were parties; (5) that plaintiffs' rights, if they ever had any, have been lost by adverse possession and laches. On hearing upon pleadings and proofs, the district court concluded that the alleged deed of the mineral rights from Sebastian to Sewell & Company was a valid and effectual conveyance thereof; that the title thereto was thereby vested in John W. Sewell and Harriet Sewell, as tenants in common; that John W. Sewell conveyed his rights to Mary F. Gregory, but that the latter subsequently reconveyed them to Sewell (Harriet Sewell never made conveyance); that the adjudication had in the state court was binding on but one of the appellees; that the defenses of laches and adverse possession had been established only as to the mineral rights in so much of the land as lies on the eastern or left-hand side of the fork, and as to the coal in the Asa Carter tract, so called, on the western or right-hand side. Each of the two appellees was accordingly decreed the owner of an undivided one third of the minerals underlying the land on the western side of the fork, excepting therefrom the coal in the Asa Carter tract. Plaintiffs have not appealed.

1. We agree with the district judge that the conveyance from Sebastian to Sewell & Company must be accepted as intended to convey absolutely the entire mineral rights in the lands in question. It is, by its express terms and in clear and unambiguous language, a warranty deed, "for a true and valuable consideration to us paid," of "the entire oil and mineral privileges" in the land described. It was made at the grantor's house. It purports to be witnessed by Sebastian's son-in-law and by the deputy clerk of the county, and to have been acknowledged before that officer. It was duly recorded as a deed on the day of its execution. It is persuasively established that the deputy clerk was present at the execution, together with John W. Sewell and one Amyx (who was assisting Sewell in buying land and mineral rights, as

well as taking leases), as was also the son-in-law referred to.

At the time of the hearing Sewell, Amyx, and the deputy clerk were all dead, as were also Sebastian and his wife. While there was testimony that the instrument was spoken of as a lease, and testimony tending to show that it was intended only as such, there was substantial testimony tending to the contrary conclusion, including the facts, as testified to, that Sewell then and there paid to Sebastian $25 in money, which cannot be said to have been regarded as wholly disproportionate to the then value of the minerals, having in mind their remoteness from transportation lines and the price recently paid by Sebastian for the fee simple of a portion of the land—together with other pertinent considerations, including the fact that the Sewells, one or both, during the five months' period, including the date of the deed in question, had taken in that district not only several deeds of lands in fee and several mining leases, but also fourteen deeds outright of mineral interests. Sebastian's subsequent devise of the fee simple of the lands is not highly significant, especially as he still held the surface rights, and not improbably the mineral rights were regarded by him as not very important. See in this connection Pond Creek Coal Co. v. Hatfield (C. C. A. 6th C.) 152 C. C. A. 456, 239 Fed. 630. It would serve no useful purpose to discuss the testimony in detail. Such discussion may be found in the opinion of the district judge, before whom the testimony of several of the more important witnesses was taken, and who closes a detailed discussion of the testimony, with the statement that there is "no evidence of any weight sustaining the position that the agreement pursuant to which the grant in question was executed was for a lease and not a deed." A deed absolute on its face cannot be shown to be otherwise by anything less than explicit testimony, and a certificate of acknowledgment may be impugned by nothing short of fraud or duress. Johnson v. VanVelsor, 43 Mich. 208, 5 N. W. 265. Neither fraud nor duress was established.

Evidence—to show deed a lease.

2. Defendants say, in brief, that "from the evidence it appears that the firm of John W. Sewell & Company [of course meaning J. W. Sewell & Company] was composed of John W. Sewell and Harriet M. Sewell, his wife." We agree with the conclusion of the learned district judge, that the deed to J. W. Sewell & Company vested the legal title in the partners as tenants in common. A deed to a copartnership in its firm name is not for that reason void. The modern authorities are practically uniform to the effect that a conveyance to a firm in its firm name passes to someone the legal title to the land as real estate. Partnership real estate is now regarded in equity as personalty only for the purpose of subjecting it to the payment of debts and adjustment of balances between partners (Riddle v. Whitehill, 135 U. S. 635, 34 L. ed. 287, 10 Sup. Ct. Rep. 924; Stearns Coal & Lumber Co. v. Van Winkle (C. C. A. 6th C.) 137 C. C. A. 314, 221 Fed. 590, 596; and in the absence of debts the partners have a right to personally divide the lands between them as real estate (Godfrey v. White, 43 Mich. 171, 179, 5 N. W. 243, 11 Mor. Min. Rep. 562; Lovewell v. Schoolfield (C. C. A. 6th C.) 133 C. C. A. 449, 217 Fed. 703), or to convey their respective interests therein, subject to its being needed to pay creditors or adjust balances between partners (Taylor v. McLaughlin, 120 Ga. 703, 707, 48 S. E. 203). The court of appeals of Kentucky has more than once declared this rule. In Wilhite v. Boulware, 88 Ky. 169, 171, 10 S. W. 630, it is said: "The principle is universally recognized that at law real estate owned by a partnership, even if purchased in the name of the partnership, and with partnership

Deed—conveyance to one "and Co."

funds, is held by the members of the firm as tenants in common."

And in Carter v. Flexner, 92 Ky. 400, 405, 17 S. W. 853, the court said: "The true rule, and the only one that reconciles the conflicting views on this question, is that, where partners own real estate as such, it cannot be treated or considered as personalty, except for the purposes of the partnership, and then as assets for the payment of firm debts. It cannot be sold by one member of the firm in the firm name, but all the partners must unite in the conveyance."

Had the conveyance been to Sewell & Sewell, each would have taken legal title to one half the property. Menage v. Burke, 43 Minn. 211, 19 Am. St. Rep. 235, 45 N. W. 155; A. J. Dwyer Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362; Morse v. Carpenter, 19 Vt. 613. Defendants do not dispute this proposition. It is also established, at least by the better weight of authority, that a conveyance to a firm, consisting of a surname, followed by the words "and brother" or "and son," passes the legal title as tenants in common to those conforming to such designation and shown to be actually members of the firm. In Hoffman v. Porter, 2 Brock. 156, Fed. Cas. No. 6,577, Chief Justice Marshall, sitting at the circuit, in an action for damages for breach of covenants in a deed to "Peter Hoffman & Son," held that the deed passed a present estate to the "son," when identified as the one who was a member of the firm. In Carter v. Flexner, supra, this principle was at least impliedly recognized—the name of the firm, the heirs of one of whose deceased members were held to take his half interest, being "Carter & Brother." In Galbraith v. Gedge, 16 B. Mon. 631, the firm consisted of four members, under the style of Gedge & Brothers. The share of the deceased partner in lands was held to descend to his heirs as real estate.

Defendants contend, however, that where the firm name contains the surname of one or more but not of all of the partners, followed by the words "and company," a conveyance of real estate to the partnership in such firm name vests the legal title in the partner or partners whose surnames so appear, in trust for the firm. Several cases declare this distinction. Among them are Percifull v. Platt, 36 Ark. 456, 464; Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57; Arthur v. Weston, 22 Mo. 378; Holmes v. Jarrett, 7 Heisk. 506. The basis on which decisions of this nature rest seems to be that the word "company" contains no certain designation of any other person than the one whose surname is given. We are unable, however, to see any logical distinction between the case where the surnames only are given, or where one surname is followed by the words "and son" or "and brother," and a firm name consisting of one surname, followed by the words "and company." In neither case is there a certain designation of all the members. In either of the first-mentioned cases there is an ambiguity to be solved by parole testimony, not only as to the full name of the partner whose surname alone appears, but also as to the identity of the specific "brother" or "son;" and the difference between supplying by parol the partners' names in those cases and in that where it is represented by the words "and company" is wholly unsubstantial. The language of Morse v. Carpenter, supra, in holding valid, in a suit in ejectment, a deed to a partnership whose firm name consisted only of the surnames of the plaintiff members, is equally pertinent here: "There is, however, an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable on that account of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the

application of terms already contained in it."

The authorities do not uniformly observe the distinction urged. In Seymour v. Western R. Co. 106 U. S. 320, 27 L. ed. 103, 1 Sup. Ct. Rep. 123, it was held, citing Hoffman v. Porter, supra, that in an action on a covenant with a partnership trading in the name of S. Seymour & Company, all the partners must join. In Walker v. Miller, 139 N. C. 448, 1 L.R.A.(N.S.) 157, 111 Am. St. Rep. 805, 52 S. E. 125, 4 Ann. Cas. 601, a conveyance of real estate to James Webb, Jr., & Brother was held to be valid, although both James Webb and his brother were dead; the persons beneficially interested continuing to do business in the old firm name. In Brunson v. Morgan, 76 Ala. 593, it was held that a conveyance of the partnership realty by Stoudenmeier, of the firm of Stoudenmeier & Company, in fact composed of three members, carried only his one-third interest. The court said: "The deed to Stoudenmeier & Company vested the legal title in the several members of the firm as tenants in common, and not in the name of the partnership as such. Its legal effect was the same as if the deed had been made to the three partners in their individual names."

We think this the logical view. It is clear, to our minds, that the Supreme Court, by its treatment in Riddle v. Whitehill, 135 U. S. 635, 34 L. ed. 287, 10 Sup. Ct. Rep. 924, of the Arkansas decision in Percifull v. Platt, did not intend to commit itself to the doctrine of that case, unless to the extent that the decision of the Arkansas courts as to the title to lands in that state was binding on the Federal courts. Stearns Coal & Lumber Co. v. Van Winkle (C. C. A. 6th C.) 137 C. C. A. 314, 221 Fed. 593; Ingersoll Engineering & Constr. Co. v. Crocker (C. C. A. 6th C.) 143 C. C. A. 242, 228 Fed. 847. Indeed, the question where the legal title rested was not necessarily involved in the decision in Riddle v. Whitehill. It may be that the Kentucky court of appeals, by the decisions already referred to (and by those cited in the margin[1]), intended definitely to adopt the rule which we have characterized as the logical one, but we prefer not to rest our opinion upon that ground.

3. December 25, 1871, John W. Sewell conveyed to Mary F. Gregory all his right, title, and interest "in any lands, oil, or mineral rights" in certain enumerated counties in Kentucky, including Morgan. Plaintiffs contend that this deed, considering all its various provisions, was not intended to convey the interests in question. We agree, however, with the district judge, that it was so intended. This intention is to our minds made especially clear—first, by the fact that, although by an earlier clause of the deed Sewell is made to convey lands for the most part, at least, belonging to others, under powers of attorney therefor, yet, following the attestation clause, Sewell and his wife (she did not sign), in terms, "quitclaim to the party of the second part all land, mineral, or oil privileges that they may own or possess in the several counties above named;" and, second, by the deed from Mary F. Gregory to Hughs, hereinafter mentioned.

Unless, then, these interests were reconveyed by Mary F. Gregory to Sewell, his one-half interest therein was lost to plaintiffs. On February 15, 1872, and less than two months after the conveyance to Mrs. Gregory, the latter made a conveyance to Sewell reciting his previous conveyance to her. The question is whether this latter instrument reconveyed the rights here in question. Plaintiffs admit that "on the face of this deed much doubt is raised as to what it conveys." Judge Cochran recognized that the deed was ambiguous. He, however, thought it no more so than the deed from Sewell to Mrs. Gregory, and expressed the opinion that

[1] Lowe v. Lowe, 13 Bush, 688; Flanagan v. Shuck, 82 Ky. 617.

"either the deed from Sewell to Gregory did not cover them [the mineral rights] or the deed from Gregory to Sewell did." The learned judge concluded that "in either contingency the title to one half the minerals was left to" Sewell.

Upon a careful consideration of the record, we are unable to agree with this ultimate conclusion. The district judge rested his conclusion of an intent to reconvey to Sewell the mineral rights in question upon a declaration in the deed last referred to, that the party of the first part does "grant and convey to the said party of the second part, his heirs and assigns, such lands, hereditaments or possessions in her vested situated in the county of Morgan and state of Kentucky." This statement, however, is immediately followed by a recital of the conveyance by Sewell to Gregory on December 25, 1871, of a large quantity of lands in Morgan and several other counties, the recital of the possible arising of a question as to the intent of Sewell in making that conveyance, and a declaration that the deed was intended to quitclaim to Sewell the title to all lands patented or granted by the commonwealth of Kentucky to either of the Sewells, and conveyed by them to Mrs. Gregory by the deed mentioned. The deed also contained a release of several tracts by numbers, as well as several other tracts by name. The lands in question are not included in the deed, unless in the general clause first quoted.

While this deed, standing alone, would perhaps make it more probable than otherwise that Mrs. Gregory intended by it to convey to Sewell the minerals in question, there is one consideration (not referred to in the opinions of the district judge) which to our minds makes it highly improbable that either Mrs. Gregory or Sewell understood the deed to have such effect: On the 9th day of March, 1872, Mrs. Gregory conveyed to John Hughs, for a stated consideration of $480, the specific lands in question (and such lands only), not only by courses, metes, and bounds, but expressly identified as being the lands conveyed by Sebastian and wife to Sewell January 23, 1865, with reference to the place of record, "and the same as conveyed by J. W. Sewell et ux. to M. F. Gregory, deed dated 25th of December, 1871, and recorded" as specified. It seems to us incomprehensible that Mrs. Gregory, who was a member of the Sewell family, should have made this conveyance to Hughs less than a month after her conveyance to Sewell, if the conveyance to Sewell was intended to reconvey or to continue to stand as a reconveyance of interests in question, to him. It is, to say the least, highly probable that the conveyance to Hughs would not have been made without Sewell's knowledge and approval. Mrs. Gregory's explanation is that she has no recollection of ever making any deed to Hughs, and that the reason for her reconveyance to Sewell was that the deed was given to her as security for a loan of a few hundred dollars, which was repaid. But this explanation, given by deposition out of court more than forty years after the conveyance, is not convincing, when considered in connection with all the other evidence in the case, including the fact that Hughs, in 1875, conveyed the interests in question, which by mesne conveyances have passed to one not a party here. We think plaintiffs have not sustained the burden of proof of showing a reconveyance of the interests in question to Sewell, and thus that appellees acquired by inheritance the one-half interest only, belonging to their mother, Harriet Sewell, therein.

Same—construction—reconveyance.

4. Adverse Possession and Laches.—Section 2505 of the Kentucky Statutes prescribes a limitation of fifteen years in actions for the recovery of real property. The section applies to actions for the recovery of mineral rights. Pond Creek Coal Co. v. Hatfield, 152 C. C.

A. 456, 239 Fed. 626. We are here concerned only with those rights (coal, oil, and gas) in the lands on the west side of the fork (aside from the Carter tract), and in the minerals other than coal in the Carter tract. The assertion of title by adverse possession to the minerals in lands other than the Carter tract is but feebly made, if at all. We think it clear that such right is not established. The ownership of the minerals having been severed from the ownership of the surface, the possession of the latter did not necessarily carry with it possession of the minerals. The statute thus did not begin to run against plaintiff's title to the minerals until adverse possession thereof by defendants (Ray v. Sweeney, 14 Bush, 1, 29 Am. Rep. 388); and the bar would not be complete unless the adverse possession was continued for the full statutory period (Wickliffe v. Ensor, 9 B. Mon. 253; Pond Creek Coal Co. v. Hatfield, supra). The Sebastians parted with the Carter tract in 1875, only ten years after plaintiffs' title accrued. As to the remainder of the Sebastian tract, it is not established, if indeed it is claimed, that there was ever any mining of coal thereon for domestic purposes. There was no commercial mining of coal on any part of the tract before 1901, and no oil mining before 1912; although Sebastian appears to have given, in 1889, a ten year oil lease, we are cited to no evidence of operation thereunder, and this suit was begun in 1913. We content ourselves with saying that we find no persuasive evidence of open, notorious, continuous, and hostile possession, for the statutory period, of plaintiff's mineral rights outside of the Carter tract.

Adverse possession—mineral rights.

As to the latter tract the situation is not the same. There was more or less mining for coal thereon, both before and after 1875, not only for domestic purposes, but to some extent for purposes of sale, and leases for coal mining were given as early as 1888 and some prospecting done thereunder. The district court has found such adverse possession of coal in place as to bar plaintiff's title thereto, and his conclusion is not appealed from. We think the record such as fairly to require us to accept it as correct, apart from the effect of plaintiff's failure to appeal. There is, however, no proof of actual adverse possession, for the statutory period, of the oil and gas. Indeed, it is asserted in defendants' brief that, "until about 1906, the only mineral that was known or supposed to exist upon this land was the coal;" appellant's contention is that, as Carter and his predecessors in title were in possession of the land under color of title, claiming it and all interests therein, general and adverse possession, for the statutory period, of a mineral known to exist, viz., the coal, cut off the real owner's title to all other mineral interests, although not known to exist. But this contention, we think, loses sight of the fact that adverse possession must, in order to devest title, be so open and notorious as to afford to the owner of the right affected actual or constructive notice of such adverse claim. Were the respective minerals held by different owners, the title of the oil and gas owner thereto surely would not be cut off by an adverse possession of the coal interests; and it can, to our minds, make no difference in principle that the rights to the various minerals are held by one person and under one title, for an assertion of a claimed right to mine coal by no means necessarily carried with it an assertion of right to bore for oil and gas, especially in view of the radically different means employed in mining coal and in boring for oil and gas. The method employed in recovering coal is not an open assertion of a right to bore for oil or gas. Interests in these different minerals are not so generally held together as to justify

Same—adverse claim to coal—effect on oil and gas.

a presumption of that nature. This record is replete with claims of interests in coal and of interests in oil and gas, wholly separate and distinct from each other.

As to laches.—In suits in equity in the Federal courts relief is not barred by lapse of time, except as it amounts to laches or works an estoppel; and while, for the sake of uniformity, the Federal courts accept state Statutes of Limitation whenever by so doing they are not required to abrogate their own principles, the ultimate question is whether, under all the circumstances of the particular case, the plaintiff is chargeable with want of due diligence in failing to institute proceedings before he did. The defense being an equitable one, the lapse of time and the relations of the defendants to the rights must be such that it would be inequitable to permit plaintiffs to assert their rights. Estep v. Kentland Coal & Coke Co. (C. C. A. 6th C.) 152 C. C. A. 451, 239 Fed. 617; Pond Creek Coal Co. v. Hatfield, supra, where the subject of laches was considered and discussed.

We agree with the conclusion of the district judge that the defense of laches has not been established. The delay has been great, but in view of the well-known fact that there was, until within comparatively few years, no general or substantial development of mineral lands situated as were these in question, that commercial mining of coal was not begun there before 1901, nor boring for oil and gas before 1912, that plaintiffs did not live in the neighborhood, and that their testimony (presumably believed by the district judge, who heard it) was that they had no knowledge of such development until about a year before this suit was begun, we cannot say that they are chargeable with such want of diligence in failing to earlier institute proceedings as to equitably deprive them of relief. The fact that they paid no taxes on their mineral rights, in the absence of a policy of separate assessment and taxation, is not, alone, enough to bar them.

Limitation of actions—effect of laches.

5. The assignment addressed to the holding that the alleged adjudication of defendants' title by the decree of the Kentucky state court was binding on but one of the plaintiffs is not presented or argued in appellants' brief. It is enough to say that, regardless of any question of waiver, reference to the record, including the opinion of the district judge, suggests no error in this respect. The same considerations apply to the defense of champerty asserted below.

It results from these views that the decree of the District Court was right, and should be affirmed so far as it adjudged appellants A. W. Sewell and Hattie F. Sewell to be the owners of two thirds of the one-half interest held by Harriet Sewell in the minerals which are the subject of this appeal, but that the decree is erroneous, and should be reversed, so far as it extended such adjudication of ownership to the one-half interest originally held by John W. Sewell.

The record is accordingly remanded to the District Court, with directions to enter a decree as modified by this opinion. The costs of this court will be divided.

ANNOTATION.

Effect of designating grantee in deed or mortgage by firm name.

There is a great variety of opinion as to the legal effect of a deed naming a partnership as grantee. All are agreed that inasmuch as a partnership is not a person, either natural or artificial, it cannot, as such, take or hold the legal title to real estate.[1]

[1] See, in addition to the cases elsewhere cited throughout this note: Stambaugh v. Smith (1873) 23 Ohio

And, while all are agreed that a deed naming a partnership as grantee is effective to give the firm an equitable title,[2] some courts have held that the legal title does not pass at all,[3] while others treat the partners whose surnames are embodied in the firm name as the legal grantees, taking as tenants in common, subject to the equities of the partnership;[4] while

St. 584, 15 Mor. Min. Rep. 82; Riddle v. Whitehill (1890) 135 U. S. 621, 34 L. ed. 282, 10 Sup. Ct. Rep. 924; Powers v. Robinson (1890) 90 Ala. 225, 8 So. 10; Shirran v. Dallas (1913) 21 Cal. App. 405, 132 Pac. 454; Adams v. Church (1902) 42 Or. 270, 59 L.R.A. 782, 95 Am. St. Rep. 740, 70 Pac. 1037; Trexler v. Africa (1910) 42 Pa. Super. Ct. 542.

A partnership is not a person, either natural or artificial, and it cannot, at law, be the grantee in a deed or hold real estate. Legal title must vest in some person; but, if the title be made to all the partners by name, they hold the legal title as tenants in common. Woodward v. McAdam (1894) 101 Cal. 438, 35 Pac. 1016.

In Shields v. Shields (1881) 1 Chester Co. Rep. (Pa.) 430, the court, in holding that judgments against the firm took precedence over those against the individual partners as against lands purchased in the name of a firm with partnership assets, said that "the title to the real estate in question was in the firm. The deeds identify it as property belonging to the partnership." The decision, however, is in no way at variance with the general rule.

[2] See, in addition to the other cases elsewhere cited throughout this note, Dunlap v. Green (1894) 8 C. C. A. 600, 23 U. S. App. 154, 60 Fed. 242; Grabbs v. Farmers' Mut. F. Ins. Asso. (1899) 125 N. C. 389, 34 S. E. 503; Daniels v. Roanoke R. & Lumber Co. (1912) 158 N. C. 418, 74 S. E. 331; Hunter v. Martin (1845) 2 Rich. L. (S. C.) 541; Stith v. Moore (1906) 42 Tex. Civ. App. 528, 95 S. W. 587.

[3] Silverman v. Kristufek (1896) 162 Ill. 222, 44 N. E. 430; Tidd v. Rines (1879) 26 Minn. 201, 2 N. W. 497; Frost v. Wolf (1890) 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. 440; Harris v. Bryson (1904) 34 Tex. Civ. App. 532, 80 S. W. 105; and see Sutton v. Kelliher (1902) 115 Iowa, 632, 89 N. W. 26, in which the question was raised, but not decided.

In Gille v. Hunt (1886) 35 Minn. 357, 29 N. W. 2, it was said: "There are some authorities which seem to hold that such a conveyance would be good to the persons so designated, and that it may be proved by parol who they are; but we think these cases go a great way towards holding that a conveyance of real estate may rest partly in parol; and when we consider the indefinite confusion in titles to real estate—in which there ought to be great definiteness and certainty—such a rule might let in, we do not hesitate to decide that the proposition that such a designation is too indefinite and uncertain rests in better reason and authority."

[4] Riddle v. Whitehill (1890) 135 U. S. 621, 34 L. ed. 282, 10 Sup. Ct. Rep. 924; Anderson v. Tompkins (1820) 1 Brock. 456, Fed. Cas. No. 365; Schlichter Jute Cordage Co. v. Mulqueen (1906) 142 Fed. 583; Lindsay v. Hoke (1852) 21 Ala. 542 (obiter); Wood v. Montgomery (1877) 60 Ala. 500; Slaughter v. Doe (1880) 67 Ala. 494; Espy v. Comer (1884) 76 Ala. 501; Brunson v. Morgan (1884) 76 Ala. 593; Southern Cotton Oil Co. v. Henshaw (1889) 89 Ala. 448, 7 So. 760; Powers v. Robinson (1890) 90 Ala. 225, 8 So. 10; Blanchard v. Floyd (1890) 93 Ala. 53, 9 So. 418; Whisenant v. Hybart (1809) 160 Ala. 578, 49 So. 760; Gossett v. Kent (1858) 19 Ark. 602; Percifull v. Platt (1880) 36 Ark. 456; Spaulding Mfg. Co. v. Godbold (1909) 92 Ark. 63, 29 L.R.A.(N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 Ann. Cas. 947; Winter v. Stock (1866) 29 Cal. 407, 89 Am. Dec. 57; McCauley v. Fulton (1872) 44 Cal. 355; Ketchum v. Barber (1886) 2 Cal. Unrep. 698, 12 Pac. 251; Shirran v. Dallas (1913) 21 Cal. App. 405, 132 Pac. 454; Jackson v. Stanford (1855) 19 Ga. 14; McRae v. Stillwell (1900) 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; Taylor v. McLaughlin (1904) 120 Ga. 703, 48 S. E. 203; Hartnett v. Stillwell (1904) 121 Ga. 386, 49 S. E. 276; Anderson v. Goodwin (1906) 125 Ga. 663, 54 S. E. 679; Close v. O'Brien & Co. (1907) 135 Iowa, 305, 112 N. W. 800; Western Securities Co. v. Atlee (1915) 168 Iowa, 650, 151 N. W. 56; McMurry v. Fletcher (1880) 24 Kan. 574; Taylor v. Danley (1911) 83 Kan. 646, 112 Pac. 595, 21 Ann. Cas. 1241; Galbraith v. Gedge (1855) 16 B. Mon.

still others hold that a conveyance to a partnership in the firm name vests the legal title in all the partners, including those designated by the words

(Ky.) 630; Carter v. Flexner (1891) 92 Ky. 400, 17 S. W. 851; Beaman v. Whitney (1841) 20 Me. 413; Gille v. Hunt (1886) 35 Minn. 357, 29 N. W. 2; A. J. Dwyer Pine Land Co. v. Whiteman (1904) 92 Minn. 55, 99 N. W. 362; Arthur v. Weston (1856) 22 Mo. 378; Riffel v. Ozark Land & Lumber Co. (1899) 81 Mo. App. 177; Adams v. Church (1902) 42 Or. 270, 59 L.R.A. 782, 95 Am. St. Rep. 740, 70 Pac. 1037; Moreau v. Saffarans (1856) 3 Sneed (Tenn.) 595, 67 Am. Dec. 582; Holmes v. Jarrett (1872) 7 Heisk. (Tenn.) 506; Gauss-Langenberg Hat Co. v. Allums (1916) — Tex. Civ. App. —, 184 S. W. 288; Jones v. Neale (1856) 2 Patton & H. (Va.) 339; Sherry v. Gilmore (1883) 58 Wis. 324, 17 N. W. 252.

Where the partnership name contains the surnames of both partners, though their Christian names are omitted, the deed is nevertheless sufficient in form to vest the legal title in such partners, inasmuch as parol evidence may be introduced to remove the latent ambiguity and identify the grantees. Cole v. Meete (1898) 65 Ark. 503, 67 Am. St. Rep. 945, 47 S. W. 407.

A deed made to a firm by the firm name instead of by the names of individual members of the firm is not, for that reason, void. It is a latent ambiguity that may be explained and supplied by parol. La Fayette Land Co. v. Caswell (1910) 59 Fla. 544, 138 Am. St. Rep. 166, 52 So. 140; Cawthon v. Stearns Culver Lumber Co. (1910) 60 Fla. 313, 53 So. 738.

A deed made to a partnership by its firm name, of property purchased by the firm at a judicial sale, is effective, where one of the partners dies before the sale is confirmed, to convey to the surviving partner an undivided one-half interest in the land. Blanchard v. Floyd (1890) 93 Ala. 53, 9 So. 418.

A deed to one "and his associates" passes the deed to the person named, the term "associates" not describing any grantees with sufficient definiteness. Ennis v. Brown (1896) 1 App. Div. 22, 36 N. Y. Supp. 737.

A conveyance to a partnership by its firm name, which does not include the name of any of the partners, does not vest in it any legal title, because the partnership is not recognized in law as a person. Percifull v. Platt (1880) 36 Ark. 456; Spaulding Mfg. Co. v. Godbold (1909) 92 Ark. 63, 29 L.R.A. (N.S.) 282, 121 S. W. 1063, 19 Ann. Cas. 947.

If none of the individual names of the copartnership appear in the deed, either by mention or description, it must fail to carry the legal title to the land for want of a grantee capable of taking. Riffel v. Ozark Land & Lumber Co. (1899) 81 Mo. App. 177.

But a deed running to a partnership, the name of which does not include the name of one of the partners, while void at law, may be reformed in equity, where the property was in fact purchased by the members of the firm individually, and the deed was taken in the name of the firm by mistake of the draftsman. Spaulding Mfg. Co. v. Godbold (1909) 92 Ark. 63, 29 L.R.A. (N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 Ann. Cas. 947.

[5] Wright v. Brooks (1913) 47 Mont. 99, 130 Pac. 968; Walker v. Miller (1905) 139 N. C. 448, 1 L.R.A.(N.S.) 157, 111 Am. St. Rep. 805, 52 S. E. 125, 4 Ann. Cas. 601; Hollingsworth v. Wm. Cameron & Co. (1913) — Tex. Civ. App. —, 160 S. W. 644.

Contra, Barnett v. Lachman (1877) 12 Nev. 361, in which a conveyance of land to Thomas Barnett & Bro. was held to vest the legal title in Thomas Barnett alone. The court said: "It may be true, as was argued by appellant, that the term 'Bro.' is not usually as uncertain as 'Co.' It would seem to limit the inquiry as to which brother was meant, and if there was only one brother it might be said that there was no good reason why such brother should not take the legal title. But, in reality, the term 'Bro.' may be just as uncertain as 'Co.' It is not uncommon, we believe, after a firm name has been once established, for other persons than the original partners coming into the firm as partners, to continue business without any change in the firm name. But, be this as it may, it is quite evident that it would be unsafe to hold that a purchaser of real estate is bound to ascertain who the partners composing the firm are. If such a rule should be adopted, it would have a tendency not only to create uncertainty in the transfer of real property, but would

"and Bro.," [5] "and Son," [6] or "and Co.," [7] on the ground that the latent ambiguity as to the identity of the grantees is resolvable by parol evidence. Still others have held that a conveyance naming a firm as grantee is effectual to pass the legal title to the members of the firm, although none of their names appear in the partnership title.[8]

Inasmuch as a partnership can take legal title to personal property, a chattel mortgage or bill of sale to a partnership by its firm name is valid.[9] And as a conveyance to a firm, even where not regarded as valid in law to pass

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open wide the door for the commission of fraud. There is no law in this state compelling persons transacting business under a firm name to publicly disclose the names of the individuals composing the firm. Now, if the rule contended for by appellant should be adopted, the purchaser of real property from the alleged copartners would never be secure. To illustrate: The purchaser examines the record and finds a conveyance to 'A. B. & Bro.' It is generally understood in the community that 'C. B.' is the 'Bro.' composing said firm. The purchaser, upon being so informed, takes the deed from A. B. to C. B. Before the Statute of Limitations expires another brother of A. B. comes into court with an action against the purchaser, and claims that he is the 'Bro.' designated in the deed, and he proves, by clear and positive evidence, that he is the real brother that was a member of the firm at the date of the execution and delivery of the deed, and that his other brothers had falsely misrepresented the facts to the purchaser. What security would the purchaser have in such a case? None whatever. The fact, relied upon by appellant, that the deed in this case is made to T. B. & Bro. of Reno, does not give to the deed any greater degree of certainty. The name, 'T. B. & Bro.,' is the firm, and does not necessarily or even by implication allude to the brother that resided at Reno. It may have been, for aught that appears in the deed, that T. B. employed his brother Isaac as a clerk, and yet, during all the time of the copartnership, the 'Bro.' who was a member of the firm may have lived at New York or Paris. The law ought not and it does not sanction any rule which would be susceptible of so much doubt and uncertainty, independent of its evident tendency to encourage fraud and perjury. In any event, it must be acknowledged that the doctrine contended for by appellant would surely tend to destroy the security of titles to real property, and ought not to be upheld."

[6] Hoffman v. Porter (1824) 2 Brock. 156, Fed. Cas. No. 6,577.

[7] Brunson v. Morgan (1884) 76 Ala. 593; Printup Bros. v. Turner (1880) 65 Ga. 71; Davis v. Davis (1882) 60 Miss. 615; (semble); Dineen v. Lanning (1912) 92 Neb. 545, 138 N. W. 759; Murray v. Blackledge (1874) 71 N. C. 492; Mann v. Paddock (1908) 108 Va. 827, 62 S. E. 951. But see, Contra, Riddle v. Whitehill (1890) 135 U. S. 621, 34 L. ed. 282, 10 Sup. Ct. Rep. 924; Gossett v. Kent (1858) 19 Ark. 602; Percifull v. Platt (1880) 36 Ark. 456; Winter v. Stock (1866) 29 Cal. 407, 89 Am. Dec. 57; Ketchum v. Barber (1886) 2 Cal. (Unrep.) 698, 12 Pac. 251; Close v. O'Brien & Co. (1907) 135 Iowa, 305, 112 N. W. 800 (obiter); McMurray v. Fletcher (1880) 24 Kan. 574; Gille v. Hunt (1886) 35 Minn. 357, 29 N. W. 2; Arthur v. Weston (1856) 22 Mo. 378; Moreau v. Saffarans (1856) 3 Sneed (Tenn.) 595, 67 Am. Dec. 582; Holmes v. Jarrett (1872) 7 Heisk. (Tenn.) 506; Gauss-Langenberg Hat Co. v. Allums (1916) — Tex. Civ. App. —, 184 S. W. 288; and see also Ennis v. Brown (1896) 1 App. Div. 22, 36 N. Y. Supp. 737, in note 4, supra.

[8] Wray v. Wray [1905] 2 Ch. (Eng.) 349, 93 L. T. N. S. 304, 74 L. J. Ch. N. S. 687, 54 Week. Rep. 136; Kelley v. Bourne (1887) 15 Or. 276, 14 Pac. 744 (semble). Contra: Percifull v. Platt (1880) 36 Ark. 456; Spaulding Mfg. Co. v. Godbold (1909) 92 Ark. 63, 29 L.R.A.(N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 Ann. Cas. 947; Riffel v. Ozark Land & Lumber Co. (1899) 81 Mo. App. 177; Trexler v. Africa (1910) 42 Pa. Super. Ct. 542.

[9] A chattel mortgage executed to a partnership by its firm name, which includes the name of no person, is good at law as well as in equity, the rule that a partnership, as such, cannot be a grantee in a deed, not applying to personal property. Hendren v. Wing (1895) 60 Ark. 561, 46 Am. St. Rep. 218, 31 S. W. 149.

As a partnership may purchase and

the legal title to the firm, is good in equity, mortgages of land to a partnership in the firm name are valid.[10]

hold personal property, there is no reason why it may not take security, by way of mortgage upon the same, to secure a partnership debt. Kellogg v. Olson (1885) 34 **Minn.** 103, 24 N. W. 364.

A bill of sale, by way of security for a loan to a firm doing business under an assumed name, passes title to the goods. Maugham v. Sharpe (1864) 17 C. B. N. S. 443, 144 **Eng.** Reprint, 179, 10 Jur. N. S. 989, 34 L. J. C. P. N. S. 19, 10 L. T. N. S. 870, 12 Week. Rep. 1057.

[10] Carpenter v. Zarbuck (1905) 74 **Ark.** 474, 86 N. W. 299; Chicago Lumber Co. v. Ashworth (1881) 26 **Kan.** 212; Bernstein v. Hobelman (1888) 70 **Md.** 29, 16 Atl. 374; Menage v. Burke (1890) 43 **Minn.** 211, 19 Am. St. Rep. 235, 45 N. W. 155; Schumpert v. Dillard (1877) 55 **Miss.** 348; Barber v. Crowell (1898) 55 **Neb.** 571, 75 N. W. 1109; New Vienna Bank v. Johnson (1890) 47 **Ohio** St. 306, 8 L.R.A. 614, 24 N. E. 503; Morse v. Carpenter (1847) 19 **Vt.** 613.

A mortgage to a partnership, the names of two of the members of which appear in the firm name, is not invalid as running to a fictitious person. Woodward v. McAdam (1894) 101 **Cal.** 438, 35 Pac. 1016. E. S. O.

EX PARTE J. TURNER RHODES.

J. TURNER RHODES

v.

THOMAS McWILSON.

Alabama Supreme Court—May 30, 1918.

(— Ala. —, 79 So. 462.)

Arrest — without warrant — unconstitutional seizure.

1. The constitutional guaranty of security of person from unreasonable seizure makes unlawful an arrest on mere verbal complaint to an officer by a citizen of trespass upon his property.

[See note on this question beginning on page 585.]

Same — due process of law.

2. A municipal corporation cannot, in view of the constitutional provision guaranteeing due process of law, authorize arrest of a person upon a mere verbal charge of a citizen to a police officer.

Same — condition for warrant — effect.

3. A constitutional provision forbidding the issuance of a warrant for arrest without an oath or affirmation prohibits arrest without warrant upon a mere verbal charge of trespass by a citizen.

Same — charge — definition.

4. The charge upon which a municipal ordinance authorizes an arrest to be made does not mean a mere verbal request for arrest, but the preferring of a criminal charge according to the forms of law.

(Anderson, Ch. J., and McClellan and Gardner, JJ., dissent.)

PETITION for a writ of certiorari to review a judgment of the Court of Civil Appeals affirming a judgment of the Circuit Court for Jefferson County in favor of plaintiff, in an action brought to recover damages for alleged unlawful arrest. *Denied.*

The facts, as stated by **Somerville**, J., on the former appeal, were as follows:

In a certain block in Birmingham, lots 13, 14, and 15 are in a tier, 13

being on the south side. Plaintiff owned 13 and the south half of 14, and defendant owned the north half of 14 and all of 15. Defendant's predecessor in title, intending to build a small house on his own land, mistakenly built it so that the entire house was on plaintiff's land, excepting a small triangular section on the north side about 4 feet in width at its large end, and tapering to nothing at the other end. Before the discovery of the mistake, defendant had a tenant in the actual occupancy of the house. When this tenant left the premises were vacant, and plaintiff took actual possession of the house by moving a cot therein and sleeping there at night. When defendant heard of this, he went to the house and moved the cot out on the front porch, and posted notices on the premises, forbidding trespassing. About this time, and after plaintiff had also posted warning against trespassing, defendant leased the house to another tenant, who began to move some of his things in just about the day that plaintiff was arrested. Defendant went to the house and threw out plaintiff's cot and tore down his notice. This was the day of plaintiff's arrest, and was the only occasion upon which defendant saw and talked to plaintiff about the house. Plaintiff was arrested on his own property, near the house. A policeman who made the arrest says he did it at the request of defendant, on a charge of trespassing. Defendant testified: "I turned to McWilson and said to him: 'If you go into the house again, I will have you arrested.' He replied: 'I am going in there again; you can have me arrested. I am acting on the instructions of my lawyer.' Then, after he said that he would go in there again, one of the officers asked me if I wanted him arrested, and I said: 'Yes, if he is going to be persistent in going on this property, why, I want him arrested.' Then they arrested him and took him."

Mr. **Horace C. Wilkinson** for petitioner.

Mr. **M. M. Ullman,** amicus curiæ:

There is no constitutional inhibition against an arrest without a warrant.

Williams v. State, 44 Ala. 41; Ex parte Thomas, 100 Ala. 101; Floyd v. State, 82 Ala. 23, 2 So. 683.

The legislature has the power to extend the right of arrest without warrants to such misdemeanors as do not constitute a breach of the peace.

Higby v. Pennsylvania R. Co. 209 Pa. 452, 58 Atl. 859; State v. Boyd, 108 Mo. App. 518, 84 S. W. 191; Jacobs v. State, 28 Tex. App. 79, 12 S. W. 408; Crippen v. State, — Tex. Crim. Rep. —, 189 S. W. 496; State v. Byrd, 72 S. C. 104, 51 S. E. 542; Wehmeyer v. Mulvihill, 150 Mo. App. 197, 130 S. W. 681; Main v. McCarty, 15 Ill. 441; Tarantina v. Louisville & N. R. Co. 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913B, 1058.

The constitutional provision against unreasonable searches and seizures manifestly does not prohibit an arrest without a warrant, unless the arrest is unreasonable under the circumstances.

Shanley v. Wells, 71 Ill. 78; Pinkerton v. Verberg, 78 Mich. 573, 7 L.R.A. 507, 18 Am. St. Rep. 473, 44 N. W. 579; Re Way, 41 Mich. 304, 1 N. W. 1021; Burroughs v. Eastman, 101 Mich. 419, 24 L.R.A. 859, 45 Am. St. Rep. 419, 59 N. W. 817; Baltimore & O. R. Co. v. Cain, 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801; Com. v. Marcum, 135 Ky. 1, 24 L.R.A.(N.S.) 1194, 122 S. W. 215.

It was within the contemplation of the makers of the Constitution that the legislature should be the judge of what is due process of law, and that due process of law is secured by the laws, operating upon all alike, and not subjecting individuals to the arbitrary exercise of the powers of the government.

Miller v. Birmingham, 151 Ala. 469, 125 Am. St. Rep. 31, 44 So. 388; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Nishimura Ekiu v. United States, 142 U. S. 651, 658, 664, 35 L. ed. 1146, 1149, 1150, 12 Sup. Ct. Rep. 336; Frank v. State, 142 Ga. 741, L.R.A.1915D, 817, 83 S. E. 465; Birmingham v. Wills, 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746; Boyd v. United States, 116 U. S. 616, 29 L. ed.

746, 6 Sup. Ct. Rep. 524; Hale v. Henkel, 201 U. S. 42, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

Mayfield, J., delivered the opinion of the court:

To hold that the arrest in this case is lawful and reasonable is to hold that any person may be lawfully seized, arrested, detained, and, unless he give bond, imprisoned, by any policeman of the city of Birmingham, on a mere verbal request of any other citizen, who says to the policeman that the person to be arrested has violated some criminal law of this state, or some ordinance of the city of Birmingham; that such arrests may be lawfully made, as for any misdemeanor, or for the violation of any municipal ordinance of Birmingham, by any policeman in the city of Birmingham, though the offense is not committed in the presence of the arresting officer, and though he have no probable cause to believe that that offense or any other, has been committed, and without the affidavit or oath of any person and even when the officer and the person requesting the arrest know that the person to be arrested has committed no offense whatever, and that the arrest is for the purpose of allowing the person making the request to get possession of the property of the person arrested. That this statement is justified, see the opinion of this court on the former appeal, and that of the court of appeals on this appeal, as to what the undisputed evidence shows. 192 Ala. 675–682, 69 So. 69; id. — Ala. App. —, 77 So. 465.

To hold an arrest lawful and reasonable, such as is shown in the opinions to which reference is made, is, in legal effect, to nullify several provisions of our Bill of Rights, as well as § 89 of the Constitution.

When the people of this state, through their representatives, met in convention to form this state government, they reserved to themselves and their descendants and successors certain rights, liberties, privileges, and immunities, which they did not surrender or cede to the government to be created by the convention. They also exacted guaranties of the government so formed to protect each person in the state, and secure to him the enjoyment and exercise of these rights, liberties, privileges, and immunities, so reserved against encroachment or destruction thereof by other persons, whether majorities or minorities of the whole, or officers of any department of the government itself. Some, but not all, of these rights, liberties, privileges, and immunities, are enumerated in the Bill of Rights, which comprises the first thirty-six sections of our Constitution. That all this is true is obvious from a reading of the last two sections of the Bill of Rights, as follows:

"Sec. 35. That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

"Sec. 36. That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."

The right, liberty, privilege, or immunity which is encroached upon, if not destroyed, by this arrest, is expressly enumerated or included by implication in several sections of the Bill of Rights. Section 5 in part declares "that the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches."

While § 7 of the Constitution, in part declares "that no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed."

The Constitutions, state and Federal, in several provisions or

clauses, not only declare but guarantee that no citizen shall be deprived of his life, liberty, or property, except by due process of law. Can it be said that this plaintiff in judgment is not within the protection of these guaranties, or that no right liberty, privilege, or immunity of his has been encroached upon, or denied him, by this arrest?

When the delegates to our first constitutional convention, who were the representatives of the people and not of the government to be created, were assembled in 1819, and were making our Constitution, there was then applicable in the Alabama territory a system of laws called "The Law of the Land," or "Due Process of Law." This consisted mainly of a great body of American laws, the American common law, together with some written laws, the acts of the Alabama and Mississippi territorial legislatures, the Constitution of the United States, and the acts of Congress. The various phrases and clauses used by the convention to describe the reserved rights, liberties, immunities, and privileges then had well-known meanings; many of them are to be found in the Magna Charta and other charters of liberties, then claimed by our ancestors as a part of the law of the land; and many of them were then embedded in the Constitution of the United States, and had been construed by the Supreme Court of our country to mean what they meant at common law. It would be unreasonable to suppose that our Constitution makers used these phrases or clauses otherwise than as then defined by the common law or the law of the land. The first clause in the 5th section of the Bill of Rights, "That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizure or searches," then had a well-known meaning, and the same phrase had been often defined by the courts, state and Federal. It must be presumed that the makers of the Constitution adopted it under its then construction. If it was not intended to prevent the government then being formed from authorizing or legalizing arrests like this, then the part which applies to the seizure of the person is worthless. If the arrest under consideration was lawful, or can be made so without amending the Constitution, then this guaranty of the Bill of Rights has failed of its purpose, to secure the people from unreasonable arrests. Surely the phrase "unreasonable seizure" included an arrest like the one now under consideration. If not, it would be difficult to suppose a seizure or arrest of the person that would be unreasonable. The same is true as to the phrase "due process of law." Surely, any seizure or arrest of a citizen is not reasonable, or any process is not "due process," merely because a legislature or a municipality has attempted to authorize it. These phrases are limitations upon the power of the legislature, as well as upon that of the other departments of government, or of their officers.

Arrest—without warrant—unconstitutional seizure.

Same—due process of law.

It is an error to suppose, because of the last clause of § 5 of the Bill of Rights does not prohibit an arrest without a warrant, but only prohibits the isuance of a warrant without an oath or affirmation, as has been often reaffirmed and uniformly acted upon, that there is no constitutional limitation upon or prohibition against arrests, and that the legislature is without limitations of its power to authorize arrests without warrant. There are other provisions in the Bill of Rights which do prohibit arrests like the one in question, one of them in the very section which prohibits the issuing of a warrant without oath or affirmation. The first clause of § 5 deals with arrests generally, and the latter clause deals with the warrant or written authority for arrests. The fact that the last clause does not condemn a given arrest, but only the issuing of

Same—conditions for warrant—effect.

the warrant, does not make it follow that other clauses of the Bill of Rights do not prohibit such arrests.

The general rules for the construction of statutes—that they are valid unless their prohibition can be found on the written pages of the Constitution, state or Federal, and that they must be held valid unless the court can say beyond a reasonable doubt that they are void—do not apply when the reserved rights liberties, immunities, and privileges of the citizen are involved. That is, when the inalienable rights of the citizen are involved. As § 36 of the Bill of Rights declares: "This enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."

These were therefore expressly excepted out of the general powers of the whole government—the legislative branch, as well as the executive and judicial branches. This distinction was, at an early date, made by this court, in the famous case of Re Dorsey, 7 Port. (Ala.) 293–419. In that case, after quoting the above Section of our Bill of Rights, Justice Ormond said:

"By this it appears, not only that the rights asserted in this instrument are reserved out of the general powers of government, but also that this enumeration shall not disparage others not enumerated; and that any act of the legislature which violates any of these asserted rights, or which trenches on any of these great principles of civil liberty, or inherent rights of man, though not enumerated, shall be void.

"I cannot, I think, be successfully maintained that this last and not least important clause of the Bill of Rights is void of meaning. Is it unreasonable to suppose that the framers of this declaration knew that the principles maintained by the immortal British judges, cited in this opinion, as well as by the jurists of our own country, had been frequently called in question; and that they intended to provide against every possible infraction of our free institutions?" Page 378.

"In ascertaining the intention of the people, in the reservation of certain great rights and privileges, we should give them a broad and liberal construction, so as to effect the manifest intention of its framers. In this there is no danger. They have asserted that they have not delegated the power to invade either of the great natural rights just cited. Does it become this court or the legislature to quibble on its terms?" Pages 380, 381.

The same principles were again well stated by our great Chief Justice Stone, in the case of Sadler v. Langham, 34 Ala. 311. After discussing the measure of proof necessary to set aside statutes, Judge Stone said: "Constitutional provisions are intended as a protection to life, liberty, and property, against encroachment, intentional or otherwise, at the hands of the government. Had not the framers of our system of government supposed it possible that legislative bodies might fall into error, they would not, in their sovereign capacity, have adopted a written Constitution, superior alike over themselves and the legislature. We cannot believe that construction a sound one, which indulges every reasonable presumption against the citizen, when the legislature deals with his rights, and gives him the benefit of every reasonable doubt, when his life and liberty are in jeopardy before the courts of the country." Page 321.

Further on in that notable opinion, treating of the provision of the Bill of Rights, to the effect that the citizen shall not be deprived of his property by the government except by due process of law, even under the right of eminent domain, Justice Stone said: "This clause in our Bill of Rights was incorporated into the fundamental law, because it was

feared that all the departments of the government might fail or be unable to protect the citizens in the rightful enjoyment of their property. It implied no distrust of one department more than another, but a jealous watchfulness of individual rights, and a prudent apprehension, based on the melancholy examples furnished by the experience of mankind, that unbridled power is too apt to merge individual right in national strength and greatness. The oppressions, then fresh in their recollection, which had forced our ancestors to sever all political connection with the mother country, had taught them that the surest and best mode of installing and preserving a noble government was to enfranchise and ennoble the people, whose virtue and happiness should be the first object of all rational government." Page 327.

Surely a man's property is not more precious or sacred than his person. If the legislature cannot deprive the citizen of his land, even when exercising the power of eminent domain, except by due process of law, surely it cannot deprive him of his liberty by authorizing his arrest upon the mere verbal request of a person who is claiming his land.

Our Constitution—especially the Bill of Rights—is largely constituted of declarations of the common-law rights which the citizens or people then possessed, together with guaranties that these rights, privileges, and immunities shall remain inviolate, and that the government shall not usurp, destroy, or encroach thereupon. It would have been of little use, practically, to enumerate some of them, and reserve all, if the power was granted to the legislature—one department of the government—to destroy them.

In very recent cases, these particular Bills of Rights, as found in our Constitution and other state constitutions, have been uniformly construed as preserving to the citizen his common-law rights and privileges against unreasonable seizure. In one of these (Gulsby v. Louisville & N. R. Co. 167 Ala. 122, 128, 52 So. 394), this court, dealing with § 5 of our Bill of Rights, said: "In a leading and well-considered case in this country (Carey v. Sheets, 67 Ind. 375), it is said that the quoted declaration [§ 5], in substance, is an affirmation of the common-law right of the citizen not to be searched or seized without probable cause."

In the Indiana case cited and approved (67 Ind. 375), it is said: "Section 11 of the Bill of Rights . . . is but an affirmance of the common-law right of every citizen not to be searched or seized without probable cause. It affords no new right of action because of an unlawful search or seizure of the property or the person of the citizen. In its practical effect, it operates as a guaranty of the continued existence of the right which it recognizes, and as an inhibition of its abridgment by legislative authority."

The constitutional provision applies to the person, as well as to the property of the citizen; it applies to seizures as well as to searches of either the person or property. An arrest of the person is unquestionably a seizure of the person. The citizen's person is as sacred and needs as much protection as his property.

It is dangerous to construe these reserved powers in bills of rights so as to encroach upon the liberties of the citizen, or to enlarge the powers of the government in regard thereto. This danger is well pointed out by that great judge and writer, Justice Bradley, in the well-considered case of Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, dealing with the construction of two statutes, where it is said:

"Can we doubt that, when the 4th and 5th amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria

of the reasonable and 'unreasonable' character of such seizures? Could the men who proposed those amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the 5th section of the Act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against the arbitrary power in which they had been engaged for more than twenty years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." 116 U. S. 630.

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be, Obsta principiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law." 116 U. S. 635.

In the case of Pinkerton v. Verberg, 78 Mich. 573, 7 L.R.A. 507, 18 Am. St. Rep. 473, 44 N. W. 579, a woman was arrested by a policeman under the charge or claim that she was a prostitute or streetwalker, and the arrest was held to be unlawful and an unreasonable seizure of the woman; the court saying: "The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. Whatever the charter and ordinances of the city of Kalamazoo may provide, no police officer or other conservator of the peace can constitutionally be clothed with such power as was attempted to be exercised here. No disorderly conduct; no breach of the peace, committed in the presence of the officer; no suspicion of felony," etc.

In Way's Case, 41 Mich. 304, 1 N. W. 1023, Mr. Justice Campbell, speaking upon the subject of arrest without warrant, says: "It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful, except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in the presence of the officer. Quinn v. Heisel, 40 Mich. 576, and Drennan v. People, 10 Mich. 169."

In the case of Re Kellam, 55 Kan. 700, 41 Pac. 960, the court thus states the facts: "On August 3, 1895, Joseph S. Kellam was arrested by John M. Wilkerson, chief of police of the city of Topeka, upon a charge of selling intoxicating liquors in Topeka, contrary to the city ordinances and to the laws of the state.

No written complaint was ever filed, nor was there any warrant issued, authorizing the arrest; but persons whom the chief of police deemed to be reliable had informed him that Kellam was engaged in the unlawful sale of liquors. The chief of police had no personal knowledge that an offense had been committed; but, upon information so received, he alleged that he had reasonable suspicion that an offense had been committed, and therefore he arrested Kellam and committed him to jail."

As to the lawfulness and reasonableness of the arrest, and the validity of the statute attempting to authorize the arrest, the court said: "The statute quoted certainly purports to give police officers power to make arrests, without warrants or other process, upon the mere suspicion that misdemeanors have been committed. But can such authority be constitutionally given? We think not. . . . In § 15 of the Bill of Rights, it is ordained that 'the right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate,' etc. This provision guarantees protection against unreasonable arrests, and when it was placed in the Constitution, and in fact ever since that time, an arrest for a minor offense without a warrant, and not in the view of the officer, was deemed to be unreasonable and unlawful. Under the common law, arrests without warrants were not permitted, except for offenses committed in the view of the officer; and in cases of felony actually committed the officer might also arrest, without process, upon a reasonable suspicion. The liberty of the citizen was so highly regarded, however, that the officer arresting the supposed felon without warrant must have acted in good faith, and upon grounds of probable suspicion that the person arrested was the actual felon." 55 Kan. 701, 702.

That court, in referring to a statute of the state which attempted to authorize an arrest by a policeman, on the mere verbal request or complaint of another, said: "It [the Kansas statute] is, in effect, a revival of the odious general warrants, which placed the liberty of every man in the hands of every petty officer, and which long ago received judicial condemnation. To prevent their use and the exercise of such arbitrary power at the discretion of an officer, 'it has not been deemed unwise to repeat in the state constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in the civil liberty.' Cooley, Const. Lim. 364, and notes.

"We readily conclude that the statute in question, which undertakes to authorize an officer to make an arrest in cases of misdemeanor, without a warrant, except upon view of the offense, is unconstitutional, and for that reason the arrest of the petitioner must be held to be illegal."

To construe the charter powers of the city of Birmingham and the ordinance in question to authorize an arrest like the one in question is to render them absolutely void. They are susceptible of a construction which renders both perfectly valid, but not so as to authorize the arrest in this case. This court has expressly, and by necessary implication, construed the charter and this ordinance, or others which then stood in the place of the ones now in question, but never to authorize an arrest like that under consideration. The trial court in this case has twice construed this identical ordinance, and the court of appeals, once or twice, as not authorizing such arrests.

In the case of Gambill v. Schmuck, 131 Ala. 321, 31 So. 604, McClellan, Ch. J., writing, it was said: "Under a general law an officer without a warrant has no authority to arrest for an offense of the grade involved here— a quasi misdemeanor—unless it is committed in his presence. Code § 5211. And conceding for the purposes in hand, without deciding, that it was competent for the legislature

to delegate to the municipality of Birmingham the power to provide by ordinance for the arrest of misdemeanants without warrant, when the offense is not committed in the presence of the arresting officer or citizen, we do not find that the legislature has attempted to do this. What it has done is to confer upon the legislative body of the city power 'to pass all laws necessary and proper for the arrest with or without warrants of any person against whom there is a charge made by any citizen for violating any city or state law.' Having only this authority to provide for the arrest, without warrant, of persons against whom charges have been made by citizens, the ordinance put in evidence, which undertook to authorize such arrests in all cases, regardless of charges having or not having been made, was beyond corporate capacity and void." 131 Ala. 331, 332.

In the case of Gambill v. Cargo, 151 Ala. 421, 43 So. 866, where the charter power and an ordinance thereunder were involved, (but whether the ordinance was the same as this, we are not informed), it was said, per Anderson J., now chief justice: "The evidence, without conflict, showed that the defendant instructed Boggan 'to enforce the collection of licenses, to arrest them.' See Boggan's testimony on cross-examination. Gambill also testified that Boggan had been arresting people for violating ordinances for several years, 'and that was with my knowledge, by my direction.' This evidence clearly shows that defendant had given Boggan authority to make arrests, and, if he did so wrongfully, he was nevertheless acting within the scope of his authority and the defendant was responsible for said arrests. Whether the ordinance was valid or not we need not decide, as it was not being violated in the presence of Boggan, and he therefore had no right to arrest the defendant without a warrant. The trial court did not err in giving the general charge for the plaintiff."

Another case is that of Sanders v. Davis, 153 Ala. 375, 44 So. 979, here twice on appeal, involving the validity of an arrest by the police authorities of the city of Birmingham and, of necessity, involving the same charter provision, and some ordinance thereunder. On the last appeal, after referring to the former appeal and following that decision, it was said:

"Upon the second trial, a third count was added by amendment, which still leaves out any averment of process and arrest thereunder, but, in lieu thereof, alleges that the defendant caused 'the plaintiff to be arrested under a charge made verbally to a policeman of the city of Birmingham, Alabama, on the charge of larceny.' " 153 Ala. 379.

"This extraordinary power given to officers, being in derogation of the common law, must be strictly construed. It results that the third count, which was added to the complaint in this case, was still a count for false imprisonment, and not for malicious prosecution. If the offense had been below the grade of felony, there would have been no authority under the statute to arrest without a warrant. Mitchell v. Gambill, 140 Ala. 545, 554, 36 So. 402; Gambill v. Schmuck, 131 Ala. 321, 331, 31 So. 604. So, whether the charge in this case was grand or petit larceny, the result as to the legality or illegality of the arrest would be the same.

"The ordinances of the city, which were introduced, have no bearing on this case, as the complaint does not aver an arrest under the circumstances therein provided for." 153 Ala. 382, 383.

It was never intended by this charter or by this ordinance to authorize arrests on the mere verbal request of a citizen. If it was so intended, the charter and the ordinance would have said so, as did the Bessemer charter and ordinance, construed in the Childers Case, 156 Ala. 96, 47 So. 70, which is in con-

flict with the decision in this case, and is hereby expressly overruled. The word "charge," as used in the charter and in the ordinance, was used and intended to mean what it means when it is used in the Criminal Code, as to the mode of one citizen's preferring a charge of criminal offense against another; and the charge must be preferred, under the municipal law, in mode and form similar to that employed to prefer a charge in the justice court, a county court, or other court having a jurisdiction of the offense. Section 6703 of the Code used similar language, where it says: "A party aggrieved, or desiring to bring a charge of misdemeanor before the county court, may apply to the judge thereof, or to some justice of the peace of the county, for a warrant of arrest, and, upon making affidavit in writing that he has probable cause for believing, and does believe than an offense (designating the misdemeanor by name, or by some other phrase which in common parlance designates it), has been committed in said county by C. D. (naming the offender) on the person (or property, as the case may be)," etc.

Bringing or preferring a criminal charge as used in the charter and in the ordinance, had a well-known meaning, and did not include a mere verbal request for an arrest or criminal prosecution. To so construe the statute and the ordinance is to uphold them; to construe them otherwise is to render them void because violative of the Constitution.

Same—charge—definition.

If the expression "preferring a charge" is given the effect in the charter and the ordinance which is accorded it in the general statutes and in the Constitution, the charter and ordinance are perfectly valid—not inconsistent with the general laws—and do not deny to the citizen any right or privilege reserved by the Bill of Rights or secured to him by the common law. If they are susceptible of this construction, it should be accorded to them, rather than a construction which renders them unconstitutional and void. If the charge is made, as the trial court held it should be made, and as the general law says it may be made, then the plaintiff would be "accused or arrested or detained in a case ascertained by law," that is, by the law as it was when §§ 5 and 7 of the Constitution were ordained; and then the arrest or seizure would not be unreasonable, the charter power and the ordinance would both be valid; but, if one or both attempt to authorize an arrest on a mere verbal request, they are invalid. If the charge is made as the Constitution and the general laws provide, then the seizure or arrest might be valid, though the warrant issued would be void. This distinction has been well drawn by this court in several cases. In Smotherman's Case, 140 Ala. 168, 170, 171, 37 So. 377, it was well pointed out as follows: "The warrant upon which appellant was arrested was issued by a justice of the peace of Shelby county. It was addressed: 'To Any Lawful Officer of Said [Shelby] County.' The arrest was made in Jefferson county by a policeman of the city of Birmingham, and the prisoner was delivered to the warden of the city jail, by whom his body was produced before the judge of the criminal court at the hearing. This warrant of the Shelby justice was not indorsed by any magistrate of Jefferson county, as required by § 5219 of the Code to give it efficacy in that county. In the absence of such indorsement, it may be conceded that as a mandate of arrest—as in and of itself conferring any authority to arrest the person named therein—this warrant was wholly inefficacious—'wholly worthless'—in the county of Jefferson. Code, § 5219; Ledbetter v. State, 23 Tex. App. 247, 257, 5 S. W. 226; Peter v. State, 23 Tex. App. 684, 687, 5 S. W. 228; People v. Shaver, 4 Park. Crim. Rep. 45; State v. Dooley, 121 Mo. 591, 603, 26 S. W. 558. But it by no means follows that the police officer was without authority to arrest Smotherman.

To the contrary, this warrant itself, though without force as a warrant in Jefferson county, showed the existence of a fact upon which the officer was authorized by the statute to make the arrest without a warrant, namely, the fact that a charge had been made, upon reasonable cause, that Smotherman had committed a felony. Code, § 5211; Floyd v. State, 82 Ala. 16, 23, 2 So. 683."

Certainly, the sections of the Bill of Rights which prohibited unreasonable seizures and arrests, and which prohibited accusations, arrests, or detentions, except in cases ascertained by law, meant the law of the land as then ordained, and not any municipal law that might thereafter be ordained.

It follows that the majority of the Court of Appeals ruled correctly in holding the arrest in question unlawful and unreasonable, and that no municipal ordinance could authorize it or make it reasonable, and that the demurrers to the defendant's special pleas were properly sustained.

Application for certiorari denied.

Mayfield, Sayre, Somerville, and **Thomas, JJ.,** concur.

McClellan, J., Anderson, Ch. J., and **Gardner, J.,** concurring in this dissent:

The question presented for review is the validity of § 839 of the 1905 Code of the City of Birmingham. It reads: "Arrest Without Warrant, When and by Whom Made. —It is the duty of the chief of police and every policeman to arrest without warrant, all persons found violating any ordinance of the city, or whom he has reason to believe have violated any city ordinance, or against whom there is a charge made by any citizen for violating any city or state law, all persons found disturbing the peace by disorderly conduct, all persons found drunk on the public streets, or in any public place in the city." etc.

This ordinance was given its present amended, corrected form after the pronouncement made in Gambill v. Schmuck, 131 Ala. 331, 332, 31 So. 604. In the new charter of the city of Birmingham, approved February 23, 1899 (Weakley's Local Laws of Jefferson County, p. 164), it was provided in subd. 25 of § 25: "To pass all laws necessary and proper for the arrest, with or without warrant of any person against whom there is a charge made by any citizen for violating any city or state law; to pass all laws needful for the issue and execution of such warrants."

The validity of the ordinance under consideration is pointedly sustained by the authority of Childers v. State, 156 Ala. 96, 47 So. 70. There the defendant, a police officer of the city of Bessemer, was on trial for an assault and battery, "committed," to quote the statement of that case, "if at all, by making the arrest" of Louis Baggett. The defendant sought to justify through a plea asserting that he arrested Baggett on a "verbal complaint," and that "the charter of Bessemer and its ordinances authorized and empowered its police officers to arrest without warrant." The court sustained the demurrer to the plea, and this court concluded there was error in that regard, and reversed the judgment. Two objections based upon the provisions of §§ 5 and 89, respectively, of the Constitution of 1901, were taken by the demurrer; and both were held to be without merit. Section 5 of the Constitution of 1901 is the same as § 7 of article 1 of the Constitution of 1868. The inhibition (§ 5) was then and is now, this: "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

In Williams v. State, 44 Ala. 41, decided in 1870, having under consideration the like provision in the Constitution of 1868, this court held that the inhibition was against the issuance of the warrant, "not arrest

without warrant." The inhibition was carried forward into the Constitution of 1875; and this reordination operated to adopt as a part of the section the construction given it in 1870 in Williams v. State, supra. 11 Enc. Dig. (Ala.) p. 1114, where many decisions are noted. In Ex parte Thomas, 100 Ala. 102, 13 So. 517, decided in 1893, the pertinent pronouncement of the Williams Case, supra, was reaffirmed. In the full light and effect of these decisions, the Constitution of 1901 reordained in § 5 the same provisions that were considered and defined in the Williams and Thomas Cases, supra. Not since the Constitution of 1875 was adopted, with the stated explicit construction put upon it in the Williams Case, could it have been soundly insisted that the subject-matter of what is § 5 of the Constitution of 1901 applied to restrain the otherwise unlimited legislative power to authorize arrests without warrant. In the Childers Case, itself decided nearly ten years ago, the court but followed and applied the well-known settled law in this regard, aptly expressing the conclusion as follows: "There being no constitutional prohibition, state or Federal, it is undoubtedly within legislative competency by statute to authorize an officer to make an arrest without a warrant for either a felony or misdemeanor, whether the offense be one committed in or out of the presence of the arresting officer."

The other objection is that § 839 of the 1905 City Code of Birmingham is the product of a legislative charter (subd. 25 of § 25, quoted supra) authorization that offends § 89 of the Constitution, which reads: "The legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state."

The same provision was in § 50 of article 4 of the Constitution of 1875. It was considered in Ex parte Cowert, 92 Ala. 94, 100, 101, 9 So. 227. The court there held, and accordingly pronounced: "This conclusion renders it unnecessary to decide whether the general assembly may authorize a municipal corporation, in which the general law of the state as to licensing the sale of liquors is in force, to prohibit that traffic, the general state law to the contrary notwithstanding. We are, however, of the opinion, based on exhaustive investigation and consideration, that such authorization would not be violative of article 4, § 50, of the Constitution. *We do not think the purpose or effect of that provision is, in any manner, to limit the legislature in conferring police powers on municipal corporations.*" (Italics supplied.)

The construction there taken of § 89, or its parent in the Constitution of 1875, has not been since even qualified, much less repudiated. The identical provisions of § 50, art. 4, of the former Constitution, were reordained as § 89 in the Constitution of 1901; whereupon the construction accorded in the Cowert Case conclusively characterizes the effect of § 89. The before-quoted provisions of the Birmingham charter are plainly referable to police power, which, the court expressly decided in the Cowert Case, was not within the restriction of § 50, art. 4, now § 89 of the present organic law. In view of the established construction of § 89 of the Constitution, it is very clear and certain that § 839 of the 1905 Code of Birmingham was not invalid because the charter (subd. 25 of § 25, supra) offended § 89 of the present organic law. As was held in the Childers Case, supra, there is nothing whatever in the Bill of Rights or elsewhere in the Constitution of 1901 that restrained or restrains the legislature in authorizing the arrest of persons without warrant.

Aside from the provisions of § 89, which is addressed to the restraint of the legislature, only, with respect to matters not referable to the police power, there is a rule of re-

straint that inhibits municipal corporations from enacting ordinances inconsistent with state laws, in virtue of charter powers that are general, not specific. The rule is thus correctly stated in Dunn v. Court of County Revenues, 85 Ala. 147, 4 So. 662: "The American theory of municipalities is that the legislation permitted to be exercised by them is a mere delegation of the power of the state; and hence it is an established rule that all laws or ordinances enacted by virtue of this delegated power are, in a certain sense, as much part of the general system of legislation as are the laws of the state; and 'it is therefore necessary that they should be consistent with the state laws.' . . . It is accordingly a familiar rule on this subject that municipal by-laws and ordinances, in conflict with the general law, will be adjudged void, *unless they be clearly authorized by the charter of the particular town or city enacting them.* (Italics supplied.)

This doctrine was recently advisedly applied in Ward v. Markstein, 196 Ala. 209, 215-217, 72 So. 41. It is also announced in McQuillin, Mun. Ord. § 16.

In the instance now under consideration, the legislature, through the quoted charter provision, specifically authorized the city to empower its police officers to arrest without warrant; and the ordinance (§ 839) conformed literally to the specific charter grant. Under that specific grant, the authority to arrest without warrant was upon the condition that a "charge" should be made by "any citizen." The term "charge," as employed in the charter and in § 839 of the City Code of 1905, did not contemplate or intend a charge expressed in the form or through the method of a written information or an affidavit. The charge, within those laws, was made if advice of an offense against the laws was verbally communicated to the police officer by "any citizen." As therein used, the term signified an accusation, however communicated, by "any citizen" that a person had committed an offense against the laws mentioned in the charter (subd. 25, § 25, of the charter). It cannot be supposed that the legislature would authorize arrests by municipal officers, without warrant, and yet burden the purpose manifested thereby with the exaction that, to meet, would require the complaining citizen to seek out someone authorized to take affidavits who, generally, is also authorized to issue warrants for the arrest of offenders so formally accused. The legislative purpose was to afford the means for prompt arrests. This purpose would not have been accomplished if a formal, written, verified accusation had been required. Manifestly, the object intended would not have been attained. The reason inspiring the lawmakers to thus discriminatively provide is succinctly indicated in McQuillin, Mun. Ord. § 17, and notes.

Reference to the opinion of this court on former appeal (192 Ala. 675, 682, ¶ 10, 69 So. 69) discloses that the question now presented was not decided.

It is hardly necessary to add that the adoption of the Municipal Code (Pol. Code, chap. 32; Acts 1907, pp. 790 et seq.) did not effect the repeal of § 839 of the 1905 City Code of Birmingham. Sloss-Sheffield Steel & I. Co. v. Smith, 175 Ala. 260, 57 So. 29.

In my opinion the writ prayed for should be granted, the conclusion of the court of appeals on the question stated being laid in error.

A petition for rehearing having been filed, Mayfield, J., on June 29, 1918, handed down the following additional opinion:

The attorney for the city of Birmingham has filed an extensive brief on the application for a rehearing, as amicus curiæ. He cites no statute and no ordinance, and no decision save that of Childers v. State, 156 Ala. 96, 47 So. 70 (overruled by this decision), which would authorize or justify an arrest like

the one in question. The most that any of the decisions or the textbooks hold is that the legislature may authorize an officer to make an arrest for a misdemeanor committed in his presence, or on probable cause that the offense was committed. That the legislature may, within reasonable bounds, determine what offenses are felonies, and what misdemeanors, and what are breaches of the peace, and what nuisances, etc. There is not to be found a single authority, decision, or textbook, in the library of this court, that sanctions the doctrine that the legislature, a municipality, or Congress can determine what is a "reasonable" arrest, within the meaning of the Constitutions, state and Federal. Those cited by counsel, as well as all others, hold that the meaning of that term, and of the phrase "due process," must be determined by what they meant at the common law, and when the Constitution was adopted. Not one of the authorities holds that an officer can legally arrest, as for a past misdemeanor, on the mere verbal request of a citizen, except the Childers Case. Counsel cites Williams's Case, 44 Ala. 41, and the line of cases following it. These cases do not hold or, in the opinion, say aught that would authorize or justify the arrest in this case. They say and decide only that the 5th section of the Bill of Rights does not prohibit and was not intended to prohibit arrests without warrant; but only to prohibit the issuance of a warrant without oath or affidavit. Neither did the common law prohibit all arrests without warrants. It only prohibited "unreasonable arrests, with or without warrants," and so does the Constitution. All the authorities, state and Federal, hold that these provisions of Constitutions, and the whole of the Bill of Rights, are declaratory of the common law. The cases of Higby v. Pennsylvania R. Co. 209 Pa. 452, 58 Atl. 859, and State v. Boyd, 108 Mo. App. 518, 84 S. W. 191, only hold that statutes are valid which authorize officers to make arrests for offenses committed in their presence, or on probable cause that the offense was committed, without a warrant. It is true that there are dicta, in the opinions cited by counsel, which, on casual reading, would seem to support the conclusion that the legislature can determine what is a "reasonable arrest," and that the legislature can authorize arrests without warrant, as for past offenses not committed in the presence of the officer; but, there is no decision to that effect except the Childers Case. One of the cases most strongly relied upon by counsel is that of Burroughs v. Eastman, 101 Mich. 419, 24 L.R.A. 859, 45 Am. St. Rep. 419, 59 N. W. 817. This case is several times cited and quoted from. All that it decided was that a statute was valid which authorized an arrest, without warrant, for a misdemeanor committed in the presence of the officer, though the offense was not a breach of the peace.

Counsel seems to think that this Michigan case overruled the former decisions of the Michigan court. In this, counsel is in error. The case did criticize what it termed "dicta," in a former case (Robison v. Miner, 68 Mich. 549, 37 N. W. 21); but it did not overrule the case, and did not even criticize the Michigan cases quoted in our decision to the contrary, it apparently approved them. This Michigan case (101 Mich. 419, 59 N. W. 817) relied upon by counsel is reported in 24 L.R.A. 859, and 45 Am. St. Rep. 419, with notes. In the later report (45 Am. St. Rep. 419), the note consists of a dissenting opinion of the chief justice, concurred in by one of the associates. In 24 L.R.A. 859, reference is made to 8 L.R.A. 529, where many authorities are collected. Instead of the early Michigan cases being overruled on the question under consideration, by the case in 101 Mich. 419, 59 N. W. 817, the very case and opinion there criticized, as to the exact point under consid-

eration, has been reaffirmed. As late as Yerkes v. Smith, 157 Mich. page 557, 122 N. W. 223, the case criticized in 101 Mich. 419, 59 N. W. 817, was quoted and reaffirmed, as to the exact point now under consideration. It was there said: "The constitutional immunity from arrest is discussed by the late Mr. Justice Campbell in Robison v. Miner, 68 Mich. 557, 37 N. W. 25: 'So far as arrests are concerned, a similar principle applies. Under our system, we have repeatedly decided, in accordance with constitutional principles as construed everywhere, that no arrest can be made without warrant, except in cases of felony, or in cases of breaches of the peace committed in the presence of the arresting officer. This exception, in cases of breaches of the peace, has only been allowed by reason of the immediate danger to the safety of the community against crimes of violence, and it was confined, even in such cases, to instances where the violence was committed in the presence of the officer. There are not many such cases. The common and statute law provide for very few specified breaches of the peace, and there are none that are not specified. An indictment charging a person as a peacebreaker, and not with any specified crime, would be good for nothing. Assaults and riotous conduct make up the largest part of the list. But there can be no breach of the peace, within the meaning of the law, that does not embrace some sort of violent as well as dangerous conduct. The manifest purpose of this statute is to bring certain things that are not breaches of the peace within that denomination, to avoid the necessity of a warrant. But, as already suggested, the Constitution cannot be so evaded.' "

In a late Michigan case (Tillman v. Beard, 121 Mich. 475, 46 L.R.A. 215, 80 N. W. 248) an opinion by the chief justice says: "Officers are justified in arresting without a warrant, only in cases of felony and breaches of the peace. This is elementary. It is needless to cite authorities."

Counsel also seems to think that the Supreme Court of the United States has departed from the doctrine announced in the case of Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. That court has never departed from the construction of the 4th and 5th Amendments to the Federal Constitution, placed thereon by Judge Bradley in Boyd's Case. It was not departed from in the case of Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370. It was only distinguished by Judge Brown from the case then in hand. It was, as to the point here in question, fully affirmed, and was in part quoted with approval. It has often been quoted and approved, as to its construction of both the 4th and the 5th Amendments, and has never been departed from. See Rose's Notes to that decision. As late as the case of Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, Boyd's Case is accepted and quoted as to the constructions of these Bills of Rights. In that case, the opinion by Justice Day, it is said:

"The history of this amendment is given with particularity in the opinion of Mr. Justice Bradley, speaking for the court in Boyd v. United States, supra. As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England, to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them. . . .

"In the Boyd Case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 How. St. Tr. 1029, Mr. Justice Bradley said (116 U. S. 630): 'The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.'

"In Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, this court in speaking, by the present Chief Justice, of Boyd's Case, dealing with the 4th and 5th Amendments, said (p. 544): 'It was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.'

"The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure to the people their persons, houses, papers, and effects against all unreasonable searches and seizures under the guise of law. . . .

"In Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, this court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. Boyd's Case, supra. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

In the case of South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737, Boyd's Case is approved and quoted, and in addition it is said:

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general, and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply, from generation to generation, to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Scott v. Sandford, 19 How. 393, 426, 15 L. ed. 691, 709: 'It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizens; and, as long as it continues to exist in its present form,

it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day.'

"It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing, in language clear and intelligible, the powers that government was to take. Mr. Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 188, 6 L. ed. 23, 68, well declared: 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.'

"One other fact must be borne in mind, and that is that, in interpreting the Constitution, we must have recourse to the common law."

Another case much relied upon by counsel is that of Baltimore & O. R. Co. v. Cain, 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801. That is a Maryland decision. It construes no statute or ordinance, but merely holds that the legality of the arrest in that case was a question for the jury, where there was evidence to show that the party arrested was drunk and disorderly, on a car full of passengers and ladies. This arrest was perfectly valid at common law; it was, as Mr. Freeman points out in a note, merely turning over the party by the conductor to the police officer. It is thus referred to by Mr. Freeman in a note (84 Am. St. Rep. 688). There is nothing in the Maryland opinion contrary to our holding. In the extended note to the case of State v. Evans, 161 Mo. 95, 84 Am. St. Rep. 669, 61 S. W. 590. Many, if not all, the cases up to that date are referred to, and some of them are quoted with approval. See note in 84 Am. St. Rep. 679.

In Wisconsin, it was decided that an arrest by an officer, without a warrant, for a misdemeanor not committed in his presence, was illegal, even if there was an ordinance attempting to authorize such an arrest. Stittgen v. Randle, 99 Wis. 78, 74 N. W. 536.

In an Illinois case that court said: "A city marshal or other police officer has no power to arrest for a misdemeanor or a violation of an ordinance, unless the offense is actually committed; and when called upon to justify the arrest he must be able to show the offense was committed in his presence. Shanley v. Wells, 71 Ill. 78; North v. People, 139 Ill. 81, 28 N. E. 966; Lynn v. People, 170 Ill. 527, 48 N. E. 964; Wice v. Chicago & N. W. R. Co. 93 Ill. App. 266. In an action for trespass and false imprisonment, probable cause and the absence of malice constitute no defense. There must be an existing legal cause for the arrest, and that cause must be a law violated. Such a form of action must be distinguished from an action for malicious prosecution. Hight v. Naylor, 86 Ill. App. 508; Johnson v. Von Kettler, 84 Ill. 315; Shanley v. Wells, 71 Ill. 78; Coffman v. Burkhalter, 98 Ill. App. 304. In this form of an action, belief in the guilt of the party arrested, no matter how strong or well founded in the mind of the officer or person making the arrest, will not justify the deprivation of another of his liberty." Markey v. Griffin, 109 Ill. App. 219.

The Illinois case cited by counsel (254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913B, 1058) only holds that a statute may authorize a conductor to arrest persons who are drunk or

boisterous on the train. There, the offense was committed in the presence of the officer whom the statute authorized to make the arrest. Counsel cites 1 Bishop, Crim. Proc. 167, 168. This authority is against the insistence of counsel, and holds with the opinion. Mr. Bishop, after stating specific cases in which arrests as for misdemeanors can be made without warrant, says: "After the tumult is over, with no prospect of its renewal, it is too late to interfere without judicial process. And other past misdemeanors are within the same rule, namely, that a private person, or even an officer, cannot, without a warrant, arrest one for a misdemeanor committed on an occasion already passed." I Bishop, Crim. Proc. §§ 166, 167, p. 94.

Then, after enumerating the officers who may make arrests, this author says:

"For a past offense below felony, none of these officers can arrest without a warrant; unless, for example, it is an assault liable to end in felony by the death of the injured person." [§ 180.]

ANNOTATION.

Constitutionality of statute or ordinance authorizing an arrest without a warrant.

I. Introductory, 585.
II. Arrests for offenses not committed in presence of the arrester, 587.
III. Arrests in view of offenses, 588.
IV. Miscellaneous, 592.

I. Introductory.

This note does not include cases of ordinances which are not authorized by statute, nor the question as to the statutory power to direct the arrest of a convict who is at large on parole.

Childers v. State (1908) 156 Ala. 96, 47 So. 70, overruled in the reported case (EX PARTE RHODES, ante, 568) is there sufficiently referred to.

There is no substantial dispute that arrests without warrant may be authorized by statute, in cases where such arrests were permitted at common law. In matters of felony there seems to be no substantial difference of opinion. As to the common law in regard to offenses less than felony very few of the old cases are precise on the subject.

A constable could not commit, for a breach of the peace done out of his sight. Sharrock v. Hannemer (1595) Cro. Eliz. pt. 1, p. 375, 78 Eng. Reprint, 622. There was no power to arrest after the affray was over. Cook v. Nethercote (1835) 6 Car. & P. (Eng.) 741. In Reg. v. Tooley (1861) 2 Ld. Raym. 1296, 92 Eng. Reprint, 349, Holt, Ch. J., said: "A constable cannot arrest, but when he sees an actual breach of the peace, and, if the affray be over, he cannot arrest." An officer, however, might arrest without warrant, to prevent an immediate breach of the peace. Knot v. Gay (1774) 1 Root (Conn.) 66; see also Quinn v. Heisel (1879) 40 Mich. 576.

It has been stated that in cases less than a felony an arrest could only be made without warrant, where there was a breach of the peace in the presence of the person arresting. Butolph v. Blust (1871) 5 Lans. (N. Y.) 84; Burroughs v. Eastman (1894) 101 Mich. 419, 24 L.R.A. 859, 45 Am. St. Rep. 419, 59 N. W. 817.

"An arrest without warrant has never been lawful, except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in the presence of the officer." Stittgen v. Rundle (1898) 99 Wis. 78, 74 N. W. 537, quoted in Gunderson v. Struebing (1905) 125 Wis. 173, 104 N. W. 149.

"The limits to the power of arrest by a constable, without process, was well defined at common law. . . . To prevent the escape of a felon, he had authority to arrest anyone whom he reasonably suspected to have been engaged in the perpetration of a felony. To prevent breaches of the

peace, he had the right to arrest any person who was engaged in, or in his presence threatened to engage in, an affray or other breach of the peace. Beyond this, the law did not allow him to exercise the function of determining whether there was a sufficient case of the violation of a law to justify an arrest." Reed, J., in Newark v. Murphy (1878) 40 N. J. L. 145.

Probably the foregoing statement from Newark v. Murphy is in accord with the weight of American opinion, but the matter is not entirely free from doubt. Thus, while a statute empowered a watchman to arrest suspicious nightwalkers (2 Hale, P. C. 89), it was held in Wheelhorse's Case (1627) Poph. 208, 79 Eng. Reprint, 1297, that, by the common law, every man might arrest a common nightwalker; see also Miles v. Weston (1871) 60 Ill. 361. (The original idea of the arrest of nightwalkers was to prevent felony; see Miles v. Weston (Ill.) supra, but "streetwalkers" seem to have been considered as breakers of the peace. Rex v. Bootie (1759) 2 Burr. 864, 97 Eng. Reprint, 605). It was held in Holyday v. Oxenbridge (1631) Cro. Car. 234, 79 Eng. Reprint, 805, that it is not trespass for a private person to arrest one who cheats him by means of false dice, he being a common cheater, as it is pro bono publico to stay such offenders.

It may be noted that, by Statute 17 Geo. II., vagrants might be apprehended by any person.

There are other cases which consider that the common-law power to arrest on view, for offenses less than felony, is not confined to breaches of the peace, and this, perhaps, is meant by Fish, Ch. J., in Westberry v. Clanton (1911) 136 Ga. 795, 17 S. E. 338, where he states that, at common law, a public officer could not lawfully arrest, without a warrant, for an offense not a felony, when not committed in his presence, except that, by statute, a watchman might arrest a suspicious nightwalker. So, it has been considered that at common law an officer might arrest without a warrant, for disorderly conduct in his presence. Johnson v. Americus (1872) 46 Ga. 80 (infra). And that there was inherent power in a constable to arrest for a nuisance committed in his presence. State v. Freeman (1882) 86 N. C. 683 (infra).

Generally, the matter of the validity of granted powers of arrest without warrant has arisen in cases where the question was whether an officer may arrest, without warrant, for an offense committed in his presence, which is not a felony or breach of the peace, or in cases where the question was whether he may so arrest for a like offense not committed in his presence. The doctrine of the reported case (Ex Parte Rhodes, ante, 568), that arrests without warrant cannot be made on suspicion of misdemeanors, is worthy of general acceptance, whether it be grounded upon the search and seizure clause, or upon the clause requiring due process of law. As to statutes permitting arrests without warrant, on view for misdemeanors other than breaches of the peace, while there is no doubt that the liberty of the citizen has been grievously abused by means of them, it is clear that many of such offenses, as, for example, violations of health orders, require immediate arrest.

It may be said, in limine, that it is generally held that the search and seizure clauses of our Constitutions do not refer to arrests without warrant. North v. People (1891) 139 Ill. 81, 28 N. E. 966; Clark v. Hampton (1915) 163 Ky. 698, 174 S. W. 490; (obiter); O'Malley v. Whitaker (1907) 118 La. 906, 43 So. 545; Burroughs v. Eastman (1894) 101 Mich. 419, 24 L.R.A. 859, 45 Am. St. Rep. 419, 59 N. W. 817; Mayo v. Wilson (1817) 1 N. H. 53; Wakely v. Hart (1814) 6 Binn. (Pa.) 316; Com. v. Krubeck (1899) 23 Pa. Co. Ct. 35; Jacobs v. State (1889) 28 Tex. App. 79, 12 S. W. 408; Crippen v. State (1916) — Tex. Crim. Rep. —, 189 S. W. 496; Re Powers (1853) 25 Vt. 261. (The Alabama cases of Williams v. State (1870) 44 Ala. 41, and Ex parte Thomas (1893) 100 Ala. 101, 13 So. 517, are sufficiently dealt with in Ex Parte Rhodes.)

Contra: Re Kellam (1895) 55 Kan. 700, 41 Pac. 960 (infra); Ex Parte

RHODES. See also State v. Byrd (1905) 72 S. C. 104, 51 S. E. 542 (infra); and Jamison v. Gaernett (1874) 10 Bush (Ky.) 221 (infra).

II. Arrests for offenses not committed in presence of the arrester.

It will be seen that in EX PARTE RHODES it is held that statute and ordinance, permitting a policeman to arrest without warrant, on the mere verbal request of a citizen, for a violation of an ordinance not involving a breach of the peace, are unconstitutional and void.

In Bessemer v. Eidge (1909) 162 Ala. 201, 50 So. 270, it was held that an ordinance attempting to prohibit the keeping of any spirituous liquors, and providing for the arrest of any and all persons suspected of violating such ordinance, with or without warrant, is void as regards such clause, and a warrant issued on an affidavit that the affiant had "good cause to believe" is not the equivalent of "probable cause for believing," required by statute, and is not in accord with the Bill of Rights, providing that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation.

Re Kellam (1895) 55 Kan. 700, 41 Pac. 960, is fully dealt with in EX PARTE RHODES, and it will be seen that it was there held that a statute giving authority to arrest on suspicion of a misdemeanor was against the search and seizure clause of the Constitution.

In O'Malley v. Whitaker (1907) 118 La. 906, 43 So. 545, where the court seemed to consider that there was reasonable probable cause to suspect the person arrested, of conspiracy to commit felony, it was held that the statute authorizing an arrest, with or without a warrant, did not violate the article of the Constitution, referring to search warrants, but the court said further: "Taken in its broadest view, the law might be taken, in an extreme case, to violate article 2, which ordains that no person shall be deprived of liberty, except by due process of law. If an arrest is unjustly and arbitrarily made, it is an illegal and criminal act, and in violation of the Constitution, which the law (Act 1904, No. 32, p. 43) would not protect. It follows that, under reasonable conditions, the law is constitutional."

In Pinkerton v. Verberg (1889) 78 Mich. 573, 7 L.R.A. 507, 18 Am. St. Rep. 473, 44 N. W. 579, also fully dealt with in the reported case (EX PARTE RHODES, ante, 568) it will be seen that it was held that a mere suspicion that a woman is plying the vocation of a streetwalker will not justify her arrest without a warrant and that any statute or ordinance to the contrary was unconstitutional.

In Jamison v. Gaernett (1874) 10 Bush (Ky.) 221, it was held that a provision of a city charter, providing that "policemen may, with or without a warrant, arrest persons guilty of offenses against the laws or ordinances of the city," did not authorize a policeman to arrest without warrant, on being informed of an assault, when the general statute authorized a peace officer to make an arrest without a warrant, "where a public offense is committed in his presence, or where he has reasonable grounds for belief that the person arrested has committed a felony." The court stated that they did not regard the charter provision as necessarily conflicting with the general law, and went on to say: "But, if we did so construe it, we should hesitate to decide that it was not an infringement of the constitutional guaranty of security to the people, 'in their persons, houses, papers and possessions, against unreasonable seizures and searches.'"

On the other hand, in Jacobs v. State (1889) 28 Tex. App. 79, 12 S. W. 408, it was held that a statute providing that a person who has violated the law by unlawfully carrying arms may be arrested without warrant by any peace officer, (upon his knowledge or) upon information of some credible person, was not in conflict with the provision of the Texas Constitution as to searches and seizures, or with any other provision of it. Followed in Ex parte Sherwood (1890) 29 Tex. App. 334, 15 S. W. 812.

In Com. v. Marcum (1909) 135 Ky. 1, 24 L.R.A.(N.S.) 1194, 122 S. W. 215, it was held that providing for the arrest, without warrant, of one guilty of uttering obscene or profane language, or of behaving in a boisterous or riotous manner, on a passenger train, to the annoyance of other passengers, by a peace officer, at the first stopping place, is not unconstitutional as an unlawful seizure, as it is reasonable thus to protect the public.

In State v. Hancock (1898) 73 Mo. App. 19, it was held that the common-law limitation on a sheriff, constable, or police officer, to make an arrest for a past offense of a grade lower than a felony, without a warrant, unless the offense was committed in his presence or within his view, was enlarged by the statute giving to police officers of the city of St. Louis, power and authority to make arrests without warrant, for offenses below the grade of felony. In this case, the arrest was for and just after an alleged breach of the peace committed in a schoolhouse, and was made by officers who were informed of the offense by the principal of the school.

In Hanser v. Bieber (1917) 271 Mo. 326, 197 S. W. 68, it was held that a statute authorizing the police boards in certain cities, through the instrumentality of the police force, to prevent crime and arrest offenders, authorized a police officer within the jurisdiction to arrest for a misdemeanor not committed in his presence, provided he had reasonable ground to suspect the offense had been committed; but in the case cited it was held that the officer had not reasonable grounds.

In Loggins v. Southern R. Co. (1902) 64 S. C. 321, 42 S. E. 163, it was held that the conductor of a train, having, by statute, the common-law powers of a constable to make arrests, rightly arrested, without warrant, the plaintiff, who, having been put off the train for disorderly conduct, as the train moved off threw rocks and struck the conductor, and, the train having been stopped again for the purpose of apprehending the plaintiff, he again boarded it, and, while sitting in the car, was arrested by the conductor.

It may be noted that if an officer sees an affray and calls other officers to his assistance, and the actual arrest is made after the affray is over, such an arrest is permissible without a warrant. Main v. McCarty (1854) 15 Ill. 441.

III. Arrests in view of offenses.

In North v. People (1891) 139 Ill. 81, 28 N. E. 966, where an arrest, or an attempted arrest, for carrying concealed weapons, was in question, the statute provided that "an arrest may be made by an officer or by a private person, without warrant, for a criminal offense committed or attempted in his presence." The court said that the search and seizure clause "has application only to warrants. It does not abridge the right to arrest without warrant, in cases where such arrests could be lawfully made at common law before the adoption of the present Constitution." The court also referred to the due process of law clause, and stated that it had been held in some states that arrests shall not be made without a warrant, except for a felony and breaches of the peace committed in the presence of the arresting officer, while in other states an arrest might be made for misdemeanors generally, committed in the presence of the officer making the arrest, and said further: "We have no hesitation in saying that it is within the principles of the common law, in force in this state at and before the adoption of this provision of the Constitution, to allow arrests to be made by sheriffs, constables, and other like officers, for such misdemeanors committed in their presence as cannot be stopped or redressed except by immediate arrest. . . . Carrying concealed weapons is made a misdemeanor by § 56. . . . It belongs to the class of offenses denominated 'breaches of the peace,' and it is obvious that, unless there be power to arrest presently upon knowledge of the offense, the purpose of the statute, that of preventing bloodshed, might often be defeated. While the

officer is preparing an affidavit and obtaining a warrant, the offender may meet his victim and accomplish his purpose of violence. The offense is a continuing one." But the judgment was reversed on other grounds.

The constitution does not prohibit a seizure without warrant where there is no need of a search and where the contraband matter is open to the eye and the hand, and a statute authorizing police officers to arrest without warrant for any freshly committed crime authorizes them to arrest persons openly committing the crime of unlawfully transferring intoxicating liquor and is not unconstitutional. State v. Quinn (1918) — S. C. —, 97 S. E. 62.

An ordinance which authorizes certain police officers, between the rising and setting of the sun, to enter any bakehouse, shop, storehouse, etc., where bread is kept, and stop and detain all bakers carrying bread for sale, to examine whether the same is marked, and ascertain the weight thereof, and, in case it is unstamped, or wanting in weight, or not baked according to the ordinance, to conduct the offender before the recorder, there to be dealt with, is no violation of article 6 of the amendments to the Constitution of the United States (Guillotte v. New Orleans (1857) 12 La. Ann. 432), as that article applies to officers of the United States government. [Probably article 4 is intended.]

In Tarantina v. Louisville & N. R. Co. (1912) 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913B, 1058, the court sustained the validity of a statute authorizing railroad conductors to arrest without process, any person who violated a provision of the statute which inflicted a punishment upon any person who shall drink any intoxicating liquor, or shall be intoxicated, in or upon any railroad car, the plea being that the plaintiff drank intoxicating liquor on the car. The court said: "The passenger is not deprived of due process of law nor is his arrest unconstitutional. He cannot be convicted or punished, except upon trial in the usual way. The right of an officer or private citizen to arrest without a warrant under certain circumstances has always been recognized at common law, and is regulated in this state by statute. The act in question extends that right, and such extension is not unreasonable in view of the fact that the enforcement of the act without such power would be practically impossible. The person arrested must be immediately delivered to an officer for trial in the county in which the offense was committed."

In Roddy v. Finnegan (1875) 43 Md. 490, where a person was arrested for violating an ordinance of the city, prohibiting placing a horse and wagon on the sidewalk, the court said that police officers "have the power to prevent the commission of crime, and to arrest and detain offenders for hearing, without warrant, wherever other police officers can do so by the common law; that is, where the offense, whether by the common law, by statute, ordinances of the city, or police regulation, is committed within their view, it is their duty to do so."

In Mitchell v. Lemon (1870) 34 Md. 176, it was held that policemen of a city which has power to provide for the preservation of the public health have a right to arrest, without warrant, those found violating regulations of the city board of health, whether they consist of common law nuisances or not.

Mason v. Lothrop (1856) 7 Gray (Mass.) 354, was an action for assault and false imprisonment in seizing and carrying away a large quantity of intoxicating liquors. The defendant, who was a constable, arrested plaintiff on the ground that he was driving with a quantity of intoxicating liquors, which he was illegally transporting from place to place. The court, without discussion, stated that the point of the constitutionality of the section in question was settled by this court in Jones v. Root (1856) 6 Gray (Mass.) 435.

The question of arrest was not directly in issue in Jones v. Root (Mass.) supra, which was an action for the taking and conversion of a pair of horses, wagon, and harnesses, the

statute providing that "any mayor, alderman, selectman," etc., "in his city or town, may, without a warrant, arrest any person or persons whom they may find in the act of illegally selling, transporting or distributing intoxicating liquors, and seize the liquors," etc. It appeared that the son of the plaintiff, while driving, was seized without warrant, the property also being seized. The court stated and held, without discussion, that the statute which authorized the seizure of liquors was not unconstitutional, saying also that the law was correctly stated to the jury. The trial court, inter alia, charged the jury that the defendant had a right, without warrant, to arrest the driver.

In Burroughs v. Eastman (1894) 101 Mich. 419, 24 L.R.A. 859, 45 Am. St. Rep. 419, 59 N. W. 817, it was held that it was error to instruct the jury that the legislature had not the power to authorize an arrest for an offense not amounting to a breach of the peace, without warrant, if committed in view of the officer, the majority opinion of the court, in that case, considering that the language in Robison v. Miner (1888) 68 Mich. 549, 37 N. W. 21, quoted in the reported case (EX PARTE RHODES, ante, 568), bearing that construction, was not necessary to its examination of the question therein involved, and should not be followed. But see the opinion in Yerkes v. Smith (1909) 157 Mich. 557, 122 N. W. 223, quoted in EX PARTE RHODES (in the Yerkes Case, however, the question was not directly in issue).

In State v. Cantieny (1885) 34 Minn. 1, 24 N. W. 458, 6 Am. Crim. Rep. 418, it was held that a statute authorizing a police officer to arrest, without a warrant, for a public offense committed or attempted in his presence, includes all such violations of municipal ordinances as are punishable by fine or imprisonment, although the offense does not amount to a breach of the peace; but the fact was that the arrest was the capture, in that case, of a person somewhat intoxicated, noisy, and disorderly.

A statute authorizing officers forcibly to stop and detain any person they shall suspect of traveling unnecessarily on the Lord's Day is not contrary to the constitutional provision that no subject shall be arrested, but by the law of the land, as the statute is the law of the land. Mayo v. Wilson (1817) 1 N. H. 53.

In O'Connor v. Bucklin (1879) 59 N. H. 589, the court sustained a charge to the jury, based upon the statute that any officer, upon view of any crime or breach of the peace or offense against the police of towns, may arrest the offender and forthwith carry him before the proper court or justice to answer for the offense, where the person arrested was charged with violating an ordinance of the city; but the nature of the ordinance does not appear.

In Early v. State (1906) 50 Tex. Crim. Rep. 344, 97 S. W. 82, it was held that a town had the authority, under the Constitution and laws of Texas, to authorize the arrest by an officer, without warrant, or one found drunk in a public place.

In Crippen v. State (1916) — Tex. Crim. Rep. —, 189 S. W. 496, where one accused of assault claimed that the officer whom he assaulted had arrested him a number of times out of malice, the court said: "Our Constitution (§ 9, art. 1) guarantees: 'The people shall be secure in their persons . . . from all unreasonable seizures. . . . ' Our law has all the time, and especially since our Codes were adopted in 1856 (arts. 259–263), expressly authorized arrests by peace officers in a great many instances, without warrant, and expressly authorized municipal corporations to establish rules, authorizing arrests without warrant in a great many instances. These statutes have uniformly been sustained by all the courts as constitutional."

In State v. Byrd (1905) 72 S. C. 104, 51 S. E. 542, the statute provided that a magistrate might arrest without warrant, if necessary, any person who, in his view, shall perpetrate any crime or misdemeanor whatsoever, and the statute relating to the Liquor Laws provided that any person detected

openly in the act of violating any of the provisions of this chapter shall be liable to arrest without a warrant. There was evidence tending to show that the defendants killed the magistrate who was attempting to arrest them while they were perpetrating, in his view, the crime of transporting contraband liquor from one place to another within the state. The court said: "Under § 16 of article 1 of the state Constitution, which protects the citizen from unreasonable seizure of his person and property, there is, no doubt, a limit to the power of the general assembly to authorize arrest of the citizen without warrant; but we do not think that limit has been reached when an officer is required to arrest without warrant, one whom he discovers in the act of violating the criminal law. . . . Common-law exceptions to the general rule were based on the principle that the ordinary right of exemption from arrest, except upon warrant, should yield to public necessity. Without such exceptions, the due administration of the law would be vitally impaired. As long as exceptions additional to those fixed by the common law fall fairly within the principle from which the common-law exceptions arose, they are not subject to constitutional objection. To hold that the legislature has no power to prevent crime by requiring an officer to arrest the person actually committing it, without waiting to procure a warrant and thus allow time for the complete perpetration, would, in many cases, lead to the practical result that, though the state may punish the criminal, it cannot arrest the perpetrator of the crime by laying its hand instantly on the criminal, while in the criminal act."

In Re Powers (1853) 25 Vt. 261, the court sustained the statute that provided that, whenever any person shall be found in such a state of intoxication as to disturb the public or domestic tranquility, any sheriff, etc., may without warrant and it is hereby made their duty to apprehend such person so intoxicated. The court held that the "search and seizure" clause did not prohibit arrests without warrant, when delay would be perilous, and said: "It seems to me that 'public and domestic tranquility' means nothing more than the public peace. The public peace is made up of the aggregate of individual peace, and domestic peace is nothing more than a subdivision of the one and the aggregation of the other. One cannot lawfully disturb the quiet of domestic life by that same kind of offensive and tumultuous carriage which would anywhere constitute a breach of public peace, although no one but the family of which he is a member is present."

Sometimes the court has considered the offense as falling within the common-law powers of arrest without warrant.

Thus, where a person was acting in a disorderly manner in the presence of an officer who arrested him for disorderly conduct, without a warrant, it was held that the ordinances of the city permitting this were valid. The court stated that the Code authorizes an arrest to be made by an officer or private person, without a warrant, when the offense is committed in his presence and there is likely to be a failure of justice for want of an officer to issue a warrant, and that the provision in the Code upon this subject "is nothing more than the affirmance of the principles of the common law." Johnson v. Americus (1872) 46 Ga. 80.

So, where the statute provided that the town constable should have within the town all powers of a constable in the county, who may enforce the ordinances and regulations of the commissioners as they may direct, the police officer arrested persons found helplessly drunk, in violation of a town ordinance which declared that such an act was a nuisance, and it was held not a false imprisonment and assault. State v. Freeman (1882) 86 N. C. 683, where the court considers the power inherent.

Illustrations.

The following cases, while not discussing the validity of statutes, may be cited as illustrations.

Ordinances authorized by statute may give power of arrest without warrant, in the case of one prostrated on the sidewalk with drunkenness. Scircle v. Neeves (1874) 47 **Ind.** 289.

So, in Pratt v. Brown (1891) 80 **Tex.** 608, 16 S. W. 443, the court considered that the Texas statutes authorized the arrest, without warrant, in a railroad station, of a person intoxicated there, but apparently not noisy.

So the courts have held that statutes authorized arrest without warrant:

—for cruelty to animals. Davis v. American Soc. (1878) 75 **N. Y.** 362; Broadway & E. S. Stage Co. v. American Soc. (1873) 15 Abb. Pr. N. S. (**N. Y.**) 51; Butolph v. Blust (1871) 5 Lans. 84, 41 How. Pr. 481 (statute and ordinance, obiter);

—for ball playing on Sunday. Re Rupp (1898) 33 App. Div. 468, 53 **N. Y.** Supp. 927;

—for carrying a concealed weapon. Ballard v. State (1885) 43 **Ohio** St. 340, 1 N. E. 76, 5 Am. Crim. Rep. 36 (stating that the statute enlarged the common law).

Where the statute provides that the mayor, marshal, and watchman of a city may, upon view, arrest any person or persons who may be guilty of a breach of the ordinances of a city or of any crime against the laws of the state, it is held that a policeman has a right to arrest without a warrant, one whom he saw violating an ordinance that no person shall sell, offer, or expose for sale, at public auction or outcry, upon any of the streets, etc., in the city, any goods, wares, merchandise, etc. White v. Kent (1860) 11 **Ohio** St. 550.

Where the charter of a city gave it authority to pass ordinances requiring arrests to be made for all violations of law without warrants, and it passed such ordinances as to policemen, a policeman was held entitled to arrest without a warrant, a person whom he saw in a railroad car, riding without a ticket and without paying his fare, in violation of an ordinance. Gulf, C. & S. F. R. Co. v. Kriegel (1918) — **Tex.** Civ. App. —, 204 S. W. 1071.

IV. Miscellaneous.

In Roberts v. State (1851) 14 **Mo.** 138, 55 Am. Dec. 97, the court seems to have been of the opinion that an ordinance directing arrests, without a warrant, for vagrancy, were legal.

In Judson v. Reardon (1871) 16 **Minn.** 431, Gil. 387, it was held that an ordinance which provided that all persons who, at a fire, shall refuse to obey any order or direction by any person duly authorized to order or direct, shall be punished, etc., and that any member of the common council may arrest and detain such person in his custody until such fire is extinguished, is unconstitutional, the reason of the decision apparently being on account of the detention.

The three following cases, while beyond the scope of this note, may be here referred to.

An ordinance permitting an arrest, without a warrant, on a violation of an ordinance of a corporation, is invalid, in so far as inconsistent with the statute providing the cases in which arrests may be made without a warrant. Pesterfield v. Vickers (1866) 3 Coldw. (**Tenn.**) 205.

There was no authorizing statute in the two following cases:

In State v. Hunter (1890) 106 **N. C.** 796, 8 L.R.A. 529, 11 S. E. 366, where it was held that an ordinance providing that a person may be arrested and taken, without warrant or hearing, to the station house, because he refuses to "move on," and, in the opinion of an officer, "unreasonably persists in remaining, so as to incommode others passing, "violates a constitutional provision that "no person should be taken, imprisoned . . . or in any manner deprived of his life, liberty or property, but by the law of the land."

A municipal ordinance which attempts to authorize an arrest without a warrant, of persons suspected of having committed misdemeanors generally, is invalid. Gunderson v. Struebing (1905) 125 **Wis.** 173, 104 N. W. 149, where the court quoted from Stittgen v. Rundle (1898) 99 **Wis.** 78, 74 N. W. 537, as follows: "An arrest without warrant has never been law-

ful, except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in the presence of the officer."

B. B. B.

COLEMAN S. BOYD et al., Plffs. in Err.,

v.

W. A. WRIGHT, Insurance Commissioner, et al.

Georgia Supreme Court—July 9, 1918.

(— Ga. —, 96 S. E. 388.)

Insurance — priority of claims.

1. In the distribution of the assets of an insolvent insurance company, the general rule is that all creditors are upon an equal basis; and this rule applies as between all classes of policyholders.

(a) There is nothing in the present case to take it out of the general rule.

(b) Holders of policies, who are suing for "death claims," are not entitled to priority of payment out of the assets of the insolvent corporation over living policyholders in the same corporation.

[See note on this question beginning on page 598.]

Same — insolvency — claims on policies.

2. Where a life insurance company is adjudged insolvent, the claims existing in behalf of its policyholders are in the nature of damages for a breach of the contract, which occurs at the date of the dissolution of the company.

Headnotes by HILL, J.

ERROR to the Superior Court for Fulton County to review a judgment in favor of petitioner in a proceeding for the distribution of the assets of an insolvent insurance company. *Reversed.*

Statement by **Hill, J.**:

From the record in this case it appears that William A. Wright, as insurance commissioner of the state of Georgia, and, as such, being in charge of the assets and affairs of the Empire Life Insurance Company, in liquidation, presented to the superior court a petition, with amendments thereto, asking for direction, etc. The allegations were substantially as follows: He had filed a statement showing the then present value of the outstanding admitted death claims against the estate of the Empire Life Insurance Company, including those claims based upon annuity policies or assumed by the Empire Life Insurance Company. Since that statement one or more death claims have been adjudicated against the Empire Life Insurance Company. Plaintiff as insurance commissioner has in his hands an additional sum of money sufficient to authorize, in his opinion, the disbursement of not less than $20,000 and not more than $25,000, to the outstanding claims, as ascertained at a time hereinbefore referred to (in original petition), and which have received payment amounting to 50 per cent, including in the amounts those claims which have been adjudicated against or admitted by the Empire Life Insurance Company since the above-mentioned statement. It is to the interest of the estate that it be allowed to make distribution to the death claimants, and that petitioner be allowed to do all things necessary and proper to be done to perfect and accomplish the payment. Petition-

er also desires to make compensation to counsel of record for services rendered since the last allowance by the court. All the persons at interest in this estate have been made parties by representation. This includes all creditors, policyholders, persons having death claims and annuity claims, and all other persons at interest. The prayer is for an order or decree to carry into effect the purposes of the petition.

The petitioner also answered the intervention of certain creditors of the Empire Life Insurance Company, and admitted that the interveners occupy the relation of creditors to the company, but denied that they were entitled to preference in the distribution of the assets of the company because of any of the matters or things alleged by them to exist. It was also averred that the Empire Mutual Annuity & Life Insurance Company was organized as an assessment life insurance company under the laws of this state. The charter of the company was granted on November 10, 1900, and by its charter it was authorized to organize and run an insurance company upon an annuity, mutual, and co-operative assessment plan. Subsequently, on March 2, 1907, the name of the Empire Mutual Annuity & Life Insurance Company was changed to the Empire Life Insurance Company. The corporate entity of the companies was the same. After hearing the case, the court below rendered the following opinion:

"This cause having been set for hearing on the 14th day of April, 1917, on the amended petition for direction filed by William A. Wright, as insurance commissioner of the state of Georgia, in charge of the Empire Life Insurance Company, in liquidation, to make distribution, and all of the persons at interest in said estate having been made parties, either directly or by representation, and said cause having been continued to the 28th day of April, and the matter of priority of claimants having been specially assigned for that date, and the hearing upon said matter of priority of claimants having been heard on that date, and having been continued from time to time since that time, all of the parties at interest having been given opportunity to be heard, and such of them as desired to be heard having been heard, it is now ordered, adjudged, and decreed as follows:

"(1) There have been two insurance companies concerned in this transaction. The first corporation was known as Empire Mutual Annuity & Life Insurance Company. This was an assessment company. Its charter was granted on the 10th day of November, 1900, and it was authorized to run an insurance company upon an annuity, mutual, and co-operative assessment plan, and upon an industrial plan. Subsequently, and on the 2d day of March, 1907, the name of the company was changed to Empire Life Insurance Company, and it qualified to do a mutual life insurance business, and was licensed to do such business, and did conduct such business for a period subsequent to March 2, 1907.

"(2) In March, 1911, the present company known as the Empire Life Insurance Company, a stock company, was chartered under the laws of the state of Georgia. The capital stock was $250,000, and on the 2d day of March, 1912, the said stock company entered into a contract of reinsurance of all the risks and liabilities of the said mutual company.

"(3) The stock company sold stock of the par value of $310,790, with premiums of $355,042.55, making a total of $665,832.55. A large amount of this stock was paid for in cash, and other amounts in notes. Much of this stock has been actually paid for. Actions are pending upon many of said notes. The said stock company immediately began to do a life insurance business, writing new policies, taking new risks, and continued so to do until the beginning of litigation in this matter.

"(4) Between the date of March 5, 1912, and May 15, 1915, the said stock company received an income

from the first year's premiums of $282,620.65, all of which said policies were written by the stock company. It received premiums from renewal policies of $1,526,513-.67. Dividends were left to accumulate with the stock company to the extent of $2,664.89, making a total of income from premiums of $1,811,799.21.

"(5) A large amount of the liability of the mutual company was paid by the stock company out of assets which had never been owned by the mutual company, and which had not been contributed by persons who had been stockholders of the mutual company.

"(6) The interveners representing claims based upon policies which have become death claims, which policies were issued by the stock company, assert priority over all claims except death claims; and interveners representing policies which are now death claims which policies were issued by the mutual company, and which are either policies payable in one sum or policies based upon annuities, assert that their claims are superior to all claims, for that the said policies were issued by the mutual company, and that the assets of the mutual company were impressed with these claims in superior right to the policyholders of the said mutual company, who stood in the position which is borne by stockholders in a stock company to assets of that company as against the claims of creditors of that company.

"(7) The court finds that the whole amount of unpaid death claims of all classes, not including contested death claims, is about $133,804.82; that all of the claims were based upon policies issued by the mutual company, except claims aggregating about $14,301.54. Health claims unpaid amount to about $400.

"(8) The court finds that the holders of claims on account of deaths insured against by the mutual company should be paid from the assets of the mutual company prior to the claims of other policyholders on any account whatsoever; and the court further finds that a sum of money has been paid from the assets of the stock company in the satisfaction of death claims based upon policies issued by the mutual company in excess of the amount of the claims now outstanding, and based upon policies issued by the stock company, and for the purpose of equalizing the outlay made by the stock company on account of the liability of the mutual company, as hereinbefore detailed. It is ordered that the said death claims, which are based upon policies issued by the stock company, be and they are hereby given the same right, priority and rank as is here given to the death claims based upon policies issued by the mutual company.

"(9) Future distribution shall be made upon this basis until the said death claims shall have been satisfied.

"(10) It is further ordered that William A. Wright, as insurance commissioner as aforesaid, is authorized and empowered now to distribute from $20,000 to $25,000 upon the basis herein set out; that the said insurance commissioner is authorized to use his discretion as to the amount to be distributed within the limits herein set out. He is authorized and empowered to do all things necessary to be done to carry this order into effect.

"(11) It is further ordered that nothing here contained shall affect advantageously or disadvantageously the claims of living policyholders who hold policies issued by the mutual company as to their rank in the distribution of this estate as against claims of those now in life who hold policies issued by the stock company. Such claims will be passed upon de novo when presented.

"Let this order remain of file twenty days, with right of all parties at interest to file objections; that, if such objections be filed, the court will hear and pass upon the

same as to justice may appertain. "This May 22, 1917."

On June 1, 1917, the order set forth above was amended as follows:

"It is ordered that the judgment and decree entered in this brief [?] on May 22, 1917, which said order, and decree was directed to remain on file for twenty days before becoming final, be and the same is hereby amended, for the purpose of clarifying the meaning thereof, by adding the following clause to the 8th paragraph of said order:

"It is further ordered that death claims upon policies issued by the mutual company and by the stock company be paid out of assets in the hands of said insurance commissioner, whether the same were owned by either the mutual company or the stock company, in priority to and over other claims of policyholders on any account whatsoever; and that such claims, when based upon policies issued by the mutual company, or upon policies issued by the stock company, shall have no priority one over the other, but the said policies shall be paid upon a basis of equality. Payments shall be so made until said policies shall have been paid in full, or until the assets of said estate shall have been exhausted. It is further ordered that this order remain of file, subject to objections until the previous order entered on the 22d day of May, 1917, shall have become effective, and that this order shall not become effective until the said order of May 22d, has become effective, and it shall be effective when the said order of May 22, 1917, is effective, and not before then."

Messrs. **Green, Tilson, & McKinney,** for plaintiffs in error Arnold, et al.:

The assets of the old mutual or assessment company taken over by the stock company under the contract of March 2, 1912, constitute a trust fund in the hands of said stock company, and are impressed with a trust for the benefit of the creditors of said mutual or assessment company, and no part of said assets can be applied to the payment of creditors of the stock company until the creditors of the old mutual or assessment company have been fully satisfied.

Huber v. Martin, 3 L.R.A.(N.S.) 653 and note, 127 Wis. 412, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 Ann. Cas. 400; Ex parte Sav. Bank, 5 L.R.A. (N.S.) 520 and note, 73 S. E. 393, 53 S. E. 614; Jennings, N. & Co. v. Crystal Ice Co. 47 L.R.A.(N.S.) 1058 and note, 128 Tenn. 231, 159 S. W. 1088; Smith Co. v. Austin Co. 143 Ga. 254, 84 S. E. 444; Buckwalter v. Whipple, 115 Ga. 484, 41 S. E. 1010; Beck v. Henderson, 76 Ga. 360; Hightower v. Thornton, 8 Ga. 492, 52 Am. Dec. 412.

Policies issued by an assessment or mutual company, which have matured into death claims, are entitled to payment from the assets of said company before living policyholders are entitled to receive any benefit from the assets of said company.

Mayer v. Atty. Gen. 32 N. J. Eq. 815; Conigland v. North Carolina Mut. L. Ins. Co. 62 N. C. 341, 98 Am. Dec. 89; May, Ins. 4th ed. 1392; Huber v. Martin, 127 Wis. 412, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 Ann. Cas. 400; Failey v. Fee, 83 Md. 83, 32 L.R.A. 311, 55 Am. St. Rep. 326, 34 Atl. 839.

Messrs. **Brewster, Howell, & Heyman** and **Mark Bolding** also for plaintiffs in error.

Messrs. **Robert C. Alston** and **Philip H. Alston,** for defendant in error:

The mutual company, and those who claim under the mutual company, cannot take the consideration received by the stock company without restoring to the stock company that which the stock company has paid for those assets.

Wilkins v. Gibson, 113 Ga. 42, 84 Am. St. Rep. 204, 38 S. E. 374.

No rescission of the contract of March 2, 1912, can be had without making restoration.

Butler v. Richmond & D. R. Co. 88 Ga. 594, 15 S. E. 668; East Tennessee, V. & G. R. Co. v. Hayes, 83 Ga. 558, 10 S. E. 350.

The $100,000 fund should be held to apply first to payment of death losses.

Kelsey v. Cogswell, 112 Fed. 599; Gilbert v. Washington Beneficial Endowment Asso. 21 App. D. C. 344.

Hill, J., delivered the opinion of the court:

Under the pleadings and record

in this case, the question to be determined is whether the "death claimants" are entitled to priority of payment out of the assets in the hands of the insurance commissioner, as against living or continuing policyholders in the stock company—the Empire Life Insurance Company. The decree rendered by the trial judge adjudicated that death claims arising under the mutual and the stock company stood upon the same basis, and no exception was taken to this ruling. It was also held that as between the death claimants and the living policyholders, under both companies, the death claimants are entitled to priority of payment; and this is the question to be considered and decided. Interveners alleged and insisted that the company had breached its contracts by failing and refusing to perform its obligations in accordance with the terms of the policies, and prayed that they might recover damages for a breach of the contracts. The case as made does not call for a decision as to the correct measure of damages on the breach of the contract by the failure of the insurance company. But the question is on the clear-cut issue, made by the record, whether the death claimants are entitled to priority of payment over the living policyholders, as to the funds in the hands of the comptroller general, who is also ex officio insurance commissioner of the state. Under the facts of this case, it seems to us that each class of claimants stands upon the same basis. We see no good reason why a death claimant is entitled to priority over the living policyholders, whose policies have an accrual or cash surrender value of a certain amount. Upon what basis of law, justice, or equity is the one class entitled to priority over the other?

It was insisted by one intervener that she was entitled to priority in payment out of the assets of the mutual company, which were acquired by the stock company under the contract of May 2, 1912, and that the assets were impressed with a trust in the hands of the stock company and should be applied to the claims against the mutual company before any of the assets were to be applied to claims against the stock company. The court found: "That the whole amount of unpaid death claims of all classes, not including contested death claims, is about $133,804.82. That all of the claims were based upon policies issued by the mutual company, except claims aggregating about $14,301.54. Health claims unpaid amount to about $400. That the holders of claims on account of deaths insured against by the mutual company should be paid from the assets of the mutual company prior to the claims of other policyholders on any account whatsoever. And the court further finds that a sum of money has been paid from the assets of the stock company in satisfaction of death claims based upon policies issued by the mutual company in excess of the amount of claims now outstanding, and based upon policies issued by the stock company, and for the purpose of equalizing the outlay made by the stock company on account of the liability of the mutual company, as hereinbefore detailed."

The court then "ordered that death claims upon policies issued by the mutual company and by the stock company be paid out of the assets in the hands of said insurance commissioner, whether the same were owned by either the mutual company or the stock company in priority to and over other claims of policyholders on any account whatsoever, and that such claims, when based upon policies issued by the mutual company, or upon policies issued by the stock company, shall have no priority one over the other, but the said policies shall be paid upon a basis of equality. Payments shall be so made until said policies shall have been paid in full, or until the assets of said estate shall have been exhausted."

In the case of a mutual fire insurance company (Taylor v. North Star Mut. Ins. Co. 46 Minn. 198, 48 N. W. 772) it was held that "all the outstanding policies at the date of the sequestration of its assets must be deemed to stand on the same footing, and the policyholders are entitled only to the surrender value of the same."

The holder of an unmatured life policy is a creditor of the insurance company issuing the policy, and is entitled to share with the other creditors in the assets of the corporation. Any question as to the value of the unmatured policies, and how such values may be ascertained, is not involved in the present suit. When a life insurance company is adjudged insolvent, the claims accruing to its policyholders are in the nature of damages for a breach of contract, which occurs at the date of dissolution of the company, and the damages which may be recovered are the value of the claims at that date. See Fuller v. Wright, 147 Ga. 70, L.R.A.1917E, 1139, 92 S. E. 873; Com. ex rel. Atty. Gen. v. American L. Ins. Co. 162 Pa. 586, 42 Am. St. Rep. 844, 29 Atl. 660. The general rule for the distribution of the assets has been thus stated: "In distributing the assets of an insolvent insurance company, the general rule is that all creditors stand on an equal footing; and this rule applies as between holders of policies of all classes, matured and unmatured, though there are cases giving priority to matured policies in mutual companies. Auditors appointed to distribute the assets of an insolvent life insurance company cannot separate mutual policies from ordinary policies in the distribution, if the company has never preserved a separate fund for the payment of mutual policies." 14 R. C. L. 855 (21); 22 Cyc. 1408 (h); Com. ex rel. Kirkpatrick v. American L. Ins. Co. 170 Pa. 170, 32 Atl. 405; Schloss v. Metropolitan Surety Co. 149 Iowa, 382, 128 N. W. 384.

Insurance—insolvency—claims on policies.

And see note to Boston & A. R. Co. v. Mercantile Trust & D. Co. 38 L.R.A. 97, 103. And we think the above states the general rule correctly. There is nothing in the present case to take it out of the general rule. We think, therefore, that the court erred in giving priority to the "death claims" over the claims of holders of life policies in the stock company.

Same—priority of claims.

Judgment reversed.

All the Justices concur.

ANNOTATION.

Right of policyholder having matured claim to priority over other policyholders in the distribution of assets of insolvent insurance company.

In the reported case (BOYD v. WRIGHT, ante, 593) it is held that, in the distribution of the assets of an insolvent stock insurance company, all creditors, including all classes of policyholders whose policies have a basis, and that holders of "death claims" are not entitled to priority of payment, out of the assets, over living policyholders whose policies have a fixed cash surrender value. This doctrine is supported by the following cases, to the general effect that holders of policies in an ordinary stock insurance company, whose claims matured before the insolvency of the company, have no right to a preference over other policyholders in the distribution of the assets, but that the matured and unmatured claims of policyholders share ratably in such distribution: Re Minneapolis Mut. F. Ins. Co. (1892) 49 Minn. 291, 51 N. W. 921; Relfe v. Columbia L. Ins. Co. (1882) 76 Mo. 594 (decided under law as it existed prior to Statute of 1879, which gave priority to matured policy claims); Re Security L. Ins. & Annuity Co. (1877) 11 Hun (N. Y.) 96, appeal dismissed in (1877) 71 N. Y.

222; People ex rel. Atty. Gen. v. Security L. Ins. & Annuity Co. (1879) 78 N. Y. 114, 34 Am. Rep. 522; Com. ex rel. Kirkpatrick v. American L. Ins. Co. (1895) 170 Pa. 170, 32 Atl. 405; Re International Life Assur. Soc. (1870) L. R. 5 Ch. Eng. 424, 23 L. T. N. S. 38, 18 Week. Rep. 794.

A holder of a fire insurance policy, who has sustained a loss under the policy prior to a fire which renders the insurance company insolvent, is not entitled to a preference in the distribution of the assets of the company, if there has been no specific appropriation of any part of the company's funds to the payment of his loss, prior to the insolvency. Lowene v. American F. Ins. Co. (1837) 6 Paige (N. Y.) 482.

And where the scheme of a benefit association required payment to shareholders at the end of each three and a half year period, of a sum not exceeding ⅛ of the amount named in the benefit certificates, and before the first payment was made the company became insolvent, it was held, in Fraternal Guardians' Assigned Estate (1894) 159 Pa. 594, 28 Atl. 482, that persons whose certificates were more than three and a half years old were not entitled to preference over those whose certificates were under that age, but that all should share pro rata.

Death claims which have accrued, but not become payable, prior to the commencement of proceedings for dissolution of the company, are not entitled to a priority. Re Equitable Reserve Fund Life Asso. (1892) 131 N. Y. 354, 30 N. E. 114.

And there is no priority of claim for a death loss, which occurs but is not adjusted before the appointment of a receiver, over that of policyholders to a return of unearned premium, although the policyholders are entitled to a share in the profits, such right not making them partners, or rendering them members of the company in such a sense as to subject them to liability for its losses. Re Security L. Ins. & Annuity Co. (1877) 11 Hun (N. Y.) 96, appeal dismissed in (1877) 71 N. Y. 222.

If, owing to the impracticable plan upon which an association is founded, it has never been solvent, the holders of certificates which have matured at the time it makes an assignment are not entitled to a preference over the holders of unmatured certificates. Re Order of Tonti (1896) 173 Pa. 464, 34 Atl. 440; Re Order of Tonti (1896) 173 Pa. 487, 34 Atl. 441.

And it was held in Re Youth's Temple of Honor (1898) 73 Minn. 319, 76 N. W. 59, that where an endowment association, organized under statute, failed to accomplish the purposes of its organization and proceedings were instituted against it to wind up its affairs and distribute the assets among its members, the trust fund accumulated for the payment of matured certificates must be distributed pro rata among those whose claims were based upon certificates in the association, without regard to whether they had matured or not.

Where members of a fraternal society contributed to a benefit fund from which, after a certain period, payments were to be made to members on the surrender of benefit certificates, and the purposes for which the fund was accumulated were illegal, it was held that, in the distribution of the fund in the hands of a receiver, members holding matured certificates were not entitled to a preference over other certificate holders, but that each member who contributed was beneficially interested pro rata to the amount of his contribution. Calkins v. Bump (1899) 120 Mich. 335, 79 N. W. 491.

In Guy v. Globe Ins. Co. (1880) 9 Ins. L. J. (Va.) 466, a death loss recognized by the company prior to its insolvency was held not entitled to a preference.

As to the reasons for the rule above indicated, it was said in People ex rel. Atty. Gen. v. Security L. Ins. & Annuity Co. (1879) 78 N. Y. 114, 34 Am. Rep. 522, supra: "The claim is made that the death claims which matured before the dissolution of the company should be paid before the claims of the holders of unmatured policies; and I think this claim was properly disallowed by the referee. Upon the assumption which we have shown to be a

proper one,—that the holders of such policies are creditors of the company—this claim has no basis to rest on. No decision has ever been made, that I can find, giving the preference claimed. The death claimants have no lien, legal or equitable, upon the funds of the company; and, without such lien, they can have no preference. It is the rule of the statute, as well as of equity, that all the creditors of such a corporation, when it becomes insolvent, shall share in its assets in proportion to their claims. . . . The fact that one claim is matured gives it no preference over others not matured. There is nothing in the nature of life insurance that gives the preference. One who has paid his money to carry a policy to maturity has no better right or greater equity than another who has paid his money to carry a policy toward maturity. The holder of a running policy has paid his money not to make a fund to pay death claimants, but for insurance upon his own life. He expects the benefit of the money he has paid, either by receiving the amount insured at the maturity of his policy, or damages for the breach if the company fails to carry his policy to maturity. To the extent of such damage he is on the same footing, legal and equitable, with every other creditor."

But where the reserve fund is dedicated to the payment of reserve certificates to the maximum limit in case of the death of members, the holders of death claims, under such certificates of members who died before the commencement of the action of dissolution, are entitled to have their claims paid in full before any portion of the fund is distributed among holders of unmatured certificates. People ex rel. Atty. Gen. v. Life & Reserve Asso. (1896) 150 N. Y. 94, 45 N. E. 8.

And in Kelsey v. Cogswell (1901) 112 Fed. 599, it was held that in the distribution by a court of equity, in insolvency proceedings, of a fund deposited by a fire insurance company under statute in the state treasury, claims of policyholders who had sustained losses by fire should be preferred over claims for unearned premiums. But this was because of special statutory provisions, which the court regarded as evincing an intention by the legislature that the fund should be security primarily for such losses. The statute provided a method for making the fund available for losses "insured against," and provided that any claims "for losses, or on existing policies where no losses have occurred," must be settled before the withdrawal of the deposit. The court said that the machinery provided for making the fund available was all for the benefit of those who had sustained fire losses, which indicated that this was the main purpose for which the legislature intended that the fund should be available, and that the evident intent of the legislature that the deposits should be held primarily for the protection of policyholders against fire losses was not overcome by the provision requiring the settlement of all claims on policies before withdrawal of the fund from the treasury.

And the right of priority of claims of policyholders which matured before insolvency has generally been sustained in the case of mutual or assessment insurance companies, the theory being that, in such companies, the happening of the contingency which renders the company liable dissolves the mutual contract between the insured and the other members of the company, and makes the beneficiary a creditor of the company, to whom the members become liable as debtors, and that the claims of members should be postponed to those of outside creditors. Thus, in Mayer v. Atty. Gen. (1880) 32 N. J. Eq. 815, the court, in holding that in a mutual insurance company the holders of policies matured at the time of insolvency are preferred creditors, not liable to contribute to losses, took the position that in such a company, after insolvency, the difference between the character of a matured claim and a claim for unearned premium was, in substance, the difference between the claim of an outside creditor against a firm for a debt, and a claim of a member of the firm for his share of the assets; and that, as partners can

claim no part of the partnership assets on a settlement until the partnership debts have been paid, so members of the company when insolvency occurred must be postponed to those who had previously become creditors and ceased to be members.

And in Vanatta v. New Jersey Mut. L. Ins. Co. (1879) 31 N. J. Eq. 15, it was held that claims on policies in a mutual life insurance company, which had matured at the time of the decree of insolvency, were entitled to payment in the order in which they severally accrued, and should not be put on the same footing as the claims of other policyholders for a return of premiums. The court said that the contract of the policyholder whose claim became due was not to bear any part of his own loss; that "when the contingency happened, when the period of payment arrived, the mutuality which, up to that time, had continued, at once ceased. The policyholder whose policy became due thereupon, ipso facto became a creditor. . . . It is urged that the view which I have taken will produce results which are highly inequitable; that the claims of those whose policies, by their terms, became due after the decree of insolvency, are as meritorious as those which became due the day before the decree, and are, in equity, entitled to equal consideration and to like treatment. But the position is untenable. The difference between the cases is that, in the one, the claim was, when the decree was made, the claim of a creditor, and, in the other, there was no claim but that of a member, which was upon the assets, after payment of creditors."

So, in Failey v. Fee (1896) 83 Md. 83, 32 L.R.A. 311, 55 Am. St. Rep. 326, 34 Atl. 839, it was held that the holder of a matured certificate for the payment of a sum of money by a mutual benefit association was a creditor of the association, and, as such, was entitled to priority in payment over unmatured certificate holders, and had a right to attach the fund of the association when insolvent.

And claims of members for benefit, in case of sickness or accident prior to the dissolution of the association, as well as death claims, were held in Baltimore & O. R. Co. v. Baltimore & O. Employers' Relief Asso. (1893) 77 Md. 566, 26 Atl. 1045, to be preferred, and entitled to payment as such in the distribution of the assets.

Also, in Stamm v. Northwestern Mut. Ben. Asso. (1887) 65 Mich. 317, 32 N. W. 710, where a mutual benefit association ceased to do business with a surplus on hand, it was held that all death losses which had accrued at the time of cessation of business were to be paid in full, and the remainder of the assets distributed pro rata among the members then in good standing.

In insolvency proceedings against a fraternal beneficiary corporation, it was said in Atty. Gen. v. Supreme Council, L. H. (1910) 206 Mass. 131, 92 N. E. 134, that beneficiaries named in certificates which matured before the date of the insolvency proceedings had priority in the distribution of the emergency fund.

And it was said, in Re Educational Endowment Asso. (1894) 56 Minn. 171, 57 N. W. 463, as to a mutual endowment association whose policies were to be paid from a fund raised by assessments on the holders of policies, that the rights of the parties were fixed as of the date of dissolution of the association, and, if they were then mature and neither lapse of time nor anything else was required to fix the company's liability, they stood as debts against its assets, and should be paid before the assets were distributed among the members. The decision, however, was on the question whether dissolution arrested the maturing of a policy.

And in the case of an endowment association doing an insurance business by way of assessments levied from time to time, according as deaths occurred, it was held that a death claim, which had accrued prior to the insolvency of the association, and had been reduced to judgment, was entitled to a preference in the distribution of the assets of the association over the claims of other certificate holders. Gilbert v. Washington En-

dowment Asso. (1903) 21 App. D. C. 344. The court said: "The mutual agreement of all the parties was that the claims of those who died first should be paid out of the funds of the association and, directly or indirectly, by the assessments levied upon the survivors. The contingency of death, which made the representative of him who died a creditor of the association, at the same time made the survivors debtors of it to the extent of their assessments. Indirectly the survivors became debtors to the estate of the deceased. . . . It cannot be that, if afterwards the association falls into difficulties and becomes insolvent, these parties who are debtors to the association, so far as . . . [the decedent's] claim is concerned, can require that claim to be prorated with their own indefinite claims, which become matured only by the insolvency of the association. It would be possible that they themselves could cause this insolvency; and yet they would be enabled to take advantage of their own wrong, if thereupon they could be permitted to share equally with those who, by no possibility, could have had a hand in such insolvency."

However, in Re Holme Mut. Aid Asso. (1895) 3 **Ohio** N. P. 145, 4 Ohio S. & C. P. Dec. 272, owners of matured certificates and death claims of a mutual aid association were held not creditors of the association in such a sense as to entitle them to a preference over other certificate owners in dissolution proceedings.

The term "accrued claims" in the Massachusetts statute, providing that when an assessment insurance company discontinued business a receiver might be appointed to administer any unexhausted portion of the emergency fund, which should be used first in the payment of accrued claims upon certificates or policies, and, second, if a balance remained, to the payment of like claims thereafter accruing in the order of their occurrence, was construed in Atty. Gen. v. Massachusetts Ben. Life Asso. (1898) 171 **Mass.** 193, 50 N. E. 520, as including all claims for death occurring before the bringing of suit by the attorney general to wind up the affairs of the company, regardless of whether the claim had previously been proved and allowed by the company. The note does not however, purport to treat this class of questions exhaustively. R. E. H.

D. I. FELSENTHAL COMPANY, FOR USE OF CHARLES R. CARPENTER, Appt.,

v.

NORTHERN ASSURANCE COMPANY, Limited, of London.

Illinois Supreme Court—June 20, 1918.

(284 Ill. 343, 120 N. E. 268.)

Insurance — rights of stockholder — proceeds going to creditor.

1. A corporation cannot recover on a fire insurance policy upon its property because the stock is held by persons not responsible for the setting of the fire which destroyed the property, if it was set by a creditor to whom their stock had been hypothecated as security for his claim, and who will receive all the proceeds of the policy.

[See note on this question beginning on page 610.]

Same — fire set by stockholder — recovery by corporation.

2. A corporation cannot recover on a policy insuring its property against destruction by fire if the property was destroyed by fire set by the beneficial owner of all its stock, who is its manager and will receive all the proceeds of the insurance policy.

Witness — cross-examination — stockholder of corporation.

3. In an action on a policy of fire insurance on property belonging to a corporation the same latitude of cross-ex-

amination should be permitted of a witness who is sole creditor and equitable owner, and will receive the entire proceeds of the policy, as though he was the plaintiff, and also of an interested stockholder who had assisted in causing the property to be burned.

Evidence — insolvency of corporation —action on insurance policy.

4. In an action by a corporation on a policy insuring its property against loss by fire, evidence is not admissible to show the solvency of the corporation, if the fire was set by a creditor of the corporation, who will receive the entire proceeds of the policy in case of recovery, since the claim of the creditor may be set off by the claim of the corporation against him for injuries done it by his act.

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago in favor of defendant in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Landon & Holt and John J. Beilman, for appellant:

No majority of the stockholders, however large, can so sanction a plain misappropriation of the property of a corporation, but that the dissenting views of a single stockholder will frustrate it.

Bagshaw v. Eastern Union R. Co. 7 Hare, 114, 68 Eng. Reprint, 46, 6 Eng. Ry. & C. Cas. 152, 18 L. J. Ch. N. S. 193, 13 Jur. 602; Knickerbocker L. Ins. Co. v. Nelson, 78 N. Y. 137.

A corporation cannot condone the fraud of a director or officer by which the assets of the corporation have been misappropriated, except by unanimous consent of the shareholders; otherwise a majority, or a director who might control a majority vote in the corporation, might rob and despoil it with impunity.

Hazard v. Durrant, 11 R. I. 195; First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646.

Notice is not imputed to a corporation through an agent who is charged with the act of fraud.

Seaverns v. Presbyterian Hospital, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079; Higgins v. Lansingh, 154 Ill. 387, 40 N. E. 362; Cave v. Cave, L. R. 15 Ch. Div. 639, 49 L. J. Ch. N. S. 505, 42 L. T. N. S. 730, 28 Week. Rep. 793; 3 Cook, Corp. p. 2585, § 727; Metcalf v. Draper, 98 Ill. App. 405.

There could be no privity between the alleged incendiary and the insured, and in this case incendiarism is no defense.

Feibelman v. Manchester F. Assur. Co. 108 Ala. 180, 19 So. 540; Henderson v. Western M. & F. Ins. Co. 10 Rob. (La.) 164, 43 Am. Dec. 176.

The wilful burning of the property by a stockholder in the corporation is not a defense against the collection of the insurance; nor could the corporation be prevented from collecting the fire insurance because an agent wilfully set fire to the property, without the participation or authority of the plaintiff company.

Meily Co. v. London & L. F. Ins. Co. 142 Fed. 873, 79 C. C. A. 454, 148 Fed. 683.

Temporary use is not "stored."

O'Niel v. Buffalo F. Ins. Co. 3 N. Y. 122; Springfield F. & M. Ins. Co. v. Wade, 95 Tex. 598, 58 L.R.A. 714, 93 Am. St. Rep. 870, 68 S. W. 977.

The word "allowed" means more than a temporary keeping.

Springfield F. & M. Ins. Co. v. Wade, supra; Clute v. Clintonville Mut. F. Ins. Co. 144 Wis. 638, 32 L.R.A.(N.S.) 240, 129 N. W. 661.

Occasional use of a prohibited article does not avoid a policy.

Westchester F. Ins. Co. v. Foster, 90 Ill. 121; Insurance Co. of N. A. v. Garland, 108 Ill. 220.

The assured only undertakes that gasolene will not be kept upon the premises with its consent, and will use reasonable diligence to prevent it.

Insurance Co. of N. A. v. McDowell, 50 Ill. 131, 99 Am. Dec. 497; Aurora F. Ins. Co. v. Eddy, 55 Ill. 219.

Cross-examination should be confined to the subject-matter of the examination in chief.

Stafford v. Fargo, 35 Ill. 481; Anheuser-Busch Brewing Asso. v. Hutmacher, 127 Ill. 656, 4 L.R.A. 575, 21 N. E. 626; Nagle v. Schnadt, 239 Ill. 595, 88 N. E. 178; Larabee v. Larabee,

240 Ill. 576, 88 N. E. 1037; Royal Neighbors v. Simon, 135 Ill. App. 599; East Dubuque v. Burhyte, 173 Ill. 553, 50 N. E. 1077.

Where evidence of matters not covered by the direct examination is brought out upon cross-examination, and is prejudicial in character, it will constitute reversible error.

Hanchett v. Kimbark, 118 Ill. 129, 7 N. E. 491.

Messrs. **Paden & Kropf**, for appellee:

When the person, who is the beneficial owner of practically all the stock in a corporation, and who has the absolute management and control of its property and affairs, and is its president and a director, sets fire to the property of the corporation, or causes fire to be set thereto, the corporation so owned and controlled by him cannot collect the insurance under a policy covering such property.

Kirkpatrick v. Allemannia F. Ins. Co. 102 App. Div. 327, 92 N. Y. Supp. 466, affirmed in 184 N. Y. 546, 76 N. E. 1098; Meily Co. v. London & L. F. Ins. Co. 142 Fed. 873, 79 C. C. A. 454, 148 Fed. 683.

If gasolene was kept, used, or allowed on the premises, the policy of insurance was void. The fact that such keeping, using, or allowing gasolene to be on the premises was by a tenant, officer, agent, or employee of the assured, and without the knowledge of the assured, does not relieve the assured from the effect of the violation of the policy.

Fire Asso. of Philadelphia v. Williamson, 26 Pa. 196; Kohlmann v. Selvage, 34 App. Div. 380, 54 N. Y. Supp. 230; Worcester v. Worcester Mut. F. Ins. Co. 9 Gray, 27; German F. Ins. Co. v. Shawnee County, 54 Kan. 732, 39 Pac. 697; McCurdy v. Orient Ins. Co. 30 Pa. Super. Ct. 77; Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co. 106 Va. 633, 56 S. E. 584; Kelly v. Worcester Mut. F. Ins. Co. 97 Mass. 284; Wheeler v. Traders' Ins. Co. 62 N. H. 450, 13 Am. St. Rep. 582; Liverpool & L. & G. Ins. Co. v. Gunther, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. Rep. 306; Gunther v. Liverpool & L. & G. Ins. Co. 134 U. S. 110, 33 L. ed. 857, 10 Sup. Ct. Rep. 448; Norwaysz v. Thuringia Ins. Co. 204 Ill. 334, 68 N. E. 551.

The cross-examination of a witness, who is a party in interest, need not be confined to the subject-matter of the examination in chief. The latitude allowed in the cross-examination of witnesses rests largely in the discretion of the trial court, and a cause will not be reversed for alleged improper rulings in that respect, unless such discretion has been clearly abused.

Ray v. Bell, 24 Ill. 444; Hanchett v. Kimbark, 118 Ill. 121, 7 N. E. 491; Brennen v. Chicago & C. Coal Co. 241 Ill. 622, 89 N. E. 756.

Duncan, Ch. J., delivered the opinion of the court:

The D. I. Felsenthal Company, a corporation, brought suit in the municipal court of Chicago, for the use of Charles R. Carpenter, against the Northern Assurance Company, Limited, of London, appellee, on a fire insurance policy, issued in favor of said corporation, appellant. Two defenses were interposed by appellee: (1) That the policy became void because gasolene was kept, used, or allowed on the premises, contrary to the terms of the policy; (2) that said gasolene was fraudulently, knowingly, and purposely ignited by said corporation, its officers, agents, and employees, in such manner as to cause the fire, and for the purpose of causing the fire and destroying the property. The jury found the issues against the plaintiff, and, after overruling the motions for new trial and in arrest of judgment, the court gave judgment for appellee and against appellant. On appeal, the appellate court affirmed the judgment, and the cause comes to this court on appeal on a certificate of importance.

The undisputed facts in this record are that appellant is an Illinois corporation, capitalized at $15,000. The entire capital stock of 150 shares was, up to the fall of 1910, owned in equal portions by David I. Felsenthal and Harry Felsenthal, brothers, and their father, Isaac Felsenthal. The corporation was engaged in the wholesale business of dealing in tailors' clippings, and had its warehouse and assorting rooms in leased buildings located at 902–904 South Morgan street, in Chicago, consisting of a three-story

brick building with a small barn in the rear. In the fall of 1910, appellant was indebted to the Fort Dearborn National Bank in the sum of more than $20,000, and was called on by the bank for the payment of the debt. David I. Felsenthal went to Morris L. Fox, an old friend of the Felsenthal family, a dealer in metal at Racine, Wisconsin, and doing an extensive business with Chicago dealers, and induced him to come to the financial assistance of appellant. An inventory of the property of appellant was taken, and Fox went into the company about December, 1910, as finance man, not pretending to have any particular knowledge of the particular merchandise handled by appellant. Fox did not purchase any of the stock of appellant, but for his financial aid was given half of the stock outright, and the three Felsenthals retained twenty-five shares each, which were assigned in blank and delivered to Fox, as expressed by David I. Felsenthal in his testimony, so that he would have full control, and so he would know just where his money went. Fox took fifty of the shares given to him in his own name, and took the other twenty-five shares in the name of Nate I. Silver, his brother-in-law, who, so far as the record shows, paid nothing for the stock taken in his name. About January, 1912, another inventory of the property of appellant was made. On February 20, 1912, David I. Felsenthal and Harry Felsenthal became connected with B. Cohen & Sons, of Chicago, who were also engaged in the tailors' clippings business, and ceased their active connection with the business of appellant, but continued to be officers of appellant. Shortly before that, D. I. Felsenthal spoke to Fox about going in business with Cohen & Sons, and proposed to Fox that they close up the business of appellant, and sell out the material and stock, and pay Fox the money owed him by appellant, and told him that he thought that Cohen & Sons would pay him whatever the stock was worth; that he (Fox) could get his money out of the concern, and that they could divide up what was left. Fox said that he liked the business and wanted to stay in it; that he had no objection to David and his brother going with Cohen & Sons, but wanted further guaranty of them that he would get his money out of the business. He then required each of the Felsenthal brothers to give him their individual note for $15,000, and that each brother's note be signed by his wife and indorsed by the other brother, and, in addition thereto, he required each of said brothers to assign to him his profits in the business of Cohen & Sons. He also still held as security the seventy-five shares of capital stock in appellant held by the three Felsenthals. On March 7, 1912, about 3 or 4 o'clock A. M., the property of the appellant, consisting of loose and bailed tailors' clippings, was destroyed or damaged by fire. At that time the total amount of insurance on the property of appellant, as found by the appraisers, was $31,500; the total cash value of the property $30,721.42; the total loss and damage $29,471.73; the amount of insurance carried by appellee $1,500; and the amount claimed to be due from appellee on its policy to the appellant was $1,403.42. The amount of sound value and loss and damage was determined by the appraisers largely from information gained from the books of appellant, kept by it before the fire, and shown to have been made up during the course of the business. The officers of appellant, at the time the fire occurred and for some time prior thereto, were: Morris L. Fox, president; Harry Felsenthal, vice president; David I. Felsenthal, treasurer; and Nate I. Silver, secretary. Ben Silver, another brother-in-law of Fox, was shipping and receiving clerk, and kept a record of the goods shipped by and to appellant.

Evidence was produced by appel-

lee in support of its defense, tending strongly to prove, in substance, that Morris L. Fox and David I. Felsenthal, about two months prior to the fire, went to the saloon of Moe Rosenberg, then at the corner of Franklin and Van Buren streets, Chicago, and from there went with Rosenberg into the restaurant adjoining the saloon, and there had dinner. Fox and Felsenthal there told Rosenberg that they were going out of business, and were planning to have a fire at their place. Fox had known Rosenberg from his early boyhood. Rosenberg told them that Ben Fink, who was in the saloon with him, was in the business of firing and destroying buildings and property insured. Rosenberg saw Fink for them and gave them his terms for firing the building and goods in question, to wit, 10 per cent of the amount of insurance that should be collected from the insurance company, $500 thereof to be paid in advance. They told Rosenberg they had $32,000 or $33,000 of insurance; that they had shipped out some of the stock, but had not canceled any of the insurance; and that they did not know whether any of the policies would hold. Rosenberg then told them he would take up the matter with Fink and have Fink take it up with Nathan Spira, an insurance adjuster, and who was at the fire when it occurred, and afterwards appeared as a representative of appellant in adjusting the loss. The burning of the building was agreed to upon said terms, and about ten days later Fox paid Rosenberg $500 advance deposit. Rosenberg afterwards took Fink to the premises of the appellant, and, on looking them over, Fink directed Rosenberg to buy and put into the premises 75 gallons of gasolene. On the afternoon of March 6, 1912, Rosenberg employed a Russian Jew by the name of Machilinsky, an expressman, to buy the gasolene of Bartell Brothers on Plymouth court, and gave him $15 to pay for and deliver the gasolene at the premises of appellant. Accordingly Machilinsky bought and delivered fifteen 5-gallon cans of gasolene at the appellant's premises about 6 o'clock that evening, and Rosenberg assisted in unloading the gasolene and storing it in the building from the rear. Fox was at the building, and was informed that the gasolene was there. Fink entered the building about 1 o'clock that morning, cut open the cans of gasolene, scattered the contents on the first and second floors and upon the bales of clips piled upon those floors, set a time fuse, and left the building. The fuse ignited the gasolene, and a raging hot fire, accompanied by explosions, followed as a result of such ignition early in the morning of the same day.

Rosenberg and Fink were witnesses for appellee, and testified to the above facts. Machilinsky corroborated them as to the buying of the gasolene, and the delivery thereof to Rosenberg at the building. A number of the members of the fire department of Chicago further corroborated their evidence by testifying that they noted a strong odor of gasolene on the first and second floors of the building while assisting in the work of putting out the fire, and also that they found a number of gasolene cans in the building cut open in a manner similar to the way in which Fink testified he had cut and left them. Fox and David I. Felsenthal denied in toto the testimony of Rosenberg and Fink, and all knowledge of the delivery of gasolene at the building by Machilinsky, and all manner of guilty knowledge of the intention of anyone to burn the building. Contradictory statements occurred in the testimony of Fox, Rosenberg, and Fink, and much other evidence was introduced tending to impeach their testimony, and showing clearly that Rosenberg and Fink were very bad characters.

The jury were warranted in finding that the building was destroyed at the instigation of Fox, beyond all reasonable doubt, and that the loss by the fire was the loss of Fox him-

self, as every dollar of the insurance money recovered would ultimately be paid to Fox. This finding is further supported by the evidence of Fox and David I. Felsenthal, whose testimony showed that the corporation owed Fox $30,000 or more, a sum greater than the total loss sustained by reason of the fire. By the affirmance of the judgment of the trial court by the appellate court, that court necessarily found that the building was so destroyed, and that Fox was substantially the entire owner of the goods destroyed, and the opinion of the appellate court so discloses. This court is, therefore, concluded on this appeal as to such finding.

It is true, as contended by appellant, that the general rule of law is that the wilful burning of property by a stockholder in a corporation is not a defense against the collection of the insurance by the corporation, and that the corporation cannot be prevented from collecting the insurance because its agents wilfully set fire to the property, without the participation or authority of the corporation, or of all the stockholders of the corporation. When, however, the beneficial owner of practically all of the stock in a corporation, and who has the absolute management and control of its affairs and property, and is its president and a director, sets fire to the property of a corporation, or causes it to be done, there is no sound reason to support the contention of appellant that the corporation should be allowed to recover on a policy for the destruction of the corporate property by a fire so occasioned. Every principle of insurance law and sound reasoning would seem to be against such contention.

Insurance—fire set by stockholder—recovery by corporation.

The question does not appear to have been heretofore decided by this court. In Kirkpatrick v. Allemannia F. Ins. Co. 102 App. Div. 327, 92 N. Y. Supp. 466, the appellate division of the supreme court held, in substance, that a corporation could not recover, on a state of facts very similar to those occurring in the record now before this court. The corporation insured was the Abbey Press, and the assignee of the corporation sued on the policy. The only issue litigated was as to the origin of the fire, the insurance company claiming that the fire was caused by the insured for the purpose of defrauding the insurance company. Carlos Martin was the president and Charles F. Rideal was treasurer of the insured corporation, the two owning all of the stock, except a sufficient amount to qualify a bookkeeper as secretary. Martin and Rideal, according to the claims of the insurance company acting in conspiracy with and through the instrumentality of Max Hart, had the property insured, and then caused the fire for the purpose of defrauding the insurance companies. The court submitted it to the jury to find for the insurance company only in case they found that the fire was purposely set, with the knowledge or approval of the officers of the Abbey Press. The supreme court found that the finding of the jury in favor of the insurance company was fully warranted, and approved as proper the following charge to the jury: "In weighing the testimony of Mr. Rideal you may consider that he may be deemed a biased and interested witness, and one of the officers of the Abbey Press charged with conspiracy to defraud the insurance companies."

On appeal the court of appeals of New York affirmed the judgment of the supreme court. Kirkpatrick v. Allemannia Ins. Co. 184 N. Y. 546, 76 N. E. 1098.

The circuit court of appeals of the United States for the third circuit followed the case above cited, and held that there could be no recovery by the plaintiff corporation in the case before it, where the verdict of the jury was practically equivalent to a finding that the plaintiff intentionally and fraudulently caused the fire, or knowingly participated in an act of incendiarism upon the stock

and fixtures destroyed. The actual facts found by the jury and by the circuit court of appeals were, that the business of the plaintiff corporation was on the decline to a marked degree; that the lease had nearly expired, and the landlord was unwilling to extend it; that the property was insured in excess of its value; that the plaintiff company was a family corporation; that the business was really George W. Meily's and was carried on in corporate form as a cloak to shield it from his creditors; that the fire was caused by his incendiary act, and that the participation by his sons in the alleged overvaluation of the stock afforded ground from which the jury could infer their acquiescence in the alleged incendiarism. Meily Co. v. London & L. F. Ins. Co. 79 C. C. A. 454, 148 Fed. 683.

In the case at bar it is strenuously claimed by appellant, on behalf of Nate I. Silver and Isaac Felsenthal, that there was absolutely nothing in the record that tended to show in any way that they participated or acquiesced in the burning of the property in question, or had any guilty knowledge of such incendiarism. While that is true, as has already been stated, the court and jury were well warranted in finding that the twenty-five shares in the name of Silver, in fact, belonged to Morris L. Fox, and were only held in the name of Silver for Fox's use and benefit, and to qualify Silver to hold an office in the corporation. The stock of Isaac Felsenthal was assigned to Fox to secure him for the debt owed him by the corporation, which exceeded the total insurance collectable, according to the finding of the appraisers, and according to the contention of appellant. Even if Silver and Isaac Felsenthal are, as contended by appellant, the legal owners of fifty shares of the corporation stock, under the evidence in this record neither of them would receive or be benefited by 1 cent of the insurance money collected, as the debts of the corporation would have to be first paid out of the insurance money, and Fox is the sole creditor of the corporation, is the assignee of all of the other stock in the corporation that he does not actually own, and was, in fact, the equitable owner of all of the property of the corporation, and is the only person who will be benefited financially by the fire. It certainly cannot be said that a corporation can recover on a fire insurance policy, where the property insured is destroyed by a fire at the instance of all of the stockholders and of all of the creditors of the corporation. That is substantially the fact found by the jury as disclosed by this record, as Fox is sole creditor and equitable owner, and the trial court held, and so instructed the jury, that the charge of incendiarism must be proved beyond a reasonable doubt. Fox, then, was really to be considered, when examined as a witness, the same as if he were the insured. The same latitude in cross-examination of Fox was permitted in this case by the trial court as if he were the insured. The court committed no error in so doing. The same latitude of cross-examination was also permissible in the case of David I. Felsenthal, who, according to the evidence, was an interested witness and had assisted in causing the property to be burned. His interest was disclosed by the fact that, should Fox not collect all of his debt against the corporation out of the insurance money, Felsenthal would still be indebted to Fox. The cross-examination of a witness who is a party in interest need not be confined to the subject-matter of examination in chief. Brennen v. Chicago & C. Coal Co. 241 Ill. 610, 89 N. E. 756.

Insurance—rights of stockholder—proceeds going to creditor.

Witness—cross-examination—stockholder of corporation.

We have examined the instructions of the court carefully, and find that they are all substantially correct. The court instructed the jury, in substance, that the provisions of the policy in question, rendering it void if gasolene be kept, used, or allowed

on the premises, is not violated by the mere bringing of gasolene on the property; that the words "kept, used, or allowed" mean that the prohibited article must not only be upon the premises, but must be there for the keeping or storing of it; that there must be some degree of permanence in its continuance there. As to the second defense the court instructed the jury that the charge was a criminal charge and must be proved beyond a reasonable doubt; "that a corporation is not bound by the fraudulent acts of one of its officers when he is not acting for and in the interest of the corporation, but is acting in his own individual interest and against the interest of the corporation, and with the intention that his acts shall be done for the individual purpose of carrying out a wilful and malicious criminal intent to destroy the property of the corporation. If, however, the officer or officers of a corporation are the owners of the stock and control it as its managers, and if such officer or officers should set fire to the property insured, or cause or consent to the same being done, it would, in law, be the act of the corporation, and will defeat a recovery on the part of the insured for any loss sustained under such circumstances."

The foregoing instructions substantially embody the law applicable to the case, and they are not subject to the objections raised by appellant. They are certainly as favorable to appellant as is permissible under the law applicable to the case.

The record is not entirely free from error, but whatever error was disclosed was not of a prejudicial nature. The whole case necessarily turned upon the proposition whether or not appellee proved its second defense, as that is the defense, as is clearly disclosed by the record, upon which the jury made its finding against appellant.

One of the errors complained of by appellant as being substantial is the ruling of the court in not permitting appellant to prove that there were good and collectable debts due and owing the corporation at the time of the fire. It is true that such evidence would have tended to prove the solvency of the appellant. In considering this objection we must assume as true that, if the evidence had been admitted, appellant would have been able to prove its solvency. It is a sufficient answer to appellant's objection to say that, if the appellant corporation is solvent and that there are large amounts of debts due and owing to it, very much in excess of the amount owed to Fox, its sole creditor, Fox cannot defeat or prejudice the other stockholders, who were not guilty of incendiarism or the encouragement thereof, in obtaining all their just interests or shares in the assets of the corporation. Fox's debt against the corporation may be offset entirely by any proceeding by or against the other stockholders to the extent of the full value of the goods destroyed or damaged by the fire, and they could even recover against him for any excess of the goods destroyed or damaged, if they could show that such loss and damage exceeded the amount of his debt against appellant. No matter from what angle this case may be viewed, to allow appellant to recover in this case would be to go against the established rule of law that the assured may not profit by his own criminal act, which is, at the same time, an act committed with a criminal intent to defraud the insurance company. While the money collected from appellee on this insurance policy would not be paid directly to Fox, still, ultimately, the amount collected would all go, under the showing in this record, in the settlement of the affairs of the corporation to Fox. It is, therefore, certainly good law to hold that an incendiary cannot, by a circuity of action, recover from an insurance company a loss occasioned by his own wilful conduct, which loss he could not recover by a direct suit against the company on a policy

Evidence—insolvency of corporation—action on insurance policy.

made direct to him. We cannot allow the corporation in this case to be used as a cloak to protect Fox and to aid him in his designs to defraud the insurance company, and at the same time to profit by his own wrong or fraud.

Under our view of this case, appellant could not reasonably expect on another trial another or different verdict. We are impressed by the record that the verdict and judgment are clearly right, and that the judgment should be affirmed, and it is accordingly affirmed.

Petition for rehearing denied, October 2, 1918.

ANNOTATION.

Disregarding corporate existence.

I. In general, 610.
II. Defrauding creditors, 611.
III. Subsidiary or auxiliary corporations, 612.
IV. Corporations formed to evade contracts or the law, 613.
V. Individual acts binding corporation, 614.
VI. Individual acts not shielded by corporation, 616.
VII. Miscellaneous, 616.

I. In general.

This note is intended to be illustrative rather than exhaustive. And bearing in mind that the rule is that the corporate entity will not be disregarded, it is designed here to include only cases of exceptions to the rule, though in two or three instances cases sustaining it are cited.

A corporation is distinct from its stockholders; its acts are not their acts, nor its deed their deed. The distinction between a corporation and its stockholders is a legal fact, strong enough to carry property, though it is not unusual for the courts to speak of it as a fiction. Ordinarily, corporate existence cannot be disregarded. The exceptions to this rule are few. In some of the cases, there are statements indicating that the disregard of the rule is a simple and not an unusual matter. This is not so. It is with due reserve, therefore, that we ought to consider such general expressions of opinion as those which immediately follow.

The "fiction that the corporate existence and corporate functions are distinct from that of stockholders . . . is introduced for convenience, and to subserve the ends of justice; but, when invoked in support of an end subversive of its policy, should be and is disregarded by the courts." Southern Electric Securities Co. v. State (1907) 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785.

In holding that it may be shown that an incorporated company was a sham, without capital or assets, intended to shield a partnership from individual liability, and that its incorporation fee had never been paid, the court in Eagle Life Asso. v. Redden (1898) 121 Ala. 346, 25 So. 779, said: "Where there is no bona fide purpose and effort to organize a real corporation with a capital to respond to its liabilities, but the purpose and effort is to put forward a sham, without capital or assets, to cover a real partnership and the carrying on of a partnership business exempt from liability as a partnership, the purpose and effort are abortive, the pretended existence of a corporation is open to collateral attack as a mere fraudulent device, and though, on the face of the proceedings, there is a regular and complete incorporation, the pretended corporate entity is to be taken as nonexistent, except as to persons who have contracted with it as a corporation in such way as to estop themselves to show the fraud."

"Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them.

But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf, and for their advantage, the corporation will not be permitted to recover." Home F. Ins. Co. v. Barber (1903) 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024.

The next case illustrates the importance of the rule that corporate existence is not to be disregarded. In Buffalo Loan, Trust, & S. D. Co. v. Medina Gas & E. L. Co. (1896) 12 App. Div. 199, 42 N. Y. Supp. 781, the appellate division said, in a case where the owner of practically all the capital stock of a corporation had negotiated its bonds: "In view of the fact that Stranahan was practically the owner of the entire capital stock, and the corporation was virtually his private property, and in the light of all the circumstances disclosed in respect to his transactions, the court must not carry too far the legal conception that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it. 'The statement that a corporation is an artificial person or entity, apart from its members, is merely a description in figurative language of a corporation viewed as a collective body; a corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact.' Morawetz, Priv. Corp. § 227. So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, and is contrary to the fact. State ex rel. Watson v. Standard Oil Co. (1892) 49 Ohio St. 137, 177, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279." But the court of appeals, while affirming the judgment on another ground in (1900) 162 N. Y. 67, 56 N. E. 505, said: "To hold that Stranahan was lawfully in possession of the bonds, so that he could pledge them, as collateral security for his individual debt, with the trustee of the mortgage securing the bonds, because he was 'practically the owner of the entire capital stock' of the company, is to confuse the powers of the corporation as a legal entity with the rights of its stockholders. Stranahan was not acting as secretary of the company in disposing of the bonds, and his ownership of a large portion of the capital stock gave him no power to make a good title to the corporate property. The title to the property of a company is in the fictitious entity called the 'corporation,' and if all the stock were owned by a single person, he could not, by his conveyance, affect the legal title. Morawetz, Priv. Corp. § 233. The entire management of the affairs of a corporation is delegated by its shareholders to the care of a corporate agent. Only the regular officers and agents whose appointment was provided for expressly or impliedly, by the charter, have authority to act for it. The individual shareholders, as such, have no power either to represent the body corporate, or to bring suit in its behalf, or to interfere in any way with its management. Morawetz, Priv. Corp. § 238. As an officer of the company, Stranahan held the bonds to raise money for corporate purposes, and when he used them for his individual benefit he became a naked wrongdoer without title."

II. Defrauding creditors.

In the cases of property transferred to a corporation to defraud creditors, it is not always easy to say whether any principle of law is involved other than that ordinarily in force in transfers between individuals.

It was held in Kellogg v. Douglas County Bank (1897) 58 Kan. 43, 62 Am. St. Rep. 596, 48 Pac. 587, that where an insolvent organizes a corporation substantially owned by him, to which he transfers most of his property for the purpose of enabling

him to carry on his business, the court may treat the corporation as sham, and sustain levies on its property, attached as the property of the insolvent.

So, where a corporation is formed to shield the property of an insolvent from his creditors, the bankruptcy court will seize the property in the hands of the corporation. Re Berkowitz (1908) 173 **Fed.** 1012.

In Booth v. Bunce (1865) 33 **N. Y.** 139, 88 Am. Dec. 372, it was held that where a corporation is organized by a debtor to defraud his creditors, and property is transferred by him to it in furtherance of such fraudulent purpose, a judgment creditor of such debtor may enforce an execution against the property so transferred; and that, in such action, it is proper to submit to the jury the question whether the organization of the corporation, and the transfer to it, were fair, or to defraud creditors.

It may be noted, however, in this connection, that it has been held in England that if the proprietor of a solvent business turns it into a limited liability company, of which he is practically the owner, and takes, in pay, shares and debentures of the company, on the insolvency of the company the debentures will be superior to ordinary debts of the company. Salomon v. Salomon & Co. [1897] A. C. (**Eng.**) 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89.

III. Subsidiary or auxiliary corporations.

Where one corporation, having two officers who owned all the stock, had formed another corporation to act as its agent, the stockholders and officers of the two companies being the same, on the bankruptcy of the first company, the second company was required to turn over its property to the receiver of the first company, and the two officers and stockholders were directed to turn over to such receiver all the stock of the second company. Re Muncie Pulp Co. (1905) 71 C. C. A. 530, 139 **Fed.** 546, certiorari denied in (1906) 202 **U. S.** 621, 50 L. ed. 1175, 26 Sup. Ct. Rep. 766.

Where a parent corporation becomes insolvent, the property of a subsidiary corporation, which has no real or substantial interest as owner, should be devoted to the payment of the debts of the parent corporation. Day v. Postal Teleg. Co. (1887) 66 **Md.** 354, 7 Atl. 608.

Where a railroad company created a telegraph company, and, owning all its stock, sold the property of the telegraph company and its stock to a third party, and received the purchase price, the railroad company was held liable, in equity, to pay a judgment against the telegraph company, due to a contract made by the telegraph company before the sale. Baltimore & O. Teleg. Co. v. Interstate Teleg. Co. (1893) 4 C. C. A. 184, 8 U. S. App. 340, 54 **Fed.** 50.

Where the United States applied to enjoin the payment of alleged rebates on freight, not to the shipping corporation, but to a transit company, as commissions for obtaining the business, it was held that the bill was not subject to demurrer in alleging that the transit company was controlled by the managing agents of the shipping corporation. United States v. Milwaukee Refrigerator Transit Co. (1905) 142 **Fed.** 247, where the court said: "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity, as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

A railroad company which organizes a company to construct an extension of its system into another state, and through it operates such extension, will be regarded as doing business in the latter state, so as to be liable to suit there, on causes of action arising out of the state, by service of process upon the officers of the new company. And the new company will be regarded as but the instrument of such sys-

tem to carry on its business there, where the stock is all placed in the names of employees of the old corporation, the principal offices of the new corporation are filled by officers of the old one, the old corporation purchases bonds of the new one to construct its road, and furnishes the rolling stock, a traffic agreement is made by which the new corporation is to work for the old one for a long period of time, the benefit of which is to pass with a sale or mortgage of the property of the old one, and the operating divisions of the road show a single system and management. Buie v. Chicago, R. I. & P. R. Co. (1901) 95 Tex. 51, 55 L.R.A. 861, 65 S. W. 27.

Where a corporation is a mere agency for a second corporation, which created and owns it, the latter is liable for services rendered to the former at its instance or request. Kelly v. Ning Yung Benev. Asso. (1905) 2 Cal. App. 460, 84 Pac. 321.

Where practically the same persons own the stock of several corporations, which have been organized as branches of a single development scheme, and advances have been made by certain of the directors, and there have been various issues of stock and bonds, a court of equity will deal with the matter between the individuals interested as if there was but a single concern. Kendall v. Klapperthal Co. (1902) 202 Pa. 596, 52 Atl. 92.

In this connection, however, reference may be made to Martin v. Development Co. of America (1917) 153 C. C. A. 78, 240 Fed. 42, where it was said that "a holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless facts are averred which show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth, or where the organization and control are shown to be such as that it is but an instrumentality or adjunct of another corporation."

It may be here noted that in New York & B. Ferry Co. v. New York (1895) 146 N. Y. 145, 40 N. E. 785, where a lessor, in case it did not renew the lease, was to pay for the buildings erected by the lessee corporation, and the lessor did not renew the lease, but granted a lease to a new corporation, organized by the officers of the former lessee for its benefit and for the benefit of its stockholders, it was held that the lessor was not yet liable to pay for the buildings erected by the first lessee.

IV. Corporations formed to evade contracts or the law.

The courts will not permit a person acting under the guise of a corporation formed for that purpose, to evade his individual contract.

Thus, a person selling out his business, and agreeing not to engage in business of that kind in a certain locality, cannot avoid his contract by forming a corporation to carry on such business, where substantially all of the stockholders know of his earlier agreement. Beal v. Chase (1875) 31 Mich. 490.

The same was held in A. Booth & Co. v. Seibold (1902) 37 Misc. 101, 74 N. Y. Supp. 776.

So, where certain of the persons selling a mill property agreed that they would not thereafter continue the business of milling in the vicinity, the court said, and held: "While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others, to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (Reeves v. Sprague (1894) 114 N. C. 647, 19 S. E. 707), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. . . . And equity will not allow [such parties], with the price in their pockets, to evade their contract, under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals." Kramer v. Old (1896) 119 N.

C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813.

The Beal Case (Mich.) supra, was distinguished in American Preservers' Co. v. Norris (1890) 43 Fed. 711, where a manufacturing corporation sold one branch of its business to its principal stockholders, and thereupon discontinued such branch of the business. Subsequently, the purchasing stockholders sold such branch of the business to a third person, and entered into an agreement not to enter into the same business, directly or indirectly. The court held that the corporation was not bound by the agreement, and distinguished the Beal Case largely upon the ground that the corporation there involved was organized after the agreement was made, and for the purpose of violating it; while, in the case at bar, the corporation was a going concern, and doing an extensive business when the agreement was made.

The Beal Case was also distinguished in Moore & H. Hardware Co. v. Towers Hardware Co. (1888) 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41, where the court, while recognizing the existence of the rule, refused to apply it so as to restrain a corporation from violating a contract entered into before incorporation, by its principal corporators and stockholders, where it was not averred or shown that the corporation was organized fraudulently, or as a device to evade the personal obligation of the contractors.

The promoters and stockholders of a corporation formed for an illegal purpose, and to shield them from the consequences of their illegal acts, will be liable for money illegally received by it in carrying out such illegal purpose. Brundred v. Rice (1892) 49 Ohio St. 640, 34 Am. St. Rep. 589, 32 N. E. 169.

Where persons, in buying and selling futures, act as a corporation formed for that purpose, they will nevertheless be individually liable for money lost to them in the illegal business, and may not cloak their illegal acts under the form of a corporation. McGrew v. City Produce Exch. (1886) 85 Tenn. 572, 4 Am. St. Rep. 771, 4 S. W. 38.

In St. Louis Stamping Co. v. Quinby (1880) 4 Bann. & Ard. 192, Fed. Cas. No. 12,240a, the court stated obiter that it did not assent to the proposition that if a few persons formed themselves into a corporation under a state statute, the business of which is a necessary infringement of a patent, they could escape individual liability for the acts done in the corporate name, and that the "Missouri statute as to private corporations, and the formation of corporations thereunder, cannot be interposed as a shield by the corporators, to protect them against wrongful acts."

A corporation, organized by a person who owns substantially all its stock, for the purpose of taking title to lands owned or controlled by him, and to which such lands were conveyed for the purpose, in part, of fraudulently concealing the title, will be bound by service on the beneficial owner, of process, in a suit to set the title to such lands aside, so that it cannot attack the service upon it as too late under the Statute of Limitations, when the service on the beneficial owner was in time. Linn & L. Timber Co. v. United States (1912) 116 C. C. A. 267, 196 Fed. 593. This decree, however, was modified on rehearing in (1913) 121 C. C. A. 498, 203 Fed. 394, affirmed in (1915) 236 U. S. 574, 59 L. ed. 725, 35 Sup. Ct. Rep. 440, where the court considered that the corporation, as a party to the fraud, could stand in no better position than the beneficial owner.

V. Individual acts binding corporation.

The decision in the reported case (D. I. FELSENTHAL Co. v. NORTHERN ASSUR. Co. ante, 602) that an insured corporation will not be able to collect for a loss by a fire set by the owner of the corporation, who is the only person to be benefited substantially by the insurance money, is supported by the similar cases of Kirkpatrick and Meily.

Kirkpatrick v. Allemannia F. Ins. Co. (1905) 102 App. Div. 327, 92 N. Y. Supp. 466, approved in (1906) 184 N.

Y. 546, 76 N. E. 1098, is sufficiently dealt with in D. I. FELSENTHAL Co. v. NORTHERN ASSUR. Co.

Meily Co. v. London & L. F. Ins. Co. (1906) 142 Fed. 873, affirmed in (1906) 79 C. C. A. 454, 148 Fed. 683, is also sufficiently dealt with in D. I. FELSENTHAL Co. v. NORTHERN ASSUR. Co., except that in the Meily Case, instead of finding facts, the appellate court stated that facts were proved from which the jury could infer, etc.; and stated further that the verdict would be warranted if the jury found that the president of the plaintiff company was the actual owner of all its stock, and that he set fire to the store, or, in case he was not the owner, that he set fire to the store with the assent of his fellow shareholders.

Where two of the four stockholders of a corporation without creditors sell their stock to the other two, who pay therefor by notes executed by themselves and the corporation, and by a mortgage of corporate property executed by themselves and the corporation, while such mortgage does not devest the corporate entity of its legal title to the property, a subsequent mortgagee of the same property could not set aside the first mortgage already foreclosed, as the only stockholders at the time of the mortgage had then the beneficial estate, and could dispose of it. First Nat. Bank v. Winchester (1898) 119 **Ala.** 168, 72 Am. St. Rep. 904, 24 So. 351.

In People v. North River Sugar Ref. Co. (1890) 121 **N. Y.** 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834, the court said, speaking of the individuals who compose a corporation: "The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act collectively as an aggregate body, without the least exception, and, so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction."

"Where all or a majority of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors; and the act so done is ultra vires of the corporation, and against public policy, and was done by them in their individual capacity, for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in quo warranto." State ex rel. Watson v. Standard Oil Co. (1892) 49 **Ohio** St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

It is doubtful whether the courts of any other jurisdiction have gone as far as those of Maryland, where it has been held that the sole owner of the corporate stock and property may give a valid mortgage upon such property in his own name, and that it will be valid as against persons who subsequently become creditors, and that such mortgage is good, irrespective of an attempted execution of it by the corporation. Swift v. Smith (1886) 65 **Md.** 428, 57 Am. Rep. 336, 5 Atl. 534. The court cited the earlier Maryland case, Bellona Co's Case (1831) 3 Bland, Ch. (**Md.**) 446, in which it was said: "It is certainly within the constitutional scope of the powers of the general assembly to constitute a body politic of one or of a plurality of individuals; but if a corporate capacity be given to a plurality, and the stock of the company, by the owning of which, alone, any individual can be considered as a corporator, is all purchased up and held by one, it would seem that the body politic would be thereby virtually dissolved." But the existence of a valid corpora-

tion was held not to be properly before the court in that case.

VI. Individual acts not shielded by corporation.

There are some cases which hold that an individual will not be able to shield himself on the theory that his acts were the acts of a corporation.

Thus, a person who, upon receiving a security for collection and reinvestment, uses the money for his own purposes, and delivers to his customer a worthless obligation of a corporation of which he is president, and which he organized for the transaction of his personal business, is personally liable to return the amount so received. Donovan v. Purtell (1905) 216 Ill. 629, 1 L.R.A.(N.S.) 176, 75 N. E. 334.

In affirming a conviction for embezzlement, the court said: One "can convert the money to his own use by putting it into the treasury and mingling it with the funds of an insolvent corporation, which is under his control and management, and of which he is a stockholder and officer in charge. . . . It is paid into that which is a mere instrumentality created by him under sanction of law, but as much under his control and as subservient to his will as the furniture of his office or the books of account in which he records his transactions. Under such circumstances, there is no room for the legal fiction of separate corporate personality, or for distinction between the defendant's acts as officer of the corporation and his acts as an independent natural person." Milbrath v. State (1909) 138 Wis. 354, 131 Am. St. Rep. 1012, 120 N. W. 252.

But in reversing a conviction for carrying on a bucket shop as principal, where the evidence, at most, merely showed that the defendant assisted in carrying on the place, which was operated by a company, the court said: "It is sought by the state to connect the defendant with the sales and purchases shown in evidence, through his connection with the corporation as its president, and yet the state, at the same time, seeks to throw aside the corporation. The state proved a valid corporation, and then undertook to show that this corporation was merely a mask, behind which the defendant operated as the real principal. The state practically conceded that the ostensible principal, carrying on the place and making the sales, was the corporation, and then, after establishing this fact, as also the further fact that the corporation had been duly incorporated, sought to ignore the corporation as a mere sham. It established the corporation, apparently, for the sole purpose of demolishing it. But this it could not do. . . . He may have been the controlling spirit of the enterprise, but the evidence does not show it. But, if the evidence did show the defendant to be the dictator of the doings and policy of the corporation, the fact would still remain that the 'person' who carried on the business as principal was the corporation. A corporation cannot be ignored, simply because it is acting outside the scope of its charter. That is a matter for the state to deal with in a direct proceeding." State v. Miner (1910) 233 Mo. 312, 135 S. W. 483.

VII. Miscellaneous.

On the bankruptcy of a firm owning over 98 per cent of the stock of a corporation, the rest being owned by relations of one of the partners, the court extended the receivership of the firm to the property in possession of the corporation, as a part of the assets of the partnership. Re Rieger (1907) 157 Fed. 609.

A corporation and its members, in their control over it, may constitute a trust or combination to fix the price of merchandise, or limit the amount sold, within the meaning of a statute prohibiting such trust or combination, and relieving third persons from liability to pay for goods purchased from such combination. Ford v. Chicago Milk Shippers' Asso. (1895) 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651.

Where a partner carries on, also, a separate business under a corporate name, on failure of both the firm and the corporation, the latter's creditors have first claim on the assets of the first corporation, ahead of the firm's

creditors, and ahead of the individual creditors of such partner. Pott v. Schmucker (1897) 84 Md. 535, 35 L.R.A. 392, 57 Am. St. Rep. 415, 36 Atl. 592, where it appeared that such partner had, in the name of the corporation, overdrawn its account with the firm, and it was considered by such partner that such overdraft was not a debt of the corporation to the firm, but was so much cash contributed by such partner to the corporation.

Where several corporations, with the consent of all their stockholders, agree to turn over their property to a new corporation, which is to allot all its stock, except certain reserved treasury stock, to the stockholders of the various corporations, and the new corporation is formed, and the agreement generally carried out, except as to certain stockholders, such last-mentioned stockholders may sue the new corporation directly for their proportion of its stock. Anthony v. American Glucose Co. (1895) 146 N. Y. 407, 41 N. E. 23. B. B. B.

SCHOFIELD JORDAN, Appt.,
v.
COMMONWEALTH OF KENTUCKY.

Kentucky Court of Appeals—April 30, 1918.

(180 Ky. 379, 202 S. W. 896.)

Evidence — seduction — child.

1. Where the testimony of the prosecutrix is not required to be corroborated in a prosecution for seduction, the child resulting from the seduction is not admissible in evidence in such prosecution, although it need not necessarily be excluded from the court room.

[See note on this question beginning on page 622.]

Appeal — argument to jury — reversible error.

2. It is reversible error in a prosecution for seduction for the prosecuting attorney in his closing argument to take in his arms the child resulting from the seduction, which is not admissible in evidence, and comment upon the wrong done to it by accused.

APPEAL by defendant from a judgment of the Circuit Court for Lawrence County convicting him of seduction. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Fred M. Vinson, A. O. Carter,** and **J. T. Swetnam,** for appellant:

The placing of the baby before a jury in its mother's arms by the prosecuting attorney was error.

State v. Carter, 8 Wash. 272, 36 Pac. 29; Flores v. State, — Fla. —, L.R.A. 1917B, 1143, 73 So. 234; Kelly v. State, 133 Ala. 195, 91 Am. St. Rep. 25, 32 So. 56; State v. Harvey, 112 Iowa, 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535; State v. Danforth, 48 Iowa, 43, 30 Am. Rep. 387; Barnes v. State, 37 Tex. Crim. Rep. 320, 39 S. W. 684; Copeland v. State, — Tex. Crim. Rep. —, 40 S. W. 589.

It was error for the attorney to hold the baby before the jury while making the closing argument in the case.

State v. Brathovde, 81 Minn. 501, 84 N. W. 340; State ex rel. Mundt v. Meier, 140 Iowa, 540, 118 N. W. 792.

Messrs. **Charles H. Morris,** Attorney General, and **Overton S. Hogan,** Assistant Attorney General, for the Commonwealth.

Even if the commonwealth's attorney's statement to the jury was in some respects improper, the case should not on this account be reversed.

Hourigan v. Com. 94 Ky. 520, 23 S. W. 355.

Carroll, J., delivered the opinion of the court:

The appellant, Jordan, was indicted under § 1214 of the Kentucky Statutes for the alleged offense of seducing Agnes Hayes, a girl under twenty-one years of age, committed under and by virtue of a promise to marry her. A trial under the indictment resulted in the conviction of Jordan, his penalty being fixed at confinement in the penitentiary for one year. On this appeal a reversal of the judgment on the verdict is asked because of alleged errors committed by the trial court in the admission of evidence, and misconduct of the attorney for the commonwealth.

Briefly stated, and confined to such facts as may be needful in disposing of the questions raised, it appears that Jordan, who was about twenty-three, and Miss Hayes, who was about nineteen years old, had the illicit intercourse that was the basis of the prosecution, in January, 1917, and that as the result of this act of intercourse a child was born to Miss Hayes in October, 1917. Jordan, when testifying in his own behalf, admitted the act of intercourse, but denied that it was preceded or accompanied by any promise of marriage on his part, or that the subject of marriage was, at any time during or previous thereto, mentioned or discussed in any manner by them. It is said in brief for the commonwealth that Jordan admitted, during his testimony, that he was the father of the child, but we do not find in the record that he made any admission of this character, or that any question concerning this matter was asked him during his examination as a witness. Agnes Hayes also testified as to the act of intercourse in January, 1917, but said that she was induced to and did consent to commit it on account of previous promises by Jordan to marry her, and further said that the child born to her, in October, 1917, was the offspring of this act of intercourse which was the only one they were guilty of. There are, in the record, some circumstances supporting the denial of Jordan that he ever promised to marry Agnes Hayes, and other circumstances that tend to support her evidence that he did promise to marry her. We may, therefore, say that, looking to the evidence alone, there was sufficient to sustain the finding of the jury that the act of intercourse was committed under a promise to marry on the part of Jordan, and, unless during the progress of the trial errors prejudicial to the substantial rights of Jordan were committed by the trial court, the judgment should be affirmed.

While Agnes Hayes was on the witness stand and being examined by the attorney for the commonwealth, she was asked, and answered, these questions:

Q. As I understand it, after this intercourse you became pregnant?

A. Yes, sir.

Q. And did you have a baby?

A. Yes, sir.

Q. When was it born?

A. The 27th day of October, 1917.

Q. Where is that baby?

A. My sister has it in the room there.

Q. Will you please step in there and get it?

A. Yes, sir.

At this point the record shows that "the defendant objected to the exhibition of the baby before the jury by the prosecuting witness. The court overruled said objection, to which the defendant excepts."

Following this these questions were asked and answered:

Q. Is that your baby, born the 27th day of October, 1917?

A. Yes, sir.

Q. Who is the father of that child?

A. Schofield Jordan.

Now, the question is, was it competent for the commonwealth to exhibit before the jury, under the circumstances stated, the child? In considering this question it should

be kept in mind that Jordan at this time had not been introduced as a witness in his own behalf. Agnes Hayes was the first witness introduced for the commonwealth, and Jordan was standing before the jury upon his plea of "not guilty," which made it incumbent upon the commonwealth to prove the essential facts charged in the indictment, which were, first, the act of seduction or intercourse, and, second, that it was accomplished under and by reason of a promise of marriage on his part. It thus being incumbent upon the commonwealth to prove these two essential elements of the offense, the point at issue narrows down to the inquiry: Was it admissible for the commonwealth, in attempting to establish the facts mentioned, to exhibit before the jury the child, then a little over three months old, that Agnes Hayes said Jordan was the father of? We are clearly of the opinion that the exhibition of the child did not throw any light on the issues in the case, or tend, circumstantially or otherwise, to corroborate the evidence of Agnes Hayes that she had been seduced by Jordan under a promise of marriage, and so was incompetent. If she was seduced under a promise of marriage, the evidence of the commission of the offense was complete so far as the commonwealth was concerned when Agnes Hayes testified to the promise of marriage and the act of intercourse following and induced by it. It was wholly immaterial, in making out the case for the commonwealth, whether or not she became pregnant or a child was born as the result of the act of seduction complained of. Her pregnancy or the birth of the child did not add anything to, or take anything away from, the offense charged, which grew out of acts and conduct that happened before either of these things came into existence.

Evidence—seduction—child.

Objection was made, as we have seen, to the exhibition, before the jury, of the child, but it does not appear that any exception was saved to the evidence of Agnes Hayes that she became pregnant, or that a child was born to her; but in view of the fact that there will be another trial, the admissibility of this evidence should be determined in order that another trial may be free from error in this respect. This question is a new one in this court, but it has been considered in a number of cases by courts of other states, and there is some conflict in the authorities, notwithstanding the fact that in the states from which the opinions, later to be referred to, have been taken, the statute requires that the evidence of the prosecuting witness in seduction cases must be corroborated by other facts or circumstances. In other words, in these states a conviction cannot be had on the unsupported evidence of the prosecuting witness. Where corroboration of the prosecuting witness is necessary to sustain the charge that the seduction complained of was committed under a promise of marriage, it can readily be seen that much stronger reasons would exist for the admission of evidence of pregnancy and childbirth than in jurisdictions like ours, where no corroboration is necessary and a conviction may be had upon the evidence of the prosecuting witness alone. But, as we have said, even in states where corroboration is required, there is conflict in the authorities as to the admissibility of evidence of this nature, and we have found no authority holding it competent. Cases on this subject are: State v. Carron, 18 Iowa, 372, 87 Am. Dec. 401; State v. Brassfield, 81 Mo. 151, 51 Am. Rep. 234; State v. Danforth, 48 Iowa, 43, 30 Am. Rep. 387; Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56; Barnes v. State, 37 Tex. Crim. Rep. 320, 39 S. W. 684; People v. Kearney, 110 N. Y. 188, 17 N. E. 736. In this last-mentioned case the court, in commenting on the admissibility of evidence that a child was born, in a prosecution for seduction under promise of marriage,

under a statute requiring that the evidence of the prosecuting witness should be corroborating, said: "We fully realize the truth of the proposition that evidence in corroboration of the prosecutrix in this class of cases upon the points where corroboration is necessary, viz., the seduction and the promise of marriage, is not very easily obtainable. For that reason only such corroboration as in the natural and ordinary course of events these facts are capable of is to be required. But this rule cannot be construed to allow evidence of a fact which does not in the least tend to support the evidence of the prosecutrix upon either of the two points which require it. That the evidence in this case, of the nature herein commented on, was of a very dangerous and probably highly injurious character and tendency we think admits of no controversy. The crime is a most atrocious one, and one which most naturally tends to enlist the sympathies of all men, and of course of jurors, in favor of the victim. In such cases, while administering the law with perfect fairness, courts must be extremely careful that no evidence of a tendency to excite or influence the resentment of jurors, and which does not tend to support the evidence of the prosecutrix, or to connect the defendant with the commission of the crime, should be permitted to go to the jury."

But, as we have said, in this state a conviction may be had on the unsupported evidence of the prosecuting witness that the act of seduction was accomplished under a promise of marriage, as our statute in § 1214 simply provides that "whoever shall, under promise of marriage, seduce and have carnal knowledge of any female under twenty-one years of age, shall be guilty of a felony and, upon conviction thereof, shall be confined in the penitentiary not less than one year nor more than five years."

And under this statute we are unable to perceive the relevancy of evidence of pregnancy or birth of a child, or how evidence of the facts could furnish any corroboration of the testimony of the prosecuting witness that she was seduced under a promise of marriage. Plainly, if no child was born as a result of the intercourse, or she never became pregnant because thereof, the prosecution could nevertheless be successfully maintained upon evidence alone of the act of seduction and the antecedent promise of marriage.

It should, however, here be said that it is essential that the woman seduced should be of chaste character; and, therefore, if her character for virtue is put in issue by the defendant, as it may be, it might be incumbent on the commonwealth to introduce evidence in support of it, but nothing more need be said in this case upon this point, because no question was made as to the chastity of Miss Hayes. Com. v. Wright, 16 Ky. L. Rep. 251, 27 S. W. 815; Berry v. Com. 149 Ky. 398, 149 S. W. 824; May v. Com. 164 Ky. 109, 175 S. W. 17. The commonwealth, however, in making out its case, is not confined strictly to direct evidence of the promise of marriage and the subsequent seduction, but may offer in evidence every relevant fact and circumstance tending, in support of the prosecuting witness, to show that there was a promise of marriage, and seduction as a result thereof. For example, the commonwealth may put in evidence the social and friendly relations between the parties; the length of their acquaintance; the opportunities they had for illicit intercourse; letters that passed between them; presents that were given by one to the other; and other acts and conduct conducing to show the intimacy between them; and the state of feeling each had for the other. And the defendant may likewise introduce in his behalf every relevant fact and circumstance that tends to support his theory that there was no promise of marriage, or seduction induced thereby, or his defense

that the woman was not chaste, if this issue is put into the case.

We may further add that in prosecutions under this statute it is indispensable to a conviction that the seduction or intercourse should follow and be accomplished as the result of a promise of marriage on the part of the man, because if the woman yields to the influences of the man, not by reason of a promise of marriage on his part, but simply for the gratification of her passion, no offense is committed under the statute. As said in Putnam v. State, 29 Tex. App. 454, 25 Am. St. Rep. 738, 16 S. W. 97: "The offense is committed if the man has carnal intercourse to which the woman assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which, without such promise, she would not have yielded. . . . The offense consists in enticing a woman from the path of virtue, and obtaining her consent to illicit intercourse by promises made at the time. . . . The promise and yielding her virtue in consequence thereof is the gist of the offense. If she resists, but finally assents or yields thereto in reliance upon the promise made, the offense is committed."

To the same effect are People v. De Fore, 64 Mich. 693, 8 Am. St. Rep. 863, 31 N. W. 585; Hamilton v. United States, 41 App. D. C. 359, 51 L.R.A.(N.S.) 809; Bishop, Statutory Crimes, § 625.

We are therefore of the opinion that it is not competent, in prosecutions under this statute, to admit evidence of pregnancy or the birth of a child, and it was manifestly prejudicial error to permit the commonwealth to exhibit before the jury a child as young as this one was, for no other purpose than to excite the sympathy of the jury for Agnes Hayes and the child, and to arouse their prejudice against the reputed father, Schofield Jordan. There is no claim made, nor could there well be, of any resemblance between the child and Jordan; its features were too immature to form the basis of an opinion pointing to any resemblance between the baby and the man. But even if the child had reached an age where there might be some resemblance between it and Jordan, we yet think its exhibition would have been error, because, as we have said, it did not throw any light on the questions at issue.

We do not, however, rule that if a child is born as the result of the alleged seduction, the prosecuting witness may not have with her in the court room, in the presence of the jury, the child, although its presence unexplained or uncommented on might create in the mind of the jurors an unfavorable sentiment against the accused; but the probability that the appearance of the child might create such a feeling is not, we think, sufficient to justify us in holding that the mother may not have it with her in the court room. But she cannot be inquired of about its parentage, nor should the commonwealth's attorney be permitted to allude in any manner to its presence, or make any comments on its appearance. State v. Fogg, 206 Mo. 696, 105 S. W. 618; State v. Carter, 8 Wash. 272, 36 Pac. 29.

During the argument of the attorney for the commonwealth the record shows that the following took place: "Hon. John W. Waugh (in his speech to the jury turning and taking the baby from its mother, to which the defendant objected, the court overruled the objection, and the defendant excepted): 'Look here, gentlemen of the jury; look here. The most innocent thing that God ever created; look at this little head, the very imprint of its father; could he deny it? He doesn't. What effect is this going to have upon this innocent babe? It will be turned into the world without a name; this makes no impression on him; he doesn't care; this innocent babe and the mother who must always go through life with the finger of scorn pointed at her; think of this little child when she is old enough to go to school and she is grown up; you

know what they will say, a bastard, a child without a name; and there sits its father, unconcerned, its father, he don't deny it, and and refuses to lift a finger to rectify the wrong he has done. He makes no attempt to save his own; he says he did not promise to marry her.' (The defendant entered a motion to exclude the above from the jury; the court overruled the motion, to which the defendant excepted.)"

Keeping in mind that the exhibition of the baby to the jury was incompetent, it is not open to doubt that the conduct of the attorney for the commonwealth, as disclosed in the extract from the record quoted, was extremely prejudicial to the rights of the accused. The conduct of the attorney for the commonwealth, in taking the baby from its mother's arms and holding it in his own while making the argument referred to, was plainly designed by him to influence the passions of the jury against the accused, and we can scarcely think of anything that a prosecuting attorney in his closing argument to the jury could do or say that would be more likely to accomplish this purpose.

Appeal—argument to jury—reversible error.

We have reversed more than one case because of improper argument of the attorney for the commonwealth, when the argument was not based on incompetent evidence; and when such an argument as was made in this case finds its support in incompetent evidence, and is accompanied by the acts described in the record, we do not feel disposed to pass it by as harmless error. The evidence, although sufficient, as we have said, to sustain a conviction, was of such a conflicting nature as that a jury might have returned a verdict of acquittal without subjecting themselves to criticism for disregarding the evidence, and it is entirely probable that under the influence of the impassioned as well as improper closing argument of the commonwealth's attorney they were induced to find the defendant guilty, when except for this such a verdict might not have been reached.

Wherefore judgment is reversed for a new trial not inconsistent with this opinion.

ANNOTATION.

Exhibition of child in criminal prosecution, or civil action, for seduction.

There is a decided conflict of authority upon the question of the propriety of exhibiting the issue of the alleged wrongful act to the jury in an action or prosecution for seduction, with the weight of authority in favor of allowing such exhibition, especially if not done for the purpose of establishing paternity or prejudicing the defendant. However, some courts have unqualifiedly permitted such a profert, even when made for the express purpose of proving that the defendant was the father of the exhibited child.

Thus, a number of courts, irrespective of the age or maturity of the child, have permitted the same to be exhibited to the jury for the purpose of tracing any likeness it bore to the defendant, as corroborative of the fact of sexual intercourse and the child's paternity. It was so held in State v. Horton (1888) 100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238, wherein the child was exhibited to the jury by a witness who also testified as to its resemblance to the defendant. And again in State v. Malonee (1910) 154 N. C. 200, 69 S. E. 786, it was held that the jury in a seduction case could take into consideration as bearing upon the sexual intimacy of the parties, but not of the promise of marriage, the birth of a child and its resemblance to the defendant, if upon its exhibition to them they found there was such a resemblance. And in Oregon the court in Anderson v. Aupperle (1908) 51 Or. 556, 95 Pac. 330, adopted the rule of unqualified admission of the child in evidence in a seduction action and

approved the admission in evidence for the inspection of the jury over defendant's objection of a child under three months of age. The objection in this case was that, although a resemblance between the parties properly proved is some evidence upon the issue, since during the first few weeks or even months of a child's existence it has that peculiar immaturity of features which characterizes it as an infant, and as it changes often and very much in looks and appearance during that period, evidence deduced from the appearance of an immature child is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury; but the court ruled that such objection went rather to the weight than to the relevancy of the evidence, or, in other words, that the objection resting upon the immaturity of the child was merely to the definiteness of the proof. So, in Adams v. State (1910) 93 **Ark.** 260, 137 Am. St. Rep. 87, 124 S. W. 766, the prosecuting witness was allowed to testify over objection that the child resembled the defendant and the court said that the weight of such evidence should be left to the jury, uninfluenced by any opinion of the court as to the child being old enough to possess settled features or other corporeal indications of paternity. And in Alabama the rule is that the jury in a seduction case may be allowed visual inspection of the child for the purpose of showing its likeness to the defendant. Watts v. State (1913) 8 **Ala.** App. 264, 63 So. 18. So, in Rex v. Hughes (1910) 22 **Ont.** L. Rep. 344, 17 Can. Crim. Cas. 450, 19 Ann. Cas. 534, in holding that it was proper to exhibit the child of the prosecutrix to the jury in a prosecution for carnal knowledge of a female, and to have its resemblance to the defendant pointed out for the purpose of establishing paternity, the court said that such was the long-established practice in both England and Ontario in cases of disputed paternity.

On the other hand, some courts have ruled with equal conviction that an infant child, issue of an alleged seduction, cannot be exhibited to the jury to show its resemblance, if any, to the defendant, especially where so young and immature as to have no settled features. Thus, in State v. Danforth (1878) 48 **Iowa**, 43, 30 Am. Rep. 387, it was held that a three months old infant which was alleged to be the fruit of the seduction could not be exhibited to the jury for the purpose of corroborating the prosecuting witness in connecting the defendant with the alleged crime by a comparison for resemblance, the court applying the rule that the resemblance of an infant three months old to the father is too indistinct and uncertain to be allowed as evidence of paternity in a seduction action. And again in State v. Hunt (1909) 144 **Iowa**, 257, 122 N. W. 902, the court laid down the rule that it was error to exhibit a baby about two months old to the jury for the purpose of showing a supposed resemblance between it and the defendant, and thereby connecting him with the crime. So, in the Texas case of Barnes v. State (1897) 37 **Tex.** Crim. Rep. 320, 39 S. W. 684, where a child then only three or four months old was exhibited to the jury and testimony given as to the color of its hair, eyes, and complexion, it was held that such evidence was inadmissible for the purpose of comparison in order to establish paternity. And see Gleason v. State (1915) 77 **Tex.** Crim. Rep. 300, 178 S. W. 506, a prosecution for seduction, wherein it was said "that the child should not have been permitted to have been brought before the jury, identified, and introduced as evidence." And see also State v. Teal (1918) — **S. C.** —, 95 S. E. 69, wherein the court seems to have been of the opinion that the issue of the alleged seduction cannot be exhibited to the jury to show a likeness to the defendant.

And, under a statute which does not require corroboration of the prosecuting witness, it has been held that exhibition of the alleged fruit of the intercourse constitutes prejudicial error, as in such a case it throws no light upon the issue. JORDAN v. COM.

(reported herewith) ante, 617, holding that it is improper to even admit evidence of the birth of a child.

But with respect to merely taking the child of the alleged seduction into the court room or upon the stand while testifying, the general rule is that the prosecutrix may do either or both, provided the state does not offer or make profert of it. It was expressly so held in State v. Fogg (1907) 206 Mo. 696, 105 S. W. 618, holding that such acts do not constitute reversible error. And even in jurisdictions which do not permit the exhibition of an immature infant in an action for seduction for the purpose of showing a resemblance between it and the defendant, it has been held that there is no rule requiring the separation of the mother and child while she is testifying or is present at the trial. See State v. Clemons (1889) 78 Iowa, 123, 42 N. W. 562; State v. Hunt (1909) 144 Iowa, 257, 122 N. W. 902 and JORDAN v. COM. (holding that such is the rule where the attention of the jury is not called to the presence of the child). However, some courts have held that for the purpose of corroboration as to the facts of sexual intercourse and the date thereof, the prosecuting witness may testify that the child with her is her child, provided it is not introduced and admitted in evidence to exhibit an alleged resemblance to the defendant. State v. Clemons and State v. Hunt (Iowa) supra; State v. Teal (1918) — S. C. —, 95 S. E. 69. So, in Cook v. State (1910) 96 Ark. 552, 132 S. W. 455, an action for carnal abuse of a female, it was held that it was permissible to exhibit the child to the jury (prosecutrix held it in her lap while on the stand and testified that it was the result of the intercourse with the defendant), at least for the purpose of proving her intercourse with someone, and especially where the witness did not attempt to show that defendant was the father of the child by reason of any claimed resemblance to him. However, the court also intimated that in its opinion it was permissible to exhibit the child to the jury to show the paternity of the child, as well as to corroborate the prosecuting witness as to the fact of intercourse at about the date charged in the indictment. And see Snodgrass v. State (1896) 36 Tex. Crim. Rep. 207, 36 S. W. 477, wherein the court said that it was not objectionable in a seduction action to prove by the prosecutrix that the defendant was the father of her child then in her arms.

But it has been held that where the prosecutrix takes her baby upon the witness stand at the direction of the prosecuting attorney and merely for the purpose of prejudicing the defendant before the jury, the defendant should be granted a new trial. State v. Carter (1894) 8 Wash. 272, 36 Pac. 29. G. J. C.

THOMAS WALTERS
v.
PITTSBURGH & LAKE ANGELINE IRON COMPANY et al. and John Berriman et al., Appts.

Michigan Supreme Court—June 3, 1918.

(— Mich. —, 167 N. W. 834.)

Relief association — discontinuance of business — distribution of surplus.

The money remaining when the employer ceases to do business in a fund established by him by contributions of himself and his employees for the relief of employees injured in the business is to be distributed among all those who have contributed to it in proportion to their contribution, and not merely among those in his employment when the business is closed up.

[See note on this question beginning on page 629.]

APPEAL by defendants Berriman et al. from a decree of the Circuit Court for Marquette County, in chancery, in favor of defendants Iron Company et al., in a bill of interpleader filed for the determination of the proper method of distributing an employees' benefit fund. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. **M. J. Kennedy**, for appellants:

A mine club fund is a trust fund, and the mining company is a trustee.

O'Neil v. Lake Superior Iron Co. 63 Mich. 690, 30 N. W. 688; Frank v. Newport Min. Co. 148 Mich. 637, 11 L.R.A.(N.S.) 182, 112 N. W. 504.

Members who withdraw from a voluntary association are not entitled to any portion of its property or funds, and the members who remain have the right to the money and property of the association.

Sommers v. Reynolds, 103 Mich. 310, 61 N. W. 501; Detroit Light Guard Band v. First Michigan Independent Infantry, 134 Mich. 598, 96 N. W. 934; Schiller Commandery v. Jaennichen, 116 Mich. 129, 74 N. W. 458; Mason v. Finch, 28 Mich. 282; Brown v. Stoerkel, 75 Mich. 269, 3 L.R.A. 430, 41 N. W. 921; Detroit Sav. Bank v. Haines, 128 Mich. 38, 87 N. W. 66; Detroit Tuberculosis Soc. v. Detroit Tuberculosis Soc. 167 Mich. 102, 132 N. W. 547; Finney's Orchestra v. Finney's Famous Orchestra, 161 Mich. 289, 28 L.R.A. (N.S.) 458, 126 N. W. 198; Hopkins v. Crossley, 138 Mich. 561, 101 N. W. 822; 1 Perry, Tr. & Trustees, 6th ed. § 151, p. 239; Everitt v. Duss, 197 Fed. 401, 124 C. C. A. 388, 206 Fed. 590; Baltimore & O. R. Co. v. Baltimore & O. Employee's Relief Asso. 77 Md. 566, 26 Atl. 1045; 7 C. J. 1068; 29 Cyc. 59; Burdon v. Massachusetts Safety Fund Asso. 147 Mass. 360, 1 L.R.A. 146, 17 N. E. 874; Schwartz v. Duss, 187 U. S. 8, 47 L. ed. 53, 23 Sup. Ct. Rep. 4.

Messrs. **W. T. Potter, Thomas Clancey**, and **William P. Belden** for appellees.

Ostrander, Ch. J., delivered the opinion of the court:

The court is asked to announce the applicable rule for the distribution of the fund which is now in the hands of the plaintiff, who, because of conflicting claims to the fund, filed a bill of interpleader. Defendants have interpleaded. The interesting and principal question presented in argument by the appellants is answered when the relation of appellants to the fund is determined. If they are surviving members of an association, voluntary or involuntary, which owns the fund which is to be divided, their rights are determined by a principle not controlling if there is no association owner.

In stating the contentions made in the court below, the trial judge said: "The company claims, as does also a group of individual contributors, that the distribution should be made among all who at any time contributed to the fund, in proportion to the amount of their several contributions, and that, in such distribution, it should receive one half the fund. It is claimed by another group of individual contributors the distribution should be among all who contributed, except the company, in proportion to the amounts contributed by each; by another group that they are each entitled to participate in the distribution in proportion to the amounts contributed by them respectively, but are silent as to whether or not the company should be allowed to participate; and by another group, in substance, that the club was a voluntary unincorporated association; that by agreement of the members all miners and laborers upon entering the employment of the company automatically became members of the club, which membership terminated upon their voluntarily leaving the employment of the company or being discharged therefrom by the company; that all money paid into the fund by the company or the workmen became the property of the club; that the money paid by the company was on the consideration that all persons injured and the representatives of persons killed while at work in the mine, upon recovering benefit from the club, would execute a release of the company from liability for all damages caused by such injury or death; that the money

in the fund is the absolute property of the club and held in trust by the company for the club, and that the company has no beneficial interest in the fund or any part of it; that on September 11, 1912, the company elected and did go under the so called Workmen's Compensation Law; that thereupon the mine club came to an end, and that the total amount in the fund at present belongs to and should be distributed among persons who were employees of the mine, and therefore members of the club when it terminated September 11, 1912."

The appellants belong to the group of contestants last described.

The facts admitted or proven, omitting many details, are briefly stated. The fund in question is made up of the residue of contributions which were made by employees of the Pittsburgh & Lake Angeline Iron Company and by the said company for a certain purpose. The purpose was to furnish money to pay employees (the official, engineering, and office forces not included) injured in the service a certain sum and a certain sum when an injury resulted in death. The defendant company undertook to contribute as much as the aggregate of all contributions of the men, and for years the mutual understanding was that each employee should contribute 50 cents monthly,—a sum later on reduced to 25 cents monthly. In practice, this sum was deducted from the pay of the employee, and this whether he worked one day or longer. The money was retained by the defendant company and paid out by it, an account thereof being kept by it. Not long after the practice was introduced at defendant's mine, releases were exacted of the injured men,—releases of or waivers of claims for damages growing out of the injury of the employee. A similar institution, if it may be called that,—a similar practice,—obtained in practically all of the iron mining region of the upper peninsula. Men went from mine to mine, working longer or shorter periods, and at whatever mine they were employed it was understood that they should contribute to a similar fund and be thereupon entitled to the agreed-upon benefit. There appears to have been some variations in details, but none in the general plan. There was no organization, no society, no association formed. It was sometimes called a "club" and the fund spoken of as a "club fund," but there were no officers, no salaries, no social or other purpose subserved. Arrangements were made for determining who were entitled to receive benefits, including a committee or committees of employees; this apparently for convenience. No period of the duration of the practice was fixed; no provision or agreement was made for the distribution of any surplus money.

This practice was instituted at the defendant's mine in the year 1885. The defendant ceased to operate the mine September 15, 1915. During the period 5,681 employees made some contribution to the fund. At one time the defendant company employed more than 700 men. In September, 1912, it employed about half of that number, and when operations were concluded but few men were on the pay roll. It turned over to plaintiff, for distribution, the sum of $37,333.58. An accounting has increased the fund so that the total is $54,515.53. It is said in the opinion of the learned trial judge: "That this figure correctly represents the entire fund is conceded all around, and the sole question left for solution is how it shall be distributed."

The decree distributes it to those who at any time contributed to it, in proportion to the contribution. Some 480 of the defendants have appealed.

Broadly stated, it is the contention of appellants in this court that the fund belongs or belonged to an association or club, of which they are the surviving or remaining members, which was dissolved either upon the taking effect of the

Workmen's Compensation Law, so called, at which time contributions to the fund ceased, or at the time the defendant company ceased operations at the mine. Upon the theory that the proper distribution date was the time when the Workmen's Compensation Law became effective, they further contend that payments made to employees thereafter injured (and there were such payments made) were improperly disbursed, and the amount so paid should be accounted for by the defendant corporation.

This court held (O'Neil v. Lake Superior Iron Co. 63 Mich. 690, 30 N. W. 688) that such a fund is a trust fund, and the mining company a trustee. The fund on hand is the aggregate of the overpayments made by each contributor, —the aggregate of what was paid more than it was actually necessary to pay to accomplish the mutual purpose of contributing at all. There is no claim made that all persons entitled to benefits did not receive them.

It is true, as appellants contend, that the mere fact that the property was held by a trustee does not determine whether there was an association,—a club. Nor, for that matter, do other facts relied upon by them in argument; namely, that the plaintiff, who filed the bill of interpleader, the defendant company in its answer, first filed, and the other defendants in their answers, describe (or agree to the description) the body of contributors as a voluntary, unincorporated association, or refer to it as a club, answer conclusively the question whether there was or is an entity entitled to the trust fund. That must be determined from all the facts. There was associated, mutual action of individuals, but it did not take the form of creating an organization—a society. Consequences sought to be provided for were those attending the work of the individual, and payments contemplated out of the fund were payments to the individual. There was no idea of a fund owned by all or any of those who contributed; there was the idea of a fund created by individual contributions to be held in trust for the purposes indicated and to be used for no other purposes. There was no notion of contributing more than would be sufficient for the purposes indicated, none of accumulating money or of acquiring property. How much would be required was necessarily uncertain, since the number of accidents and deaths in any period could not be certainly anticipated. The business of the defendant company might assume large proportions, or it might reduce the force of employees at pleasure. In this way new employees would be added to the number entitled to benefits, or employees driven to seek work elsewhere. The character of the fund is not changed by the fact that the defendant company might refuse to pay a claimed benefit until a release for damages was furnished. If it was the understanding that such a release should be given, compliance therewith would be necessary before the benefit was due. Frank v. Newport Min. Co. 148 Mich. 637, 11 L.R.A.(N.S.) 182, 112 N. W. 504.

There is evidence of some rather confused and confusing ideas of officers of the defendant company while the practice of contributing continued, and of counsel after the contributing period ended and the subject of distribution of the fund was presented. No theory now presented affords reason for discontinuing the making of contributions upon the taking effect of the Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10), if further contributions were needed, and there were, it is admitted, disbursements made which, although charitable in nature, were not warranted when the purpose for which the fund was established is considered. Questionable disbursements have been repaid to the fund.

In the absence of a formal association of contributors, in an en-

deavor to fix the status of contributors to the fund with respect thereto, it is said by appellants that the contributions, especially those made by the defendant company, were not gifts, but based upon actual consideration, for which reason a trust in the residue did not result for the benefit of the contributor. They rely upon the principle stated in 1 Perry on Trusts & Trustees, 6th ed. § 151: "If a conveyance has been made upon a valuable consideration, there can be no resulting trust to the grantor, as the payment of a valuable consideration imports an intention to benefit the grantee in case the trusts declared fail, or are imperfectly declared, or do not take effect for any other reason."

See also Everitt v. Duss (D. C.) 197 Fed. 401, and 124 C. C. A. 388, 206 Fed. 590; Schwartz v. Duss, 187 U. S. 8, 47 L. ed. 53, 23 Sup. Ct. Rep. 4; Baltimore & O. R. Co. v. Baltimore & O. Employees' Relief Asso. 77 Md. 566, 26 Atl. 1045.

But how can this principle be applied here? Here was no public charitable use, no gifts for a charitable use for the benefit of the public. It is and it must be assumed that contributions were payments made for the advantage of the contributor, whether the contributor was an employee or was the employer. Suppose, for example, that the defendant company had made all of the contributions, and, upon going out of business, claimed all of the residue in the fund. Could any person, except one whose right to an indemnity or portion of the fund had accrued, contest its right to take the residue?

The applicable rule was stated by the learned trial judge when he said: "The fund was deposited with and held by the company upon the express trust to disburse so much thereof as was necessary from time to time, in the payment of injury and death benefits, while the mine continued in operation. When the mine ceased operations the purposes of the trust were discharged and the trust became extinguished. Upon the happening of the event, there being no agreement or understanding, express or implied, providing for or contemplating the disposal of any balance in the fund, a resulting trust arose in favor of all who at any time contributed to the fund."

It is the general rule that, if a trust for a specific purpose fails by the failure of the purpose, the property reverts to the donor or his heirs. 1 Perry, Trusts, § 159. And in 39 Cyc. 110, the rule is stated as follows: "Where property is conveyed upon an express trust for particular purposes, but, by reason of its being ineffectually or illegally declared, the trust fails, or is otherwise extinguished or terminated, a resulting trust arises as against the trustee, in favor of the grantor, and those claiming under him, in the property conveyed, or in the residue of the property remaining at the time of the failure or extinguishment of the trust, or after the purposes of the trust have been discharged."

In Coe v. Washington Mills, 149 Mass. 543, 21 N. E. 966, the society formed by employees and employer was more formal, there was more evidence of a voluntary association than here, but it was held, the employing corporation being dissolved, that as to money in the fund, created there as here by joint contributions of employees and the employer, a trust resulted for contributors.

It has been many times decided that persons who withdraw from a voluntary association are not entitled to any portion of its property, and that those who remain have the right to the property of the association and its use so long as any of the members remain, and clearly withdrawing members ought not to decide the right of those not withdrawing to continue the association. Sommers v. Reynolds, 103 Mich. 307, 61 N. W. 501; Schiller Commandery v. Jaennichen, 116 Mich. 129, 74 N. W. 458; Detroit Light Guard Band v. First Michigan Inde-

pendent Infantry, 134 Mich. 598, 96 N. W. 934.

In Hopkins v. Crossley, 132 Mich. 612, 96 N. W. 499; Id., 138 Mich. 561, 101 N. W. 822, it appeared that an incorporated volunteer fire department, preparatory to dissolution, attempted to create from its property a trust fund, the income from which should be applied by trustees to certain benevolent uses. The trust was held to be void. 132 Mich. 612, 96 N. W. 499. Thereupon the question of distribution of the fund arose, and it was held that it must be divided among the persons recognized as members at the time the corporation was dissolved, and the personal representatives of deceased members.

None of these cases disturbs the obviously equitable doctrine of Coe v. Washington Mills, supra, or the decree appealed from in this case.

Relief association—discontinuance of business—distribution of surplus.

To permit those who happened to be retained as employees of the defendant company to divide among themselves the money in this fund is manifestly inequitable; the fund having been continued for their benefit until the company ceased to do business.

It must be held that title to the money contributed was in the defendant company as trustee. The period of trusteeship having ended, it was its duty to distribute what remained (the overpayments) to those who contributed it, in proportion to their contributions. It will be difficult to find all of those entitled to a part of the fund, but this fact does not demand application of any other rule.

With respect to the accounting, two contentions are presented. It is said: First, that the trustee should be charged with all payments made by it from the fund after September 11, 1912; and, second, it should be charged interest on the trust fund during the time it was in its possession, not deposited and kept as a separate fund,—kept with its own funds. It is not pointed out in the brief that money paid from the fund as benefits after September 11, 1912, was paid to any who had not before that date been a contributor to the fund.

The account of the defendant company credits the fund with interest at bank rates on balances semiannually from April, 1909, and it appears that it accounts for all interest it ever received since that date. There was in the beginning no surplus, and there was the necessity of meeting at all times lawful demands upon the fund so far as the fund could pay them. But some time in 1908 the fund was deposited in a banking institution in Cleveland. It does not appear that the question of interest prior to 1909 was raised in the court below. There is evidence (testimony) to the effect that the defendant company never did, in fact, use any of the money in its business. Trustees are chargeable with interest on trust funds upon the principle that "they have received interest, have used the money themselves, or that they have been negligent either in not paying over the money or in not loaning or investing it so as to render it productive." Calkins v. Bump, 120 Mich. 335, 79 N. W. 491.

We find no reason for disturbing the decree, and it is affirmed, but without costs to either party.

ANNOTATION.

Distribution of employees' relief fund on discontinuance of business or dissolution.

It will be noticed that in the reported case (WALTERS v. PITTSBURGH & L. A. IRON CO. ante, 624) it was held that the money remaining when the employer ceased to do business, in a fund established by him by contributions of himself and his employees for the relief of employees injured in

the business, should be distributed among all those who had contributed to it, in proportion to their contribution, and not merely among those in his employment when the business was closed up.

A similar decision was reached in Coe v. Washington Mills (1889) 149 Mass. 543, 21 N. E. 966. In that case the employees of a mill formed a voluntary relief association by the regulations of which it was provided that all employees of the mill should be members; that membership should cease on leaving the employ of the mills; that the mill and employees should pay a stated weekly contribution; that the sick benefits should be a certain sum; that the officers should be chosen from the superintendents and overseers of the mill, and should decide points of dispute and manage the internal affairs of the society. It was held that the association was a voluntary one for the benefit of its members, and not a public charitable institution, and that it ceased to exist when, after many years, the mill corporation was dissolved, and that at its extinction the board of government of the society held the accumulated funds for the benefit of all the contributors and that they were entitled to it each in proportion to the amount contributed by him. And all members except the mill corporation having voted, or consented, that the fund should be paid to a charitable society for a certain purpose, it was held that the residue of the fund, after paying the corporation its proportion, should be paid to that society.

In Re Lead Co's. Workmen's Fund Soc. [1904] 2 Ch. (Eng.) 196, 73 L. J. Ch. N. S. 628, 52 Week. Rep. 571, 91 L. T. N. S. 433, 20 Times L. R. 504, where a society, not registered under the Friendly Societies Acts, was formed for the benefit of workmen in the employ of a company to provide aid in case of sickness and old age, and it was provided that, upon members attaining the age of sixty-five, they should cease to contribute to the society, and should be entitled to a weekly allowance from it, it was held that the court had jurisdiction to wind up the society and order that the rights of all parties interested in the funds be ascertained, it appearing that the company employing the members, and in whose name the fund stood as trustee, had discontinued business; that a large number of the members were over sixty-five, and that no new members were coming in, so that, if it continued to pay the weekly pension to members over sixty-five, there would probably be nothing left for the younger members; and that a majority of members had voted for a dissolution by the court. And, with respect to distribution, it was held that the funds should be distributed upon the principle of a return to the members existing at the date of distribution of their contributions, including fines on admission, but irrespective of fines or payments in respect of sick benefits, and without interest.

In Baltimore & O. R. Co. v. Baltimore & O. Employee's Relief Asso. (1893) 77 Md. 566, 26 Atl. 1045, a relief association was incorporated for the purpose of affording relief to employees of a railroad in case of sickness, accident, old age, and death, no provision being made by the constitution or by-laws for the relief of members in case of old age; the railroad donated a sum to the association, and agreed to pay its operating expenses, amounting annually to $25,000, but, after organization, the committee of management deemed it wise to create a pension department, and entered into an agreement with the railroad whereby the road agreed to appropriate $25,000 annually to the pension feature, provided the relief association would agree to pay its own operating expenses. It was held that the committee had no power to make such an agreement charging the payment of the operating expenses upon the relief association, and releasing the railroad from its obligation to pay such expenses, there being no compliance with the provisions regulating the amendment of the constitution, and it was held that all sums paid by the association for its operating expenses up to the time of its dissolution should be considered a part of the gross as-

sets of the association for distribution. (Meaning, apparently, that the equivalent amount due from the railroad should be so considered.)

And the by-laws having provided for the payment of a specific sum in case of sickness or accident, and for a certain sum in case of a member's death, it was held that benefits due for accident and sickness occurring prior to the dissolution, as well as matured death claims, were preferred claims.

In Stein v. National Bank (1916) — Mo. App. —, 181 S. W. 1072, the board of directors of a bank passed a resolution creating an employees' pension fund and an employees' participation fund, and providing that, at the expiration of business of December 31st of each year, a certain percentage of the net earnings should be set apart for these funds, and further providing that the directors should reserve the right at any time to discontinue the annual appropriation for the pension fund, and that when the appropriation was so discontinued, the amount to the credit of the fund should be held for the benefit of those employees who, at that time, had been in the employ of the bank continuously for five years or more, such amount to be distributed in such manner as the board might determine. It was contended that the board of directors could not discontinue the annual appropriation to the fund except on December 1st of any year; but the court refused to adopt this construction, and held that the board might discontinue it at any time, and that the time for reckoning the period of service of the employees in order to determine their eligibility to participation in the accumulated funds commenced on the date in July that a resolution to terminate the trust was passed by the directors, and not on December 31st following.

In Re Ontario Bank Pension Fund (1914) 30 **Ont.** L. Rep. 350, where a by-law was passed at the annual meeting of a bank, authorizing the directors to establish a pension fund for the officers and employees of the bank and their families, and granting a certain sum to such fund, and empowering the directors to contribute that sum from the funds of the bank, and authorizing them to pass rules for the organization and regulation of the pension fund, and to determine the amount of pensions, and the amount of deductions from the salaries of officers and employees which should be paid to the fund, and at five subsequent annual meetings of the shareholders resolutions were passed granting $5,000 to the pension fund which amounts were transferred to an account headed "Officers' Pension Fund," but the directors of the bank never acted upon the authority given them to establish a pension fund and organization,—it was held, upon the winding up of the bank, that, under these facts, no pension fund was created, or trust in favor of the officers and employees established and that if there had been, it would not have been a charitable trust, so that the cy-pres doctrine would have been applied. J. T. W.

OVERSEER OF POOR OF TOWN OF MONTCLAIR et al., Respts.,
v.
CHARLES W. EASON, Appt.

New Jersey Court of Errors and Appeals—June 17, 1918.

(— N. J. —, 104 Atl. 291.)

Bastardy — corroboration.

1. In a bastardy case under our statute, it is not necessary to a finding against the putative father that the testimony of the mother of the bastard should be corroborated.

[See note on this question beginning on page 635.]

Headnotes by PARKER, J.

Appeal — failure to enter judgment.

2. In a proceeding before a statutory tribunal, as in bastardy cases, when there is a trial de novo on appeal, with jury, before the court of common pleas or quarter sessions, and a verdict requiring the entry of an independent judgment by that court, its failure to enter such judgment will not work a reversal on certiorari, but the record will be remitted to it for the entry of such judgment as was required by law in accordance with the verdict.

Evidence — character — bastardy.

3. A bastardy case under our statute is not a criminal but a "civil proceeding." The burden of proof does not require proof of paternity beyond a reasonable doubt; and, while the incidental element of criminality involved in the paternity of an illegitimate child entitles the putative father to present evidence of good character, which the jury should consider in connection with the other evidence in the case, the defendant is not entitled to be absolved if the character evidence, either alone or in connection with the other evidence, raises no more than a reasonable doubt that he is the father of the bastard child.

APPEAL by defendant from a judgment of the Supreme Court affirming proceedings in the Essex Quarter Sessions in favor of plaintiffs in a bastardy proceeding. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. **William R. Wilson** for appellant.

Messrs. **Hartshorne, Insley, & Leake,** for respondents:

Bastardy suits are civil suits and not criminal suits; the sole object being to determine who is the father of the illegitimate child, so he may be compelled to support it.

State, Leconey, Prosecutor, v. Overseer of Poor, 43 N. J. L. 406, 7 C. J. 966; Hildreth v. Hopewell Twp. 13 N. J. L. 5.

The supreme court is bound by the finding of fact in the quarter sessions, if there was legal evidence before the latter court on which a finding could be based.

State, South Brunswick Twp., Prosecutor, v. Cranbury Twp. 52 N. J. L. 298, 19 Atl. 787; Deyo v. Keighley, 75 N. J. L. 249, 67 Atl. 347; Conner v. Fogg, 75 N. J. L. 245, 67 Atl. 338; New York & N. J. Teleph. Co. v. Connelly, 69 N. J. L. 182, 54 Atl. 219; Vandegrift v. Meihle, 66 N. J. L. 92, 49 Atl. 16; Deubel v. Vanderbilt, 64 N. J. L. 159, 44 Atl. 842.

The jury may find the accused to be the father of the child on the mother's testimony alone, if it be credible.

Bennett v. Briggs, — N. J. L. —, 65 Atl. 717.

Parker, J., delivered the opinion of the court:

This is a bastardy case. An order of filiation having been made by the recorder of Montclair, after the usual hearing and before birth of the child, there was an appeal to the Essex quarter sessions, and a retrial with a jury. The child had then been born, and was exhibited to the jury; and, upon their finding that appellant was the father, the sessions gave judgment accordingly, and made an order providing, inter alia, that appellant enter into bond conditioned to obey the order of filiation made by the recorder. There was no new order of filiation in the sessions, and, the proceedings having been removed therefrom to the supreme court by certiorari, that court affirmed the judgment that appellant was the father, but held that it was the duty of the sessions to make its own order of filiation, and ordered the record remitted for that purpose. This action of the supreme court, and matters occurring at the trial in the sessions, are assigned for error.

Taking up first the remission of the record by the supreme court, we think its action was clearly right. That a new order of filiation should be made in the sessions is settled. Hurff v. Armstrong, 38 N. J. L. 287, and cases cited. In that case it was held that the matter must go back to the sessions for a retrial, but this was because there had been no jury in that court, and there was consequently no record of the facts found

on which to base an order. 38 N. J. L. 289. At the same time the practice, established in the earlier case of Doremus v. Howard, 23 N. J. L. 390, of remitting a record which exhibited the verdict of a jury, for entry of a judgment in accordance therewith, was recognized in the Hurff Case, and followed in the later decision of State, Mulcahy, Prosecutor, v. New Jersey Traction Co. 57 N. J. L. 345, 30 Atl. 472. The rule may therefore be considered as settled that when there is a trial de novo on appeal, with jury, in the court of common pleas or quarter sessions, and a verdict requiring the entry of an independent judgment by that court, its failure to enter such judgment will not work a reversal on certiorari, but the record will be remitted to it for the entry of such judgment as was required by law in accordance with the verdict.

Appeal—failure to enter judgment.

We proceed, therefore, to consider the alleged errors at the trial before the quarter sessions, as set forth in the appellant's brief; there was no oral argument. The first point made is that there was no corroboration of the testimony of the complaining witness, the mother of the bastard. There is some contrariety in the decisions of the various states on this point, due no doubt to variance in the respective statutes. The rule as stated in 7 C. J. 994, is that "in the absence of a statute requiring corroboration, the jury may find that defendant is the father of the child on the sole testimony of the mother, provided they believe it to be credible."

This seems to be the rule in Massachusetts (Noonan v. Brogan, 3 Allen, 481), and Indiana (Evans v. State, 165 Ind. 369, 2 L.R.A.(N.S.) 619, 74 N. E. 244, 75 N. E. 651, 6 Ann. Cas. 813). The English statute was strict in requiring corroboration of the mother in some material particular (Reg. v. Read, 9 Ad. & El. 619, 112 Eng. Reprint 1346, 8 L. J. Mag. Cas. N. S. 19, 1 Perry & D. 413, 2 W. W. & H. 94, and consequently decisions thereunder are hardly relevant. Our own act contains no such requirement. Comp. Stat. 185, §§ 5, 6, and 187, § 14. The trial on appeal is conducted in the same manner as that before the magistrate, who, if no jury be demanded, shall "examine the mother of such bastard, or the woman so pregnant as aforesaid, on oath, in the presence of the person so charged, touching the father of such child, and shall hear any proofs that may be offered in relation thereto." Section 5. In jury cases the magistrate is to impanel and swear the jury, "and swear the witnesses produced to establish and rebut such accusation, and the said accusation shall thereupon be tried as in cases in courts of common law before such jury." Section 6. There is no intimation in our statute or decisions, pointed out by counsel or discovered by our examination, that the testimony of the mother, who is not merely a competent but a required witness, must not be evidential unless corroborated. We think the rule is otherwise.

Bastardy—corroboration.

But if the position taken by counsel were correct, it would not avail the appellant; for, apart from the fact that the point was not raised at the trial in any way, corroboration was supplied in the production of the child before the jury in the presence of appellant, with opportunity of inspection and a determination of resemblance. This was a proper means of proof. Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600, 8 Am. Crim. Rep. 297.

The next division of the brief, headed "Burden of Proof," points to no judicial action.

The third, fourth, and fifth points may be considered together. They amount to this: That no finding against appellant could be had unless he was shown to be the father beyond a reasonable doubt, and that the court refused to recognize this rule and charged counter to it; and that appellant was entitled to the

benefit of any reasonable doubt engendered by evidence of good character given in his behalf. Four requests to charge were submitted and refused. The first is not now pressed; the last was covered in the charge. The other two are as follows:

"(2) That evidence of good character is not a mere make-weight thrown in to assist in the production of a result that would happen at all events, but is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal.

"(3) That evidence of good character may of itself produce a reasonable doubt where otherwise no reasonable doubt would exist."

These requests are manifestly based on the theory that, unless appellant was shown beyond reasonable doubt to be the father of the bastard, no verdict of paternity should go against him. As has been stated, the court declined to recognize such a rule, and told the jury that they could find such a verdict if the town had sustained the burden of proving, by a fair preponderance of the testimony, that appellant was the father of the child. This instruction was correct. It may be conceded that bastardy proceedings are sometimes characterized as criminal or quasi criminal in character, but usually they are held to be in the nature of civil proceedings. The views in the various state jurisdictions, with authorities, will be found collected in 7 C. J. 966. In this state it seems to be settled that they are civil or at least quasi civil. In Hildreth v. Hopewell Twp. 13 N. J. L. 5, it was said by Chief Justice Ewing, that "an order of affiliation and maintenance is not for the punishment or prevention of crime, or for the reformation of morals, but to compel the . . . father to pay for the maintenance of his illegitimate offspring, and thus to protect the township from any charge for its support. The proceeding therefore is strictly of a civil nature."

The question under consideration was whether a commission to take testimony de bene esse could be issued in such a case, it being conceded that it could not if the action were a criminal one. In the later case of Dally v. Woodbridge, 21 N. J. L. 491, 494, the same court said it was in the nature of a civil action, but as it incidentally charged a criminal offense, the defendant was entitled to put in evidence of good moral character. Still later, in State, Leconey, Prosecutor, v. Overseer of Poor, 43 N. J. L. 406, Mr. Justice (afterwards Chief Justice and Chancellor) Magie, said: "The proceeding under the bastardy act, while of statutory character, intended to compel, in a summary way, the putative father to protect the public against the maintenance of his illegitimate children, is not a criminal, but a civil, action" (citing the foregoing cases).

In Schomp v. Tompkins, 46 N. J. L. 608, Chief Justice Beasley speaking for this court, it was held that every intendment should be made in favor of the orders in bastardy proceedings, and that the judgment was to be treated as common-law judgment, to which the action, "Omnia præsumuntur esse rite acta," is applicable.

The summary features of the procedure have been greatly mitigated by the legislature, as will be seen from a comparison of the older and later acts. Elmer's Dig. 39; Rev. Stat. 1847, p. 903; Pamph. Laws 1858, p. 467; Nixon's Dig. 1868, 70–73; Rev. 1877, pp. 70 et seq. In the present statute (§ 6) it is provided that the jury is to be summoned as in a small cause court, which is a court of civil jurisdiction exclusively; that the same right of challenge to jurors shall exist as in civil cases at law; and in § 14 the act says that on appeal to the sessions the "burden of proof" shall be "upon the township as it was before the magistrate." These provisions are plainly consonant with the theory

of a civil proceeding and that alone. If so, the doctrine of reasonable doubt does not apply, and the requests predicated thereon were properly refused.

Evidence—character—bastardy.

The character evidence proffered by appellant was duly admitted, and the jury were properly charged to consider it with the other evidence in the case. Appellant was not entitled to more than that.

We find no error either in the Supreme Court or in the trial before the sessions, and the judgment brought up will accordingly be affirmed.

ANNOTATION.

Necessity of corroboration of prosecuting witness in bastardy proceedings.

It is characteristic of the common law, as distinguished from other legal systems, such as the Hebrew and civil law, that it does not, as a rule, require the truth of a matter in dispute to be established by the testimony of two or more witnesses; in other words, the proof will not fail merely because it is made by one witness only. 3 Enc. Ev. 671–673.

To this common-law rule there are, however, some exceptions established, it seems, partly by statutes and partly by decisions of the courts. The English Statute of 1834, and similar statutes subsequently enacted, expressly require, as a condition of an order of filiation, that the evidence of the mother of the bastard child "shall be corroborated in some material particular by other testimony." Reg. v. Read (1839) 9 Ad. & El. 619, 112 Eng. Reprint, 1346, 8 L. J. Mag. Cas. N. S. 19, 1 Perry & D. 413, 2 W. W. & H. 94; Lawrence v. Ingmire (1869) 20 L. T. N. S. (Eng.) 391; Hodges v. Bennett (1860) 5 Hurlst. & N. 625, 157 Eng. Reprint, 1329, 29 L. J. Mag. Cas. N. S. 224, 2 L. T. N. S. 190, 8 Week. Rep. 463; Reg. v. Armitage (1872) L. R. 7 Q. B. (Eng.) 773, 42 L. J. Mag. Cas. N. S. 15, 27 L. T. N. S. 41, 20 Week. Rep. 1015; Cole v. Manning (1877) L. R. 2 Q. B. Div. (Eng.) 611, 46 L. J. Mag. Cas. N. S. 175, 35 L. T. N. S. 941; Hill v. Denmark (1895) 59 J. P. (Eng.) 345; Harvey v. Anning (1902) 87 L. T. N. S. (Eng.) 687, 67 J. P. 73, 87 L. T. N. S. 687; Reffell v. Morton (1906) 70 J. P. (Eng.) 347; Mash v. Darley [1914] 3 K. B. (Eng.) 1226, 83 L. J. K. B. N. S. 1740, 111 L. T. N. S. 744, 30 Times L. R. 585, 58 Sol. Jo. 652.

In this country, as is indicated by the decisions of the courts, statutes have not, generally, expressly required corroboration of the testimony of the complainant in a bastardy proceeding. Statutes are, however, common requiring corroboration in certain kinds of criminal proceedings, as in cases of rape and seduction, and prohibiting conviction based solely on the uncorroborated testimony of an accomplice. See Wigmore, Ev. §§ 2056, 2061.

In the cases in which the question has arisen as to the necessity of corroboration of the prosecuting witness in a bastardy proceeding, the grounds upon which it was contended such corroboration was necessary are not, as a rule, clearly stated, and the courts have usually dismissed the point somewhat summarily. Doubtless the nature of the proceeding, in which, often, an innocent party is placed largely at the mercy of an offending and interested prosecutrix, has contributed to the belief that, in justice, the courts should require corroboration of the complainant's testimony. And the fact that statutes require corroboration in related cases has perhaps in some instances, even where it is not expressly so stated in the decisions, strengthened the contention that this rule should be applied also in bastardy proceedings. But the fact that the legislature has required corroborative evidence, in addition to that of the person injured, in prosecutions for rape and seduction, and has not expressly required such corroboration in

bastardy proceedings, has been regarded as tending to show that the corroboration in the latter instance was not intended. State v. McGlothlen (1881) 56 **Iowa**, 544, 9 N. W. 893.

But whatever the grounds for argument in favor of the view that corroboration should be required, it is well settled that, in the absence of statute requiring corroboration of the testimony of the mother of the bastard child, such corroboration is not essential to a conviction in a bastardy proceeding, provided her testimony is credible and is sufficiently clear and convincing; in other words, a conviction will not be denied or set aside merely on the ground that it cannot be based on the mother's testimony alone. Qualls v. State (1909) 92 **Ark.** 200, 122 S. W. 498; Belford v. State (1910) 96 **Ark.** 274, 131 S. W. 953; Kennedy v. State (1915) 117 **Ark.** 113, L.R.A.1916B, 1052, 173 S. W. 842, Ann. Cas. 1917A, 1029; Kennedy v. State (1911) 9 **Ga.** App. 219, 70 S. E. 986; Evans v. State (1905) 165 **Ind.** 369, 2 L.R.A.(N.S.) 619, 74 N. E. 244, 75 N. E. 651, 6 Ann. Cas. 813; State v. McGlothlen (**Iowa**) supra; State v. Croatt (1917) 179 **Iowa**, 658, 161 N. W. 648; State v. Nichols (1882) 29 **Minn.** 357, 13 N. W. 153; State ex rel. Zehntner v. Tipton (1894) 15 **Mont.** 74, 38 Pac. 222; Olson v. Peterson (1891) 33 **Neb.** 358, 50 N. W. 155; Robb v. Hewitt (1894) 39 **Neb.** 217, 58 N. W. 88; Gatzemeyer v. Peterson (1903) 68 **Neb.** 832, 94 N. W. 974; Clow v. Smith (1909) 85 **Neb.** 668, 124 N. W. 140; MONTCLAIR v. EASON (reported herewith) ante, 631; People ex rel. Kenfield v. Lyon (1894) 83 Hun, 303, 31 **N. Y.** Supp. 942; Webb v. Hill (1909) 115 **N. Y.** Supp. 267; Public Charities Comr. v. Vassie (1915) 167 App. Div. 74, 152 **N. Y.** Supp. 496; State v. Brunette (1914) 28 **N. D.** 539, 150 N. W. 271, Ann. Cas. 1916E, 340 (it being stated in the syllabus by the court that corroboration is not necessary, although in the opinion it is said there was corroborating evidence which, though not strong or conclusive, had some weight); Com. v. Betz (1867) 2 Woodw. Dec. (**Pa.**) 210 (statement of mother, under oath, in court, is sufficient to warrant a conviction, without proof of a charge against defendant made by her during pregnancy); State v. Mears (1901) 60 **S. C.** 527, 39 S. E. 245; State v. Adams (1914) 100 **S. C.** 43, 84 S. E. 368.

There are other cases, which, while they cannot be regarded as full authority for the above proposition, may perhaps be construed as assuming or implying it, in view of the discussion of the questions involved or the conclusion reached. Among other cases of this kind are: Johnson v. People (1892) 140 **Ill.** 350, 29 N. E. 895; McElhaney v. People (1878) 1 **Ill. App.** 550; Corcoran v. People (1888) 27 **Ill. App.** 638; Gehm v. People (1899) 87 **Ill. App.** 158; Matteson v. People (1905) 122 **Ill. App.** 66; Simis v. Alwang (1901) 61 App. Div. 426, 70 **N. Y.** Supp. 580.

State v. Reese (1913) 43 **Utah**, 447, 135 Pac. 270, is sometimes cited as holding that corroboration of the prosecuting witness in a bastardy proceeding is not necessary. The court stated that the testimony of the prosecutrix and that of the defendant were diametrically opposed, and it was a question for the jury which one was more worthy of belief and which one, under all the circumstances, they would believe; and that the contention, therefore, that the judgment should be reversed for the reason that the evidence was insufficient to support the verdict, could not be sustained.

And in Noonan v. Brogan (1862) 3 Allen (**Mass.**) 481, a conviction in a bastardy proceeding in which the complainant was the only witness was sustained, the court saying that it was within the province of the jury to decide upon the credibility of the witness, and to determine if her testimony, "in connection with what was otherwise shown by the records," was sufficient to prove the allegations in the complaint.

The manner in which the question arose and in which the court disposed of it, in some of the cases cited above, may properly be here indicated.

Thus, in State ex rel. Zehntner v. Tipton (1894) 15 **Mont.** 74, 38 Pac. 222, supra, an instruction was held

erroneous that, before the defendant could be convicted of the charge against him, the testimony of the complaining witness must be sustained by facts and circumstances corroborating it; the court saying that this instruction was contrary to the provision of the Code, which declared that "the direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact, except perjury and treason."

In State v. McGlothlen (1881) 56 Iowa, 544, 9 N. W. 893, supra, the statute provided that the issue on the trial should be tried as an ordinary action; and the court said that in such actions no corroboration of the witness, however much he might be interested in the result, was required.

And in State v. Croatt (1917) 179 Iowa, 658, 161 N. W. 648, supra, the court stated that in a bastardy proceeding no corroboration was required, as in a prosecution for rape or seduction.

So, in People ex rel. Kenfield v. Lyon (1894) 83 Hun, 303, 31 N. Y. Supp. 942, supra, the court dismissed the point under consideration with the observation that "the objection that the testimony of this witness to the principal fact was not directly corroborated by other evidence goes only to the question of the credit to be given to her testimony. There is no statute requiring corroboration in order to conviction in this case, as in that of rape or seduction."

In State v. Nichols (1882) 29 Minn. 357, 13 N. W. 153, supra, the court, in holding that corroboration of the testimony of the complaining witness was not essential in a bastardy proceeding, stated that the rule invoked by the defendant had reference only to criminal prosecutions, except where, by statute, it was given a broader application, as in England with respect to bastardy proceedings; that the Minnesota statute relating to convictions on the testimony of accomplices applied only to prosecutions for crime, and that bastardy proceedings were not criminal proceedings, in the proper sense of the term.

The prosecuting witness in a bastardy proceeding does not occupy towards the defendant the relation of an accomplice, so as to make it the duty of the trial judge to advise the jury against a conviction upon her uncorroborated testimony. State v. Adams (1914) 100 S. C. 43, 84 S. E. 368, supra.

And in State v. Meares (1901) 60 S. C. 527, 39 S. E. 245, supra, the court said that, if the prosecuting witness be regarded as particeps criminis, it would still be unnecessary that her testimony should be corroborated.

In Webb v. Hill (1909) 115 N. Y. Supp. 267, supra, the court, in holding that the evidence was insufficient to sustain an order of filiation, said: "It is doubtless true that a defendant may be held upon uncorroborated testimony of a complainant, if her story is in all respects worthy of belief, and the evidence of the defendant is conflicting and uncertain. . . . An order of filiation, however, should not be rendered against the defendant, except upon testimony which is entirely satisfactory. . . . A conviction resting substantially upon uncorroborated testimony of the mother, which, in connection with her contradictory statements, makes it very uncertain whether justice has been done the defendant, will be reversed."

But the testimony of the complaining witness in a bastardy proceeding may be sufficiently positive and convincing to sustain a conviction, although other witnesses testify to acts of intercourse, denied by the complainant, between her and others than the defendant at about the time conception occurred. Michael v. State (1915) 57 Ind. App. 520, 108 N. E. 173.

However, a distinction should be observed between the question indicated in the title to the present note, and that of the sufficiency of the testimony of the prosecuting witness in a bastardy proceeding to justify or sustain a conviction, assuming that corroboration of such witness is not essential. The latter point the note does not purport to cover. Thus, in Kennedy v. State (1915) 117 Ark. 113, L.R.A. 1916B, 1052, 173 S. W. 842, Ann. Cas. 1917A, 1029, the court, while holding that it was not necessary in a bastardy

proceeding that the testimony of the mother of the child should be corroborated, held that in this instance her testimony that the defendant was the father of the child was insufficient to sustain a conviction. And among other cases in which the uncorroborated testimony of the complainant was held insufficient to sustain a conviction are: Gehm v. People (1900) 87 Ill. App. 158; Matteson v. People (1905) 122 Ill. App. 66; State v. McCulloch (1907) 102 Minn. 419, 113 N. W. 1059; Drummond v. Zucker (1913) 157 App. Div. 728, 142 N. Y. Supp. 651; and Busse v. State (1906) 129 Wis. 171, 108 N. W. 64. R. E. H.

JIM DARNEAL, Plff. in Err.,
v.
STATE OF OKLAHOMA.

Oklahoma Criminal Court of Appeals—Sept. 11, 1917.

(— Okla. Crim. Rep. —, 174 Pac. 290.)

Evidence — sufficiency.

1. Evidence examined, and held sufficient to sustain a conviction for the crime of riot committed while disguised.

[See note on this question beginning on page 642.]

Witness — infant — competency.

2. The question of the competency of a witness under ten years of age is a matter addressed peculiarly to the discretion of the trial court.

Appeal — admitting testimony of infant — abuse of discretion.

3. Where the trial court permits such a witness to testify and it appears conclusively from the record on appeal that there has been an abuse of that sound discretion placed in such court by § 5050, Revised Laws 1910, the appellate court is authorized and will reverse a judgment of conviction upon such ground if it appears that the testimony of such witness was prejudicial to the accused; however, on the other hand, where no abuse of discretion appears, then this court is not authorized to reverse a judgment of conviction solely upon the ground that a witness under ten years of age was permitted to testify for the state.

Same — refusal of instruction — singling out witness.

4. It is not error to refuse to give an instruction which has a tendency to single out any particular witness by calling to the attention of the jury that such witness has been impeached. The general instruction covering the credibility of all witnesses is a sufficient rule for the guidance of the jury in determining the credibility of any witness.

Headnotes by MATSON, J.

ERROR to the District Court for Leflore County to review a judgment convicting defendant of riot. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Neal & Fleming** for plaintiff in error.

Messrs. **S. P. Freeling**, Attorney General, and **R. McMillan**, Assistant Attorney General, for the State.

Matson, J., delivered the opinion of the court:

Jim Darneal was convicted in the district court of Leflore county for the crime of riot committed by himself and several others, acting together with him disguised, and sentenced to the penitentiary for a term of two years' imprisonment.

According to the witnesses for the state, this plaintiff in error and several others, in the nighttime, took an old man by the name of W. J. Garrison from his tent, where he was living with his two daughters

on the banks of a small creek in Leflore county, making a livelihood by fishing, dragging him a short distance, beating, whipping, and otherwise abusing the old man, also cutting off his hair. The defense was an alibi. All of the parties to the crime lived in that immediate neighborhood, and each presented a different alibi. Jim Darneal asked for a severance, which was granted.

He first contends that the court erred in permitting Rachael Garrison, a girl nine years of age, to testify as a witness against him. The statute of this state governing the competency of witnesses of tender age is as follows (Rev. Laws 1910, § 5050): "The following persons shall be incompetent to testify. . . . 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

It is apparent from the reading of the above statute that the question of the competency of a witness under ten years of age is a matter addressed peculiarly to the discretion of the trial court. If the trial court permits such a witness to testify, and it appears conclusively from the record on appeal that there has been an abuse of that sound discretion placed in such court, then this appellate court is authorized and will reverse a judgment of conviction upon such ground if it appears that the testimony of such witness was prejudicial to the accused; however, on the other hand, where no abuse of discretion appears, then this court is not authorized to reverse a judgment of conviction solely upon this ground. The weight of authority is clearly to the effect above stated. The following cases are in point: Walker v. State, 12 Okla. Crim. Rep. 179, 153 Pac. 209; Milligan v. Territory, 2 Okla. 164, 37 Pac. 1059; People v. Swist, 136 Cal. 520, 69 Pac. 223; People v. Baldwin, 117 Cal. 244, 49 Pac. 186; People v. Daily, 135 Cal. 104, 67 Pac. 16; People v. Wilmot, 139 Cal. 103, 72 Pac. 838; State v. Blythe, 20 Utah, 378, 58 Pac. 1108.

Witness—infant—competency.

Appeal—admitting testimony of infant—abuse of discretion.

The California and Utah statutes on this subject are identical with that of Oklahoma. The case of Birdwell v. United States, 4 Okla. Crim. Rep. 474, 113 Pac. 205, relied upon by counsel for plaintiff in error, is not in point. The question there decided was based on the Arkansas statute operative in the Indian Territory prior to statehood, and the facts of that case are dissimilar to the facts in this. We have carefully examined the record, and find that the only objection made against the competency of the witness Rachael Garrison was because of her age. It was nowhere contended upon the trial, nor does it appear from the examination of the witness's testimony, that she was incapable of receiving a just impression of the facts respecting which she was examined, or of relating them truly, which form the basis of the legal objections that may be taken to the testimony of a witness under ten years of age where it is not contended that she is of unsound mind. We are convinced that there was no abuse of discretion by the trial court in the instant case in permitting this witness to testify.

It is also contended that the court erred in refusing to give the following instruction, requested by counsel for the defendant: "You are instructed that one mode of impeaching the credibility of a witness is to offer evidence of such witness's general reputation for truth and honesty in the community where he lives, and if you find from the evidence in this case that the general reputation of any witness for truth and honesty has been shown to be bad in the community where such witness lives, you may consider such evidence in determining the question of whether such witness has been impeached as the

word 'impeached' is used in these instructions."

Upon the trial certain witnesses were introduced who testified that the general reputation of the prosecuting witness W. J. Garrison for truth and honesty was bad; therefore it is contended that the failure of the court to give the foregoing instruction was prejudicial to the plaintiff in error in view of the fact that the court gave the following general instruction relative to the credibility of witnesses: "You are the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each. If the testimony of a witness is apparently candid and fair, reasonable within itself, and has been in no way impeached, you should not arbitrarily discard his testimony. It is your duty to reconcile the testimony if you reasonably can, so that it all may stand. If you cannot reconcile the testimony, then, for the purpose of determining what testimony is worthy of credit, you may take into consideration the apparent candor and fairness of the witness, his demeanor upon the witness stand, the reasonableness of his or her story, the means of knowing the facts concerning which the witness testifies, whether or not the witness has been in any way impeached, the interest of the witness in the case, if any, whether the witness has made contradictory statements, and all the circumstances surrounding the case."

It is contended that in the general instruction the court called attention to various ways of impeaching a witness without calling attention to the fact that the method employed to impeach the witness Garrison was a proper one. The only effect of the instruction requested was to call the specific attention of the jury to the fact that W. J. Garrison had been impeached. We must presume that the average juryman has a reasonable amount of intelligence. Certainly at this late day in the history of criminal jurisprudence it would be folly to assert that when a witness takes the stand and testifies that a certain other witness has the general reputation in the community where he resides of being untruthful the average juryman would clearly understand that the witness attacked had been impeached for truth. Instructions of the kind requested have met with the condemnation of this court. While perhaps it would not be error, it has repeatedly been held that the better practice is to refrain from the giving of any instruction which has a tendency to single out any particular witness by an instruction touching upon his credibility. The general instruction covering the credibility of all witnesses has been held to be a sufficient rule for the guidance of the jury. Munson v. State, — Okla. Crim. Rep. —, 165 Pac. 1162. For the reasons above stated, we believe this assignment of error to be without merit.

Same—refusal of instruction—singling out witness.

Lastly, it is contended that the evidence is insufficient to support the judgment. This prosecution is based upon § 2558 and the third subdivision of § 2559, Rev. Laws 1910, which read as follows:

"Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot."

"If such person carried at the time of such riot any species of firearms or other deadly or dangerous weapon, or was disguised, he is punishable by imprisonment in the penitentiary not exceeding ten years and not less than two."

It is alleged in the information, and the state attempted to prove upon the trial, that the parties to the crime were disguised at the time of its commission.

The state's evidence disclosed that the defendant was dressed almost entirely in the wearing apparel of a woman, such as skirt, waist, and hat. His face

Evidence—sufficiency.

was partly concealed by cloths and rags wrapped around his head. His eyes, nose, mouth, and a portion of each cheek were exposed. Others in the party were similarly attired; while some of the participants wore only male attire, with their features partially concealed by cloths.

The prosecuting witness and his oldest daughter were able to identify the defendant and those with him by means of recognizing their voices and familiarity with some of the clothes worn (as belonging to the Darneal family), and also by recognizing certain of the features not covered by the attempted disguise.

The fact that the disguise was penetrable leads to the contention that it was no disguise at all, and therefore the evidence is insufficient. In other words, there may be no conviction of a felony under the foregoing provision of law unless the participants are so completely disguised as to make it impossible to identify them; that is, a prosecution will only lie under this statute when it is impossible for the state to prove the offense. Such a construction would render the statute a dead letter.

For the position taken counsel for plaintiff in error rely upon the case of Dale County v. Gunter, 46 Ala. 118, wherein the supreme court of Alabama distinguished between a person in ambush and one in disguise. It is asserted that it was held in that opinion as follows: "A person in disguise is one who is visible to the eye, but who cannot be identified because of the dress or mask which he wears. A person in ambush, or 'concealed in the bushes,' is one not visible to the eye, and may not be in disguise. 'Disguise' has reference solely to the dress or mask assumed, by which the party cannot be recognized when seen."

Counsel are mistaken. The foregoing is an excerpt from the brief of counsel who represented the plaintiff in error in that case. It forms no part of the opinion of the court. In defining a person in disguise the language employed by the court falls far short of that used by counsel. We quote from the court's opinion, as follows: "The evidence of the plaintiff, as stated and admitted, says the plaintiff's husband was shot by some person in ambush, or concealed in the bushes. The noun 'ambush' means: 1st, the act of attacking an enemy unexpectedly from a concealed station; 2d, a concealed station, where troops or enemies lie in wait to attack by surprise; an ambuscade; 3d, troops posted in a concealed place, for attacking by surprise. The verb 'ambush' means to lie in wait; to surprise; to place in ambush. 'Conceal' means: 1st, to hide, or withdraw from observation; 2d, to withhold from utterance or declaration. The synonyms of 'conceal' are to hide; disguise, dissemble; secrete. 'To hide' is generic; 'conceal' is simply not to make known what we wish to secrete; 'disguise' or 'dissemble' is to conceal by assuming some false appearance; to 'secrete' is to hide in some place of secrecy. A man may conceal facts, disguise his sentiments, dissemble his feelings, or secrete stolen goods. The verb 'disguise' means: 1st, to change the guise or appearance of, especially to conceal by an unusual dress; to hide by a counterfeit appearance; 2d, to affect or change by liquor; to intoxicate. The noun 'disguise' means: 1st, a dress or exterior put on to conceal or deceive; 2d, artificial language or manner, assumed for deception; 3d, change of manner by drink; slight intoxication. This learning I derive from Mr. Webster, and I am satisfied with it. I can hardly conceive of things better distinctly marked and different than that of a person or persons in ambush, or concealed in the bushes, where a person so concealed lies in wait to attack by surprise, and a person or persons in disguise, or disguised by an unusual dress, or,— in the language of the preamble to the act to suppress secret organizations of men disguising themselves

for the purpose of committing crimes and outrages,—by the use of masks, hideous costumes, and other grotesque disguises."

It is not held in that opinion that the disguise worn must be so perfect as to defeat identification. For the purpose of deception and concealment this man was wearing in the nighttime the apparel of a woman, with a cloth wrapped around his face and head which partially concealed his features.

Whether or not a person is disguised within the meaning of the foregoing provisions of law must depend largely upon the facts of each particular case. It is impossible for the court to give any fixed definition that would apply to all the facts and circumstances of which the human mind might conceive. What might be a perfect disguise in the nighttime might be no disguise at all if employed or used in the daytime. There is no fixed standard by which we may be guided in passing upon a question such as this. However, it is our fixed opinion that this defendant was sufficiently disguised on this occasion within the meaning of the third subdivision of § 2559, above quoted, as to authorize the jury to assess the punishment prescribed by that provision.

We hold, therefore, that the evidence is sufficient to sustain the conviction, and the judgment is accordingly affirmed.

Doyle, P. J., and Armstrong, J., concur.

Petition for rehearing denied, August 27, 1918.

ANNOTATION.

What amounts to disguise within criminal law.

It will be noticed that in the reported case (Darneal v. State, ante, 638) evidence tending to show that the defendant was dressed almost entirely in the wearing apparel of a woman and that his face was partly concealed by cloths was held sufficient to sustain a conviction under a statute for committing a riot while "disguised." The court in effect refused to sustain the contention of the accused that as the disguise was penetrable it was not a disguise.

The conclusion reached is undoubtedly sound, as the provision of the statute for a more severe penalty in case of a disguise would be rendered entirely nugatory and without effect if the contention advanced was allowed to prevail.

This case is of especial value as there appears to be but one other which has considered the question under annotation. The court in Dale County v. Gunter (1871) 46 Ala. 118, had occasion to determine whether one had been shot by a person "in disguise," and decided the question in the negative where the evidence merely showed that he was shot by some person in ambush, or concealed in the bushes, stating that the verb "disguise" means, first, to change the guise or appearance of, especially to conceal by an unusual dress; second, to affect or change by liquor, to intoxicate; and that the noun "disguise" means, first, a dress or exterior put on to conceal or deceive; second, artificial language or manner assumed for deception; third, a change of manner by drink, slight intoxication. J. T. W.

E. E. BRUNNER et al., Appts.,
v.
YORK BRIDGE COMPANY et al.

West Virginia Supreme Court of Appeals—September 26, 1916.

(78 W. Va. 702, 90 S. E. 233.)

Receiver — priorities — resident creditors.

1. Resident general creditors of such defunct corporation not having previously obtained liens upon its property are not entitled to any priority or preference over nonresident creditors in the distribution of the funds derived from such assets by the local or ancillary receiver; all creditors of such corporation of the same class are, on principles of equity, entitled to share ratably in the distribution of the whole estate of such corporation, regardless of their places of residence.

[See note on this question beginning on page 648.]

Same — nonresident creditors.

2. Nonresident creditors of an insolvent corporation, being interested therein, may maintain a suit in the courts of this state to obtain the appointment of an ancillary receiver of the assets of the corporation located here, and for the sequestration thereof for the benefit of all creditors.

Same — withdrawal of funds.

3. But the courts of the local or ancillary jurisdiction should, before allowing a domiciliary receiver or other representative of such corporation to withdraw the funds sequestrated there, protect the resident domestic creditors out of such funds or otherwise to the extent of their distributive shares in the whole estate of the insolvent corporation.

Headnotes by MILLER, J.

APPEAL by plaintiffs from a decree of the Circuit Court for Harrison County distributing funds in the hands of a receiver, in a suit to preserve and administer the assets of the defendant bridge company. *Reversed.*

The facts are stated in the opinion of the Court.

Mr. **Taney Harrison**, for appellants:

In the administration of the assets of an insolvent corporation, after possession by the court, they must be treated as a pledge or trust fund for the benefit of creditors.

1 Cook, Corp. § 9; 5 Thomp. Priv. Corp. § 6555; 9 Am. & Eng. Enc. Law, 608, note 4; 10 Cyc. 1246, 1256; High, Receivers, §§ 314, 344; 3 Pom. Eq. Jur. § 1046; 4 Enc. U. S. Sup. Ct. Rep. 639; Lamb v. Laughlin, 25 W. Va. 300; Kahle v. Long Reach Oil Co. 51 W. Va. 313, 41 S. E. 233; Crumlish v. Shenandoah Valley R. Co. 28 W. Va. 623; Sweeny v. Wheeling Grape Sugar & Ref. Co. 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431.

The status of all creditors is fixed as of the time of the entry of the order of the receiver's appointment, and no creditor will be permitted thereafter to gain a preference over other creditors of the same class.

High, Receivers, § 439b; City Bank v. Bryan, 76 W. Va. 481, L.R.A.1915F, 1219, 86 S. E. 8; Lang v. Macon Constr. Co. 101 Ga. 343, 28 S. E. 860; 34 Cyc. 199; Waggy v. Jane Lew Lumber Co. 69 W. Va. 666, 72 S. E. 778.

Equality is equity; and, in the administration of assets in equity, all who stand in equal relation, on an equal footing, in equal degree, or in equal right, are entitled to share equally.

1 Pom. Eq. Jur. §§ 407, 410; 10 Cyc. 1256, 1263; Lang v. Macon Constr. Co. 101 Ga. 343, 28 S. E. 860.

All creditors of a corporation, wherever residing, are entitled, in case of insolvency, to have the assets distributed among them upon principles of perfect equality. The courts of one state have no right to favor domestic

creditors in the distribution, but it must be made upon the principle that equality is equity.

Blake v. McClung, 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307; 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; People v. Granite State Provident Asso. 161 N. Y. 492, 55 N. E. 1053; Wilson v. Keels, 54 S. C. 545, 71 Am. St. Rep. 816, 32 S. E. 702; Alderson, Receivers, § 29; 2 Cook, Corp. § 641, p. 1839; 5 Pom. Eq. Jur. § 261; 19 Cyc. 1284.

Giving priority to creditors residing in the state over those who reside out of the state, in distributing the assets of an insolvent corporation, is in violation of the Constitution of the United States, providing for equal privileges and immunities of citizens of the several states.

Blake v. McClung, supra; People v. Granite State Provident Asso. 161 N. Y. 492, 55 N. E. 1053; Wilson v. Keels, 54 S. C. 545, 71 Am. St. Rep. 816, 32 S. E. 702.

Messrs. **Osman E. Swartz** and **E. Bryan Templeman**, for appellee Union Bank:

A receiver regularly appointed by a court of competent jurisdiction is the representative of all creditors and others, formal parties to the suit, or who come into the suit to assert and protect their rights; and such creditors or other parties cannot maintain suits to recover assets of the estate, either within the jurisdiction of the court appointing the receiver, or elsewhere.

High, Receivers, 3d ed. §§ 314, 454; 5 Pom. Eq. Jur. § 154; 34 Cyc. 236, 390, 403, note 39; Beach, Eq. Pr. § 717; Castleman v. Templeman, 87 Md. 546, 41 L.R.A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; Hogg, Eq. Principles, §§ 63, 142; Swing v. Bentley & G. Furniture Co. 45 W. Va. 283, 31 S. E. 925; Wilson v. Keels, 54 S. C. 545, 71 Am. St. Rep. 816, 32 S. E. 702.

While the courts of one state will, out of comity, permit receivers appointed by the courts of other states to sue to recover assets of an insolvent corporation located in such first-mentioned state, they will not permit such suit when to do so will prejudice the rights of local creditors, or violate the policy of such state.

Boulware v. Davis, 9 L.R.A. 601, and note, 90 Ala. 207, 8 So. 84; Wyman v. Eaton, 107 Iowa, 214, 43 L.R.A. 695, 70 Am. St. Rep. 193, 77 N. W. 865; Castleman v. Templeman, 87 Md. 546, 41 L.R.A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; Reynolds v. Adden, 136 U. S. 353, 34 L. ed. 362, 10 Sup. Ct. Rep. 843; United States v. Borcherling, 185 U. S. 223, 46 L. ed. 884, 22 Sup. Ct. Rep. 607; Fowler v. Osgood, 4 L.R.A.(N.S.) 824, and note, 72 C. C. A. 276, 141 Fed. 20; Hurd v. Elizabeth, 41 N. J. L. 1; Day v. Postal Teleg. Co. 66 Md. 354, 7 Atl. 608; Lewis v. American Naval Stores Co. 119 Fed. 397; Choctaw Coal & Min. Co. v. Williams-Echols Dry Goods Co. 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569; Gray v. Covert, 25 Ind. App. 564, 81 Am. St. Rep. 117, 58 N. E. 731; Security Trust Co. v. Dodd, 173 U. S. 629, 43 L. ed. 837, 19 Sup. Ct. Rep. 545; Frowert v. Blank, 205 Pa. 302, 54 Atl. 1000; Small v. Smith, 14 S. D. 625, 86 Am. St. Rep. 808, 86 N. W. 649; Minor, Confl. L. § 117; Humphreys v. Hopkins, 81 Cal. 551, 6 L.R.A. 792, 15 Am. St. Rep. 76, 22 Pac. 892; Rogers v. Riley, 80 Fed. 759; Grogan v. Egbert, 44 W. Va. 75, 67 Am. St. Rep. 763, 28 S. E. 714; Second Nat. Bank v. Lappe Tanning Co. 198 Mass. 159, 84 N. E. 301; Lackmann v. Supreme Council, O. C. F. 142 Cal. 22, 75 Pac. 583; Clark v. Supreme Council O. C. F. 146 Cal. 598, 80 Pac. 931; Long v. Forrest, 23 L.R.A. 33, and note, 150 Pa. 413, 24 Atl. 711; Barth v. Backus, 23 L.R.A. 47, and note, 140 N. Y. 230, 37 Am. St. Rep. 545, 35 N. E. 425; Gilman v. Hudson River Boot & Shoe Mfg. Co. 23 L.R.A. 52, and note, 84 Wis. 60, 36 Am. St. Rep. 899, 54 N. W. 395; Beach, Eq. Pr. § 747; Peterson v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298; 34 Cyc. 489; Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; High, Receivers, § 239.

There can be but one primary receivership for an insolvent corporation. All other proceedings in other states for the appointment of receivers to collect the assets of such corporation are ancillary to the primary proceeding; and the funds in the hands of such ancillary receiver, after the payment of costs and local debts, should be turned over to the primary receiver for distribution.

19 Cyc. 504; Failey v. Fee, 83 Md. 83, 32 L.R.A. 311, 55 Am. St. Rep. 326, 34 Atl. 839; Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 113 Fed. 405, affirmed in 60 C. C. A. 400, 125 Fed. 1001; Barley v. Gittings, 15 App. D. C. 427; Minor, Confl. L. § 117.

The policy of the state of West Vir-

ginia is to protect domestic creditors of nonresident debtors, and to provide for the payment of local debts out of local assets before permitting such assets to be removed from the state.

Grogan v. Egbert, 44 W. Va. 75, 67 Am. St. Rep. 763, 28 S. E. 714; McClung v. Seig, 54 W. Va. 467, 66 L.R.A. 884, 46 S. E. 210; Billmyer Lumber Co. v. Merchants Coal Co. 66 W. Va. 696, 26 L.R.A.(N.S.) 1101, 66 S. E. 1073.

Miller, J., delivered the opinion of the court:

The defendant company is a foreign corporation, organized under the laws of the state of Pennsylvania, with its chief works and place of business at the city of York, in that state. Becoming insolvent, the plaintiffs, upon a bill filed in the courts of that state, obtained the appointment of special receivers of the property and assets of said company, and thereafter by this suit sought and obtained the appointment of an ancillary special receiver of certain property and assets of the corporation located in Harrison county, in this state.

As a result of the ancillary receivership a net balance of $4,232.36 remained for distribution to creditors of the insolvent corporation.

The local West Virginia creditors of said company intervened in this suit, and as such claimed right of priority and preference as against the nonresident creditors, one of whom, the York National Bank, also intervened by petition and sought a decree against the defendant company for its debt, and prayed that it might be decreed its pro rata share of said assets without discrimination in favor of the West Virginia creditors, on account of the location of its principal place of business.

By the decree appealed from the circuit court adjudged that the net amount in the hands of its receiver should be distributed first to the payment and discharge in full of the claims of the resident West Virginia creditors, and that the residue, if any, should be paid over to the domiciliary receivers appointed by the court in Pennsylvania. From this decree the York National Bank, the intervening creditor, applied for and obtained this appeal. The Union National Bank, of Clarksburg, West Virginia, the principal West Virginia creditor, and to whom was decreed the sum of $2,680 out of said fund, is the only one of the appellees who has appeared to defend in this court.

The right of creditors to maintain this suit is challenged by counsel for the Union National Bank. It is argued that only the special receivers can maintain a suit to recover the assets of the insolvent corporation. The general proposition contended for and for which counsel cite numerous decisions is not controverted; but we see little application of this proposition to the matters involved. In the first place this is not primarily a suit by creditors to recover the assets of the insolvent corporation. The main effect of the bill was accomplished by the decree appointing the ancillary receiver, who was authorized and has recovered the assets and brought them into court for distribution. Certainly it will not be seriously contended that creditors may not maintain a suit for that purpose. And as applied to the petition of the York National Bank, intervening to protect its interest, and to obtain its ratable share of these local assets, and for general relief, the proposition has little, if any, application. Certainly this bank is interested in the fund to be distributed, and has right to intervene to protect its interests and to see to it that the fund is not wasted or disbursed to its detriment. The prayer of its petition is that it may be decreed its ratable share, without discrimination in favor of local creditors, and for general relief.

Receivers—nonresident creditors.

Numerous propositions are advanced by counsel more or less pertinent to the issues involved, but it is conceded that the real and con-

trolling question decisive of all others, and the only one which we need consider, is, have the local resident creditors of the insolvent corporation any right to priority of payment, to the exclusion of nonresident creditors, out of the funds derived from the assets in this state? If they have, the decree is right; if not, it is concededly wrong and should be reversed.

Counsel for the Union National Bank admit that the principle of law for which they contend can be supported and justified upon but one ground, namely, the right of a state as a sovereign power to exercise its sovereignty for the benefit and protection of citizens within its borders. They cite as instances of the exercise of this power, the denial to foreign receivers of the privilege of removing out of the state assets of an insolvent corporation without payment of the debt of resident creditors; the denial to foreign corporations of the privileges of doing business in the state, except upon terms provided for the protection of citizens of the state; and the provisions of our statutes relating to the removal from the state by foreign fiduciaries of trust funds, to the detriment of citizens of the state.

We deem it unnecessary to follow learned counsel in the elaborate discussion pertaining to the sovereign powers of the states, and the instances given of their exercise by the states. The question we have to decide is, Can one state, or the courts thereof, in the exercise of any power not denied them by the Federal Constitution, prefer its own citizens or residents as decreed in this case? By the Federal Constitution one state is not permitted to deny to the citizens or residents of another state, coming within its jurisdiction, the equal protection of the laws, or to withhold from them those privileges and immunities which are guaranteed to them by the Federal Constitution, or to deprive them of their property without due process of law.

It is conceded that we have no statute giving to local or resident creditors priority or preference in the distribution of the assets of a foreign corporation located here; but it is argued that we have a public policy to that effect analogous to the provisions of chapter 84 of our Code, relating to the transfer of trust funds by a foreign fiduciary, which as fully protects domestic creditors, and which the courts are bound to enforce.

We know of no public policy of this state evidenced by statute or judicial decisions going to the extent affirmed by counsel. We do have chapter 84 of the Code (§§ 3979–3987), prohibiting the transfer of trust funds to a foreign fiduciary to the prejudice of interested persons; and we have decisions, notably Grogan v. Egbert, 44 W. Va. 75, 67 Am. St. Rep. 763, 28 S. E. 714, and Billmyer Lumber Co. v. Merchants Coal Co. 66 W. Va. 696, 702, 26 L.R.A.(N.S.) 1101, 66 S. E. 1073, to the effect that foreign receivers will not be allowed to remove assets of a foreign corporation to the detriment of resident persons, or compel local creditors to go into a foreign jurisdiction to collect their debts; but neither the statute nor the decisions evince a public policy to contravene the provision of the Federal Constitution, by undertaking to give resident creditors as a class priority and preference in the distribution of such assets, further than to protect them in their right to be paid their equal and ratable shares based on the total assets of the foreign corporation, out of the assets in the hands of local representatives, without having to go outside the state to collect their debts. We have examined the numerous decisions cited from other states, and find that few, if any, of them go to the extent contended by counsel. Dicta may be found in some of them giving color to the views of counsel, but in few instances was this the exact point of decision.

Same—priorities—resident creditors.

But say we had a statute or a public policy going to the limit claimed, neither could prevail against the provisions of the Federal Constitution referred to as interpreted by our highest Federal tribunal, the Supreme Court of the United States. That court distinctly held that a statute of Tennessee, which undertook to so prefer resident creditors of a foreign corporation doing business there, was unconstitutional, void, and unenforceable. Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, reaffirmed upon a second appeal in id. 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307. One of the points of the syllabus embodying the point of decision in the first case is: "It is not in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges, connected with that business, which it denies to citizens of other states."

And again: "When the general property and assets of a private corporation, lawfully doing business in a state, are in course of administration by the courts of said state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union."

In accordance with these Federal decisions are People v. Granite State Provident Asso. 161 N. Y. 492, 55 N. E. 1053, 1054; Wilson v. Keels, 54 S. C. 545, 555, 71 Am. St. Rep. 816, 32 S. E. 702. See also 5 Pom. Eq. Jur. § 261; 19 Cyc. 1284; 2 Cook, Corp. 7th ed. 1986. As was said by the South Carolina court in Wilson v. Keels, 54 S. C. 545, 555, 71 Am. St. Rep. 816, 32 S. E. 702, construing a statute of that state: "There is no doubt that it is the duty of the courts of this state to protect the interests and rights of domestic creditors concerning assets of a foreign corporation in this state; but there is a vast difference between protecting domestic creditors and sequestrating to them exclusively assets which ought, in justice and right, be administered for the benefit of all creditors. If so construed as to exclude nonresident citizens who are creditors from participating in the assets in this state of a foreign corporation, a grave question as to the constitutionality of the act might be raised." Citing Blake v. McClung, supra.

Of course if resident creditors have obtained valid liens, by attachment or otherwise, upon the property and assets of such foreign corporation, the courts of the state, upon the principles enunciated, would have the right and would be bound to protect its citizens and residents in those rights before allowing the assets to be withdrawn from the state by the representatives of the domiciliary administration; but respecting general creditors having no such specific liens, they could not properly be decreed any priority in the distribution of assets in the hands of an ancillary receiver, or other representative. In People v. Granite State Provident Asso. supra, the New York court put the representative of the domiciliary administration upon terms of securing the New York creditors in their distributive shares by a bond. We think the court should be conceded a discretion in the manner of protecting the local creditors in their rights, according to the circumstances of each individual case. The funds might be retained until the proportionate shares of the local creditors have been ascertained and these shares decreed and paid out of the local assets, before transferring the funds to the domiciliary administration, or their rights protected in some other manner best suited to the circumstances of the individual case.

Same—withdrawal of funds.

Our conclusion is to reverse the decree, and remand the cause to the Circuit Court to be therein further proceeded with in accordance herewith and further according to rules and principles governing courts of equity.

ANNOTATION.

Right of resident creditors of foreign corporation to preference over nonresident creditors.

This note excludes foreign insurance companies.

It will be seen that it is held in the reported case (BRUNNER v. YORK BRIDGE CO. ante, 643) that domestic general creditors of a foreign corporation, without lien by attachment or otherwise, have no preference over foreign creditors.

A statute preferring unsecured domestic creditors of a foreign corporation is unconstitutional.

Thus a state statute giving to residents of that state a priority over nonresidents in the distribution of the assets of a foreign corporation which, by filing its charter or articles of association in the state is deemed a corporation of that state, is, so far as it discriminates against citizens of other states, in violation of U. S. Const. art. 4, giving equal privileges and immunities to the citizens of the several states. Blake v. McClung (1898) 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, on further appeal (1900) 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307.

The same statute of Tennessee, held invalid in the Blake Case, was in issue in Sully v. American Nat. Bank (1899) 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935, where it was held that an unsecured nonresident creditor of a foreign corporation is entitled, under U. S. Const. art. 4, giving equal privileges and immunities to the citizens of the several states, to share in the distribution of its assets upon the same level as like creditors of the company who reside within the state.

Blake v. McClung (U. S.) supra, was followed in Maynard v. Granite State Provident Asso. (1899) 34 C. C. A. 438, 92 Fed. 435, holding that the statute of Michigan was void which provided that the stockholders and creditors in that state, of a foreign corporation, should have a first lien on all assets in the state, and that the business of such foreign corporation should be closed by the receiver, and its assets used to satisfy the claims of such stockholders and creditors.

In Sands v. E. S. Greeley & Co. (1898) 31 C. C. A. 424, 59 U. S. App. 610, 88 Fed. 130, it was held that the courts of justice make no distinction between foreign and domestic creditors of a foreign corporation when their claims are of equal validity.

In Clark v. Painted Post Lumber Co. (1918) — N. J. Eq. —, 104 Atl. 728, it was held that the policy of New Jersey expressed in its statute law is not to prefer domestic creditors over foreign creditors in case of the insolvency of a foreign corporation.

It may be noted that it was held in J. A. Holshouser Co. v. Gold Hill Copper Co. (1904) 138 N. C. 248, 70 L.R.A. 183, 50 S. E. 650, that a nonresident creditor of a foreign corporation is not prevented from joining in a suit to have the assets of the corporation which are within the jurisdiction of the court placed in the possession of a receiver, to be administered for the benefit of creditors, by a statute providing that a nonresident cannot maintain a suit against a foreign corporation in the courts of the state, unless the cause of action arose in the state or its subject-matter has its situs there.

The two following cases from Illinois were decided before the Blake Case.

In Corn Exch. Bank v. Rockwell (1895) 58 Ill. App. 506, it was held that in the distribution of the assets of a foreign corporation the domestic creditors should be paid in full, and the balance only sent to the state where the corporation was formed.

In Webster v. Judah (1888) 27 Ill. App. 294, it was held where a foreign corporation, through its receiver appointed both in the state of its origin, and in Illinois endeavored to collect a debt in Illinois, that a resident of Illinois who was a creditor of such foreign corporation might garnishee the debt. The court said: "The policy of our law secures to creditors resident in this state, if they avail themselves of it by proper legal steps, a priority as against foreign creditors on the assets here situated and belonging, or debts here owing to the estate of a foreign insolvent. . . . Domestic creditors may, by suitable proceedings, prevent the removal from this state of assets of that character until their own claims are satisfied."

It may be noted that it was held in Hunt v. Gilbert (1894) 54 Ill. App. 491, that the receiver of a foreign corporation appointed in the state of its origin, who had taken possession of the assets of such corporation in another state, does not obtain such title thereto as will prevent a domestic creditor from realizing his claim out of such assets by attachment proceedings, as the property of the corporation.

This note, however, does not intend to include the question of preference as between an attaching creditor and a foreign receiver or assignee.

But the rule of the Blake Case does not apply to the distribution of a fund deposited in a state by a foreign corporation as a condition of doing business there.

Thus the distribution of a fund deposited in a state by a foreign corporation as a condition of its doing business there may be made by statute exclusively to the creditors of the corporation in that state, and such application of the fund for the benefit of domestic creditors does not infringe upon the provision of the Federal Constitution, that the citizens of each state should be entitled to all the privileges and immunities of citizens of the several states. People v. Granite State Provident Asso. (1900) 161 N. Y. 492, 55 N. E. 1053.

The principle of this decision seems to be admitted in Bank Comrs. v. Granite State Provident Asso. (1900) 70 N. H. 557, 85 Am. St. Rep. 646, 49 Atl. 124.

Where a corporation, as a condition of doing business, has deposited money in a state, it is for the state to dispose of such money exclusively among the resident creditors of the corporation upon its insolvency; the corporation must be considered as having assented to the constitutionality of a trust of this character. Lewis v. American Sav. & L. Asso. (1898) 98 Wis. 203, 39 L.R.A. 559, 73 N. W. 793.

But in Irwin v. Granite State Provident Asso. (1897) 56 N. J. Eq. 244, 38 Atl. 680, it seems to be indicated that the money deposited in New Jersey by the foreign corporation then concerned on condition of its doing business there would not, on its insolvency, be distributed so as to increase the proportion of the dividends of the New Jersey creditors.

There is no constitutional objection to deferring a foreign creditor of a foreign corporation if such creditor is also a foreign corporation.

Thus a corporation of another state cannot invoke the constitutional guaranty of equal privileges and immunities of citizens in case of a discrimination against it in favor of the residents of a state, in respect to participation in the assets of an insolvent foreign corporation, as it is not a citizen within such guaranty. Blake v. McClung (1898) 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

And a corporation of another state is not deprived of property without due process of law by denying it equality with residents of the state in the distribution of the assets of an insolvent foreign corporation. Ibid.

And a corporation not created by the laws of a state, nor doing business in that state under conditions that subject it to process from the courts of that state, is not within the jurisdiction of that state, within the meaning of the constitutional provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Ibid.

Under the statutes of Tennessee a

foreign corporation doing business in Tennessee according to its laws may be discriminated against as a creditor of another foreign corporation in Tennessee in the same manner as if it was not doing business in the state. Re Standard Oak Veneer Co. (1909) 173 Fed. 103. B. B. B.

T. A. LAMBERT et al.
v.
HUFF, ANDREWS, & THOMAS COMPANY et al., Appts.

West Virginia Supreme Court of Appeals—April 30, 1918.

(— W. Va. —, 95 S. E. 1031.)

Levy — shares of stock.

1. Though an execution creates a lien upon shares of the capital stock of a corporation owned by the debtor, such shares cannot be seized and sold under an execution, by the officer holding it, because they are intangible property in the nature of choses in action, and incapable of manual seizure, possession, or delivery.

[See note on this question beginning on page 653.]

Execution — reaching shares of stock.

2. For the same reason, they are not such estate or effects of the execution debtor in the hands of the corporation to which they pertain as can be delivered by it to an officer, or ordered to be delivered to him, in a proceeding founded upon a suggestion, authorized by §§ 10–13 of chapter 141 of the Code (§§ 5132–5135).

Same — sale of shares.

3. The court from which a summons issues in such a proceeding cannot, upon the answer of the corporation, showing title to the shares in the execution debtor, order a sale thereof.

Lien — on stock — enforcement.

4. A pledgee of such shares so ordered to be sold, having a lien or other right in respect thereof superior to the lien of the execution, may protect and enforce such lien or right by a bill in equity quia timet, and enjoin the sale thereof pending the suit.

Pleading — variance — character of defendant.

5. The variance between a bill in equity charging the defendant in a representative capacity and the process commanding him to be summoned in his individual capacity is immaterial.

Headnotes by POFFENBARGER, P.

APPEAL by defendants from an order of the Circuit Court for McDowell County overruling a motion to dissolve an injunction restraining a sale of shares of the capital stock of a certain corporation. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Anderson, Strother, Hughes, & Curd** for appellants.

Messrs. **Litz & Harman** for appellees.

Poffenbarger, P., delivered the opinion of the court:

This appeal is from an order overruling a motion to dissolve an injunction restraining a sale of shares of the capital stock of a corporation, the Rocky Branch Pocahontas Coal Company, by a special commissioner, under an order of a court of law, made in favor of an execution creditor, Huff, Andrews, & Thomas Company, upon a suggestion that the corporation had in its possession or under its control property or estate of the execution debtor Stephen Kennedy.

The bill upon which the injunction was awarded alleges that the

plaintiffs, Lambert and Kamper, are accommodation indorsers for the execution debtor, upon a note held by a certain bank, and hold by assignment, the certificate of the corporation, evidencing title to the shares, for their security and indemnity as such indorsers.

The demurrer to the bill and the motion to dissolve are predicated upon the theory of adequacy of legal remedy in the plaintiffs and lack of jurisdiction by injunction. Owing to the character of the property involved and the nature of the proceeding, an order of sale of intangible property, analogous to a chose in action, Doheny v. Atlantic Dynamite Co. 41 W. Va. 1, 23 S. E. 525, Rollins v. Hess, 27 W. Va. 570, and Zanhizer v. Hefner, 47 W. Va. 418, 35 S. E. 4, the authorities relied upon in support of the defensive procedure, are not applicable. In each of those cases the property involved was tangible personal property in the hands of an officer, susceptible of sale by him under an execution without a court order of sale, and about to be so sold. Here the threatened sale is not to be made under an execution at all, but, on the contrary, under a court order, made in a proceeding to which the plaintiffs were not parties, and likely without their knowledge or an opportunity to assert their claim. Neither the common law nor any statute affords them an adequate remedy. Sections 5 and 6 of chapter 107 (§§ 4496, 4497) of the Code do not do so. Both contemplate and provide for conflicting claims to property susceptible of seizure and sale under an execution or a distress warrant, and initiation of the procedure by: (1) The officer; (2) a claimant who has given a suspending bond; (3) the party issuing the process. The plaintiffs are not within any of these designations.

Levy—shares of stock.

The execution creditor has proceeded under §§ 10 to 17 of chapter 141 (§§ 5132–5139) of the Code, making certain provisions for enforcement of execution liens, but these provisions do not seem to authorize the order of sale made. They contemplate enforcement of the liability of a third person to the debtor for the benefit of the creditor, a liability to the judgment creditor by virtue of the lien of his fieri facias, § 10 says, and the subjects of such liens are described in subsequent sections, as "debts," "estate," "value of such estate," and "effects of the execution debtor." A corporation is clearly not a debtor of its stockholder in respect of his shares of stock or their value, nor are such shares effects or estate of the stockholder in its hands, within the meaning of the statute. A share of the capital stock of a corporation is an entity, though intangible and incapable of manual possession and delivery. Both the title and possession thereof, in so far as it is susceptible of possession, are in the stockholder. His share is an interest in the corporation itself, not something held by the corporation for him. It is estate, of course, but it is manifestly not estate of the debtor in the hands of the corporation. The corporate property in which the share, for some purposes, represents an equitable interest, legally belongs to the corporation. It may be an item of the "effects" of the debtor, but, if so, it is not such an item in the hands of the corporation. The Suggestion or Trustee Process Statute contemplates debts that may be paid, or money or other property of which manual delivery can be made. Moreover, the suggestee must owe the debt or have the property in his possession. Corporation shares are not property of the kind described, nor does the corporation have possession thereof. It is suggested here, but not decided, that the debt or property obtainable by suggestion must be the absolute property of the debtor; for the statute makes no provision for trial of conflicting claims of title or liens.

Execution—reaching shares of stock.

Though the statute clearly does

not authorize a sale of property of the kind involved, upon a mere answer of the corporation, proving title thereto in the debtor, it contains a provision for enforcement of the execution lien thereon in another way. Section 15 of the chapter empowers the officer holding the execution to sue in his own name for enforcement of the lien, and makes it his duty to do so, if indemnified by the creditor, and permits the creditor to sue for such purpose in the officers name, if he prefers such procedure. The statutory authority so conferred includes both actions at law and suits in equity. If there is a question of title or right of possession, as to tangible personal property to be determined, the suggestee refusing to deliver the property because he claims it as his own or as a pledgee, lienor, or trustee, detinue would be the proper remedy. It might be invoked for recovery of specific coins or bills or other identifiable property. If the property is incapable of manual delivery, possession, and sale under execution, a suit in equity for enforcement of the lien is the proper remedy. If the right of possession is in the suggestee by reason of a pledge, mortgage, or common-law lien, the remedy would be in equity, since a mere equity of redemption cannot be sold under an execution, but is enforceable by a suit in equity. A close scrutiny of the provisions of §§ 11, 12, and 13 fails to disclose any expression of legislative intent to empower a court to determine, upon an answer to a summons upon a suggestion, conflicting claims to funds or property. Section 11 provides for an order to pay or deliver, not a judgment for the money or property. Section 12 provides for a jury inquest as to whether a full disclosure has been made. Section 13 authorizes a judgment, on a failure to answer within twenty days after service, not for the money or property, but "for the amount suggested." Nowhere is there a provision for a judgment for the possession of goods and chattels on which a writ or their seizure could issue, nor for an order of sale of property delivered up by the suggestee. If the order to deliver authorized by § 11 can be and is obeyed, the property comes into the hands of the officer for sale under the execution. If not, he may sue for it, under the authority conferred by § 15, and sell it, if and when obtained. If this is the true interpretation of these provisions, no court order of sale of tangible personal property disclosed upon a suggestion is necessary, and absence of a provision therefor strongly argues the correctness of the interpretation, but, as the case made by the bill does not call for a decision as to the procedure in cases involving efforts to enforce the execution lien upon tangible property in the hands of a third person, this interpretation of the statute is merely suggested, since it bears a close relation to the ground of our conclusion and not given as matter of decision. It suffices here to say there can be no order of sales of shares of corporate stock, upon the answer of the corporation admitting ownership thereof by the debtor, because they cannot be reduced to possession by the officer, nor brought within the jurisdiction of the court by a summons upon a suggestion. Cook, Corp. § 491.

Same—sale of shares.

Nor are we to be understood as reviewing the order of sale. Of course, it is not binding upon the plaintiffs; for they were not parties to it. If they have invoked the proper remedy and have superior right, they may avoid its effect, not only because they are not bound by it, but also because the statute did not authorize it. The creditors should have proceeded in equity for enforcement of their execution lien. Their unauthorized procedure by an order of sale has cast a cloud upon the right of the plaintiffs, if they are pledgees of the shares, and thus

raised an issue properly cognizable in equity, conflict of claims to liens on the shares which neither constitute a debt collectable by execution nor property convertible into money by an execution sale. Although it may be lacking in formality, the bill contains sufficient matter to bring it within the definition of a bill quia timet, and, under its prayer for general relief, the rights of the plaintiffs respecting the shares may be ascertained and adjudicated, and the threatened mischief thereto, if any, prevented.

Lien—on stock—enforcement.

Departure of the bill in its allegations from the summons, the former going against T. H. S. Curd as special commissioner, and the latter against him in his individual capacity, is not a fatal defect. In equity, it is ignored as being immaterial. Evans v. Evans, 23 N. J. Eq. 72; Walton v. Herbert, 4 N. J. Eq. 73. At law, it would be curable by an amendment. Code, chap. 125, § 15 (§ 4769).

Pleading—variance—character of defendant.

Upon these principles and conclusions the decree complained of will be affirmed.

ANNOTATION.

Shares of corporate stock as subject of execution or attachment.

I. Common-law rule, 653.
II. Statutory provisions in general, 654.
III. National bank stock, 658.
IV. Miscellaneous, 659.

The present note does not cover the question whether shares of stock in a foreign corporation are subject to execution or attachment, nor does it include the question whether shares of stock owned by a public corporation,—for instance, a municipality,—are subject to levy and sale under execution, assuming that if the stock were owned by an individual it would be so subject, by reason of statute. See, for example, Oelrichs v. Pittsburgh (1859) 2 Pittsb. 93, Fed. Cas. No. 10,444, holding that stock owned by a municipal corporation was subject to levy and sale on execution, under Pennsylvania statutes.

And the note does not cover such questions as that presented in Gypsum Plaster & Stucco Co. v. Grove (1893) 97 Mich. 631, 57 N. W. 191, as to whether the beneficial interest of the debtor in shares of stock is subject to attachment, where the legal title is in a third person as trustee. See also Middletown Sav. Bank v. Jarvis (1866) 33 Conn. 372, holding that the equitable as well as the legal interest of the debtor in corporate stock is subject to levy and sale on execution, under a statute subjecting to such levy "the rights or shares which any person may own in the stock of any . . . corporation, together with the interest, rents, and profits due and growing thereon."

The question whether corporate stock can be sold for taxes is, of course, beyond the scope of the note. See, for example, Kennedy v. Mary Lee Coal & R. Co. (1890) 93 Ala. 494, 9 So. 608, holding that a levy on and sale of shares of corporate stock for the payment of delinquent taxes was not authorized, under statutes declaring corporate shares to be personal property, requiring the tax collector to levy on any personal property of the delinquent taxpayer, and subjecting shares of stock to levy and sale under attachment or execution.

I. Common-law rule.

The rule appears to be well settled that, in the absence of statute, shares of stock in a corporation are not subject to levy and sale on execution. This doctrine is applied, or at least recognized, in the following cases: Gundry v. Reakirt (1909) 173 Fed. 167; Nabring v. Bank of Mobile (1877) 58 Ala. 204; Kennedy v. Mary Lee Coal & R. Co. (Ala.) supra; Fowler v. Dickson (1909) 1 Boyce (Del.) 113, 74 Atl. 601; Barnard v. Virginia L. Ins. Co. (1885) 4 Mackey (D. C.) 63; Goss & P. Mfg. Co. v. People (1879) 4 Ill. App. 510;

Van Norman v. Circuit Judge (1881) 45 **Mich.** 204, 7 N. W. 796; Feige v. Burt (1898) 118 **Mich.** 243, 74 Am. St. Rep. 390, 77 N. W. 928; Foster v. Potter (1866) 37 **Mo.** 525; Dean Rapid Teleg. Co. v. Howell (1911) 162 **Mo.** App. 100, 144 S. W. 135; Voorhis v. Terhune (1887) 50 **N. J. L.** 147, 7 Am. St. Rep. 781, 13 Atl. 391; Denton v. Livingston (1812) 9 Johns. (**N. Y.**) 96, 6 Am. Dec. 264; Cooper v. Dismal Swamp Canal Co. (1812) 6 **N. C.** (2 Murph.) 195; Slaymaker v. Bank of Gettysburg (1849) 10 **Pa.** 373; Nashville Bank v. Ragsdale (1823) Peck (**Tenn.**) 296; Nashville Trust Co. v. Weaver (1898) 102 **Tenn.** 66, 50 S. W. 763; Keating v. J. Stone & Sons Live Stock Co. (1892) 83 **Tex.** 467, 29 Am. St. Rep. 670, 18 S. W. 797; Lipscomb v. Condon (1904) 56 **W. Va.** 416, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392; LAMBERT v. HUFF, A. & T. Co. (reported herewith) ante, 650.

And shares of stock in a canal company, though declared by the Act of Incorporation to be real estate, have been held not subject to levy and sale on execution, the statutory provision being regarded as intended merely to make the shares inheritable, and not to subject them to liability for payment of debts, as real property. Cooper v. Dismal Swamp Canal Co. (1812) 6 N. C. (2 Murph.) 195.

The reasons for the rule above indicated are somewhat vaguely stated in the cases. But corporate stock was generally regarded, it seems, as in the nature of a chose in action, and therefore within the rule that choses in action are not, at common law, subject to execution. Corporate stock was, of course, not capable of physical seizure by the officer, which was regarded as essential to the levy and sale under execution; and doubtless its relatively small value, in early days, as compared with tangible real and personal property, contributed to the result that it was ignored in levying writs of execution, and to the adoption by the courts of the rule indicated.

The modern proceeding by attachment is statutory (see 4 Cyc. 396). Hence, as was said in Lipscomb v. Gordon (1904) 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392: "If the statutes governing the remedy by attachment do not make shares liable under it, it is clear that they cannot be subjected to the payment of debts by such proceedings."

The conclusion that shares of stock in a corporation are not subject to attachment at common law seems to follow, necessarily, from the statutory basis of attachment proceedings. And expressly recognizing the rule that shares of corporate stock are not subject to attachment, unless expressly made so by statute, are the following cases: Rhea v. Powell (1887) 24 **Ill.** App. 77; United States Exp. Co. v. Hurlock (1913) 120 **Md.** 107, 87 Atl. 834, Ann. Cas. 1915A, 566; Foster v. Potter (1866) 37 **Mo.** 525; Armour Bros. Bkg. Co. v. St. Louis Nat. Bank (1892) 113 **Mo.** 12, 35 Am. St. Rep. 691, 20 S. W. 690; Dean Rapid Teleg. Co. v. Howell (1911) 162 **Mo.** App. 100, 144 S. W. 135; Nashville Bank v. Ragsdale (1823) Peck (**Tenn.**) 296; Merchants' Mut. Ins. Co. v. Brower (1873) 38 **Tex.** 230.

It was held in Duncanson v. National Bank (1889) 7 Mackey (**D. C.**) 348, that attachment of shares of corporate stock was not authorized in the District of Columbia, and that seizure by the marshal under the attachment of the stock certificate gave the creditor no lien.

And that corporate shares are not subject to attachment was intimated in Evans v. Monot (1858) 57 **N. C.** (4 Jones, Eq.) 227, although the court did not find it necessary to decide the point.

Williamson v. Smoot (1819) 7 Mart. (La.) 31, 12 Am. Dec. 494, is sometimes cited as holding that corporate stock cannot be attached. The court did, indeed, formulate this question as one for decision, but the holding appears to be merely that the interest of a stockholder in specific property of the corporation is not subject to attachment for a debt of the stockholder.

II. Statutory provisions in general.

It is not the purpose of the present note to set out in detail all of the various decisions, involving construc-

tion of statutes expressly subjecting corporate stock to attachment or execution. And the statute law of any state at the present time cannot feasibly be here presented. It is the purpose of the note, however, by reference to cases, to suggest the wide extent to which corporate stock is now, by statutes, expressly made subject to attachment and execution, and to set out such cases of statutory construction as appear to be most helpful as precedents. For the former purpose, attention is called to the following cases, among others, which present statutory provisions expressly subjecting to execution shares of stock in a corporation: Nabring v. Bank of Mobile (1877) 58 **Ala.** 204; Berney Nat. Bank v. Pinckard (1888) 87 **Ala.** 577, 6 So. 364; Farmers State Bank v. Southern Cotton Oil Co. (1917) 127 **Ark.** 278, 192 S. W. 230; West Coast Safety Faucet Co. v. Wulff (1901) 133 **Cal.** 315, 85 Am. St. Rep. 171, 65 Pac. 622; National Bank v. Western P. R. Co. (1910) 157 **Cal.** 573, 27 L.R.A. (N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391; Morgan v. Thames Bank (1840) 14 **Conn.** 99; Wells v. Price (1899) 6 **Idaho,** 490, 56 Pac. 266; People ex rel. Adams v. Goss & P. Mfg. Co. (1881) 99 **Ill.** 355; State ex rel. Koons v. First Nat. Bank (1883) 89 **Ind.** 302; Boone v. Van Gorder (1905) 164 **Ind.** 499, 108 Am. St. Rep. 314, 74 N. E. 4; Stedman v. Eveleth (1843) 6 Met. (**Mass.**) 114; Fisher v. Essex Bank (1885) 5 Gray (**Mass.**) 373; Athol Sav. Bank v. Bennett (1909) 203 **Mass.** 480, 89 N. E. 63; Blair v. Compton (1876) 33 **Mich.** 414; Foster v. Potter (1866) 37 **Mo.** 525; Mechanics' Bank v. Merchants' Bank (1870) 45 **Mo.** 513, 100 Am. Dec. 388; Tufts v. Volkening (1894) 122 **Mo.** 631, 27 S. W. 522; Smith v. Pilot Min. Co. (1891) 47 **Mo.** App. 409; Princeton Bank v. Crozer (1850) 22 **N. J. L.** 383, 53 Am. Dec. 254; Voorhis v. Terhune (1887) 50 **N. J. L.** 147, 7 Am. St. Rep. 781, 13 Atl. 391; Sewall v. Lancaster Bank (1828) 17 Serg. & R. (**Pa.**) 285; Lex v. Potters (1851) 16 **Pa.** 295; West Branch Bank v. Armstrong (1861) 40 **Pa.** 278; Weaver v. Huntingdon & B. T. M. R. & Coal Co. (1865) 50 **Pa.** 314; Braden's Estate (1895) 165 **Pa.** 184, 30 Atl. 746; First Nat. Bank v. Kountz (1889) 6 **Pa.** Co. Ct. 249; Bonaffon v. Wyoming Canal Co. (1860) 4 Phila. (**Pa.**) 29; Arnold v. Ruggles (1837) 1 **R. I.** 165; Beckwith v. Burrough (1884) 14 **R. I.** 366, 51 Am. Rep. 392; Lippitt v. American Wood Paper Co. (1885) 15 **R. I.** 141, 2 Am. St. Rep. 886, 23 Atl. 111; Memphis Appeal Pub. Co. v. Pike (1872) 9 Heisk. (**Tenn.**) 697; Young v. South Tredegar Iron Co. (1886) 85 **Tenn.** 189, 4 Am. St. Rep. 752, 2 S. W. 202; Nashville Trust Co. v. Weaver (1899) 102 **Tenn.** 66, 50 S. W. 763; Keating v. J. Stone & Sons Live Stock Co. (1892) 83 **Tex.** 467, 29 Am. St. Rep. 670, 18 S. W. 797; Barnes v. Hall (1883) 55 **Vt.** 420; Daniel v. Gold Hill Min. Co. (1902) 28 **Wash.** 411, 68 Pac. 884.

And statutory provisions expressly subjecting corporate stock to attachment have, it seems, generally been adopted, as is evident from the following cases, among others, presenting such statutes: Nabring v. Bank of Mobile (1877) 58 **Ala.** 204; Berney Nat. Bank v. Pinckard (1888) 87 Ala. 577, 6 So. 364; National Bank v. Western P. R. Co. (1910) 157 **Cal.** 573, 27 L.R.A. (N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391; Middletown Sav. Bank v. Jarvis (1866) 33 **Conn.** 372; Wells v. Price (1899) 6 **Idaho,** 490, 56 Pac. 266; Johnson v. Louisville City Nat. Bank (1900) 22 **Ky.** L. Rep. 118, 56 S. W. 710; Bowman v. Breyfogle (1911) 145 **Ky.** 443, 140 S. W. 694, Ann. Cas. 1914B, 938; Husband v. Linehan (1916) 168 **Ky.** 304, 181 S. W. 1089, Ann. Cas. 1917D, 954; Armour Bros. Bkg. Co. v. St. Louis Nat. Bank (1892) 113 **Mo.** 12, 35 Am. St. Rep. 691, 20 S. W. 690; Tufts v. Volkening (1894) 122 **Mo.** 631, 27 S. W. 522; Smith v. Pilot Min. Co. (1891) 47 **Mo.** App. 409; Plimpton v. Bigelow, 93 **N. Y.** 592; Weller v. J. B. Pace Tobacco Co. (1888) 2 **N. Y.** Supp. 292; People ex rel. Wynn v. Grifenhagen (1915) 167 App. Div. 572, 152 **N. Y.** Supp. 679; National Bank v. Lake Shore & M. S. R. Co. (1871) 21 **Ohio** St. 221; Beckwith v. Burrough (1884) 14 **R. I.** 366, 51 Am. Rep. 392; Ireland v. Globe Mill. & Reduction Co. (1895) 19 **R. I.** 180, 29 L.R.A. 429, 61 Am. St. Rep. 756, 32 Atl. 921; Pelzer Mfg. Co. v. Pitts (1906) 76

S. C. 349, 57 S E. 29, 11 Ann. Cas. 665; Daniel v. Gold Hill Min. Co. (1902) 28 Wash. 411, 68 Pac. 884.

In England, a charging order by the court is the method by which, under statute, stocks or shares are made available to satisfy a judgment. 14 Laws of England (Halsbury) pp. 101–103.

And corporate stock has been subjected to execution by Canadian statutes. See the following, among other Canadian cases, involving statutory provisions authorizing a sale of corporate stock on execution: Brock v. Ruttan (1850) 1 U. C. C. P. 218; Robinson v. Grange (1859) 18 U. C. Q. B. 260; Goodwin v. Ottawa & P. R. Co. (1862) 22 U. C. Q. B. 186; Re Bank of Ontario (1879) 44 U. C. Q. B. 247; Hatch v. Rowland (1870) 5 Ont. Pr. Rep. 223; Morton v. Cowan (1894) 25 Ont. Rep. 529; Malauf v. Labad (1912) — Ont. —, 2 D. L. R. 226, 21 Ont. Week. Rep. 575, 3 Ont. Week. N. 796; Herold v. Budding (1916) 37 Ont. L. Rep. 605, 11 Ont. Week. N. 12.

Stock in a plank road company was held to be a chose in action, in Bank of St. Marys v. St. John (1854) 25 Ala. 566, and chargeable by attachment under the Statute of 1846. But the court did not set out the particular statutory provisions. And this is true also of Struby-Estabrook Mercantile Co. v. Davis (1892) 18 Colo. 93, 36 Am. St. Rep. 266, 31 Pac. 495, in which stock in a ditch company was held to be personal property, and subject, under statute, to execution and sale as other personal property.

The court was of the opinion, in Mitchell v. Leland Co. (1917) 158 C. C. A. 329, 246 Fed. 103, that corporate stock is personal property within the meaning of the Washington statutes, providing that corporate stock should be deemed personal estate, that all property, real and personal, should be liable to execution, and that property should be levied on in like manner and with like effect as similar property is attached; the attachment statute providing a method for the attachment of corporate stock.

It was held in Union Nat. Bank v. Byram (1889) 131 Ill. 92, 22 N. E. 842, that shares of corporate stock were subject to attachment, under a statute providing for attachment of lands, tenements, goods, chattels, "rights," credits, money, and "effects" of the debtor, especially where, in enacting a statute subjecting corporate shares to execution, which became effective at the same time as the Attachment Statute, the legislature assumed that such shares were subject to attachment, the method of proceeding under the execution being made to depend on the question whether an attachment had or had not been issued. To a similar effect is Thompson v. Wells (1895) 57 Ill. App. 436.

Attachment of corporate stock was held authorized in Lipscomb v. Condon (1904) 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392, by statutes declaring shares of corporate stock to be personal estate, and giving the plaintiff in an attachment proceeding a lien, from the time of the levying of his attachment, upon "the personal property, choses in action, and other securities of the defendant."

And it was held in Chesapeake & O. R. Co. v. Paine (1877) 29 Gratt. (Va.) 502, that shares of stock in a corporation were subject to attachment, under a statute making the debtor's "estate" liable to attachment. This decision was followed in Shenandoah Valley R. Co. v. Griffith (1882) 76 Va. 913.

So, attachment of corporate stock was held authorized by the New Jersey statutes, subjecting to attachment the "rights and credits," "goods and chattels," of the debtor, and directing the assignment of the "choses in action," rights and credits, of the defendant, in proportion to the creditors' respective debts, if, after the sale of the goods and chattels, lands and tenements, the money arising therefrom was insufficient to satisfy the debts. Curtis v. Steever (1873) 36 N. J. L. 304.

And in Cord v. Newlin (1904) 71 N. J. L. 438, 59 Atl. 22, it was held that, under the New Jersey statute, stock in a domestic corporation was subject to attachment, and that this was true although the certificates of stock were in the possession of the

debtor, outside of the state. As to the latter point, the court said: "The fact that the certificate of stock is outside of the state cannot disturb this conclusion. The certificate is only evidence of title to the right. The substance of the right is at the domicil of the corporation. Even if the situs rei were deemed to be attendant upon the person of the owner outside of the state, that would not necessarily defeat the levy of an attachment. In National F. Ins. Co. v. Chambers (1895) 53 N. J. Eq. 468, 32 Atl. 663, Vice Chancellor Pitney, after an elaborate examination of the cases, reached the conclusion that, in case of foreign attachment, jurisdiction over choses in action depend not upon the presence of the chose within the territorial jurisdiction of the court, but upon ability to serve process of garnishment within that territory. This conclusion is, I think, sound."

In Castle v. Carr (1838) 16 N. J. L. 394, the court, without discussion of the point, and without reference to any statute, directed auditors to sell corporate stock which had been attached.

Banks were held to be within the Massachusetts Statute of 1804, subjecting to attachment and execution shares in any turnpike, bridge, canal, "or other company." Hussey v. Manufacturers & M. Bank (1830) 10 Pick. (Mass.) 415.

A provision in a Statute of Incorporation, prescribing a particular manner for the attachment and sale of stock in the company, in satisfaction of the debts of creditors, supersedes provisions of a prior general law, prescribing the mode of attachment, levy, and sale of corporate stock. Titcomb v. Union M. & F. Ins. Co. (1811) 8 Mass. 326.

But in Howe v. Starkweather (1821) 17 Mass. 240, it was held that a provision in the Statute of Incorporation, providing the method of sale on execution of shares of stock in the company, was superseded by a subsequent general law, directing the mode of sale on execution of shares of debtors in incorporated companies, and providing that such shares may be sold on execution, "in the manner provided by this act, and no other, anything in the act incorporating such company to the contrary notwithstanding."

Shares of stock in a Connecticut corporation, belonging to a nonresident debtor, were held subject to attachment in Barber v. Morgan (1911) 84 Conn. 618, 80 Atl. 791, Ann. Cas. 1912D, 951, under a statute providing that "rights or shares in the stock of any corporation" might be attached, and that such attachment should be made by leaving a copy of the process and of the accompanying complaint "with the defendant, or at his usual place of abode, if within this state, and with the secretary, clerk, or cashier of such corporation." And it was held that personal service within the state on the nonresident debtor was not essential to jurisdiction in the attachment proceeding.

In a number of cases, statutory provisions have been held not to authorize attachment or execution of corporate stock.

Thus, attachment of corporate stock was held in Haley v. Reid (1854) 16 Ga. 437, not authorized by a statute, subjecting to attachment "the estate, both real and personal," of the debtor, the charter of the corporation declaring that shares of stock in the company should be deemed personal property, and might be transferred as prescribed by the by-laws of the company. The court said: "To 'levy' means to seize,—to take corporeally. It follows that what cannot be seized,—what cannot be taken corporeally,—cannot be levied on. And as the law is not to be presumed to require impossibilities, when it requires an executing officer to levy on both personal and real estate, it is not to be presumed to intend to require him to levy on such personal or real estate as it is impossible to levy on; that is to say, as it is impossible to seize,—to take corporeally." The court relied, in part, on the legislative interpretation of a somewhat similar statute passed by the same legislature, relating to executions.

And attachment of corporate stock was held, in Foster v. Potter (1866) 37 Mo. 525, not authorized by a statute,

subjecting to attachment evidences of debt and real and personal property.

Shares of corporate stock were held in Nabring v. Bank of Mobile (1877) 58 Ala. 204, to be "things in action," and therefore not subject to execution under a statute providing for the levy of execution on personal property, except things in action.

It was held in Hawley v. Lumberman's Bank (1840) 10 Watts (Pa.) 230, that shares of capital stock of a bank, belonging to it and in its possession, were not subject to execution or attachment for its own debts, under a statute providing that stock owned by any defendant in any corporate body should be liable to execution as other goods or chattels, "subject nevertheless to all lawful claims thereon of such body corporate." The court regarded the last clause of this statute as showing that it related to stock of an individual or corporation, held in another corporation.

And the purchase by a corporation of shares of its own stock for nonpayment of an assessment was held, in Robinson v. Spaulding Gold & S. Min. Co. (1887) 72 Cal. 32, 13 Pac. 65, not to render the company the owner of the shares in such a sense as to render them subject to sale on execution against the company, under a statute providing that purchases of its own stock by a corporation vested the legal title to the same in the corporation, and that the stock so purchased should be held "subject to the control of the stockholders," who might make such disposition thereof as they deemed fit.

Shares of corporate stock are not subject to attachment merely because they have been by statute made subject to execution, and the legislature, in enacting the statute, apparently assumed that they might be attached, by providing that, if the shares had been attached in the suit in which the execution issued, the purchaser should be entitled to all the dividends accrued after the levying of the attachment. Van Norman v. Circuit Judge (1881) 45 Mich. 204, 7 N. W. 796.

Also, in Foster v. Potter (1866) 37 Mo. 525, it was said that statutory provisions authorizing a levy of an execution on shares of stock did not authorize the levy of an attachment also.

III. National bank stock.

In Braden's Estate (1895) 165 Pa. 184, 30 Atl. 746, it was held that stock in a national bank was subject to levy and sale on execution, under state law. The court said: "The argument of the learned counsel for appellant, that the national bank stock levied upon is not subject to seizure and sale under state laws, and that such a procedure could only be authorized by act of Congress, is ingenious, but not convincing. Our understanding of the Constitution of the United States is that all powers not therein granted to Congress are withheld. We do not find anywhere in it a grant of authority to declare exempt from levy and sale, for debts contracted under state laws, the property of debtors, except in bankruptcy proceedings under national Bankruptcy Laws. It has been held that the national government has power to charter banks as a necessary and useful instrument in its fiscal operations, and to that end may exempt the shares of stock and issues from taxation. But Congress has not anywhere, in the national Banking Law, undertaken to decleare that investments in the stock of such banks shall not be subject to seizure for debt. There is no analogy between the power to regulate and promote, by congressional enactment, the fiscal operations of the government, by taxation or exemption from it, and an attempt to protect a debtor's property from seizure in payment of his debts. So, we are of the opinion that the Act of Assembly of 1819, which subjects the stock of any individual in any body corporate to levy and sale, the same as other goods and chattels, authorized this levy."

And shares of stock in a national bank were held in Oldacre v. Butler (1897) 116 Ala. 652, 23 So. 3, to be subject to levy and sale under execution, under a state statute, where such transfer of title would not interfere with the operation of the bank as a governmental agency. It was contended that shares of officers of such a

bank could not be levied on and sold, without putting such officers and directors out of office, and that, consequently, a levy and sale under execution would not be permitted, because it would operate to obstruct the management of the bank. But the contention was overruled in this instance, for the reason that the shares in question did not belong to an officer or director, and it was unnecessary to decide as to the effect of such ownership.

However, in holding that the Vermont statute did not authorize the attachment of shares of stock of a national bank, the court, in Sowles v. National Union Bank (1897) 82 Fed. 696, said: "When this attachment was attempted the laws of the state provided, in terms, for the attachment of shares of stock in corporations organized under the laws of the state only. . . . Shares in a national bank existing wholly under the laws of the United States were not included, if they could be. The laws of the United States provide for the transfer of shares in national banks, and what the effect of the transfer shall be, and this might exclude any effect of transfer proceedings by attachment under state laws."

IV. Miscellaneous.

Shares of stock in a sporting club were held, in Lyon v. Denison (1890) 80 Mich. 371, 8 L.R.A. 358, 45 N. W. 358, not subject to sale on execution under a statute providing for such sale of shares in any "bank, insurance company, or any other joint stock company." The court said: "There is an essential difference between a joint stock company as it existed at the common law, and a joint stock company having extensive statutory powers conferred upon it by the state within which it is organized. It is not within the contemplation of the statute, under which the club was organized, that it should carry on a business for profit, but to hold a limited amount of property for the purpose for which it was organized, to wit, 'yachting, hunting, fishing, boating, rowing, or other lawful sporting purposes;' and it is quite evident the legislature never intended that its shares of stock, if any were provided for by its articles of association or by-laws, should be regarded merely as property to be bartered and sold, like shares of stock in a purely business concern, and to be treated subject to levy and sale under execution, within the provisions of § 7697. They are not, by the terms of the statute, compelled to issue stock in order to keep up and maintain their corporation. . . . They have, however, issued certificates of shares of stock. Whether this is provided for in their articles or by-laws is not made to appear by the bill. From an inspection of this certificate, it appears that the same may be transferred upon the books of the company by a surrender of the certificate properly indorsed; but it is also provided that the ownership of such stock shall not entitle the person owning the same to any of the privileges of the club, unless such person be duly elected a member of the club. That is, one holding and owning a share of stock has none of the rights and privileges of members of the club, of yachting, hunting, etc. Just what rights one holding such a certificate as owner might be entitled to, it is not necessary to determine upon this record. We are satisfied that the case does not come within the provisions of the statute, authorizing the levy and sale of shares of stock of a bank, insurance company, or any other joint stock company."

It was held, in Nashville Trust Co. v. Weaver (1899) 102 Tenn. 66, 50 S. W. 763, that stock in a building and loan association was subject to execution under the Code of 1858, subjecting to levy and sale "stocks in all private corporations formed under this chapter," or created by "special law," although, at the time the Code was enacted, particular acts chartering specific corporations were allowable and were not unusual, but had been prohibited by constitutional provision before the loan association was incorporated, and such incorporation was under existing "general laws." The court took the view that the term "special law" in the Code meant any legislation for the creation of private

corporations, other than the general provisions set forth in the statute in question.

It was held in Fowler v. Dickson (1909) 1 Boyce (Del.) 113, 74 Atl. 601, that a statute providing that corporate shares might be attached for debt, and directing the method by which the right so conferred might be exercised, was not repealed or altered by provisions of the General Corporation Laws, relating generally to service of legal process.

The New Jersey statute, providing that "shares of any person in any incorporated company" may be attached for debt, was held, in Morgan v. Ownbey (1916) 6 Boyce (Del.) 379, 100 Atl. 411, not limited in its operation by the later provision of the Revised Code, that all corporations "doing business in this state" should be subject to the operations of the Attachment Laws, as provided in the case of individuals, and should be liable to be summoned as garnishee, especially where another statute provided that, for purposes of attachment, the situs of the ownership of the capital stock of all corporations, existing under the laws of the state, should be regarded as in the state. R. E. H.

JAMES B. JOHNSON et al., Appts.,
v.
FRED F. BIXBY et al.
(Two cases.)

U. S. Circuit Court of Appeals, 8th Circuit—May 23, 1918.

(252 Fed. 103.)

Contribution — wrongful pledge of customer's stock — proceeds of sale.

1. If a broker wrongfully pledges his customers' stock for his own debt and his creditor elects to dispose of the collateral gradually by piecemeal, the owner of stock sold after the claim has been satisfied is not bound to contribute to those whose stock was necessary to satisfy the claim, but if he can trace the proceeds of his stock he is entitled to them, free from the claim of owners of the other stock.

[See note on this question beginning on page 664.]

Pledge — by broker — effect.

2. An unauthorized pledge by a broker of stock of his customer which is indorsed in blank is binding.

Same — right to sell — closing account.

3. A large existing debt upon the books of a broker against his customer, which cannot be materially altered by closing the account, is sufficient to warrant the sale of collaterals, without the necessity of closing the account, striking a balance, and demanding payment.

Same — absence of notice to redeem — right to set up.

4. Owners of stock which has been wrongfully pledged by their broker, and sold by the pledgee, cannot set up want of notice to redeem from the sale while attacking the validity of the pledge.

Same — sale — amount — duty to return.

5. A pledgee of stock as collateral for a debt, who elects to dispose of it gradually, by piecemeal, must stop selling when he has sold enough to satisfy his claim, and return the balance to the pledgeor.

PETITION by contestants to revise order of, and appeal from, the District Court of the United States for the Western District of Missouri, (Trieber and Dyer, District Judges) modifying an order of the referee,

in a contest for priority in the assets of the bankrupt estate of a certain partnership. Petition dismissed. *Judgment affirmed.*

The facts are stated in the opinion of the court.

Argued before Hook, Carland, and Stone, Circuit Judges.

Messrs. **Randolph Laughlin, Emil A. Roebke, and L. E. Richardson,** for petitioners and appellants:

The owners of securities wrongfully pledged by Payne & Becker to Finley, Barrell, & Company are entitled to, at least, their respective pro rata shares of the surplus remaining in the hands of the trustee in bankruptcy.

31 Cyc. 843, 867, notes 49–54; Brittan v. Oakland Bank, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; Thomas v. Taggart, 19 Am. Bankr. Rep. 710; Re Stringer, 37 Am. Bankr. Rep. 44; Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104.

Hypothecation of Bixby's stock by Payne & Becker did not constitute a greater breach of trust than the hypothecation of the securities of Johnson and Schoellhorn.

Rhinelander v. National City Bank, 36 App. Div. 11, 55 N. Y. Supp. 229; Denison v. Emery, 153 Fed. 427; Harmon v. Sprague, 90 C. C. A. 32, 163 Fed. 486; Le Marchant v. Moore, 150 N. Y. 209, 44 N. E. 770.

The sale of Johnson's and Schoellhorn's stock was not a valid foreclosure of pledge.

Greer v. Lafayette County Bank, 128 Mo. 559, 30 S. W. 319; Markham v. Jaudon, 41 N. Y. 235; National Bank v. Baker, 128 Ill. 533, 4 L.R.A. 586, 21 N. E. 510; Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; Leahy v. Lobdell, 26 C. C. A. 75, 54 U. S. App. 35, 80 Fed. 665; Jones, Collateral Securities, 610; Farwell v. Importers & T. Nat. Bank, 90 N. Y. 490; Randall v. Pettes, 12 Fla. 535; Bronson v. Rugg, 39 Vt. 245; Moore v. Norman, 52 Minn. 87, 18 L.R.A. 359, 38 Am. St. Rep. 526, 53 N. W. 809; Phillips v. Mayer, 7 Cal. 83; Hatch v. Hutchison, 64 Ark. 120, 40 S. W. 578; Boardman v. Blizzard, 36 Fed. 26.

Messrs. **Jones, Hocker, Sullivan, & Angert,** for respondent and appellee Bixby:

When the indebtedness due a pledgee is satisified, his interest in the remaining collaterals is ended.

31 Cyc. 853; New England Trust Co. v. New York Belting & Packing Co. 166 Mass. 42, 43 N. E. 928; Farwell v. Importers' & T. Nat. Bank, 15 Jones & S. 409, s. c. 90 N. Y. 483.

The bankrupts were without authority to hypothecate Mr. Bixby's securities.

Thomas v. Taggart, 209 U. S. 387, 52 L. ed. 847, 28 Sup. Ct. Rep. 519.

The appellants are not entitled to contribution by Bixby.

Re McIntyre, 104 C. C. A. 419, 181 Fed. 955, 110 C. C. A. 610, 189 Fed. 46; Denison v. Emery, 153 Fed. 427; Harmon v. Sprague, 90 C. C. A. 32, 163 Fed. 486; Black, Bankr. § 357.

The trustee is without interest in this fund.

Re Harralson, 29 L.R.A.(N.S.) 737, 103 C. C. A. 70, 179 Fed. 492; Re Cutler, 228 Fed. 773; Re LeVay, 125 Fed. 990; Ridgely Nat. Bank v. Matheny, 45 C. C. A. 32, 105 Fed. 754; Re J. H. Alison Lumber Co. 137 Fed. 643; Re Pierson, 225 Fed. 889; Re Rauch, 226 Fed. 982.

The sale of securities in question by Finley, Barrell, & Company has been ratified by claiming the proceeds thereof.

22 Am. & Eng. Enc. Law, 886; Griggs v. Day, 32 Am. St. Rep. 731, note; Strong v. Adams, 30 Vt. 221, 73 Am. Dec. 305; Hancock v. Franklin Ins. Co. 114 Mass. 156.

Stone, Circuit Judge, delivered the opinion of the court:

This is a contest between three parties, Johnson, Schoellhorn, and Bixby, for priority in the assets of the bankrupt estate of Payne & Becker, a brokerage partnership. Each of these three parties had deposited with the bankrupt, under different arrangements and agreements, certain shares of stock, indorsed in blank; none of these deposits, however, authorizing the subsequent use made of the shares by the bankrupt. Shortly after securing the shares, the bankrupt pledged them to its Chicago correspondent, Finley, Barrell, & Co., as collateral to secure existing and future indebtedness. Some time after this had been done the bankrupt became financially involved. At that time, Finley, Barrell, & Co. had closed out all of its dealings with

the bankrupt, except one small transaction in New England stock. Immediately upon ascertaining the financial difficulties of the bankrupt, Finley, Barrell, & Co. proceeded to realize on much of the pledged collateral of all kinds which it held, including the shares of the three parties here involved. In the course of doing this, it sold a large amount of collateral not here involved, and the shares belonging to Johnson for $4,183.50, and those belonging to Schoellhorn for $12.217. The next day it sold the Bixby stock for $5,435.50. The sale of the collateral up to the time the Bixby shares were sold was sufficient to pay all indebtedness due from the bankrupt to Finley, Barrell, & Co., and leave an excess of $3,356.65, due the bankrupt. The subsequent closing out of the New England stock (the day following sale of the Bixby stock) resulted in a loss to Finley, Barrell, & Co. of $746.56, thus leaving a final credit due the bankrupt of more than $2,500, without the proceeds of the Bixby shares, and of $8,101.65, including such proceeds. This fund, and some shares not here involved, which had been pledged with Finley, Barrell, & Co., but not sold by them, were remitted to the trustee. To this fund each of these contestants lays claim. The referee prorated the fund between the three, on the basis of the amounts realized for the respective stocks.

Upon review, the district court modified this disposition of the amount to payment in full of the Bixby claim, and proration of the balance between Johnson and Schoellhorn. A petition to revise, and an appeal, bring this order before us. Several errors are pressed upon our attention, which will be noticed in turn.

It is said that hypothecation of Bixby's stock by the bankrupt was no greater breach of trust than the hypothecation of the securities of Johnson and of Schoellhorn. Without examining this contention, it may, for the purposes of this opinion, be taken that the bankrupt was without authority to hypothecate any of the stock. The fact, however, is that it did pledge all of it, and, since the certificates were signed in blank and taken innocently by Finley, Barrell, & Co., such pledge was binding.

Pledge—by broker—effect.

It is next contended that the sale of the Johnson and of the Schoellhorn stock was not a valid foreclosure of the pledge, because (a) the open account with Finley, Barrell, & Co. was not a debt until the account had been closed, balance struck, and payment demanded,—a result, it is claimed, not possible until the New England stock had been closed out, which was after the Bixby stock sale; (b) absence of notice to redeem; and (c) no application of payment until account was balanced, several days after the stock sales took place. As to the first proposition, the testimony shows that on the day the Johnson Schoellhorn stock was sold the status of the account was as follows: It had not been formally balanced upon the books, but the books showed that the bankrupt owed over $27,000, with but one unfinished item (the New England stock, closed out two days later with a loss of $746.56). Barrell & Co. knew with fair accuracy, upon that date, what would be the result of disposing of the New England stock, so that they knew to a certainty that the final debt of the bankrupt could be little altered from what their books then showed it to be. With a large existing debt, which could not possibly be materially reduced, due from an insolvent debtor, the existence of an indebtedness is clear. As to the second proposition, it is enough to say that neither the bankrupt which made the pledge, nor the trustee who succeeded to his rights, has complained of any lack of opportunity to redeem. These claimants cannot, at the same time contest

Same—right to sell—closing account.

Same—absence of notice to redeem—right to set up.

the pledge and claim protection through it. The third proposition is answered by the testimony, showing the credit to the bankrupt account, as of the day of sale, of the amount realized from the Johnson and Schoellhorn stock, and other collateral not here involved. This credit overbalanced the then debit by $3,356.65. We find no objection to the foreclosure and application of this collateral.

Under the title, "Potentiality of Payment Does Not Constitute Payment Itself," it is contended there was no application of the proceeds of the earlier sales of collateral until after sale of the Bixby stock, therefore Bixby cannot claim that the sale of his stock was unnecessary; that Finley, Barrell, & Co. were not restricted to the debt of the bankrupt, but could collect the entire collateral; that even if there had been full payment as the result of prior sales of collateral, yet Bixby must share in the ultimate fund with Johnson and Schoellhorn on equal terms, because of the doctrine of contribution. As above stated, the evidence shows the application of the proceeds of the prior sales before the Bixby sales, and it shows that such prior sales had left a credit far beyond what was necessary to absorb any possible loss upon the New England stock, which was the sole source of liability not then definitely determined. A considerable amount of stock, including all of that here involved, had been pledged for the sole purpose of collaterally securing this indebtedness. The pledgee could sell any or all of it for that purpose. But, if it elected to dispose of the collateral gradually, by piecemeal, then it must stop when the proceeds thereof were unquestionably enough to satisfy all possible claim. The entire purpose of the pledge had then been served, and any collateral remaining must be returned to the pledgeor.

Same—sale—amount—duty to return.

As to the contribution, the pledgee had a right to sell the Johnson and the Schoellhorn stock and apply the proceeds, because such action was necessary to pay its debt. So far as this record shows, the other collateral sold that day belonged to the bankrupt. The balance of such proceeds, after payment, was, so far as the pledgee was concerned, due the pledgeor. But as it sprang from stock wrongfully pledged, and can be traced by the owners of that stock, it may be made subject to their superior rights. It is the only fund that can be so followed by them. This measures the maximum residue of their converted property which can be legally identified. The then unsold collateral (including the Bixby stock) was not in æquali jure with the proceeds of the prior sales. This collateral was burdened with no obligation of contribution. It was at that time freed from the pledge. No such obligation originated in the mere fact of a subsequent wrongful sale by the pledgee. No part of the proceeds of the Bixby stock was or, under the circumstances, could properly be applied to the debt. The entire proceeds of that sale remain intact, and can be traced. The mere fact that such were transmitted to the trustee in a common sum, or payment, with the above balance, does not lessen Bixby's right therein. It does not create a right in Johnson or Schoellhorn to any part thereof.

Contribution—wrongful pledge of customer's stock—proceeds of sale.

The judgment of the trial court was correct, and is affirmed. The petition to revise is dismissed.

Petition for rehearing denied, September 11, 1918.

ANNOTATION.

Rights inter se of customers whose securities have been repledged by broker.

In general.

Questions with respect to the rights, inter se, of customers whose securities have been repledged by the broker, arise, ordinarily, after the insolvency or bankruptcy of the broker.

Thus, it appeared in the reported case (JOHNSON v. BIXBY, ante, 660) that securities deposited by customers with a broker were wrongfully repledged by him to secure his own indebtedness, after which he became bankrupt. It was held that the owners of the securities must, under the doctrine of contribution in bankruptcy, share the loss equally, if it took all their securities to satisfy the pledgee's claim, and that if, prior to the broker's failure, the pledgee disposed of all the securities in one deal, the rule of equal contribution and distribution applied to any surplus in the hands of the pledgee. But it was held that, if the pledgee elected to dispose of the securities by piecemeal, he must stop after he realized sufficient to satisfy his debt, and the unsold securities must be returned intact to the respective customers; and that, if the pledgee continued to dispose of securities after having realized the amount of his claim, the proceeds of the sales of such securities were free from any contribution, and the owners of the securities last disposed of were entitled to the proceeds of the same, in the hands of the trustee in bankruptcy, without contribution to the other owners.

Where a customer deposits stock with a broker as collateral, he exposes himself to the risk of losing the stock, if the person to whom it is repledged by the broker, in good faith and for a valuable consideration, finds it necessary to sell it in order to secure payment for his advances, on the ground that the customer is estopped from asserting his title against a bona fide pledgee. Re M'Intyre (1910) 104 C. C. A. 419, 181 Fed. 955.

But where the pledgee is in possession of stock of several customers, and repays himself from the sale of some of the stock, then the doctrine of estoppel is not available to him as against the owner of the unsold stock, whose title to the same is absolute, whether the stock is in the hands of the pledgee, or of the trustee of the bankrupt broker. Ibid. In that case the pledgeor brought replevin in a state court against a pledgee of the broker, to recover his stock which remained unsold. The Federal district court directed the pledgee to turn over the stock to the receiver of the bankrupt broker, and enjoined the pledgeor from prosecuting his replevin suit. In reversing an order of the district court which directed the trustee to sell the pledgeor's stock and place the proceeds into a fund with the proceeds of other stock sold by the pledgee, to be divided equally, the court said: "In this fund Pippey [pledgeor] is to share with others, whose stock was improperly pledged by the brokers with the trust company, and sold by it. The amount coming to him would be less than his stock. This is practically applying the principle of general average to the situation. The pledge is treated as a common adventure, the securities sold as a sacrifice for the common benefit, to which all interests are required to contribute. We do not think Pippey can be thus required to contribute. If he had been left undisturbed to prosecute the replevin suit, he would have recovered the specific piece of property, which he owned, had identified, and was entitled to. . . . By prosecuting his claim of his stock in the bankruptcy court, he did not abandon any of his legal rights, nor obligate himself to contribute to the reimbursement of anyone whose stock had been sold. . . . So much of the order as relates to Pippey's stock is reversed, and cause remanded, with instructions to direct the trustee to return his stock to him, or, if it has been sold, to turn the proceeds over

to him." See, to the same effect, Re Stringer (1916) 230 Fed. 177, affirmed in (1916) 233 Fed. 799. Compare Whitelock v. Seaboard Nat. Bank (1899) 29 Misc. 84, 60 N. Y. Supp. 611, wherein the court reached a contrary conclusion, and ordered that the securities of customers repledged by the broker and which remained unsold in the hands of the pledgee, after the latter repaid itself from other securities, should be sold as impressed by the trust for contribution, and distributed on the ratio of the relative loss of all the customers. Of this case, it was said in Re McIntyre (Fed.) supra, that it was only a special term decision, and not controlling. To the same effect, see Gould v. Central Trust Co. (1879) 8 Abb. N. C. (N. Y.) 381, wherein it was held that, while a pledgee in possession of securities wrongfully repledged by a broker is not justified in selling more of the securities than are sufficient to satisfy his claim, that would not, however, relieve the unsold security from the burden of contribution.

The mere fact that a customer tenders to the broker's pledgee the amount of his indebtedness to his broker who had wrongfully pledged the stock of several of his customers, does not entitle the customer making the tender to priority over the others. Rhinelander v. National City Bank (1898) 36 App. Div. 11, 55 N. Y. Supp. 229.

In Van Woert v. Olmstead (1901) 71 N. Y. Supp. 431, it appeared that a broker wrongfully repledged his customers' securities, after which he made an assignment for the benefit of creditors. The pledgee, having sold all the stock, had a surplus in its hands after satisfying its own indebtedness, and the question involved was the distribution of the surplus fund. It was suggested, on the one hand, that it should be divided in the proportion of the "equities," or margins, of the various customers in their respective stocks; that is to say, in proportion to the interest of each customer in his stock, after deducting his indebtedness to his broker. On the other hand, it was contended that, inasmuch as the title to the whole of his stock remained at all times entirely in each customer, the distribution should be made in proportion to the total value of their several holdings, without reference to their several indebtedness to the broker. In following the method of distribution suggested in the first proposition, the court said: "Where the fund to be distributed is equal to or greater than the aggregate 'equities', or margins, of the various creditors in their stocks, the two theories will bring about the same result, when these two facts are borne in mind: (1) That each creditor must account in this action with the assignee as well as with the other creditors; (2) and that each creditor is entitled to a preference over the assignee, as to every part of the fund. The two theories bring about, however, entirely different results, where the amount to be distributed is less than the aggregate 'equities,' or margins, of the various creditors, and this is the condition which obtains in the case before me. A simple example will illustrate the operation of the two theories, under the condition last mentioned. Let us suppose that the value of the stock of each of two creditors, A and B, is $1,000; that their respective indebtedness to their broker is $900, and $100; that their stock was repledged by him for $1,800; and that the fund remaining for distribution in the hands of the subpledgee, after the satisfaction of his lien, is $200. If we distribute this fund on the second theory, A would get $100, and B $100. If we suppose the estate in the hands of the assignee to be utterly worthless (as is, apparently, actually the fact in the case at bar), we find that A and B, being equally innocent, and who fell into a common misfortune through the same wrong of their common broker, have come out of that misfortune on unequal terms. A is precisely as well off financially as he would have been had the wrong never been committed, and had the broker remained perfectly solvent. On the other hand, the entire burden and loss is cast upon B. When we consider that their property was intermingled as common surety for the same debt . . . under iden-

tical circumstances, and without the fault of either, this seems a most inequitable outcome. If now we turn from this theory, and apply the other theory advanced, we find that, by a division under that theory, viz., in proportion to the 'equities,' A would receive $20, and B $180, so that each would have sacrificed in the common misfortune the same percentage (80 per cent) of what he would have received had that misfortune never occurred. While a division on the theory of 'equities' seems to bring about a fair result, I think the true theory for the equitable solution of the question is found by approaching it from a different standpoint. Before the pledge by Olmstead & Taylor [broker] was ever made to Thompson & Mairs [pledgee] (or at least before the stocks of these claimants were intermingled in their final relations under the pledge), these claimants all stood in the same position. The stock of each claimant was subject to a lien in favor of Olmstead & Taylor for the amount of their respective indebtedness to them, and each lien had been placed there by their respective consents. It seems to me the amounts of the liens placed on the securities by the consents of the claimants themselves cannot be equitably disregarded in the disposition of this case. The amounts placed upon the stocks by the consents of the claimants and the amount placed there without their consents are, in my opinion, the two salient factors in the determination of this matter. Had the stocks been intermingled, and pledged only for the aggregate liens or indebtedness of all these parties, no one of them would, by that act alone, have been substantially injured. It was when an additional lien was placed there, over and above the lien to which these parties had consented, that the substantial injury was done. The placing of this additional lien was a common and joint misfortune, due to the same error of judgment on the part of all the parties in intrusting to Olmstead & Taylor the possession of all the indicia of title to their respective stocks, and it was the only common misfortune to which their stocks were subjected. The several liens upon the stocks for the amounts of their respective indebtedness did not represent any common misfortune, but represented an incident to their independent individual speculations. If we suppose the stocks to be still in the hands of Thompson & Mairs, and the conditions precisely the same as when the pledge was made to them and the intermingling of the stocks consummated, and that the present purpose is to raise the necessary fund to release the stocks, and that the question is how it should be contributed by the claimants, it seems to me the first step would be to call upon each of the claimants to contribute the amount of the lien which was placed upon his stock with his own consent, and in the pursuit of his own purposes. Whatever encumbrance each claimant individually placed upon his own stock, he ought to stand for individually. The question would then arise how to contribute the amount of the lien which was placed upon the stocks, without the consent or fault of any of the claimants, but by the same misfortune common to all. The answer is, it should be contributed in such a manner that each claimant would sacrifice the same percentage of that interest in his stock which was affected by the common wrong; in other words, it should be contributed by each claimant in equal proportion to the interest remaining to him, after deducting the amount of the lien created by his individual action. To state the process of raising this fund in the form of an account: Each claimant should first be credited with the value of his stock. There should then be deducted the amount of the lien created by his individual consent. From each balance thus remaining there should then be deducted an equal proportion thereof, sufficiently large to make up, with the amounts already deducted, the full amount of the fund necessary to be raised. If this be the equitable manner in which the amount necessary to discharge the lien of Thompson & Mairs should have been contributed under such circumstances,

it is the method Thompson & Mairs ought to have followed in satisfying their lien, and it must, in equity, be assumed that they did follow it. The accounts of the claimants should be stated accordingly. It will be observed that this result, as an arithmetical proposition, is the same as a division of the fund remaining in the hands of Thompson & Mairs, on the basis of the 'equities' of the various claimants, viz., in accordance with the first theory suggested."

In Furber v. Dane (1909) 203 Mass. 108, 89 N. E. 227, the question of priorities, as between customers who had deposited stock with a broker to cover marginal purchases, which the latter had an implied right to repledge, was determined by the diligence used by the customers in notifying the pledgees of their stock, after the broker's failure. It was accordingly held that, where certain customers requested the pledgee not to dispose of their securities until the proceeds of other securities in its hands were exhausted to satisfy its debt, those customers were entitled to redeem any of their unsold stock left in the hands of the pledgee; but that a customer who failed to give such notice, and instead sued the pledgee directly, which tended to induce the pledgee to include such customer's stock in the securities which it sold, was not entitled to priority in the proceeds of the sales, which could not be specifically traced, but must be content to rank as a general creditor of the insolvent broker.

Stock loaned by a customer to a broker for use in his business, and which he pledges, and which remains unsold after the pledgee has repaid itself from the sale of other securities, cannot be treated in the same way as stock deposited as collateral security; but the pledgeor is nevertheless entitled to the return of such stock on its payment to the trustee in bankruptcy of the value of such stock at the time of the bankruptcy. Re McIntyre (1910) 104 C. C. A. 419, 181 Fed. 955.

A customer receiving in good faith securities from a broker, deposited by another customer, is entitled to retain them as against the other customer, after the broker's adjudication in bankruptcy. Pirkey v. Williams (1916) 45 App. D. C. 590.

Effect of repledge of marginal stock.

Ordinarily a broker buying stocks for customers on margin has an implied power to rehypothecate such stock, in order to obtain money to carry on his business. Skiff v. Stoddard (1893) 63 Conn. 198, 21 L.R.A. 102, 74 Am. St. Rep. 482, 26 Atl. 874, 28 Atl. 104.

The legal relations of all customers whose marginal stock is repledged by the broker are the same, and in the event of the broker's bankruptcy there are no priorities between them; but the relation of a customer who deposits his own stock as security for future transactions is different, since the broker has no implied authority to repledge a customer's securities for his own indebtedness. As a corollary it follows that the equity of such a customer is superior to that of the owners of marginal stock, and it is his right, in case of the broker's bankruptcy, to have the proceeds of his repledged stock applied to the discharge of his debt, before he can be called on to bear a burden imposed on his property by the wrongful act of the broker. Ibid. See, to the same effect, Re Jamison Bros. (1913) 126 C. C. A. 363, 209 Fed. 541; Chamberlain v. Greenleaf (1878) 4 Abb. N. C. (N. Y.) 178.

A customer's claims in respect to stocks deposited as collateral security stand on a different basis than stock purchased on a margin, and, so far as he is able to trace those stocks and their proceeds, he is entitled to a superior equity over the other customers, whose stocks were purchased on a margin. Sillcocks v. Gallaudet (1892) 66 Hun, 522, 21 N. Y. Supp. 552.

One who can trace his securities in the hands of a pledgee, after the broker's insolvency, is entitled to receive whatever excess may arise from the sales of such securities over and above his indebtedness to the broker, provided the debt to the pledgee is satisfied. "In other words, his equity

seems to be greater than the equity of those parties who gave the orders for the purchase of these stocks, with the expectation that money should be raised by the pledge of these stocks to pay for the same." Willard v. White (1890) 56 Hun, 581, 10 N. Y. Supp. 170.

Where a broker pledges for his own debt stock which he has purchased on margin for his customers, and thereafter assigns for the benefit of creditors, the fact that one customer can trace a certificate of stock, which belonged to him, in the hands of the assignee, will not entitle him to recover it, and thus receive a preference over the other customers. Sillcocks v. Gallaudet (N. Y.) supra.

If a customer deposits securities with his broker to margin certain stock purchases which he proposes to make in the future, and the broker pledges the securities for his own indebtedness before he receives an order from the customer, and then is adjudicated a bankrupt, the customer is entitled to share equally with persons whose securities the bankrupt pledged, without any color of right, in the funds turned over to the trustee in bankruptcy by the pledgee, after the latter has repaid itself.

Re Tracy (1911) 185 Fed. 844, order reversed in (1911) 112 C. C. A. 324, 191 Fed. 810, on the theory that no creditor can justly demand that the estate of the bankrupt shall be augmented by a wrongful conversion of the property of another, or the application to the general estate of property which never rightfully belonged to the bankrupt, a customer, for whom the broker purchased stock which he used in his business, is entitled to the same kind of stock in the hands of the bankrupt broker's estate, though the certificate of stock is not the identical one purchased for the customer, if no other customer is shown to have a right to that particular stock. Gorman v. Littlefield (1913) 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690.

Where a broker purchases the same kind of stock for several customers, and pledges it for his own indebtedness, a customer is not entitled to his specific quantity of stock left unsold by the pledgee after the broker's bankruptcy, under the rule that customers, whose stock has been used by a bankrupt for his own purposes, cannot establish title to specific certificates of stock, found after bankruptcy as collateral to some loan, unless they identify those certificates as representing the shares which the bankrupt took from the claimant. Re McIntyre (1910) 104 C. C. A. 424, 181 Fed. 960.

The court may, however, distribute pro rata parts of the unsold stock repledged by the broker, which cannot be specifically identified after the customers have repaid into the general estate the amounts respectively due on such stocks. Duel v. Hollins (1916) 241 U. S. 523, 60 L. ed. 1143, 36 Sup. Ct. Rep. 615, reversing (1914) 135 C. C. A. 312, 219 Fed. 544.

A customer has a right to demand the delivery of stock purchased for his account after paying the broker the amount due thereon, and such delivery may be made by the broker, though he is insolvent, without creating a preference. Duel v. Hollins (U. S.) supra. See, to the same effect, Richardson v. Shaw (1908) 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; Thomas v. Taggart (1908) 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519.

L. S. B.

ELLEN GERTRUDE MANWELL et al., Appts.,
v.
RALPH H. DURST et al., Respts.

California Supreme Court (In Banc)—August 14, 1918.

(— Cal. —, 174 Pac. 881.)

Master and servant — labor dispute — injury — liability.

1. One is not negligent in employing another to assist in expelling a dangerous mob from his premises, during a labor dispute, if the facts are not concealed from the employee, so as to become liable for injuries inflicted upon the employee by the mob.

[See note on this question beginning on page 673.]

Pleading — negligence — general statement.

2. A complaint in an action to recover damages for negligent injuries is not assisted by a general allegation that the injury was caused by the gross negligence of defendants.

APPEAL by plaintiffs from a judgment of the Superior Court for Yuba County dismissing an action brought to recover damages for the alleged negligent killing of plaintiffs' decedent. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. F. H. Dam, for appellants:

Negligence may be pleaded in general terms.

Smith v. Buttner, 90 Cal. 99, 27 Pac. 29.

The unsanitary condition of the camp, due to defendants' negligence, was a contributing cause of Manwell's death.

Vallejo & N. R. Co. v. Reed Orchard Co. 169 Cal. 545, 147 Pac. 238; People v. Hagar, 52 Cal. 186.

Defendants assumed the risks of Manwell's employment.

Crabbe v. Mammoth Channel Gold Min. Co. 168 Cal. 504, 143 Pac. 714.

Defendants are liable even for unusual and extraordinary consequences of their negligence, if the result is a natural one under the circumstances.

1 Shearm. & Redf. Neg. 1913, 6th ed. § 26a; Cleveland, C. C. & St. L. R. Co. v. Carey, 33 Ind. App. 275, 71 N. E. 245; White Sewing Mach. Co. v. Richter, 2 Ind. App. 331, 28 N. E. 447; William v. Koehler, 41 App. Div. 426, 58 N. Y. Supp. 863.

Defendants are liable if their negligence was a concurring or contributing cause of Manwell's death.

Shearm. & Redf. Neg. 6th ed. §§ 31 et seq.; Harton v. Forest City Teleph. Co. 141 N. C. 462, 54 S. E. 302; Merrill v. Los Angeles Gas & E. Co. 158 Cal. 505, 31 L.R.A.(N.S.) 559, 139 Am. St. Rep. 134, 111 Pac. 534; Shippers Compress & Warehouse Co. v. Davidson, 35 Tex. Civ. App. 559, 80 S. W. 1033; White Sewing Mach. Co. v. Richter, 2 Ind. App. 331, 28 N. E. 446; Southern R. Co. v. Webb, 116 Ga. 156, 59 L.R.A. 112, 42 S. E. 395, 12 Am. Neg. Rep. 232; Lane v. Atlantic Works, 111 Mass. 139.

Where it is doubtful whether defendants' neglect is a concurring cause to the injury, the case is left to the jury.

1 Shearm. & Redf. Neg. 6th ed. § 28; Clark v. San Francisco & S. J. Valley R. Co. 142 Cal. 618, 76 Pac. 507.

Mr. W. H. Carlin for respondents.

Angellotti, Ch. J., delivered the opinion of the court:

This action is by the surviving wife and children of Edmund T. Manwell, deceased, to recover from the defendants the sum of $150,000 damages, alleged to have accrued to plaintiffs from the death of said Manwell; the claim being that the complaint shows that such death was caused by the negligence of defendants. The lower court sustained a demurrer which was in-

terposed, with leave to plaintiffs to amend. Plaintiffs having failed to file an amended complaint within the time allowed therefor, judgment of dismissal was entered. We have here an appeal by plaintiffs from that judgment.

It is claimed that the complaint fails to state a cause of action, in that it fails to allege any negligence on the part of defendants, proximately contributing to the death of Mr. Manwell. Of course, allegation of such negligence was essential to the statement of a cause of action.

Pleading—negligence—general statement.

The complaint is not assisted in this respect by the general allegation contained in paragraph 5 that "the death of said Edmund T. Manwell, on said 3d day of August, 1913, was caused by the gross negligence of the defendants." While it is true, under the rule in force in this state and in most jurisdictions, that negligence may be charged in general terms, that rule simply means, as has been stated many times, that, "what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." See Stein v. United R. Co. 159 Cal. 370, 113 Pac. 663; Smith v. Buttner, 90 Cal. 99, 27 Pac. 29. And it must appear from the facts averred that the negligence caused or contributed to the injury. Smith v. Buttner, supra. The cases cited by counsel for appellants fully illustrate the meaning and application of this rule. What was done, with the charge that the same caused or contributed to the injury, must be alleged; but to show that there was negligence in what was done, which is likewise essential, it is sufficient to allege that it was negligently done, without stating more particularly what the matters constituting such negligence were. As said in Stephenson v. Southern P. Co. 102 Cal. 147, 34 Pac. 620: "Negligence is not the act itself, but the fact which defines the *character* of the act, and makes it a legal wrong." (Italics ours.)

No rule of which we have knowledge warrants a conclusion that this allegation assists the complaint in the slightest degree. This was apparently recognized by the pleader, for the allegation is immediately followed by the language, viz.: "And more particularly in the manner and form and under the circumstances hereinafter stated," and this is followed, in paragraphs 6, 7, and 8, by the allegations upon which plaintiffs must rely for a showing of negligence.

So far as material, these paragraphs allege the following facts: On August 3, 1913, what was known as the Durst ranch in Yuba county was in the possession and under the control of defendants, who were using the same for growing hops. They had thereon in their employment, as hop pickers, some 2,500 or more persons, men, women, and children, of different nationalities, who were living on said premises. Through a committee of twelve these employees presented certain written demands to defendants, on said premises, for a higher rate for picking hops, and for certain specific improvements in the sanitary conditions of the premises, and in the conditions under which the employees were living and working. The defendants refused the demand for a higher wage, but promised to make some improvement in the sanitary, living, and working conditions. These promises were not satisfactory to said employees. Thereupon defendant Ralph Durst who was the general manager of the business, in the presence of the committee of twelve, stated to one Ford, the spokesman of the committee, that he (Ford) was discharged and must leave the premises immediately, and, without justification, struck Ford in the face with a pair of gloves in such a way that the committee understood the act to be intended as an affront to the committee and to Ford. Thereupon said Durst, in the presence of said em-

ployees, caused an attempt to arrest Ford to be made by an officer, without first having procured a warrant for such arrest, and Ford, with the assistance of others of said employees, resisted the attempt and prevented the arrest. Thereupon the employees were embittered and incensed, "because the defendants refused to grant certain of their demands," and "because" the premises were in an unsanitary condition, and "because" defendants "negligently had omitted" to take such measures as would have prevented such conditions, and "because" the promises for the improvement of the conditions were not satisfactory to them, and "because" of the conduct of said Ralph Durst toward Ford. They thereupon threatened they would go "on a strike" until all their demands were granted. Thereupon, 1,000 or thereabouts of the employees held a meeting on the premises, at which addresses were made by certain of their number. The employees then and there resolved to insist upon their demands, making open expressions and demonstrations of opposition and hostility against defendants. They "then and there became and were in a bad temper and in a state of excitement and agitation, and then and there became and were in such an angry frame of mind" that they "were indifferent to and heedless and reckless of the personal safety of anyone acting in aid and assistance of defendants, in opposition to" their will and wishes. By reason of these things, it was unsafe and dangerous and hazardous for anyone to act in aid and assistance of defendants, in opposition to the will and wishes of said employees. All of this said Ralph Durst well knew, nevertheless he thereupon "requested and solicited and employed said Edmund T. Manwell . . . to accompany the said defendant Ralph H. Durst, and the sheriff and certain deputy sheriffs of said county of Yuba, from the said town of Wheatland to the said meeting of said employees of defendants, . . . and then and there to act in the lawful aid and assistance of said defendants in any matter which should then and there arise." The service so requested of Manwell was, "under the circumstances of the case as aforesaid," unsafe and dangerous and hazardous to Manwell, and "said defendants then and there had reason to believe, and by the exercise of reasonable care might have anticipated and foreseen, that such employment" might result in serious injury to the person of Manwell. Thereupon Manwell, pursuant to such request and employment, accompanied said Ralph H. Durst and said sheriff and five deputy sheriffs to said meeting of said employees on said premises, and while he was there so engaged in such service, "without fault or misconduct on his part, and negligently solicited and induced thereunto by the defendants, as aforesaid," he was then and there wilfully, wantonly, and tortiously shot and wounded with a revolver in the hands of one of said employees of defendants, and thereby instantly killed.

It seems clear to us that the only possible basis for a claim that these allegations show any negligence contributing to the murder of Mr. Manwell is in the matters charged as to the employment by Durst of Manwell, for a service known to the former to be dangerous and hazardous to the latter, or which by the exercise of reasonable care might have been so known to the former. As to the allegations relative to the causes that operated to make the employees on the Durst property a dangerous mob, "indifferent to and heedless and reckless of the personal safety of anyone acting in aid and assistance of defendants, in opposition to its will and wishes," there is no sufficient allegation of negligence on the part of the defendants, or of facts consistent only with the theory of such negligence. A demand for a higher rate for hop picking was made, and the defendants refused to grant it. There is

nothing to show that the demand was not properly refused. Certain specific improvements in sanitary and other conditions were demanded, and some improvement in these conditions was promised, and there is nothing to show that every proper concession in this respect was not made. That the concessions made "were not satisfactory to said employees" establishes nothing in this regard. In so far as the complaint shows, Durst was entirely justified in discharging Ford, and directing him to leave the premises. It is not even affirmatively made to appear that Durst was not justified in striking Ford. The allegation that he did so "without justification" is the statement of a mere conclusion of law. Nor is it affirmatively made to appear that there was anything negligent or improper in causing "an attempt to arrest said Ford to be made by an officer, without first having procured a warrant for such arrest." Under certain circumstances, either a peace officer or a private person may arrest a person without a warrant. Penal Code, §§ 836 and 837. The subsequent statement that thereupon the employees "became and were embittered," etc., "because" of certain reasons specified, is not an allegation that defendants were in fact negligent in any of the matters specified as reasons for the feeling of bitterness. In other words, there is no issuable allegation therein that the premises were in fact in an unsanitary condition, or that defendants negligently had omitted to make such provision as would have removed an unsanitary condition, etc. The thing alleged is that the employees then and there became and were embittered and incensed against defendants, and all the rest is a mere recital of their reasons for so becoming embittered and incensed, and not an allegation of any act or omission on the part of defendants. In so far as the complaint shows, therefore, it does not appear that the defendants were legally responsible, by negligence or otherwise, for the existence of the mob on their premises. It is therefore unnecessary to discuss the question presented by counsel for appellants as to the effect of such responsibility in this case, had the same been shown by the complaint.

We come, then, to a consideration of the facts alleged as to the employment of Mr. Manwell. The allegations as to the dangerous nature of the employment are full and complete, as are those as to the knowledge or imputed knowledge of the defendants thereof. But it is not suggested, even by implication, that Durst concealed anything pertaining to the conditions from Manwell, or did not inform him fully in regard thereto, or that Manwell was not cognizant of the entire situation, and the danger incident to the employment. Indeed, in so far as the complaint shows anything in this regard, it indicates, from the very terms of the employment, notice to Manwell of the possible danger. He was employed to accompany Durst "and the sheriff and certain deputy sheriffs . . . to the said meeting of said employees," then and there to act in aid and assistance of the defendants "in any matter which should then and there arise," and he went with the defendant and the sheriff and five deputy sheriffs. It must, we think, be conceded that defendants had an absolute right to solicit and employ these people to assist them in clearing their premises of this dangerous mob, the existence of which is so specifically alleged, even though the service to be rendered was one dangerous to those rendering it. Many necessary employments are notoriously hazardous in the very nature of things, and certainly it is not the law that the mere fact of employing one to render such a service constitutes negligence. Of course, in such a case, the employer must use what is reasonable care under the circumstances to protect his employee from injury in the rendition of his service; but there is no allegation of any

omission in this regard, as there was in McCalman v. Illinois C. R. Co. 132 C. C. A. 15, 215 Fed. 465, cited by appellants. And, where the danger is not obvious from the very terms of the employment and the nature of the service prescribed, it may freely be conceded that it is the duty of the employer to acquaint the employee with the facts of which he has actual or imputed knowledge, and that, if he fails to do this, he is guilty of negligence. In such a case, it is the employment without informing the employee of the danger that constitutes the negligence. This is clearly shown in one of the cases cited by appellants (Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160), where the charge was that the defendant employed the plaintiff to perform a service which he knew to be perilous, without giving the employee any notice of its perilous character. The conclusion that the defendant was liable was based upon the fact, impliedly found by the jury, that the knowledge of the defendant as to the perilous nature of the employment, due to special circumstances of which the employee was ignorant, was not communicated to but was withheld by him from the employee. In Pigeon v. W. P. Fuller Co. 156 Cal. 691, 105 Pac. 976, the allegation was that: "Defendant negligently failed at the time it employed this plaintiff to warn him or inform him in any way of the danger of said employment, and defendant, at all times herein mentioned, negligently omitted to warn plaintiff of said danger."

In Holshouser v. Denver Gas & E. Co. 18 Colo. App. 431, 72 Pac. 290, 13 Am. Neg. Rep. 635, cited by appellants, the negligence charged was the failure to disclose the situation to the employee. In the case at bar, as we have seen there is no allegation whatever in this regard, and without such an allegation we cannot see that the complaint stated negligence in the matter of the employment of Manwell. Some force in this regard is sought to be attributed by appellants to the statement that, "while he (Manwell) was there so engaged in such service, without fault or misconduct on his part, and negligently solicited and induced thereunto by the defendants, as aforesaid," he was murdered by one of said mob; but obviously this cannot be construed as an allegation, general, or specific, of any negligence on the part of defendants in the matter of the employment. It is purely by way of recital rather than allegation, and is, even as a recital, limited in its effect by the facts theretofore alleged, and to which it refers by the words "as aforesaid;" which facts, as we have seen, are barren of any showing of negligence.

Master and servant—labor dispute—injury

From what we have said, it follows that the complaint did not state a cause of action against defendants, and it is unnecessary to notice the points made in support of other grounds of demurrer.

The judgment is affirmed.

We concur: **Sloss, J.; Shaw, J.; Lorigan, J.; Melvin, J.; Wilbur, J.; Richards,** Judge pro tem.

Petition for rehearing denied, September 13, 1918.

ANNOTATION.

Master's responsibility for injury to or death of servant during labor dispute.

The courts appear to have been called on in but a few cases, to determine the question of the responsibility of a master for the killing or injuring of a servant, during a labor dispute.

In the reported case (MANWELL v. DURST, ante 669), the widow and surviving children of an employee sued for damages caused by his death. It was charged in the complaint that one

of the employers directed the intestate to accompany the sheriff, deputy sheriffs, and himself on a mission the purpose of which was to break up a meeting of discontented workmen of the employers, which was being held on the premises of the latter. The complaint was held to show that the purport of the mission was not concealed from the intestate by the employer, but, on the contrary, that he was placed on notice of the dangerous character of the undertaking in which he was about to engage, and of the possibility of injury to himself from his participation therein. The court held, in sustaining a demurrer to the complaint, that it must be conceded that the defendants had a right to solicit the intestate and the sheriffs to aid them in clearing their premises of the discontented workmen, who were assuming a dangerous attitude towards their employers; that, so far as the complaint showed, it did not appear that the defendants were legally responsible, by negligence or otherwise, for the existence of the mob on their premises, and that, consequently, it was unnecessary for the court to discuss the question of the effect of such responsibility in the instant case, had the same been shown by the complaint.

In McCalman v. Illinois C. R. Co. (1914) 132 C. C. A. 15, 215 **Fed.** 465, it appeared that certain guards employed by the defendant railroad companies in suppressing a railroad strike came into collision with certain deputy marshals. The latter were informed by the defendants of existing trouble at that place, and proceeded there to quell the disturbance, without having been informed by the defendants of the presence of the guards at the crossing. The guards were not informed of the coming of the deputy marshals. In the affray which followed, the plaintiff, one of the guards, was injured. It was held that it was the duty of the defendants not to enhance the peril of the plaintiff's service, without notice; that the defendants owed a duty to the plaintiff to inform both the deputy marshals and the guard of the presence and purpose of both, and that the question whether a sufficient notice had been given should have been submitted by the trial court to the jury, under appropriate instructions, instead of granting a motion to direct a verdict for the defendants.

In Holshouser v. Denver Gas & E. Co. (1903) 18 **Colo.** App. 431, 72 Pac. 290, 13 Am. Neg. Rep. 635, it appeared that the defendants employed the plaintiff in their gas works, during the existence of a strike of their former employees, without informing him of the fact of the strike. The plaintiff claimed not to have had any knowledge of the existence of the strike until the occurrence of the assault on him by strikers, which resulted in his injury. It appearing that the plaintiff had no knowledge, either of the existence of the strike or of facts putting him on notice thereof, and that the defendants had concealed the true state of affairs from him, the court held the defendants to be liable for the damage occasioned to the plaintiff by the assault on him, saying: "It is uniformly held that in inducting an employee into an employment which involves exposure to some invisible danger, no matter what the cause or nature of the peril may be, the employer, to escape responsibility, must impart to the employee his own knowledge of the situation."

Poulton v. Kelsall [1912] 2 K. B. (**Eng.**) 131, 81 L. J. K. B. N. S. 774, [1912] W. C. Rep. 295, 5 B. W. C. C. 318, 106 L. T. N. S. 522, [1912] W. N. 98, 28 Times L. R. 329, was a proceeding under the English Workmen's Compensation Act of 1906, by one who had been employed by the defendant as a storekeeper, to settle the compensation alleged to be due to him by reason of his having been incapacitated by an injury which he sustained while on his way home from his place of employment, during a strike of carters. The evidence disclosed that, during the existence of the strike, the defendant's manager had asked the plaintiff to drive a lorry to the railway station for the purpose of obtaining

and bringing back goods of the defendant; that, at first, the plaintiff objected because of the risk of injury to himself, but, on the manager agreeing to assume the responsibility of any such injury, he agreed to go; that he had police protection, but was hit several times by stones thrown by the strikers; that he repeated the trip the next day, and was threatened by the strikers; that at noon of that day he was told to go home and take a rest and return at midnight, and that on his way home he received the injury of which he complained. It was held that though, under the special agreement, the defendant was liable to compensate the plaintiff for any injury received by the latter during and as a result of the strike, without regard to whether the injury was received in the course of the plaintiff's employment, under the Workmen's Compensation Act, and irrespective of the special agreement, the injury did not arise out of or in the course of the employment.

In Priestley v. London [1913] 2 K. B. (Eng.) 115, 82 L. J. K. B. N. S. 353, [1913] W. C. & Ins. Rep. 250, 6 B. W. C. C. 104, 108 L. T. N. S. 277, [1913] W. N. 35, 29 Times L. R. 252, 57 Sol. Jo. 282, it was held that a meat porter, whose employment as such had been temporarily discontinued because of a strike at his place of employment, and who had applied for and received work as a strike breaker, at which employment he was injured, was entitled, during his incapacity, to a weekly compensation, under the English Workmen's Compensation Act, of one half of the wages which he had earned during the first week of his employment as a strike breaker, notwithstanding his emploment was that of an "extra casual laborer," entitling him to employment only after other classes of laborers had first been given employment, and his compensation was a definite sum per hour; it appearing that his employment had been continuous and, had he not been injured, would have been continuous until the end of the strike. J. V. B.

R. W. KAYS and Wife, Appts.,
v.
A. A. LITTLE et al.

Kansas Supreme Court—July 6, 1918.

(103 Kan. 461, 175 Pac. 149.)

Tender — rent — use of mail.

A judgment of a trial court refusing to cancel a gas and oil lease for failure to pay rentals at a stipulated time will not be reversed, where the lessee remits the amount of the rental by registered letter so that it will reach the place of payment five days before the time provided for the payment, and the remittance fails to reach that place in time because of delay in the mails, and where, because of other and additional circumstances, it would be inequitable and unjust to cancel the lease.

[See note on this question beginning on page 677.]

Headnote by MARSHALL, J.

APPEAL by plaintiffs from a judgment of the District Court for Greenwood County in favor of defendant Foster in an action brought to cancel a gas and oil lease given by plaintiffs to defendant Little. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **S. F. Wicker** and **Gordon A. Badger,** for appellants:

The court had no right to excuse a default in the payment of rentals under the lease.

O'Neill v. Risinger, 77 Kan. 63, 93 Pac. 340; Bucks v. Jouitt, 3 Litt. (Ky.) 229; Wells v. Smith, 2 Edw. Ch. 78; New York & N. E. R. Co. v. Providence, 16 R. I. 746, 19 Atl. 759; Barnet v. Passumpsic Turnp. Co. 15 Vt. 757; Harvey v. Aston, 1 Atk. 361, 26 Eng. Reprint, 230; Missouri River, Ft. S. & G. R. Co. v. Brickley, 21 Kan. 275; Phelps v. Illinois C. R. Co. 63 Ill. 469; Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Conkling v. Krandusky, 127 App. Div. 761, 112 N. Y. Supp. 13; United States v. Comet Oil & Gas Co. 187 Fed. 674; Bennett v. Taylor, 72 Kan. 602, 84 Pac. 533; Davis v. Chautauqua Oil & Gas Co. 78 Kan. 97, 96 Pac. 47; Morrison v. Wells, 48 Kan. 494, 29 Pac. 601; 6 R. C. L. 945.

Messrs. **H. J. Hodgson** and **Burdette Blue,** for appellees:

Equity has ample power, and has throughout its history always exercised it, to relieve against unjust, inequitable, and unconscionable forfeiture.

Rhodes v. Mound City Gas, Coal & Oil Co. 80 Kan. 762, 104 Pac. 851; Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; Edwards v. Iola Gas Co. 65 Kan. 362, 69 Pac. 350, 22 Mor. Min. Rep. 293; Bloom v. Rugh, 98 Kan. 589, 160 Pac. 1135; Monihon v. Wakelin, 6 Ariz. 225, 56 Pac. 735; Shade v. Oldroyd, 39 Kan. 313, 18 Pac. 198; National Land Co. v. Perry, 23 Kan. 140; 16 Cyc. 79 et seq.; Shaffer v. Marks, 241 Fed. 139.

Marshall, J., delivered the opinion of the court:

The plaintiffs seek to cancel a gas and oil lease given by them to defendant A. A. Little, and by him assigned to defendant H. V. Foster. Judgment was rendered in favor of defendant Foster, and the plaintiffs appeal.

On December 2, 1915, the plaintiffs, husband and wife, gave to defendant A. A. Little a gas and oil lease running for ten years, on 80 acres of land in Greenwood county, in consideration of $1, one eighth of the oil produced, $100 for each well from which gas should be sold, and free gas for domestic use. The lease contained the following provision: "Provided a well is not commenced on said premises within one year from the date hereof, unavoidable accidents and delays excepted, then this grant shall become null and void, unless second party shall pay to the said first parties a yearly rental of eighty (80) dollars payable quarterly in advance for each quarter thereafter commencement is delayed; it is expressly agreed that payment of all moneys due under this lease may be made by cash or check to parties of the first part, or be deposited to their credit in the Home National Bank of Eureka, Kansas."

Defendant Foster held other leases covering lands in the vicinity of that owned by the plaintiffs. That territory was undeveloped, so far as gas and oil were concerned, but defendant Foster was drilling a well about 2 miles southwest of the plaintiffs' land. On December 2, 1916, that well had been drilled to a depth of about 1,500 feet, at a cost to the defendant of approximately $15,000. On October 18, 1917, the well had been drilled to a depth of 2,600 feet, and, at the time of the trial, was producing oil which was being sold by defendant Foster. Paul Dahlgren was Foster's general agent at Bartlesville, and J. C. Gibson was Foster's agent at Eureka. Gibson looked after Foster's drilling operations in Greenwood county, and paid rentals on Foster's leases, as specifically directed, when the money was sent to him. The rental due the plaintiffs was not paid until December 5, 1916. On November 27, 1916, Foster, through his agent Dahlgren, by registered letter from Bartlesville, Oklahoma, remitted to J. C. Gibson, at Eureka, a check for $20 with which to pay the rental under the lease. That registered letter should have reached Eureka on the following day. On account of being delayed in the mail, the check was not received by Gibson until December 5, 1916, although he

called repeatedly at the postoffice at Eureka and inquired for his mail. On December 2d, Dahlgren, not having received any word from Gibson, and not having received the returned registered letter receipt, got into telephone communication with Gibson and learned that the $20 had not been received by him. Dahlgren immediately, by mail, transmitted another check to Gibson for the same amount and for the same purpose. This check was also received on December 5, 1916. On that day Gibson tendered $20 to the plaintiffs through the Home National Bank of Eureka, but the payment was refused. This action was commenced shortly thereafter. The cause was tried without a jury; special findings of fact were made; and the court in its conclusions of law said "that a state of facts is presented which, in the interest of justice, requires that a court of equity should relieve against the forfeiture attempted to be enforced by the plaintiffs in this action."

The plaintiff attempted to enforce the forfeiture of Foster's rights under the lease, although Foster was diligent in doing what the lease required that he should do. He manifested no intention to abandon his rights under the lease, not even by neglecting to make any effort to pay the rental required until after the time fixed for that payment. He attempted to make those payments before the stipulated time. It was not through any act of his that the payment did not reach the plaintiff in ample time. Under the circumstances, it would have been inequitable to have granted the plaintiff the relief he asked. The court decreed that Foster had a "good, valid, and subsisting oil and gas lease" on the property in question, and rendered judgment against the plaintiffs for costs.

Tender—rent—use of mail.

The judgment rendered was justified by the facts, and is affirmed.

Petition for rehearing denied, October 18, 1918.

ANNOTATION.

Delay of remittance in mail as affecting forfeiture or loss of rights through nonpayment.

The reported case (KAYS V. LITTLE, ante, 675), seems to have been the only one, aside from certain insurance cases which are subsequently treated, to have passed upon the question stated. Consequently, of special interest is the decision in that case to the effect that the mailing of the amount of certain rentals, under a gas and oil lease, in time to have reached the lessor in the ordinary course of mail to comply with the terms of the lease, will prevent a cancelation of the lease for failure to pay the rentals at the stipulated time, the remittance having been delayed in the mail. This decision, it will be remembered, was upon the ground that, under the circumstances, it would have been inequitable to have allowed the delay, which was through no fault of the lessees, to work a forfeiture of the lease.

Under insurance policies providing that payment of premiums shall be made at a certain place by a certain time under penalty of forfeiture, it has been held that where the insurer requests, authorizes, or acquiesces in the sending of the premiums by mail, a deposit thereof in the mail, properly addressed, and in time, according to the usual course of mail, to reach the prescribed place by the time it is due, will prevent a forfeiture, even though it does not in fact reach its destination at all, or until after the date when due, and this notwithstanding time be regarded as the essence of the contract. Mutual Reserve Fund Life Asso. v. Tuchfeld (1908) 88 C. C. A. 657, 159 Fed. 833; Travelers Ins. Co.

v. Brown (1903) 138 Ala. 526, 35 So. 463; Illinois L. Ins. Co. v. McKay (1909) 6 Ga. App. 285, 64 S. E. 1131; Protection L. Ins. Co. v. Foote (1875) 79 Ill. 361; Suess v. Imperial L. Ins. Co. (1900) 86 Mo. App. 10; Hartford Life & Annuity Ins. Co. v. Eastman (1898) 54 Neb. 90, 74 N. W. 394; Kenyon v. Knights Templar & M. Mut. Aid Asso. (1890) 122 N. Y. 247, 25 N. E. 299; Hollowell v. Life Ins. Co. (1900) 126 N. C. 398, 35 S. E. 616; Coile v. Order of United Commercial Travelers (1912) 161 N. C. 104, 76 S. E. 622. And see Vancura v. Zapadni Cesko Bratrska Zednota (1907) 78 Neb. 755, 111 N. W. 845. It has been said that the rule that mailing the premium, in such a case, in time to reach the prescribed place before it is due, is sufficient, may well be based on the ground that such is the reasonable interpretation to be put on the conduct of the insurer in requesting, authorizing, or acquiescing in its being so sent, and that the insured has a right to act upon it. Mutual Reserve Fund Life Asso. v. Tuchfeld (1908) 86 C. C. A. 657, 159 Fed. 833. So, in Hartford Life & Annuity Ins. Co. v. Eastman (1898) 54 Neb. 90, 74 N. W. 394, it was said that an insurance company cannot be allowed to escape liability because the agency which was employed, at its instance, to transmit premiums, had failed to act with its usual promptness and precision. And in Hollowell v. Life Ins. Co. (1900) 126 N. C. 398, 35 S. E. 616, the court said that a timely remittance by mail is so far a payment that it prevents a forfeiture, and that the regularity of the mail, a public agency, is such that it is not negligence to rely upon it, especially when it has been the custom of the parties to employ such method of transmission.

And it has been held that where the insured, by a continuous course of dealing, was justified in believing that a remittance deposited in the mail would be received by the insurer, in the ordinary course of business, before the expiration of the period in which payment might be made, a forfeiture for nonpayment of a premium within the specified time cannot be declared, where the delay was due to the omission of the insurer promptly to take the letter from the postoffice. Kenyon v. National Life Asso. (1899) 39 App. Div. 276, 57 N. Y. Supp. 60.

But a different rule seems to apply in insurance cases, where the use of the mails is not authorized, or customary. Thus, in Beeman v. Supreme Lodge, S. H. (1905) 29 Pa. Super. Ct. 389, affirmed in (1906) 215 Pa. 627, 64 Atl. 792, it was held that, where the previous course of dealing between the parties did not show a sanctioned use of the mails, the mere mailing of a remittance in such time as usually would have allowed receipt thereof within the required time did not prevent the suspension of the insured for failure to make timely payment of his dues, the remittance not having been received until after the period allowed for payment. And in Rice v. Grand Lodge, A. O. U. W. (1897) 103 Iowa, 643, 72 N. W. 770, where the contract provided that failure to pay an assessment by the 28th of the month operated as a suspension, subject to reinstatement on certain conditions, and the insured mailed an assessment on the 25th, and died on the 29th, before the receipt of the money, it was held that he was legally suspended at the time of his death, the insurer not having established a course of dealing sufficient to excuse fulfilment of the obligation to pay the assessment by the 28th. In this case the premium was to go from Montana to Iowa; but the court makes no point of the fact, if such it was, that the assessment was mailed in time to have reached its destination within the required time.

G. J. C.

WILKIN-HALE BANK, formerly Night & Day Bank, Plff. in Err.,
v.
BERNIE HERNSTEIN.

Oklahoma Supreme Court—June 8, 1915.

(48 Okla. 628, 149 Pac. 1109.)

Bank — authority of president.

1. The affairs and business of a banking association under § 283, Comp. Laws 1909, are managed and controlled by the board of directors. The statute is silent as to the duties of the president. He is, however, the presiding member of the board of directors, and may be delegated the authority of exercising personal supervision over the affairs of the bank; if such authority is not delegated to him, he has only such authority as is inherent in the office itself.

[See note on this question beginning on page 693.]

Same — fraud — liability.

2. Where the president of a bank, while purporting to act in such capacity, engages in a fraudulent transaction entirely without the scope of his general or delegated powers, by which he obtains the property of another, but of which transaction the directorate has no knowledge, and from which the bank derives no benefit, and which is in no manner ratified by the board of directors, the bank is not bound thereby, and is not liable in damages for any injury arising therefrom.

Headnotes by BLEAKMORE, C.

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover the value of certain promissory notes, alleged to have been sold and delivered to defendant on the faith of its representations. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Ledbetter, Stuart, & Bell,** for plaintiff in error:

Defendant was not bound by the fraud of its president and is not liable for the value of the notes.

Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601; United States v. City Bank, 21 How. 356, 16 L. ed. 130; First Nat. Bank v. Marshall & I. Bank, 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 725; Kansas City Hay-Press Co. v. Devol, 72 Fed. 722; Michie, Banks & Bkg. p. 786; Preston v. Marquette County Sav. Bank, 122 Mich. 696, 81 N. W. 920; American Nat. Bank v. Warren Deposit Bank, 129 Ky. L. Rep. 195, 92 S. W. 585.

Messrs. **Giddings & Giddings,** for defendant in error:

Abner Davis being president of the bank, it was within the apparent scope of his authority to solicit subscriptions for the sale of its stock, and any misrepresentations made by him would be binding upon the bank; and a party dealing with him did not have to look any further to ascertain whether or not the bank had actually voted an increase of its stock.

Marshall, Corp. § 252; Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509; Jack v. National Bank, 17 Okla. 431, 89 Pac. 219; Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 131; Pronger v. Old Nat. Bank, 20 Wash. 618, 56 Pac. 391; Tome v. Parkersburg Branch R. Co. 39 Md. 36, 17 Am. Rep. 540; Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co. 137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; Central R. & Bkg. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Merchants' Nat.

Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; First Nat. Bank v. Stribling, 16 Okla. 41, 86 Pac. 515.

Bleakmore, C., filed the following opinion:

This action was commenced in the district court of Oklahoma county on the 22d day of April, 1911, by Bernie Hernstein, as plaintiff, against the Night & Day Bank, Abner Davis, and A. Lorenze, as defendants seeking recovery of the value of certain promissory notes alleged to have been procured by defendants from plaintiff and the Turner Mercantile Company by means of fraudulent pretense. The action was subsequently dismissed as to Davis and Lorenz. During the pendency of the action the name of the defendant Night & Day Bank was changed to Wilkin-Hale Bank. The case was tried to the court, and resulted in judgment for plaintiff. The parties will be referred to as they appeared in the trial court.

The facts as disclosed by the record are: That the Night & Day Bank, having a capital of $25,000, was doing a general banking business at Oklahoma City; that Abner Davis, its president, owned $22,000 of the stock. At some time during the year an increase of the capital stock of said bank from $25,000 to $50,000 was duly authorized, and the stock issued, the whole amount being purchased by Abner Davis. Thereafter, Abner Davis wrote the following letter to the Turner Mercantile Company (written on Night & Day Bank letter head):

Oklahoma City, Okla.,
Aug. 15, 1910.

Turner Mercantile Co.,
Indianola, Oklahoma.

Gentlemen:

On the 2d of last June, we had a letter from you in answer to a letter of ours of May 31st, with reference to you investing in our bank stock. We have heard nothing further from you since, and as we decided not to place the stock which we were then offering took it off the market. At this time, however, we are again confronted with the proposition of increasing our capitalization to $100,000. This we are compelled to do in order to comply with the Banking Laws of the state, which, on account of the large deposits we have by now going toward the half-million dollar mark, and the population of the city, have reached the point where, as above stated, will compel us to take this step. We are therefore offering the stock to influential and leading business men in the different cities covering this territory, so as to make the Night & Day Bank, in its stockholders' way, what the people have made it in the depositors' way, namely a bank of the people. We to-day have over 4,000 depositors, and are increasing at so rapid a pace that no other bank in this city has ever made such a record in the past, and is not likely to do this in the future. If you are interested we would be pleased to hear from you on the inclosed addressed envelop, and as the stock we are offering amounts to but a limited amount, we would suggest that you act quickly and, if you prefer, Mr. Lorenze, who has charge of the stock issues for the bank, may have occasion to come to your city in the next few days, and will be pleased to call on you for a personal interview. We may frankly say to you that were we to desire to sell the stock, that we can get a much larger price from parties in this city, who are aspiring the control of it, than we are getting from our friends through the state, as the stock to you will be sold at par without any premium, while, on the other hand, a bank of the magnitude of our bank, with more than over 4,000 depositors, and reaching the half-million deposit mark, any shrewd business man must understand that the growing business itself is worth 100 per cent premium from a point of a permanent and profitable investment.

Thanking you for an early reply, and awaiting your immediate answer, we remain,

Sincerely yours,
Abner Davis, President.

Thereafter A. Lorenze, the person referred to in said letter, called upon the plaintiff, who was the president of the Turner Mercantile Company, at its place of business at Indianola, Oklahoma; and, relying upon the representations contained in said letter, plaintiff, on behalf of the mercantile company and for himself, entered into the following contract:

Indianola, Okla., 11/1/10.

To Whom It may Concern:–This is to certify that Turner Mercantile Company, Bernie Hernstein, and A. Lorenze, representing the Night & Day Bank of Oklahoma City, have entered into the following agreement: Bernie Hernstein has subscribed ten shares of stock in the above-mentioned bank and Turner Mercantile Company, ten shares of stock in said bank, said amount of $2,000 being payable January 1, 1911.

A. Lorenze, representing said bank, being their authorized agent, agrees to take over sundry notes representing land sales and secured by land, and bearing the indorsement of Turner Mercantile Company, to be discounted at a net rate of 8 per cent per annum and 2 per cent commission for sale of same. Balance of said stock, if any remaining, shall be paid in cash to make out the $2,000.

Turner Mer. Co.,
Bernie Hernstein, Prest.
Bernie Hernstein.
A. Lorenze.

Pursuant to said contract, about December 20, 1910, plaintiff forwarded by registered mail to Abner Davis, president of the Night & Day Bank, negotiable notes, amounting to approximately $2,000, and two checks, one for $281.50 and one for $218.50, which were received by him and remained on his desk for some days. The check for $218.50 disappeared and was not heard of again. In some manner, not disclosed by the evidence, Lorenze acquired possession of the notes, and was holding them for commissions claimed by him to be due on the sale of the stock of defendant bank. All the statements and representations contained in the letter, and made by Lorenze, which induced the making of said contract and the delivery of the notes and checks to the president of the bank, were false. The bank had not been compelled or authorized to increase its capital stock, no action had been taken by its stockholders looking to such increase, and no certificate showing compliance with the statute in this respect had been filed with the bank commissioner. Such representations were unquestionably made by Abner Davis, purporting to act as president of the bank, for the fraudulent purpose of obtaining the notes and checks of plaintiff as the purchase price, in a pretended sale of stock which the bank had not issued and did not contemplate issuing.

Prior to the contract for the purchase of stock in question, plaintiff and the Turner Mercantile Company had subscribed for $1,000 of the stock of defendant bank, actually issued when its capital was increased from $25,000 to $50,000, and had paid the money therefor to Abner Davis, as president. That stock had not been delivered; but the $1,000 had been deposited to the credit of the stock or subscription account in the bank.

On the 29th of December, following, plaintiff demanded of Abner Davis, as president of the bank, the performance of the contract, on the part of the bank. This was refused.

In this regard plaintiff testified:

Q. Who did you make the demand of?

A. Abner Davis.

Q. Where was he then?

A. In the bank, Night & Day Bank.

Q. Was he still in charge of the Night & Day Bank?

A. Yes, sir.

Q. What, if anything, did he say, Mr. Hernstein?

A. Why, he said: "We have decided not to issue this stock, and I

will return the money." He says: "It has been placed to the credit of the stockholders' account, and I will return what it shows there as a credit from your payments," which was $1,281.50, he said, and he said he had turned over the other check and the notes to Mr. Lorenze, and Lorenze had them, but he was, at that time, he said, in Milwaukee, but would return within a day or two, and he would get these notes and this check and return them to me.

Q. He said there was to your credit $1,281.50?

A. To the credit of the stockholders' account as paid by me.

Q. What constituted that $1,281.50?

A. It constituted the payment I made on the first purchase of stock, and $281.50 which I paid on the second purchase of the stock.

Q. Did you ever get that stock?

A. No, sir.

Q. Did they pay you back the $1,000 you sent them in settlement of your note given for the stock?

A. Yes, sir.

Q. And paid you the $281.50?

A. Yes, sir.

It was stipulated by the parties: "The books of the Night & Day Bank show that on the 29th day of December, 1910, the Turner Mercantile Company was credited on the books of the bank with the sum of $1,281.50 the deposit slip showing that this $1,281.50 was made up of the following two items: First, subscription $1,000; second, check from Indianola, $281.50."

The directors and cashier of the bank testified that they never saw the notes in question, and were unaware of any transaction between the plaintiff, the Turner Mercantile Company, and Abner Davis and Lorenze, and that neither Davis nor Lorenze were authorized to act for the bank in such transactions.

Prior to the bringing of the suit the interest of the Turner Mercantile Company was assigned to plaintiff.

Section 261, Rev. Laws 1910, provides: "The capital stock of any banking association doing business under the laws of this state may be increased or decreased at any time by resolution adopted by three-fourths of its stockholders, at any regular meeting or at a special meeting called for that purpose, of which all stockholders shall have due notice, in the manner provided by the by-laws of such banking association. A certificate must be filed with the bank commissioner by the chairman and secretary of the meeting, and by a majority of all the directors, showing the compliance with the provisions of this section, the amount to which the capital stock has been increased . . . , the amount of stock represented at the meeting, and the vote upon the question to increase or decrease the capital stock. No such changes in the capital stock of any such association shall be valid or binding until the same shall have been approved by the bank commissioner."

Bank—authority of president.

The affairs and business of a banking association under § 262, Rev. Laws 1910, are managed and controlled by the board of directors. The president is selected from among their number; but the statute is silent as to his duties. In Michie on Banks and Banking, § 102 (5b), it is said: "The president of the bank is generally, if not always, a member of the board of directors, and chosen by the board from their own number. He is expected to preside at meetings of the board of directors, and ordinarily the position is one of dignity and of indefinite general responsibility, rather than of any great and accurately known power. He is usually expected to exercise a more constant, immediate, and personal supervision over the daily affairs of the bank than is required of any other director; but the authority inherent in the office itself is very small, and it is difficult to say precisely how or where it is much in excess of that which can be exercised by any other

single director. Indeed, it is said that the entire collection of judicial authorities justifies the enunciation of only one function as falling within the properly inherent power of the president, namely, to take charge of the litigation of the bank . . . but, while the powers inherent in the office of president are very few, he may be authorized by the directors to do anything within the authority of the bank's charter which the directors themselves might do, except such positive requirements as the charter may make personal to the directors, and which can not be delegated. . . . In order that the circumstance of a particular case may be sufficient to raise the presumption of authority in a bank president to bind the bank in matauthority, the bank must, in some ters beyond the scope of his usual manner, be a party to the circumstances, or must be chargeable with knowledge of them. . . . The president has no power to bind the bank, except in the discharge of his ordinary duties."

Again, it is said by the same author, § 102 (1): "For acts and contracts not within the general scope and sphere of agents' duties, the bank is not liable, unless there has been a previous special authority or a subsequent ratification."

It is clear that the bank derived no benefit by reason of the receipt by Abner Davis of the notes and checks involved herein, in the course of his dealings with the plaintiff and the Turner Mercantile Company. The $218.50 check disappeared and was not cashed, the notes were never in its possession, and the check for $281.50 dated Indianola, Oklahoma, December 20, 1910, was deposited to the credit of the mercantile company by Davis, president of the bank, on the 29th day of December, 1910, together with the $1,000 which had theretofore been paid to him by virtue of the former attempted purchase of stock, and the whole amount subsequently withdrawn by the plaintiff. It will also be remembered that the contract entered into by the mercantile company and the plaintiff with Lorenze, under the terms of which the two checks and the notes were forwarded to Abner Davis, president of the bank, was entered into at Indianola, Oklahoma, away from defendant's place of business.

The bank was in no way a party to the transaction, either by having authorized the pretended increase of its capital, or by doing any act that might be construed as evidencing an intent to increase the same or to empower its president, or anyone else, to solicit subscriptions to any contemplated increase of its stock. Every act of its president in his dealings with the plaintiff was, obviously, entirely without the scope of his general powers as an officer and agent of the bank under the laws of this state. Abner Davis, as president of the defendant bank, had no authority under the law or by virtue of any act of its directorate to bind the bank by the transactions in question. The board of directors had no knowledge of such unauthorized acts, and therefore could not have ratified them. Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572.

Same—fraud—liability.

The evidence is wholly insufficient, and does not reasonably tend to support the judgment. It follows, therefore, that the judgment of the trial court should be reversed and the cause remanded.

Per Curiam:

Adopted in whole.

Petition for rehearing denied, July 6, 1915.

FARMERS' STATE GUARANTY BANK, Plff. in Err.,
v.
C. E. CROMWELL.

Oklahoma Supreme Court—June 25, 1918.

(— Okla. —, 173 Pac. 826.)

Banks — authority of officers.

1. The affairs and business of a state banking corporation, under § 262, Rev. Laws 1910, are managed and controlled by its board of directors. The statute provides for the selection and qualification of the president and cashier, but does not prescribe their respective duties; in the absence of specific delegation these officers only have such authority as is inherent in the respective office itself.

[See note on this question beginning on page 693.]

Same — statement as to condition of bank.

2. Where a prospective purchaser of stock in a bank goes to the cashier and president of the bank, and makes inquiry as to the condition of the bank, and as to the value of the stock, and is misled and deceived by the information given, and sustains loss on account thereof, in the absence of a showing of specific authority to make such representations, the bank cannot be held liable, for the reason that the officers were acting without the scope of their authority in giving the information relied upon.

Headnotes by GALBRAITH, C.

ERROR to the District Court for Custer County to review a judgment in favor of defendant, and denying a motion for new trial in an action on a promissory note. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. George T. Webster for plaintiff in error.

Messrs. **Massingale & Duff**, for defendant in error:

The statements and representations of the president and cashier of the plaintiff bank were actionable and binding upon the bank.

Nevada Bank v. Portland Nat. Bank, 59 Fed. 339; Hopkins v. Cooper, 28 Ga. 392; Boyd v. Browne, 6 Pa. 310; James v. Crosthwait, 97 Ga. 673, 36 L.R.A. 631, 25 S. E. 754; Morse, Banks & Bkg. pp. 376–378; Johnston-Fife Hat Co. v. National Bank, 4 Okla. 17, 44 Pac. 192; Stewart v. Wright, 77 C. C. A. 499, 147 Fed. 321; Second Nat. Bank v. Howell, 40 Minn. 390, 12 Am. St. Rep. 744, 42 N. W. 200.

Galbraith, C., filed the following opinion:

The plaintiff in error, as plaintiff in the trial court, commenced an action against the defendant in error, as defendant, to recover on a promissory note for $1,360, with interest from August 9, 1914, and attorney's fee of $100. The answer was a general denial, and the affirmative defense of failure of consideration and fraud and deceit on behalf of the plaintiff, in this, that the note represented the purchase price of eight shares of the capital stock of the plaintiff bank, which the defendant purchased from a third party by the name of Ross, but, before purchasing, the defendant advised with the cashier of the plaintiff and its president in regard to the value of the stock, and was misled by the advice falsely and fraudulently given, and was thereby led to believe that the stock was of great value, and purchased the same, when as a matter of fact it was worthless then as it afterwards proved to be. The cause was tried to the court and a jury, and a ver-

dict returned for the defendant. On the denial of a motion for new trial, the judgment rendered was brought here for review.

A number of errors are assigned, one in the denial of the motion to direct a verdict, and another, errors in the admission of testimony.

The controlling facts, as disclosed by the record, are as follows: The plaintiff in error is a state banking corporation, located at Thomas, Custer county, Oklahoma. At the time of the execution of the note in suit its cashier was one Garner and its president was one Huston. The defendant in error was a customer of the bank, but not a stockholder, and was engaged in the drug business in Thomas. He was indebted to the bank, as evidenced by his promissory note, in the sum of $2,100. Cromwell arranged with a man by the name of Ross to buy his interest in the drug store, provided the stock in the plaintiff bank would be accepted in payment thereof; Ross proposing to transfer eight shares of stock at the valuation of $162 each in consideration for Cromwell's interest in the drug store. Cromwell agreed to accept the stock, provided he could satisfy himself that it was worth the money that Ross asked for it.

His testimony in regard to what he did to inform himself of the value of the stock is all the testimony on this point in the record, and is as follows:

Q. Now, referring to the transaction at the time you took the assignment over from Ross, tell the jury what was said with reference to the bank taking your note for part of the Ross stock?

A. I told them that I would have to give them my note for it; intended to give my note to them for the eight shares of stock.

Q. Who was you talking to at that time?

A. I was talking to Mr. Garner.

Q. What did Mr. Garner say with reference to that adjustment of the notes?

A. He said it was—it would be all right.

Q. What further was said at that time between you and Mr. Garner?

A. I asked the value of the stock, what it was worth.

Q. What did he say?

A. He figured out the stock was worth $1.83.

Q. How did he figure it out?

A. He took the building, capital stock, fixtures.

Q. What other statement, if any, did he make?

A. Well, before that he said the stock was selling at $1.50, but he said that it was actually worth $1.83.

Q. Is that all he said?

A. No, I asked him in regard to bad paper in the bank; he said there was a small amount in there. I asked him the amount of it; he said about $2,500.

Q. Did he make any reference to the note he considered bad paper?

A. He did.

Q. What paper did he name?

A. He said the Bank of Taloga note for $2,500.

Q. Did he name any other note as being bad?

A. No, sir.

Q. Have you told the jury all John Garner said on that occasion?

A. I was telling him what I was going to do, and why I came to see him, and what I was contemplating doing, and I wanted to find out the condition of it, whether it was a profitable investment, and he said it was, he said the bank stock would pay out itself there at the bank.

Q. Did he say anything more about the bad paper?

A. No; he did not.

Q. What did he say, if anything, with reference to the undivided profits?

A. He turned to Mrs. Combs, and asked her what the undivided profits was. She told him $3,500. She turned to the book and found out it was right about $3,500. He said the undivided profits would more than cover the bad paper.

Q. Well, is that all he said at that time?

A. Well, we were talking there quite a while that evening—I do not remember whether it was evening or not—it was that day.

Q. Where was Ross at that time?

A. He was over at the drug store.

The witness further testified in regard to the conversation with the president of the bank, as follows:

Q. Did you ever talk with any other officer of the bank with reference to its condition during that period of time?

A. I talked with Mr. Huston once about the time I was making the trade, at several times with Mr. Huston.

Q. Where was Mr. Huston when you talked to him?

A. He was at the drug store.

Q. Did you consult him about the condition of the bank to inform yourself about the value of this stock prior to the time you closed your deal with the bank?

A. I did.

Q. Where did you see John Huston at that time?

A. He was at the drug store.

Q. What did John Huston say?

A. He said the stock was worth $1.62, well worth it.

Q. And that was in regard to the value of the stock; that was prior to the time you bought?

A. Yes, sir.

This witness testified that, relying on these representations of the cashier and the president of the the bank, he made the deal with Ross, and executed his note for the purchase price, being the note in suit, but by an arrangement between Ross and himself and the bank the note was executed to the bank, and in the transaction he took up his $2,100 note the bank then held against him; that afterwards an assessment against the capital stock of the bank of 100 per cent was made; that he refused to pay the assessment, and his stock was sold, and he did not receive anything for it. There was no evidence to show that the cashier and the president of the plaintiff were clothed with any other powers than those prescribed for such officers under the state Banking Law.

At the close of the evidence a motion was presented to direct a verdict for the plaintiff, and denied, and this is assigned as error.

It is argued in support of this assignment that it appears from the defendant's testimony that the officers of the bank were acting without of the scope of their authority in giving the information to Cromwell, even if they did make the representations as he contends, and that he was misled and deceived thereby, and sustained the loss claimed, and that the bank is not liable; that it is no part of the duties of the president and cashier to give out information as to the financial condition of the bank, or to advise as to the value of its stock, and that they have no authority to pass out such information to customers who were not stockholders or directors of the bank; and, if they did so, it was simply a gratuitous service, and did not create any liability on the part of their principal, the bank.

Section 262, Rev. Laws 1910, provides, in part, as follows: "The affairs and business of any banking association organized under the laws of this state shall be managed and controlled by a board of directors of not less than three or more than thirteen in number, who shall be selected from the stockholders, at such time and in such manner as may be provided by the by-laws of the association. . . . The board shall select from among their number the president and secretary, and shall select from among their stockholders a cashier. Such officers shall hold their offices for a term of one year and until their successors are elected and qualified. The board shall require the cashier and any and all officers having the care of the funds of the bank to give a good and sufficient bond, to be approved by them, and held by the state banking board. The board of directors

shall hold at least two regular meetings each year, and at such meetings a thorough examination of the books, records, funds and securities held by the bank shall be made and recorded in detail upon its record book, and a certified copy thereof shall be forwarded to the bank commissioner and to each stockholder of record within ten days."

In Wilkin-Hale Bank v. Herstein, 48 Okla. 628, ante, 679, 149 Pac. 1109, the first paragraph of the syllabus reads: "The affairs and business of a banking association under § 283, Comp. Laws 1909 (Rev. Laws 1910, § 262), are managed and controlled by the board of directors. The statute is silent as to the duties of the president. He is, however, the presiding member of the board of directors, and may be delegated the authority of exercising personal supervision over the affairs of the bank; if such authority is not delegated to him, he has only such authority as is inherent in the office itself."

Banks—authority of officers.

In that case the president of the bank made fraudulent representations as to the value of the stock of the bank, and induced defendant to purchase it, and the court held that, inasmuch as the bank had not authorized him to make such representation and had no knowledge of his unauthorized acts, the same were without the scope of his authority as president, and the bank was not bound thereby.

The supreme court of Alabama announces the rule in Singer Mfg. Co. v. Taylor, 150 Ala. 574, 9 L.R.A. (N.S.) at 929, 124 Am. St. Rep. 90, 43 So. 210, as follows: "The liability of the principal for the torts of the agent, when not based upon a breach of duty arising out of contract, as in the case of common carriers, is based upon principles of public policy. It is essential to such liability that the tort of the agent, if not authorized or ratified by the principal, should be committed by the agent in the course of the business of the principal and of the agent's employment."

A case in point is Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601, where the Cuero bank sought to hold the Beeville bank liable for the loss sustained by it on account of the forgery of a signature to a note, which it had accepted upon the representation of the cashier of the Beeville bank that the signature was genuine. The court, in denying the liability of the Beeville bank, says that the facts do not show a transaction embraced in the provisions of the Banking Law, but do show that it was a matter in which the Beeville bank was not interested, and was a mere courtesy between the officers of the two banks, performed gratuitously by the cashier of the Beeville bank for the accommodation of the officers of the Cuero bank, to aid them in making a loan.

In United States v. City Bank, 21 How. 356, 16 L. ed. 130, the cashier of the defendant bank gave to one of its directors, Mr. Minor, a statement that he was authorized on behalf of the bank to "contract with the Treasury Department of the United States for the transfer of money from the East to the South and West for the government," and upon the force of the statement of the cashier the Secretary of the Treasury contracted with Mr. Minor for the transfer of $100,000 from New York to New Orleans. Minor received and cashed the draft, but the government did not receive the money at New Orleans. The United States brought suit against the Columbus bank, alleging that it was liable for the loss on account of the letter its cashier had given to Minor. The United States Supreme Court held that the cashier had no authority to make such representations on behalf of the Columbus bank, and that it was not liable for the loss sustained in consequence of the reliance upon the false statement.

In Crawford v. Boston Store Mercantile Co. 67 Mo. App. 39, a firm

of merchants secured from the cashier of a bank a statement to the effect that the firm was "solvent and would pay for all that they would buy." Upon this statement the firm obtained credit, and, having failed in business, it was sought to hold the bank responsible for the loss. The court held that the cashier had no authority to give such a statement, and therefore the bank was not liable for the damage.

Likewise the representations of Garner, the cashier, and Huston, the president, as to the value of the stock in the plaintiff bank, and as to the bank's business condition, even if made, as contended by Cromwell, were not made in the line of their duty as officers of the bank, and were not within the scope of their authority as president and cashier, and the bank was not liable therefor. The defendant's evidence shows that the things relied upon to defeat the recovery on his note were mere personal transactions, not concerning the business of the bank, and that liability, if any resulted therefrom, rested upon the officers, and not upon the bank. It is no part of the duty of the bank cashier to pass out, gratuitously or otherwise, to prospective purchasers of stock in the bank, information as to the financial standing of the bank, or to advise as to the value of its stock; nor is it any part of the duty of the president of the bank to advise such persons as to the value of the stock. The record does not show that either the cashier or president were authorized to make representations of this kind or character, or that the board of directors had any knowledge that they had made such representations; and for that reason there can be no grounds for the contention that the wrongful acts of the officers had been ratified by the directors. Lamon v. Speer Hardware Co. 119 C. C. A. 1, 198 Fed. 453; Federal Trust Co. v. Coyle, 34 Okla. 635, 126 Pac. 800; Cargile v. Union State Bank, 40 Okla. 506, 139 Pac. 701.

Same—statement as to condition of bank.

In this view of the case it will not be necessary to consider the other assignments of error, and particularly those urged in regard to the admission of letters from the banking department to the bank, criticizing the management of the bank. These letters were doubtless incompetent upon the theory they were admitted; but, as we view the case, the condition of the bank and the representations in regard to it can have no possible relevancy under the law of the case as herein declared.

On account of the error in refusing to direct a verdict for the plaintiff, the case is reversed, and the cause remanded, with directions to the trial court to grant a new trial.

Per Curiam:
Adopted in whole.

G. G. DENT, Appt.,
v.
PEOPLE'S BANK OF IMBODEN.

Arkansas Supreme Court—April 12, 1915.

(118 Ark. 157, 175 S. W. 1154.)

Bank — authority of president — retaining attorney.

1. The president of a bank has no authority, as such officer, to retain an attorney to render legal services to the bank, for an annual fee.

[See note on this question beginning on page 693.]

Same — ratification of contract.

2. The act of the president of a bank, in employing an attorney by the year to furnish legal advice to the bank, is not ratified by the mere fact that he is consulted by the cashier and other officers of the bank, who would not have authority themselves to enter into such a contract on behalf of the bank.

APPEAL by plaintiff from a judgment of the Circuit Court for Lawrence County in defendant's favor in an action brought to recover compensation, under a contract for a yearly retainer for services rendered to the defendant, and damages for breach of the contract. *Affirmed.*

Statement by **Kirby, J.:**

G. G. Dent, an attorney at law, brought suit against the People's Bank of Imboden for the recovery of $1,440, claimed as compensation upon a contract for a yearly retainer for twelve years' service as attorney for the bank, and $1,550 as damages for breach of the contract, alleged to have been made with him by the bank, to pay him for attending to all lawsuits brought by or against the bank, or for collections coming through it.

He alleged an oral contract of employment by W. C. Sloan, president of the bank, from its organization in 1905 until the filing of the suit on January 2, 1910, and that from time to time, prior to 1908, he was consulted by the bank, its officers, and employees and rendered valuable service in giving advice, etc., other than in the institution and conduct of litigation, for which he was to be paid fees to be fixed by agreement.

The second count of the complaint alleged that, by the contract of employment, he was to attend to all litigation of and for the bank, and that he had held himself in readiness at all times to perform the service and carry out the contract; but that the bank had instituted various suits, and employed other attorneys in the conduct of the litigation, to his damage in the sum of $1,500. This count was stricken out upon motion of appellant.

The answer denied any agreement to retain the plaintiff at a salary of $120 a year, or any other amount, and alleged that the bank made an arrangement with him providing, when it needed the services of an attorney in litigation from time to time, it would give him such business and pay him for whatever services he rendered, that it used him as attorney from time to time, and paid him for each service when completed, pleaded the three-year Statute of Limitations, and denied that it employed the plaintiff to represent it in all litigation, and pleaded the Statute of Frauds, the alleged contract not being one to be performed within a year.

The plaintiff testified that, after the bank was organized, he talked with two or three of the stockholders about the attorneyship, with several of the directors, and finally had a conversation with W. C. Sloan, the president of the bank and principal owner of its stock. He told him he would like to become the bank's attorney, and Captain Sloan replied that he could consider himself the attorney of the bank. Nothing was said about any pay, but, from the conversation, he (witness) was to attend to any suits the bank had, that is, suits for or against the bank, for which he was to be paid. There was nothing said about how long the employment was to continue. He knew that Captain Sloan was president of the bank and virtually the owner, having a majority of the stock (he and his children), that he generally attended to the business of the bank; "whatever he said went, in a business way." That the then cashier, as well as the one who succeeded him, relied on the judgment of Captain Sloan in all business matters, and that nobody ever objected to

what he did, and all acquiesced in his actions. That from time to time, independent of specific lawsuits, he was called upon for advice by the cashier of the bank, in consultation about its affairs, and rendered services proper and necessary under the law, for which he had never been paid. That he rendered such services, beginning with the organization of the bank, and continuing until it closed in 1908. He held himself out as the attorney of the bank during this time. Said he was not claiming under an express but an implied contract; his contention being that no specific amount was agreed upon. That he was the regular retained attorney for the bank, was consulted about its business from time to time, held himself in readiness at all times to answer all questions and inquiries made, and he could not say how many times he was consulted, but very often. That $120 a year was a reasonable compensation for the services, for which he had never received any compensation. That he always intended to charge for such services, and felt himself disqualified from taking any business against the bank. He did not claim to have had any contract of employment with the board of directors, or anyone else, except with Captain Sloan, the president of the bank, as already stated, nor did he tell any member of the board of directors that he was the regular retained attorney of the bank by the year, for he knew he was the bank's attorney and did not think of how much he was to be paid.

He said, on cross-examination, that he never intimated to anybody that he was retained by the bank as attorney by the year, nor that he expected a compensation of $120 yearly, but that he never dreamed of it being questioned that he was the bank's attorney. He made no claim of the bank being due him any amount for services as attorney, until after it went into the hands of a receiver and he was notified to pay up his indebtedness to the bank. He then claimed he notified the officers of the bank that he had an account against the bank far in excess of his overdraft, and said: "I was sued by the bank after I had gone and told them I did not owe anything, and when they commenced suit against me I remembered these services."

Another attorney testified that he knew the value of the services claimed to have been rendered by plaintiff, and that $10 or $15 a month would be a reasonable retainer; "and when an individual has considerable business, and employs me in whatever business he has, I ordinarily consider advice and consultations as gratuities. The general custom is, so far as I know it, among lawyers, that a retainer is not considered to be due unless there is a special contract for it." And to the question: "If the People's Bank were to say to you that you might consider yourself their attorney, would you take that to mean that they would pay you a salary by the year?" Ans. "Ordinarily, without more was said than that, I would consider that they expected to employ me in whatever business they had, and pay me the customary fees for attending to it. I think that is the custom among attorneys, so far as I know it, in this locality."

Homer Sloan, cashier, testified that whatever his father (the president) did usually met with the approval of the directors. "Whatever legal business we had, we gave it to Mr. Dent, and I suppose you would consider that we made him the attorney for the bank. We had so little legal business that we had little use for an attorney. Whatever we had, however, was turned over to Mr. Dent. I attended most of the directors' meetings; never heard of Mr. Dent being the attorney for the bank at a yearly salary, or being retained by the year, and meant, when I said he was its attorney, that, whenever we needed an attorney in litigation, we gave the business to Mr. Dent, and paid

him for such lawsuits as he attended to. He made the bank his headquarters when he was in town, and I asked him questions when he was there, and wanted advice, thinking I had the right to do so because the bank gave him whatever legal business it had."

C. C. Bacon testified that Homer Sloan, the cashier, told him, if he had occasion to use an attorney, to use Mr. G. G. Dent. "I did not make any contract with Mr. Dent at all while I was cashier or assistant, but used him in that capacity for certain cases."

Two others testified they had been vice presidents of the bank for some years, attended most of the meetings of the directors, and had never heard of Dent's being employed or retained as attorney for the bank.

Dr. Warren stated that he talked with Dent in 1901, and asked him how much salary the bank paid him as attorney, and he replied that he was the regular attorney of the bank, but that he did not get a salary, but was to attend to the cases of the bank, and was to get paid for his services in that way. The court instructed the jury, amending and giving, over plaintiff's objections, requests numbered 1 and 3, by adding a proviso; the instructions given being as follows:

"No. 1. If you find from the evidence in this case that W. C. Sloan, while acting as president of the People's Bank, employed the plaintiff George G. Dent as its attorney, and that, under such employment the said Dent performed services for the said bank or held himself in readiness at all times to advise, consult, or otherwise serve the bank, being its regular attorney, for which service he has not been paid, you will be warranted in finding for the plaintiff in such an amount as the proof in the case shows his services to be reasonably worth. Provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them, and they acquiesced in said employment by Sloan and ratified the same."

"No. 3. You are further instructed that, if you find from the evidence in this case that the plaintiff Dent, as an attorney at law, performed services such as giving advice about the business of the bank, during the period of years as alleged in the complaint in this case, that he refrained from taking cases against the bank, and always held himself in readiness to serve the bank when called upon by its cashier, or other officers, and that the services rendered were at the solicitation of the cashier and other officers of the bank, that such services have never been paid for, then, in that event, you will be warranted in finding for the plaintiff in such an amount as the proof shows such services to be reasonably worth. Provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them, and they acquiesced in said employment by Sloan and ratified the same."

The jury returned a verdict for the bank, and from the judgment plaintiff brings this appeal.

Messrs. **J. Robert Blair** and **R. E. L. Johnson**, for appellant:

The president of a banking corporation has power to employ an attorney for the bank, without specific delegation of such authority from the board of directors.

10 Cyc. 904; Citizens Nat. Bank v. Berry, 53 Kan. 696, 24 L.R.A. 719, 37 Pac. 131; Morse, Banks & Bkg. § 143; Boone, Bkg. § 144; Gillett v. Campbell, 1 Denio, 522; American Ins. Co. v. Oakley, 9 Paige, 406, 38 Am. Dec. 561; Mumford v. Hawkins, 5 Denio, 355; Pixley v. Western R. Co. 33 Cal. 183, 91 Am. Dec. 623; Western Bank v. Gilstrap, 45 Mo. 419; Turner v. Chillicothe & D. M. City R. Co. 51 Mo. 501; Southgate v. Atlantic & P. R. Co. 61 Mo. 89; Campbell v. Pittsburg Bridge Co. 23 Pa. Sup. Ct. 138; Beebe v. George H. Beebe Co. 64 N. J. L. 497, 46 Atl. 168; Dallas Ice Factory & Cold Storage Co. v. Crawford, 18 Tex. Civ. App. 176, 44

S. W. 875; Dublin & S. W. R. Co. v. Akerman, 2 Ga. App. 746, 59 S. E. 10.

The board of directors, by its silence, impliedly ratified the appointment of appellant as attorney for the bank by the president.

Clark, Corp. 500, 498; Merchants & Farmers Bank v. Harris Lumber Co. 103 Ark. 283, 146 S. W. 508, Ann. Cas. 1914B, 713; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 13 L.R.A. 559, 28 N. E. 245; Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802; Western Development & Invest. Co. v. Caplinger, 86 Ark. 287, 110 S. W. 1039; Winer v. Bank of Blytheville, 89 Ark. 435, 131 Am. St. Rep. 102, 117 S. W. 232; National Spraker Bank v. Geo. C. Treadwell Co. 80 Hun, 363, 61 N. Y. S. R. 817, 30 N. Y. Supp. 77; Louisville, N. A. & C. R. Co. v. Carson, 151 Ill. 444, 38 N. E. 140; Mobile & K. C. R. Co. v. Owen, 121 Ala. 505, 25 So. 612; 10 Cyc. 1073; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770.

Messrs. **Rose, Hemingway, Cantrell, Loughborough, & Miles,** for appellee:

The president had no power to make the alleged contract.

Plum Bayou Levee Dist. v. Harper, 89 Ark. 173, 116 S. W. 196; 1 Morawetz, Priv. Corp. § 537; 2 Cook, Corp. 716; 10 Cyc. 903; Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634.

Knowledge is essential to ratification.

Lyons v. Tams, 11 Ark. 189; Pike v. Douglass & Co. 28 Ark. 59; Martin v. Hickman, 64 Ark. 217, 41 S. W. 852; Bank of Batesville v. Maxey, 76 Ark. 472, 88 S. W. 968; Merchants & Farmers Bank v. Harris Lumber Co. 103 Ark. 283, 146 S. W. 508, Ann. Cas. 1914B, 713; Oglesby v. Ft. Smith, 105 Ark. 506, 152 S. W. 145.

Kirby, J., delivered the opinion of of the court:

(1) It is strongly urged that the court erred in refusing the instructions as requested, and in giving said instructions as amended. The president of a bank has authority to take charge of the litigation of the bank, to institute, carry on, and defend legal proceedings, and for the accomplishment of these purposes may retain and employ counsel on behalf of the bank. 1 Michie, Banks & Bkg. 704; Boone, Bkg. § 144; Bolles, Nat. Bank Act, 89; 3 R. C. L. 442; 10 Cyc. 904; Citizens' Nat. Bank v. Berry, 53 Kan. 696, 24 L.R.A. 719, 37 Pac. 131.

In the Kansas case the court said: "The president of a banking corporation has power to employ counsel and manage the litigation of the bank, in the absence of any order of the board of directors depriving him of such power."

Bank—authority of president—retaining attorney.

The authorities do not reach to the extent however, of holding that the president of a bank is authorized to make a contract of employment, retaining the services of an attorney by the year, for consultations and advice. The business of a bank and other corporations is under the care of and managed by its board of directors; and the president, as a rule, has no greater powers, by virtue of his office merely, except he is presiding officer at the meetings of the board, than any other director of the company. Kirby's Dig. §§ 841, 843; 1 Morawetz, Priv. Corp. 537; 10 Cyc. 903; 2 Cook, Corp. 716.

(2) The employment of an attorney upon a yearly retainer is a matter of moment to the corporation, and there is usually no such haste required about it as would prevent the matter being considered and passed upon by the board of directors; and, although the authority of the president of the bank, in this instance, to make the contract, might have been implied from the usual course of business of the bank, the president having been allowed to manage and control its affairs largely, the instruction offered did not submit the question of his implied authority to the jury, and permit them to draw the inference that he had such authority, and was erroneous, as requested, in telling the jury that, if the contract was made by the president of the bank and the services performed,

they would be warranted in finding for the plaintiff. The requested instruction numbered 1 being erroneous, in assuming that the president had authority to make the contract and bind the bank, the court tacked on the amendment to correct the error, and directed the jury that such a contract, made with the president, would be valid in effect, if ratified by the board of directors.

(3) Neither did the court err in giving instruction numbered 3, which, as requested, assumed that the cashier, or other officers of the bank, had authority to bind it to the payment, under an alleged contract, of yearly retainer for an attorney's services, other than attending to its litigation, in giving advice about the business of the bank, in refraining from taking cases against it, and holding himself in readiness to serve the bank. These officers, as such, had less authority than the president of the bank in that regard, and the amendment to the instruction, added by the court, did but tell the jury that the bank would be bound to pay a reasonable compensation for such service only if the employment was ratified by the board of directors. Of course the bank would have been bound to the payment of a reasonable fee to the attorney for the conduct of any litigation of which it received the benefit, without regard to whether there was a contract of employment or not, and also to the payment of a reasonable compensation for his service in attending to any litigation of the bank, upon a contract of employment made with its president; but each of the instructions, as requested, assumed that the president of the bank, or the officers consulting the attorney, had the authority to retain the attorney by the year, and bind the bank to the payment of a reasonable compensation for consultations with and advice from him in the conduct of the bank's affairs, and the court's amendment, directing that they could not find in his favor unless the contract of employment was ratified by the directors of the bank, was but a correction of the instructions in accordance with the law, and no error was committed in giving them as amended.

Same—ratification of contract.

As already said, the court could have submitted the question of the president's or the cashier's implied authority to make the contract with the attorney, upon the testimony relating to the course of conduct of this bank's affairs; but appellant did not request an instruction of this kind, and the court did not err in its attempt to correct the requested instructions by the amendment, without including the submission of this question in the same instruction.

The views already expressed render it unnecessary to pass upon the question of waiver of the plea of the Statute of Limitations.

Finding no prejudicial error in the record, the judgment is affirmed.

ANNOTATION.

Powers of bank president or vice president.

I. In general, 694.
II. Borrowing money and giving security, 695.
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IX. Miscellaneous acts and contracts, 706.
X. Honorary president, 710.
XI. Vice president, 710.

I. In general.

Some of the courts take the view that, in the absence of usage or authority otherwise derived from the board of directors, the powers of a bank president go little beyond those of any other individual director. Pacific Bank v. Stone (1898) 121 Cal. 202, 53 Pac. 634; Guernsey v. Black Diamond Coal & Min. Co. (1896) 99 Iowa, 471, 68 N. W. 777; Farmers' Nat. Bank v. Templeton (1896) — Tex. Civ. App. —, 40 S. W. 412; Commercial Nat. Bank v. First Nat. Bank (1904) 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601; Hodge v. First Nat. Bank (1872) 22 Gratt. (Va.) 51; First Nat. Bank v. Kimberland (1880) 16 W. Va. 555.

This view proceeds from the notion that ordinarily the cashier, not the president, is the chief executive agent of a bank. Spyker v. Spencer (1845) 8 Ala. 333; Montgomery Bank & T. Co. v. Walker (1913) 181 Ala. 368, 61 So. 951; Griffin v. Erskine (1906) 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193; Smith v. Lawson (1881) 18 W. Va. 212, 41 Am. Rep. 688.

This rule is considerably relaxed, where the president, with the knowledge and acquiescence of the directors, exercises full control over the bank's affairs. Bell v. Hanover Nat. Bank (1893) 57 Fed. 821; Stapylton v. Stockton (1899) 33 C. C. A. 542, 63 U. S. App. 412, 91 Fed. 326; Hanover Nat. Bank v. First Nat. Bank (1901) 48 C. C. A. 482, 109 Fed. 421; Rankin v. Tygard (1912) 119 C. C. A. 591, 198 Fed. 795; Wells, F. & Co. v. Enright (1900) 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 439; First Nat. Bank v. New (1896) 146 Ind. 411, 45 N. E. 597; Steinke v. Yetzer (1899) 108 Iowa, 512, 79 N. W. 286; Griffin v. Erskine (1906) 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193; State ex rel. Carroll v. Corning Sav. Bank (1908) 139 Iowa, 338, 115 N. W. 937; Ida County Sav. Bank v. Johnson (1912) 156 Iowa, 234, 136 N. W. 225; Citizens L. Ins. Co. v. Owensboro Sav. Bank & T. Co. (1912) 150 Ky. 161, 150 S. W. 26; Johnston Fife Hat Co. v. National Bank (1896) 4 Okla. 17, 44 Pac. 192; Panhandle Nat. Bank v. Emery (1890) 78 Tex. 499, 15 S. W. 23; Farmers' & M. Bank v. Western Loan & Bldg. Co. (1918) — Wash. —, 174 Pac. 1.

And the modern tendency is no longer to regard the president of a bank as a mere figurehead. Bartlett Estate Co. v. Fraser (1909) 11 Cal. App. 373, 105 Pac. 130; Third Nat. Bank v. McCullough Bros. (1899) 108 Ga. 249, 33 S. E. 848; Park v. Cordray (1917) 20 Ga. App. 35, 92 S. E. 394; Bank of Minneapolis v. Griffin (1897) 168 Ill. 314, 48 N. E. 154, affirming (1896) 66 Ill. App. 577; Boyd v. First Nat. Bank (1908) 128 Ky. 468, 108 S. W. 360.

The modern tendency and the probably prevailing custom, in banking, is to make the president the active manager as well as the responsible head of all the affairs of the bank, subject to the control of the directors. Boyd v. First Nat. Bank (Ky.) supra.

"Under the usages and customs of modern banking, the president of a bank is no longer regarded as an ornamental magnet with which to attract deposits, but, on the contrary, is now and has been for several years recognized as the executive head and most important agent in connection with banking operations. The reason for the rule that, through banking usage, the president's power was limited to transactions expressly authorized by the board of directors, no longer obtains, and the rule should cease." Bartlett Estate Co. v. Fraser (1909) 11 Cal. App. 373, 105 Pac. 130.

The president of a bank is its chief executive officer, and, in the absence of any showing to the contrary, will be presumed to be the agent in charge of its affairs. In the absence of any evidence to the contrary, it may be very properly assumed, as a matter of law, that it is the duty of the president of a chartered bank to take charge of and manage its business. He is, in legal contemplation, its alter ego. Third Nat. Bank v. McCullough Bros. (1899) 108 Ga. 249, 33 S. E. 848; Park v. Cordray (1917) 20 Ga. App. 35, 92 S. E. 394.

The general rule is that a corporation acts through its president, and through him executes its contracts

and agreements; and an act pertaining to the business of the corporation, not clearly foreign to the general powers of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body. Bank of Minneapolis v. Griffin (1897) 168 Ill. 314, 48 N. E. 154, affirming (1896) 66 Ill. App. 577.

The president of a bank may be authorized by the directors to do anything within the authority of the bank's charter. Boyd v. First Nat. Bank (1908) 128 Ky. 468, 108 S. W. 360.

The affairs and business of a banking association, under the Oklahoma statute, are managed and controlled by the board of directors. The statute is silent as to the duties of the president. He is, however, the presiding member of the board of directors, and may be delegated the authority of exercising personal supervision over the affairs of the bank. If such authority is not delegated to him, he has only such authority as is inherent in the office itself. WILKINHALE BANK v. HERNSTEIN (reported herewith) ante, 679.

Except as otherwise specifically provided in the charter, the business of a bank is in charge of its board of directors; and without their authority to do so, the president cannot bind the bank in any unusual manner, or in any undertaking lying outside of its customary routine business. First Nat. Bank v. New (1896) 146 Ind. 411, 45 N. E. 597.

The authority of the president of a bank is limited to those transactions in connection with its affairs which are usual to such officer. De Bacca v. Higgins (1914) 58 Colo. 75, L.R.A. 1915B, 1091, 143 Pac. 832.

Unusual authority may be given to the president of a bank, not only by a formal vote of the board of directors, but also by the existence of such facts as constitute a public holding out, and warrant the public in believing that the undertaking is within the scope of his legitimate, delegated authority. First Nat. Bank v. New (Ind.) supra; Steinke v. Yetzer (1899) 108 Iowa, 512, 79 N. W. 286; Bell v. Hanover Nat. Bank (1893) 57 Fed. 821.

A trust company is not simply a bank, for the purpose of applying the doctrine as to the scope and nature of the inherent powers of a bank president. Carrington v. Turner (1905) 101 Md. 437, 61 Atl. 324.

II. Borrowing money and giving security.

The authorities are not agreed as to whether a bank president may borrow money for the bank, and give security for its repayment.

It was said in Hanover Nat. Bank v. First Nat. Bank (1901) 48 C. C. A. 482, 109 Fed. 421, that the president and actual manager of a bank had ample authority from it, by virtue of his official position, to borrow money to pay a discount of its notes, to agree to repay the money borrowed, and to contract on its behalf to pay the discounted notes as they mature.

And in Bell v. Hanover Nat. Bank (1893) 57 Fed. 821, the court said that the evidence abundantly shows that the board of directors of a national bank left it to the president, as their agent and the agent of the bank, to negotiate loans and make such contracts as to repayment and security as are lawful and usual; sufficiently so, at least, to bind the bank in such transactions with third persons, when the bank has received the benefits of such contract, without objections, for more than a year.

The authority of the president of a national bank to make an agreement with another bank, under which deposits in the latter bank to the credit of the former were pledged as collateral to secure the payment of a loan, may be established by proof of the course of business, the usages and practices which the directors may have permitted to grow up in the business of the bank, and by the knowledge which the board of directors must be presumed to have had of the acts and doings of its subordinates, in and about the affairs of the corporation. Ibid.

See also, infra, IX., Stapylton v. Stockton (1899) 33 C. C. A. 542, 63 U.

S. App. 412, 91 Fed. 326. And for powers of vice president, see infra, XI.

The rule that the president or other executive officer of a national bank has implied authority to borrow money on its behalf, in the usual course of business, has no application where the borrowing is by trustees, appointed by the bank from its active officers to carry out a benefit plan for its employees, even should it be admitted that the loan was one to the bank. Commonwealth Trust Co. v. First-Second Nat. Bank (1918) 260 Pa. 223, 103 Atl. 598.

A national bank president expressly clothed with authority over the internal management of the bank's affairs, with complete control over subordinate officers and employees, has no power to negotiate or secure, on the bank's account, a loan to its employees' benefit fund.

The existence of such power is flatly denied in a number of cases. Montgomery Bank & T. Co. v. Walker (1913) 181 Ala. 368, 61 So. 951; Fifth Ward Sav. Bank v. First Nat. Bank (1885) 47 N. J. L. 357, 1 Atl. 478; Byron v. First Nat. Bank (1915) 75 Or. 296, 146 Pac. 516.

The president of a bank has no authority, as such, to borrow money on behalf of the bank, without express or implied authority from the board of directors. Byron v. First Nat. Bank (Or.) supra.

The president of a savings bank, who has authority to carry on its general business, is not thereby authorized to borrow money in behalf of the institution. Fifth Ward Sav. Bank v. First Nat. Bank (1885) 47 N. J. L. 357, 1 Atl. 478.

The office of president of a bank does not necessarily carry with it the inherent power to pledge the bank's collateral to secure a loan. Montgomery Bank & T. Co. v. Walker (1913) 181 Ala. 368, 61 So. 951.

A Louisiana statute provides that "no officer of any state banking association, savings bank, or trust company shall have the right to borrow money and pledge or hypothecate any of its assets except in pursuance of a resolution of the board of directors duly entered upon its minute books." Sims v. Athens Bank (1916) 139 La. 324, 71 So. 525.

Where the directors of a bank passed a resolution authorizing the president, vice president, and cashier, or either of them, to borrow money from another bank, and to execute the borrowing bank's promissory notes for the amount, and deposit bills receivable as collateral security, and where there was a course of dealing between the two banks in accordance with this resolution, the execution of a note by such officers, and the transfer and assignment of collateral to secure its payment, is not invalid for want of authority on the part of the parties giving the note and transferring the collateral, although the note was not given immediately after the passage of the resolution; it appearing that there was no revocation of the authority to borrow money and give such note. And renewals of the note, given in pursuance of the authority thus conferred, stand upon the same footing as the original note. Collins v. American Exch. Nat. Bank (1917) 147 Ga. 273, 93 S. E. 880.

III. Making or transferring negotiable paper.

As incident to loan, see, supra, II.

The president of a bank has authority to draw checks when the cashier is absent, although there is a temporary cashier present. Neiffer v. Bank of Knoxville (1858) 1 Head (Tenn.) 162.

"There can be no doubt," says Mr. Justice White, in Putnam v. United States (1896) 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923, "that the president of a national bank, virtute officii, has not necessarily the power to draw checks against the account kept with another bank, by the bank of which he is president."

A resolution of the board of directors, authorizing the president of a national bank to make checks and drafts, with no limitations on its face, is not to be interpreted as conferring only such power as is incidental to the customary powers of the president,

or to power specially bestowed, or one to be exercised only in execution of some special authority. First Nat. Bank v. National Park Bank (1910) 175 Fed. 881. The court said, in answer to the contention that the resolution intended no more than to give the president a power to be exercised only when specially authorized, that the other words of the resolution, giving him the power not only to make all checks and drafts, but "all contracts," were worthy of notice, because the president is, in any event, the proper person to sign contracts which are specially authorized. The resolution must have meant more than this. It must have meant to confer upon him some self-subsisting authority. It meant to give him general authority to sign contracts and checks.

It has been held that the president of a bank has no power to obligate it as indorser. Commonwealth Trust Co. v. First-Second Nat. Bank (1918) 260 Pa. 223, 103 Atl. 598; Smith v. Lawson (1881) 18 W. Va. 212, 41 Am. Rep. 688.

So, too, it has been held that the president of a bank has no authority, as such, to sell notes belonging to the bank. First Nat. Bank v. Lucas (1887) 21 Neb. 280, 31 N. W. 805.

And in National Bank v. Atkinson (1893) 55 Fed. 465, which presented the case of an accommodation indorsement by the president of a national bank, the court said that the president of a national bank has no power inherent in his office to bind the bank by executing or indorsing a promissory note in the name of the bank.

To the contrary are State ex rel. Carroll v. Corning Sav. Bank (1908) 139 Iowa, 338, 115 N. W. 937, where it was held that the transfer of commercial paper is within the apparent authority of the president of a bank, who is its chief officer representing it in the discharge of its corporate functions, and United States Nat. Bank v. First Nat. Bank (1897) 24 C. C. A. 597, 49 U. S. App. 67, 79 Fed. 296, affirmed in (1899) 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628, where the court said: "There are some authorities, it is true, which maintain that the president of a bank has no implied power to bind the bank by an indorsement of commercial paper, and that, when an indorsement by the president is relied upon as transferring a title thereto, a special authority to indorse must be shown. Smith v. Lawson (1881) 18 W. Va. 228, 41 Am. Rep. 688; Hallowell & A. Bank v. Hamlin (1817) 14 Mass. 180; Gibson v. Goldthwaite (1844) 7 Ala. 293, 42 Am. Dec. 592. But we think the weight of reason and authority is in favor of the view that it is within the scope of the implied powers of the president of a bank to indorse negotiable paper in the ordinary transaction of the bank's business, and that a special authority to that end need not be conferred by the board of directors. Such implied power is generally conceded to bank cashiers, and we know of no sufficient reason why the implied powers of the chief executive officer of a bank should be more limited in this respect than those of its cashier. Farmers' & M. Bank v. Smith (1896) 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 135; Fleckner v. Bank of United States (1823) 8 Wheat. (U. S.) 338, 360, 5 L. ed. 631, 636; Wild v. Bank of Passamaquoddy (1825) 3 Mason, 505, Fed. Cas. No. 17,646; City Bank v. Perkins (1864) 29 N. Y. 569, 86 Am. Dec. 332; Cooke v. State Nat. Bank (1873) 52 N. Y. 114, 11 Am. Rep. 667; Bank of State v. Wheeler (1863) 21 Ind. 90; Merchants' Nat. Bank v. State Nat. Bank (1871) 10 Wall. (U. S.) 604, 650, 19 L. ed. 1008, 1020. It can hardly be expected that the cashier of a bank will be in attendance on all occasions when it becomes necessary for the bank to indorse notes and bills, draw drafts and checks, certify checks, or issue certificates of deposit. Such transactions as these are of hourly occurrence in all banks located in large business centers, and the exigencies of business demand that the power to perform such acts should be vested in some other officer, as well as in the cashier. Our observation teaches us that such power is very generally exercised by bank presidents; and, in ordinary transactions, no layman, we think, would hesitate to accept negotiable paper which had

passed through a bank, because it was indorsed by the president, rather than by the cashier. In its practical operation, the rule that a bank president has no implied power to indorse commercial paper for and in behalf of his bank would seriously interfere with the transaction of business, and put the public to great inconvenience, while it would have no marked tendency to prevent fraud or breaches of trust on the part of bank officers. The public interest requires that the same presumptions should attend an indorsement made by the president of a bank, which exist in favor of an indorsement made by a cashier, and that banks should be held bound by acts of that nature, when done by either of such officers in the ordinary course of business. Aside from these considerations, we think that it has been settled, so far as the Federal courts are concerned, by the decision in People's Bank v. National Bank (1880) 101 U. S. 181, 25 L. ed. 907, that the president of a national bank, by virtue of his office, does possess the power to bind his bank by a contract of indorsement or guaranty, made in the usual course of business. It was held in that case, where the vice president of a national bank, contemporaneously with a sale of certain notes to another bank, guaranteed their payment, that the latter bank could rightfully presume, without inquiry, that the vice president had authority to execute the guaranty. And the same doctrine has been approved by some of the state courts. Thomas v. City Nat. Bank (1894) 40 Neb. 501, 24 L.R.A. 263, 58 N. W. 943; Palmer v. Nassau Bank (1875) 78 Ill. 380; Thomp. Corp. § 4621."

See also infra, XI.

It is said in Schwehm v. Chelten Trust Co. (1917) 257 Pa. 76, 101 Atl. 93, that even where the authority of a bank president comes from the directors, rather than from the by-laws, he may indorse bills or notes payable to it, and that he possibly has an implied power to indorse and transfer its negotiable paper.

The president of a national bank has no authority to negotiate in its name promissory notes which do not belong to the bank, especially where he is also payee of the notes, and is personally interested in the negotiation. City Electric Street R. Co. v. First Nat. Bank (1898) 65 Ark. 543, 47 S. W. 855.

IV. Loaning bank's money; discounts.

Loaning the bank's money seems uniformly regarded as within the president's powers. Brobston v. Penniman (1895) 97 Ga. 527, 25 S. E. 350; Roe v. Bank of Versailles (1902) 167 Mo. 406, 67 S. W. 303; Johnston Fife Hat Co. v. National Bank (1896) 4 Okla. 17, 44 Pac. 192.

It was within the immediate scope of the business and authority of the president of a bank, who is its alter ego, and the cashier, who is its special agent for the purpose of negotiating loans, to make a loan and take a note to secure its payment. Brobston v. Penniman (1895) 97 Ga. 527, 25 S. E. 350.

It is within the employment of the president of a bank, who has the active management of its business, to make loans for the bank, to take security for it, to take any necessary steps for the protection of its funds loaned, or on hand; and in carrying out any of these functions the bank is bound by his act. Johnston Fife Hat Co. v. National Bank (Okla.) supra.

A proposal by the president and cashier of a national bank to its regular correspondent to discount, according to custom, bills receivable, belonging to the former bank, is not so far outside the scope of ordinary banking transactions as to impose upon the purchasing bank the duty of ascertaining that the transaction has been specially authorized by the board of directors of the former bank. United States Nat. Bank v. First Nat. Bank (1897) 24 C. C. A. 597, 49 U. S. App. 67, 79 Fed. 296, affirmed in (1899) 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628. "If, as in the present case," said the court, "the proposal to rediscount emanates from the president and cashier of a bank, and is made to its regular correspondent, and there are no circumstances attending the

transaction which are calculated to arouse suspicion, we think that the bank to which the proposal is addressed may safely act on the proposition without further inquiry, on the assumption that the act has either been specially authorized, or that the officers from whom the proposition emanates are acting within the purview of their general powers." The court distinguished Western Nat. Bank v. Armstrong (1894) 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572, on the ground that the conversion of bills receivable into cash, by discounting them, differs essentially from borrowing money, saying: "There is an obvious difference between a transaction where a bank goes into the market as a borrower, giving its own notes, bills, or other obligations for the money borrowed, and a transaction where it disposes of the notes and bills of third parties which it has previously discounted. In the former case it becomes primarily bound; it is the principal debtor; while in the latter, even if it indorses the paper, it only incurs a contingent liability, which may never ripen into an absolute obligation to pay. The latter transaction has more, if not all, of the characteristics of a sale, and it is generally regarded as a sale, whereby assets of a certain kind are converted into cash. It may be said that a bank or an individual borrows money when they execute their own notes or bills, and receive the money thereon from a third party, even though the interest to accrue is deducted in advance, in the form of a discount. But we can see no propriety in characterizing the transaction as a borrowing of money, when a person or a corporation sells commercial paper made by third parties, which they happen to own."

The authority of the president of a national bank to discount commercial paper, and to do other acts in its behalf within the scope of the authority of its ministerial officers, is established, where the board of directors has by resolution expressly authorized, or, by acquiescence for a reasonable length of time, permitted, him to participate in the actual management of its daily business affairs. Rankin v. Tygard (1912) 119 C. C. A. 591, 198 Fed. 795.

But where the charter of a bank requires an act of the board to make discounts, the board cannot confer that power on the president. Percy v. Millaudon (1832) 3 La. 568.

And where an act of incorporation provided that there should be thirteen directors, of whom a majority should be a quorum for its business, but that ordinary discounts might be made by the president and four directors, he could not act without the specified number of directors. Manderson v. Commercial Bank (1857) 28 Pa. 379.

V. Using bank's funds for personal ends; adverse interest.

The president of a bank may not bind it by an agreement in which he has an interest adverse to the bank, although the agreement was otherwise within his authority, by virtue of his position. Lester v. Hawkins (1916) — Tex. Civ. App. —, 181 S. W. 481.

Adverse interest forbids the president of a bank to undertake to bind the bank to pay the debt of a corporation in which he is a stockholder. Watt v. German Sav. Bank (1917) — Iowa, —, 165 N. W. 897.

Without express authority, the president of a bank may not use the bank's funds, or credit, for his personal ends. Anderson v. Kissam (1888) 35 Fed. 699; Chrystie v. Foster (1894) 9 C. C. A. 606, 26 U. S. App. 67, 61 Fed. 551; Lamson v. Beard (1899) 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30; De Baca v. Higgins (1914) 58 Colo. 75, L.R.A. 1915B, 1091, 143 Pac. 832; Watt v. German Sav. Bank (Iowa) supra; Rhodes v. Webb (1877) 24 Minn. 293; Austin v. Daniels (1847) 4 Denio (N. Y.) 299; Lanning v. Trust Co. of America (1910) 137 App. Div. 722, 22 N. Y. Supp. 485; Dowd v. Stephenson (1890) 105 N. C. 467, 10 S. E. 1101; Harwood v. Ft. Worth Nat. Bank (1918) — Tex. Civ. App. —, 205 S. W. 484.

A bank president, or cashier, has no implied authority to bind his corporation to negotiable paper made for his

own use. Anderson v. Kissam (Fed.) supra.

The authority of the president of a national bank to discharge his individual liabilities by drawing drafts upon the funds of the bank in favor of his creditor could come only from the directors, by direct resolution, or by acquiescence or consent. Lamson v. Beard (1899) 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30.

The president of a bank, though owning all its capital stock and transacting all its business, has no authority to use the bank's funds in payment of his individual debt. De Baca v. Higgins (1914) 58 Colo. 75, L.R.A. 1915B, 1091, 143 Pac. 832.

The president of a bank, though owning practically all its stock and being the dominating influence in the management of its affairs, may not draw drafts on the bank's funds in payment of his personal obligations. Harwood v. Ft. Worth Nat. Bank (1918) — Tex. Civ. App. —, 205 S. W. 484.

The president of a trust company has no authority to direct another trust company to apply to the payment of his individual indebtedness a check drawn by his own trust company upon the other trust company, payable to the order of "yourselves." Lanning v. Trust Co. of America (1910) 137 App. Div. 722, 122 N. Y. Supp. 485.

The president of a national bank has no implied authority to authorize, in his official capacity, another bank to pay his note, and charge the amount thereof to the account of his bank. Christie v. Foster (1894) 9 C. C. A. 606, 26 U. S. App. 67, 61 Fed. 551.

The president cannot authorize the cashier of a bank to pay checks to one who has no deposit in the bank, but has a claim against the president, unless the directors have given authority to do so. Dowd v. Stephenson (1890) 105 N. C. 467, 10 S. E. 1101.

The presumption is against the right or authority of the president of a bank to execute the bank's obligation for his own use. Pope v. Ramsey County State Bank (1917) 137 Minn. 46, 162 N. W. 1051.

The president, with the cashier of a bank cannot pledge its responsibility for their own individual engagement, nor is his assent to a misappropriation by the cashier any protection to the latter. Austin v. Daniels (1847) 4 Denio (N. Y.) 299.

The president of a bank needs no authority from it to keep a checking account there, and to draw his personal check thereon. Pope v. Ramsey County State Bank (Minn.) supra.

But a general authority to the president of a bank to certify checks drawn upon it does not extend to checks drawn by himself. Claflin v. Farmers' & C. Bank (1862) 25 N. Y. 293.

VI. Admissions and representations.

The admissions of the president of a bank cannot create a liability against it. Henry v. Northern Bank (1879) 63 Ala. 527.

Nor can he, by such admissions, release the maker of a note from his legal responsibility to the bank. Hodge v. First Nat. Bank (1872) 22 Gratt. (Va.) 51.

The making of a statement as to the efficiency, fidelity, and integrity of the cashier of a national bank, for the benefit of the cashier and to enable him to obtain a bond insuring his fidelity, is no part of the ordinary routine business of a bank president, and is not within his implied powers. American Surety Co. v. Pauly (1898) 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, affirming (1896) 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 470; United States Fidelity & G. Co. v. Muir (1902) 53 C. C. A. 56, 115 Fed. 264.

The bank will be responsible, however, for statements of this character made by the president in a declaration, in reliance upon which the cashier's bond is issued, where such statements are made and are required to be made on behalf of the bank, and the president acts for the bank in so doing, and the bond is procured by the bank, and the bank pays the premium. Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. (1902) 183 U. S. 402, 46 L. ed. 253, 22 Sup, Ct. Rep. 124.

A prospective buyer of treasury stock in a national bank is authorized to rely upon the representations made

by the president of the bank as to its financial condition, without further inquiry. Merrill v. Florida Land & Improv. Co. (1894) 8 C. C. A. 444, 13 U. S. App. 649, 60 Fed. 17.

But the president of a bank, the control and management of which is, by statute, vested in a board of directors, may not bind the bank by his representations, made in order to obtain notes and checks as the purchase price of stock which the bank had not issued, and did not contemplate issuing. WILKIN-HALE BANK v. HERNSTEIN (reported herewith) ante, 679.

And the president and cashier of a bank are acting without the scope of their authority, in advising a prospective purchaser of the bank's capital stock from a third person as to the value of the stock and the financial condition of the bank, where there is nothing to indicate that these officers were clothed with any other powers than those prescribed for such officers under the State Banking Law, which invests the board of directors with the control and management of the bank's affairs, and creates the offices of president and cashier, but does not prescribe their respective duties. FARMERS' STATE GUARANTY BANK v. CROMWELL (reported herewith) ante, 684.

It was held in State Bank v. Brocton Fruit Juice Co. (1912) 152 App. Div. 335, 136 N. Y. Supp. 396, that the president of a bank which holds an unrecorded mortgage from a corporation, covering all its property, in an amount double the value of such property, may bind it by his representations to inquiring creditors of such corporation, to the effect that it would be safe to extend credit and sell goods to it. But, on appeal to the New York court of appeals, that court reversed a judgment against the bank for error in admitting the declarations of the president, explaining why the mortgage had been withheld from record, made after it had been recorded and at a time when the president was not engaged in any transaction in behalf of the bank with which these statements were connected, or to which they were pertinent. (1913) 208 N. Y. 492, 102 N. E. 591.

See also infra, XI.

A person purchasing negotiable paper from the president of a bank, with a guaranty of payment executed by the president, is justified in relying upon the president's representation that the paper belonged to the bank, and the bank is bound by his representation to that effect; at least, where the transaction occurred in the banking house, and while the president was apparently engaged in performing his duties as such officer. City Nat. Bank v. Thomas (1896) 46 Neb. 861, 65 N. W. 895.

Even if procuring the signature of an accommodation maker to a promissory note in order that a national bank may loan money to the real maker is within the authority of another national bank, the president of the latter bank was not authorized to transact such business for his bank, and did not bind it by his representations that the signatures to the note were genuine. Commercial Nat. Bank v. First Nat. Bank (1904) 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601, reversing (1903) — Tex. Civ. App. —, 77 S. W. 239. "Under the National Banking Law," said the court, "the corporation was authorized to elect a board of directors to which was committed the management and control of the bank, and the board was empowered to select one of its members as president of the bank, of whom it is said: 'It is his duty to preside at the meeting of the board of directors, and he has charge of the litigation of the bank; and other than these he has no power inherent over and beyond another director.' . . . The board could have adopted by-laws conferring larger powers upon the president, but the petition does not allege the existence of such by-laws, nor any fact which would extend the authority of the president so as to embrace the act upon which this action rests."

A bank is liable for fraudulent representations of its president, made while he was endeavoring to collect a debt due the bank, although the directors did not know of or authorize the false representation. The bank, of course, did not authorize him to commit a fraud, but it intrusted him with

the conduct of this class of business; and he conducted it unfairly, and committed the fraud in the course of his employment. Binghampton Trust Co. v. Auten (1900) 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105.

The president of a bank, in employing an agent to bring suit upon a draft deposited with the bank for collection, is not the agent of his own bank so as to render it liable to such attorney for false representations of the president. Ryan v. Manufacturers' & M. Bank (1880) 9 Daly (N. Y.) 308.

VII. Compromising, waiving, or surrendering corporate rights.

Compromise and settlement.

The president of a bank has, as such, no power to make an accord and satisfaction. First Nat. Bank v. Kimberland (1879) 16 W. Va. 578.

The president of a bank has no authority to assent to a composition, by which the bank agreed with the other creditors of an insolvent debtor to accept 50 per cent in full discharge of their claims. Wheat v. Bank of Louisville (1887) 9 Ky. L. Rep. 738, 5 S. W. 305.

But, the president of a bank, taking a new note in settlement of matured paper, acts within the apparent scope of his authority, so as to bind the bank. Cake v. Pottsville Bank (1887) 116 Pa. 264, 2 Am. St. Rep. 600, 9 Atl. 302.

The president of a security and trust company which, as mortgagee, furnished the money for the erection of a building and was surety for the building contractor, had the power, prima facie at least, to consent to a compromise agreement whereby the contractor agreed to build a retaining wall as compensation for a breach of the building contract; he having, in all stages of the business, represented and acted for the corporation. Christensen v. Hamilton Realty Co. (1912) 42 Utah, 70, 129 Pac. 412.

The president of a loan and trust company has presumptive power to settle with an agent who has been employed for many years, during which he has dealt with the president alone. Farmers' Loan & T. Co. v. Mann (1867) 4 Robt. (N. Y.) 356.

Under ordinary circumstances, the president of a bank has power to receive payment of a note, or of a judgment recovered upon it, on behalf of the bank, and to give a satisfaction of such judgment. Booth v. Farmers' & M. Nat. Bank (1872) 50 N. Y. 396.

And the president of a national bank, held out to the public as fully empowered to attend to all of the business of the bank, has the apparent authority to attend to such general business with the public as might be transacted with the directors themselves, including such an adjustment of a claim as an agreement to accept an assignment of a judgment in discharge of all liability on a promissory note. First Nat. Bank v. New (1896) 146 Ind. 411, 45 N. E. 597.

In deference to the ruling in Panhandle Nat. Bank v. Emery (1890) 78 Tex. 499, 15 S. W. 23, that the president of a national bank, who was intrusted with its management and control, might accept mortgaged property from a debtor in payment of a debt, and thus bind the bank to pay the mortgage indebtedness to the amount of the value of the property, the court in Farmers' Nat. Bank v. Templeton (1896) — Tex. Civ. App. —, 40 S. W. 412, held that the president of a national bank could, by virtue of his office, release a debt due to the bank, in consideration of a quitclaim deed from the debtor to certain real property.

But the president of a bank has no authority, by virtue merely of his office, to agree with a borrower that, if the latter will not sue the bank for damages because of the bank's failure to extend further credit, the bank will not sue the borrower on its promissory note, which the bank held. Swindell v. Bainbridge State Bank (1907) 3 Ga. App. 364, 60 S. E. 13.

And unrestricted authority to the president and cashier of a bank to do its business does not include power to surrender a note owned by the bank, for an individual debt of one of them. Rhodes v. Webb (1877) 24 Minn. 293.

Releasing bank debtors.

As to release by compromise or settlement, see supra.

A bank president has no authority to assure the maker of a note that his obligation thereon will not be enforced against him. Kennedy v. Otoe County Nat. Bank (1878) 7 Neb. 59; Bank of Dexter v. Simmons (1918) — Mo. App. —, 204 S. W. 837; First Nat. Bank v. Tisdale (1879) 18 Hun (N. Y.) 151; Fowler v. Walch (1907) 119 App. Div. 542, 104 N. Y. Supp. 54; Thompson v. v. McKee (1888) 5 Dak. 172, 37 N. W. 367; Mead v. Pettigrew (1899) 11 S. D. 529, 78 N. W. 945; Hodge v. First Nat. Bank (1872) 22 Gratt. (Va.) 51; Baker v. Berry Hill Mineral Springs Co. (1911) 112 Va. 280, L.R.A.1917F, 303, 71 S. E. 626; Culpepper Nat. Bank v. Walter (1913) 114 Va. 522, 77 S. E. 484.

As an abstract proposition of law, it is probably true, said the court in Central Bank & T. Co. v. Ford (1912) — Tex. Civ. App. —, 152 S. W. 700, that it is not within the lawful powers of the president or other officer of a bank to accept paper payable to the bank, for which the bank gave, either directly or indirectly, a consideration, and to agree collaterally with the maker of the paper that it need not be paid, or will not be collected.

Neither the president nor the cashier of a bank has any authority to release makers of a note, acquired by the bank for value, from any liability thereon; especially, where there is no consideration for such release. Bank of Dexter v. Simmons (1918) — Mo. App. —, 204 S. W. 837.

The maker of a note payable to a bank, given in renewal of another note which had been given for the amount of a draft indorsed by him solely for the purpose of identification, is not released from liability to the bank because he was assured by the cashier, or the president, or both, before signing each paper, that he would incur no liability by signing the instrument. Thompson v. McKee (1888) 5 Dak. 172, 37 N. W. 367.

The president and cashier of a bank could not agree for it, with persons signing notes as accommodation makers for the beneficial maker, who was already in debt to the bank in excess of the legal limit, that the only use to make of such notes was to deceive the bank examiner. Bank of Dexter v. Simmons (Mo.) supra.

The representations by the president of a bank that the maker of a note payable to him, but discounted at the bank, will not be called upon to meet the note, are not binding upon the bank. Kennedy v. Otoe County Nat. Bank (1878) 7 Neb. 59.

The president of a bank, who procures a note made by himself and others to be discounted by said bank solely for the joint benefit of himself and of the other makers, by acting for or assuming to act for the bank, cannot make any agreement respecting such note which will in any manner relieve such makers, himself included, from their obligation to pay the same, when such agreement, made by the president, has not been ratified by the bank, otherwise than by his acts as such president. Fowler v. Walch (1907) 119 App. Div. 542, 104 N. Y. Supp. 54.

The president, who was the controlling and managing officer of a bank, could not bind it by agreeing with certain persons to whom he loaned the bank's money in furtherance of an enterprise of his own, taking from them notes therefor payable to the bank, that payment of said notes was not to be demanded if he was unsuccessful in paying them out of the proceeds of certain securities belonging to the makers, which he guarantees to sell at par. Baker v. Berry Hill Mineral Springs Co. (1911) 112 Va. 280, L.R.A. 1917F, 303, 71 S. E. 626.

An arrangement between the president, who was also the executive and managing officer of a bank, and a partnership, pursuant to which the former directed and allowed the latter to check upon the bank (at which the firm had no balance), and accepted and discounted notes for the amounts of the checks out of the bank's money, and applied the proceeds of such notes to balance the overdraft, and promised the partnership that he would pay the bank one of the notes, and thus discharge his own debt to the partnership, does not release the makers from liability to the bank on such note.

Culpeper Nat. Bank v. Walter (1913) 114 Va. 522, 77 S. E. 484.

Nor can a bank president enter into an agreement with an indorser of a note that the latter shall not be liable to the bank upon his indorsement. Bank of United States v. Dunn (1832) 6 Pet. (U. S.) 51, 8 L. ed. 316; Loomis v. Fay (1852) 24 Vt. 240.

Thus, in Bank of United States v. Dunn (U. S.) supra, it was held that the liability of parties to bills of exchange or promissory notes has been fixed on certain principles which are essential to credit and the circulation of such paper, and parol evidence is not admissible to show that one who indorsed a note did so upon the assurance of the president and cashier of a bank that it was only a matter of form, to satisfy the requirements of the law, and that certain bank stock had been pledged or was to be pledged as security for the payment of the note, and that the indorser was to be looked to only in case of a deficiency.

A bank president has no power to bind the bank by an agreement made with one depositing securities to a note, to the effect that he will see that the note is paid and that the securities will not be sold. Breyfogle v. Walsh (1894) 71 Fed. 898.

A national bank is not bound, by its president's agreement, to refrain from selling collateral security to satisfy the pledgeor's debt, where the directors never authorized the president to make such a contract, and never ratified his action, and the facts raise no inference of implied authority. Arbogast v. American Exch. Nat. Bank (1903) 60 C. C. A. 538, 125 Fed. 518.

See also infra, XI. And as to release by mortgage, see infra, IX., Citizens' L. Ins. Co. v. Owensboro Sav. Bank & T. Co. (1912) 150 Ky. 161, 150 S. W. 26.

Waiver.

The president of a bank has no inherent power, as such, to agree for the bank that it will not plead the Statute of Limitations. Morgan v. Merchants' Nat. Bank (1884) 13 Lea (Tenn.) 234.

But where it is within the power of the president, by the custom of the bank, to arrest the running of the Statute of Limitations, such power may be exercised out of the state wherein the bank is situated, and although the president is himself the guarantor of the debt. Ibid.

A waiver of the right to plead the Statute of Limitations to an action to enforce the liability of a bank as a stockholder in a corporation, in consideration of extension of time, is binding on the bank when signed for its best interests by its president who was its general manager, allowed to act for it according to his judgment, under a by-law giving him general supervision of the business of the corporation and power to perform all duties which its interests may require, although the directors never knew of its execution. Wells, F. & Co. v. Enright (1900) 127 Cal. 669, 49 L.R.A. 647, 60 Pac. 439.

The president of a banking corporation has no power, as such, unless conferred by charter, by-law, or resolution, to waive conditions in an offer to sell land; and such authority will not be presumed because he assumed to exercise it. Chadbourne v. Stockton Sav. & L. Soc. (1894) 4 Cal. Unrep. 535, 36 Pac. 127. The court, while admitting that, when the president assumes to act for the corporation in a matter pertaining to the usual business of the corporation, authority will be presumed in the absence of proof, said: "This was a transaction for the sale of land, and such corporations are prohibited from dealing in land, except within quite narrow limits. It may be true that when they do violate the law in this respect no one can object or take advantage of the fact, except the state. Still such prohibited business cannot be held to be the customary business of the bank, and authority will not be presumed in the president, merely by virtue of his office."

VIII. Litigation and employment of attorneys.

The conduct of the bank's litigation, including the employment of counsel, is almost universally recognized as falling within the powers of a bank

president, inherent in his office. DENT V. PEOPLE'S BANK (reported herewith) ante, 688; Russell v. Washington Sav. Bank (1904) 23 App. D. C. 398; Yatesville Bkg. Co. v. Fourth Nat. Bank (1916) 17 Ga. App. 420, 87 S. E. 606; Citizens' Nat. Bank v. Berry (1894) 53 Kan. 696, 24 L.R.A. 719, 37 Pac. 131; Mumford v. Hawkins (1848) 5 Denio (N. Y.) 355; American Ins. Co. v. Oakley (1842) 9 Paige (N. Y.) 496, 38 Am. Dec. 561; National Bank v. Earl (1895) 2 Okla. 617, 39 Pac. 391; Merchants' Nat. Bank v. Eustis (1894) 8 Tex. Civ. App. 350, 28 S. W. 227.

See also infra, XI.

The president of a bank has the inherent power, by virtue of his office, of instituting, carrying on, and controlling the litigation of his bank, unless this power is limited by some statute, or by the charter or by-laws of the bank, or possibly by some order of its directors. Yatesville Bkg. Co. v. Fourth Nat. Bank (1916) 17 Ga. App. 420, 87 S. E. 606.

In the absence of proof to the contrary, it must be assumed that the president of a bank was duly authorized to institute and carry on a legal proceeding to enforce a claim of the bank. Mumford v. Hawkins (1848) 5 Denio (N. Y.) 355.

The president of a bank, unless his power is limited by charter or by-laws, or possibly by some order of its directors, has the authority to dismiss a suit brought by the bank. Yatesville Bkg. Co. v. Fourth Nat. Bank (Ga.) supra.

The president of a bank may empower its attorney to enter a remittitur of a judgment in favor of the bank, while an appeal therefrom by the judgment debtor is pending and undetermined, in consideration of the judgment creditor's agreement to pay the costs. Case v. Hawkins (1876) 53 Miss. 702.

But the president of a bank has no inherent authority to order the sheriff to stay an execution against a judgment debtor to the bank. Spyker v. Spence (1845) 8 Ala. 333.

The president of a bank, under the scope of his general authority, may employ counsel to appear for it and defend its interests in pending or prospective litigation. Russell v. Washington Sav. Bank (1904) 23 App. D. C. 398.

The authority given to an attorney to appear and defend its title to the property involved in certain replevin suits, by the president of a national bank, was a sufficient authorization and employment on behalf of the bank. National Bank v. Earl (1895) 2 Okla. 617, 39 Pac. 391.

The employment of an attorney by the president of a bank was held sufficient without any formal resolution of the board of directors, where the court was satisfied that the directors must have been aware of the proceedings taken by the attorney. American Ins. Co. v. Oakley (1846) 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

The president of a national bank has authority, by virtue of his office, to employ an attorney to bring a suit for the bank upon a contingent fee. Merchants' Nat. Bank v. Eustis (1894) 8 Tex. Civ. App. 350, 28 S. W. 227.

The president of a national bank has power to employ attorneys and conduct the bank's litigation, in the absence of any order of the board of directors depriving him of such power, and the mere fact that such board had employed counsel would not necessarily take away from the president the right to control a case in court, and to have the bank represented by other counsel if he saw fit. Citizens' Nat. Bank v. Berry (1894) 53 Kan. 696, 24 L.R.A. 719, 37 Pac. 131.

A discordant note is sounded in Pacific Bank v. Stone (1898) 121 Cal. 202, 53 Pac. 634, where the court, in holding that without authority from the board of directors, in whom, by statute, are vested the powers of the corporation, the vice president and acting president may not employ an attorney to render professional services to the bank, in consideration of the cancelation of the attorney's note held by the bank, referred to the statement in Streeten v. Robinson (1894) 102 Cal. 542, 36 Pac. 946, that "the authority of the president or other head of a corporation to employ an attorney when the exigencies of his

company require it has been repeatedly recognized," and said: "We have examined these cases, beginning with Pixley v. Western P. R. Co. (1867) 33 Cal. 183, 91 Am. Dec. 623, and in no one of them is the doctrine laid down that the president of a corporation has, by virtue of his office alone, the power to bind the corporation in a transaction like the one we have here. In all the cases, as was true in the case in 102 Cal. supra, the president or other head of the corporation was shown to have been the general business manager; or he had admitted relations to the corporation from which authority might be inferred; or there was specific knowledge and acquiescence brought home to the directors; or there was a general custom or usage proven that the president or other manager had exercised like powers with the consent and acquiescence of the directors. It is true that Mr. Morse, in his work upon Banks and Banking, vol. 1, § 143, lays down the doctrine that to take charge of the litigation of a bank is the function of the president, by virtue of his office. But this doctrine is controverted by Mr. Thompson in his treatise on the Law of Corporations, vol. 4, § 4620. The cases cited by Mr. Morse presented the question of the authority of the attorney to bring the action for or to appear and defend the corporation, and in which the interests of third parties were involved. In such cases, the courts presume the authority to so appear. But a distinction is made where the attorney himself sues the corporation upon a contract for services rendered. . . . We do not doubt but that authority to employ an attorney may be given to the president orally, or without formal resolution by the directors, or that, where he has employed an attorney without such, or any, authority, the directors may orally or by conduct ratify or sanction such employment (Pixley v. Western P. R. Co. (Cal.) supra); nor do we doubt that the president may be clothed with such general management of the affairs of the corporation by resolution or by-laws of the directors, or by their acquiescence or consent, as would raise a presumption of authority to act in a particular case where such proofs were made. But in the absence of all evidence of authority to employ an attorney, as was the case here, and in the absence of all evidence of subsequent consent or ratification, we must hold that the contract sued upon was unauthorized; and, in an action based thereon, he cannot recover."

While the president of a bank has authority to take charge of the litigation of the bank, to institute, carry on, and defend legal proceedings, and for these purposes to retain and employ counsel on behalf of the bank, he has no authority, as such officer to employ an attorney for the corporation upon a yearly retainer. DENT v. PEOPLE'S BANK (reported herewith) ante, 688.

And the president of a savings bank cannot authorize an attorney to accept service on the bank, when the corporation is accustomed to appoint attorneys by vote of the directors. Bridgeport Sav. Bank v. Eldridge (1859) 28 Conn. 556, 73 Am. Dec. 688.

See also supra, VI., Ryan v. Manufacturers' & M. Bank (1880) 9 Daly (N. Y.) 308.

IX. Miscellaneous acts and contracts.

The president of a bank must be deemed to have been authorized to receive for the bank a draft sent to him to pay off a bond held by the bank for collection, where he was intrusted with the entire management of the bank by the directors, and for several years had been in complete control, received all its mail for the post-office, and indorsed all its drafts. Griffin v. Erskine (1906) 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193.

Ordinarily, the cashier and not the president of a bank is the officer whose duty it is to receive directly, or through subordinate officers, payment of notes and bills due the bank. But authority may be conferred upon the president to receive payment of notes, or the bank may allow him to hold himself out and act in such a manner, and under such circumstances, as to raise the presumption that he pos-

sessed such power. Reno v. James (1894) 16 Ky. L. Rep. 60.

Unless especially authorized by the board of directors, the president or a director of a state bank is not legally authorized to close the bank, or to prevent the reception of deposits by the bank, being as void of power in this regard as is the president or director of a railway company to stop the operation of trains, or other business of the company. Ex parte Smith (1910) 33 Nev. 466, 111 Pac. 930.

The president of a bank, in employing a person to repair the damage caused by fire to a dwelling on which the bank owns a mortgage, is acting within the apparent scope of his authority. Manny v. Spokane State Bank (1914) 78 Wash. 230, 138 Pac. 682.

The president of a bank cannot bind it by his receipt for money to be invested in bonds. First Nat. Bank v. Hoch (1879) 89 Pa. 324, 33 Am. Rep. 769.

Evidence that the directors of a trust company had commonly permitted its president and treasurer to act for it in matters generally warrants a finding that they authorized the execution by these officers of a contract whereby the trust company agreed to hold, as trustee, securities pledged for the payment of certificates of deposit issued by another corporation, to rate such securities at their actual worth, according to the best of its judgment, and to faithfully discharge all the duties thereby imposed, such contract being one in pursuance of the object for which the company was formed, and within the express terms of its charter. Smith v. Bank of New England (1903) 72 N. H. 4, 54 Atl. 385.

Paying corporate debts.

The authority of the president of a bank to make payments on a building contract other than according to its terms may be inferred from the facts that the matter was placed in his hands; that the payments were entered on the bank's books, and that the bank is suing under the contract and claiming credit for these payments. First Nat. Bank v. Fidelity & D. Co. (1906) 145 Ala. 335, 5 L.R.A.(N.S.) 418, 117 Am. St. Rep. 45, 40 So. 415, 8 Ann. Cas. 241.

Purchasing furniture or building materials.

The president of a foreign banking corporation, who is expressly authorized by the articles of incorporation and by the action of the directors to open an office in the city of New York, presumptively had authority to purchase the furniture necessary to equip the office which he was directed to establish. Cross v. Anglo American Bkg. Co. (1894) 79 Hun, 424, 29 N. Y. Supp. 960.

The president and treasurer of a savings bank, though apparently in charge of the bank's business, have no authority, merely by virtue of their offices, to purchase materials to go into the construction of a building on which the bank has a building loan mortgage, pursuant to an arrangement with the mortgagor by which a large amount of the loan was to be retained by the bank to insure the completion of the building. Slattery v. North End Sav. Bank (1900) 175 Mass. 380, 56 N. E. 606.

Transfer of personal property.

The president of a national bank cannot sell a horse belonging to the bank without authority of the board of directors. Greenawalt v. Wilson (1893) 52 Kan. 109, 34 Pac. 403.

The president of a bank has no implied power to sell a safe. Asher v. Sutton (1884) 31 Kan. 286, 1 Pac. 535.

Assignments of judgments in favor of a bank in trust for the purpose of collection are within the inherent powers of a bank president. Guernsey v. Black Diamond Coal & Min. Co. (1896) 99 Iowa, 471, 68 N. E. 777.

See also infra, XI.

But the president and cashier of a canal and banking company, whose management is vested in directors, have no implied authority to assign the choses in action of the corporation to a creditor as security for a precedent debt. Hoyt v. Thompson (1851) 5 N. Y. 320.

Mortgages; trust deeds.

The president and cashier of a bank have, as such, no power to execute

a mortgage or conveyance of its real estate. Leggett v. New Jersey Mfg. & Bkg. Co. (1831) 1 N. J. Eq. 541, 23 Am. Dec. 728.

But the execution of a trust deed must be regarded as within the apparent authority of the president and cashier of the bank, where they were the bank's principal stockholders as well as the officers through whom it transacted all its business, and where such deed was executed without special authority from the directors, they at all times having acquiesced in all the acts of the president and cashier. Farmers' & M. Bank v. Western Loan & Bldg. Co. (1918) — Wash. —, 174 Pac. 1.

And the authority of the president of a national bank is sufficient to sustain as an equitable mortgage a deed of the bank building and lot executed by him to secure a loan to the bank, which, though actually insolvent, was supposed by the lenders to be only temporarily in financial difficulties, especially where the president is the owner of a controlling interest in the bank, and, with the acquiescence of the directors, exercises exclusive control over its affairs. Stapylton v. Stockton (1899) 33 C. C. A. 542, 63 U. S. App. 412, 91 Fed. 326.

The president of a savings bank, who was in fact the bank's chief executive officer, and who, with full knowledge and acquiescence of the bank and its directors, attended to the making of loans, the execution of deeds and mortgages, and the releasing of liens, could, on behalf of the bank, join in a mortgage releasing one of the bank's liens, and subordinating another to the lien of the mortgage. Citizens L. Ins. Co. v. Owensboro Sav. Bank & T. Co. (1912) 150 Ky. 161, 150 S. W. 26.

Lease.

The president of a bank possesses no implied power, without express authority from the board of directors, to cancel the bank's lease with him and enter into a new one for the bank, whereby the bank was made the tenant of a subtenant instead of the latter's remaining a tenant of the bank, especially where the president was known to be dealing as owner of the property for himself on his own account and for a profit to him. People's Bank v. Bennett (1911) 159 Mo. App. 1, 139 S. W. 219.

Without the authority of the directors, the consent of the president of a bank to a lease of an elevator covered by a mortgage owned by the bank could not bind the bank. Tulley v. Citizens' State Bank (1897) 18 Ind. App. 240, 47 N. E. 850.

Deeds; land contracts.

A conveyance of land for the benefit of creditors cannot be made by the president on behalf of a bank, without express authority. Mc Keag v. Collins (1885) 87 Mo. 164.

See also supra, Leggett v. New Jersey Mfg. & Bkg. Co. (1831) 1 N. J. Eq. 541, 23 Am. Dec. 728. And as to power of vice president, see infra, XI.

But deeds executed by the president and cashier of a bank, who were intrusted with the management of the bank's affairs, and who, with the knowledge of the directors, had previously executed other deeds, are not invalid because not authorized by the directors at a formal board meeting. Steinke v. Yelzer (1899) 108 Iowa, 512, 79 N. W. 286.

The making of an executory contract for the sale of land acquired by a savings bank by foreclosure of a mortgage thereon is fairly within the presumptive authority of the president of a bank, notwithstanding the provision in the articles of incorporation that the corporate affairs shall be managed by a board of directors, where the method adopted by such board was to appoint a president who should have supervision of the conduct and business of the bank under the direction of the board of directors. Ida County Sav. Bank v. Johnston (1912) 156 Iowa, 234, 136 N. W. 225.

The burden rests on the bank to show that its president's act in making an executory contract for the sale of real property acquired by the bank by the foreclosure of a mortgage was not authorized or ratified by the board of directors, where the president was ap-

pointed by the directors to supervise the conduct and business of the bank under the direction of the board who, under the articles of incorporation were to manage the corporate affairs. Ibid. The court said: "The question is one of fact rather than of law. The question is not whether the articles of incorporation conferred power upon the president to make the agreement. It is whether it was within the fair scope of the direction imposed by the board of directors upon the president. In view of the ordinary character of the transaction, and in view of the long-continued and open possession of the defendant, and the failure of any officer of the bank to challenge the same for at least a period of five years or more, it leaves little merit to this particular contention."

The authority of the president of a savings bank to make an executory contract for the sale of land acquired by the bank by the foreclosure of a mortgage thereon need not appear of record. Ibid.

The president of a savings bank possessed no power, solely by virtue of his office, to make a proposal that the bank execute any conveyance or release necessary to transfer the fee in a private way to a town for a public way, or to complete the transfer. Institution for Savings v. Brookline (1915) 220 Mass. 300, 107 N. E. 939.

Securing deposits.

The president of a bank could not, without express authority from the board of directors, make a contract to pay a person for services rendered by him in obtaining deposits for the bank. Tifft v. Quaker City Nat. Bank (1890) 8 Pa. Co. Ct. 606, affirmed in (1891) 141 Pa. 550, 21 Atl. 660.

The president of a national bank has authority, general and implied, to secure a deposit for his bank by agreeing to pay interest upon it. Boyd v. First Nat. Bank (1908) 128 Ky. 468, 108 S. W. 360.

Soliciting stock subscriptions.

The solicitation of subscriptions to the contemplated increase of the capital stock of a bank is not within the general powers of the bank's president. WILKIN-HALE BANK v. HERNSTEIN (reported herewith) ante, 679.

Offering reward.

The president of a bank will be presumed, in the absence of proof to the contrary, to have been authorized to offer, on behalf of the bank, a reward for information leading to the arrest of a defaulting teller. Bank of Minneapolis v. Griffin (1897) 168 Ill. 314, 48 N. E. 154, affirming (1896) 66 Ill. App. 577.

Gifts.

The president of a bank may not bind it by signing the bank's name to a subscription paper, obligating it to donate a sum of money to certain parties on condition that they erect a paper mill in a certain locality. Robertson v. Buffalo County Nat. Bank (1894) 40 Neb. 235, 58 N. W. 715.

Guaranty or indemnity.

The president of a national bank has no authority to obligate it as guarantor or surety. Commonwealth Trust Co. v. First-Second Nat. Bank (1918) 260 Pa. 223, 103 Atl. 598.

See also infra, XI.

The president of a bank will not be presumed to be authorized, by virtue of his office, to bind the bank to make good the default of another. Swenson Bros. Co. v. Commercial State Bank (1915) 98 Neb. 702, L.R.A. 1917F, 1096, 154 N. W. 233.

If a postdated check is, before the day of its date, delivered to the bank upon which it is drawn, and there is no money of the maker of the check on deposit in the bank at the time, the president of the bank has no authority, by virtue of his office, to bind the bank to pay to the payee the amount of the check on the day of its date. Ibid.

Treating a loan for an employees' benefit fund, managed by trustees appointed from the active officers of the employer (a national bank), as a loan to the trustees, the bank could not be liable on the parol guaranty of its president. Commonwealth Trust Co. v. First-Second Nat. Bank (Pa.) supra.

Authority from the board of directors of a national bank, to its president, to execute to a purchaser of real property from the bank a bond of in-

demnity against the assertion of any legal claim, or lien, by a third party, does not empower him to give a bond conditioned to secure a satisfactory lease from such third party. National Bank v. Levanseler (1897) 115 Mich. 372, 73 N. W. 399.

But a guaranty of payment of principal and interest is within the apparent authority of the president of a national bank, when negotiating certain promissory notes which have been taken by the bank from its debtor. Thomas v. City Nat. Bank (1894) 40 Neb. 501, 24 L.R.A. 263, 58 N. W. 943.

Confession of judgment.

The president and cashier of a state bank may not enter confession of judgment against the corporation, under a statute providing that any person indebted, or against whom a cause of action exists, may personally appear and, with the assent of the creditor, confess judgment therefor,—at least where the judgment was confessed more than two years after the bank had ceased doing business, and upon notes executed by the cashier in the name of the bank, after the bank had ceased doing business. Fogg v. Ellis (1901) 61 Neb. 829, 86 N. W. 494.

Certification; affidavit.

While the president or cashier of a bank ex officio has implied power to certify a check drawn in the usual course of banking business when presented for payment, he has no implied power, without special authority conferred upon him, to certify a noncommercial check or order, such as one whereby the drawers sought to indemnify their surety on a building contractor's bond, in case such surety should incur liability on the bond. Fidelity & D. Co. v. National Bank of Commerce (1907) 48 Tex. Civ. App. 301, 106 S. W. 782.

As to certification by president of checks drawn by himself, see supra, V., Claflin v. Farmers' & C. Bank (1862) 25 N. Y. 293.

The president of a bank, in taking a chattel mortgage for and in the name of the corporation, acts not as an agent, but as principal in the exercise of the corporate powers of the bank, and therefore the affidavit of bona fides, under Upper Canada Consol. Statutes, chap. 45, §§ 1, 2, is sufficient when made by such officer, without the authority in writing necessary under such act in the case of an agent. Bank of Toronto v. McDougall (1865) 15 U. C. C. P. 475.

Employment of agents.

The president of a bank has implied authority to agree that a certain person shall, as agent, receive payment of a note at another place than that designated in the note. Vilas Nat. Bank v. Strait (1886) 58 Vt. 448, 3 Atl. 541.

The president of a bank, neither as such, nor as member of a committee of the board of directors appointed to purchase land for a building site, had any implied authority to appoint a person as agent of the bank to make the purchase, and bind the bank to pay him a commission for his services. Bryant v. Bank of Commerce (1897) 95 Wis. 476, 70 N. W. 480.

X. Honorary president.

While the active president of a bank has authority, by virtue of his office, to agree to take cotton and credit the proceeds of its sale to the payment or reduction of an overdraft, the honorary president has no such authority. Guaranty State Bank v. Hull (1914) — Tex. Civ. App. —, 165 S. W. 104.

XI. Vice president.

The vice president of a national bank however general his powers, cannot exercise the power to borrow money for the bank unless specially authorized so to do, and persons dealing with the bank are presumed to know the extent of his general power. Western Nat. Bank v. Armstrong (1893) 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572.

Prior to the decision of the Federal Supreme Court in Western Nat. Bank v. Armstrong (U. S.) supra, the negotiation of a call loan from another bank was held in Chemical Nat. Bank v. Armstrong (1892) 50 Fed. 798, to be within the authority of the vice president of a national bank, the court further holding that, if he used his

authority fraudulently for his own advantage, the bank that enabled him to commit the fraud must suffer the consequences, and not the bank that made the loan and advanced the money, under the representation and in the belief that it was conducting a fair, legitimate transaction.

On appeal to the circuit court of appeals that court, in its first opinion, said on this point that the evidence was undisputed that the leading bank had no knowledge that the vice president was engaged in defrauding his own bank, and dealt with him as an authorized officer of that bank, placing the money to its credit, and held that the debt was, therefore, the debt of the bank. This case was twice reheard, and, on the second rehearing, the court's attention having been called to the holding in Western Nat. Bank v. Armstrong (U. S.) supra, the circuit court of appeals reversed the judgment, and sent the case back to the lower court with leave to introduce evidence to establish the special authority of the vice president which the ruling of the Supreme Court made necessary. Chemical Nat. Bank v. Armstrong (1894) 28 L.R.A. 231, 8 C. C. A. 155, 16 U. S. App. 465, 59 Fed. 372, on rehearing in (1895) 28 L.R.A. 239, 13 C. C. A. 47, 31 U. S. App. 75, 65 Fed. 573.

When the cause was again heard in the circuit court, that court held that, in view of the long-established local custom and usage, the vice president of the bank (who was also the acting president) could, without special authority from the directors, negotiate the loan in question. (1896) 76 Fed. 339.

This holding was affirmed by the circuit court of appeals in (1897) 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 556. That court held that proof of the usage prevailing in Cincinnati and New York, where the borrowing and lending banks were respectively situated, by which banks were accustomed to negotiate loans through their executive officers from their corresponding banks, could and did supply the place of the special authority which the Federal Supreme Court, in Western Nat. Bank v. Armstrong (U. S.) supra, held to be necessary. The court, speaking through Taft, Ch. J., said: "We think that the evidence establishes in the most satisfactory way that, in 1887, when the loan at bar was made, and for many years previous, it was the frequent practice of banks in the interior to borrow money of their New York correspondents; that a similar practice prevailed in Cincinnati, between the country banks in the neighboring territory and their Cincinnati correspondents, and that the borrowing was always done by one of the executive officers of the borrowing bank, and usually by letter; that no special authority from his board of directors was ever required; and that, by the usage of banks in those two cities, at least, he was treated as having adequate authority for the purpose, as between his own bank and the lending bank. The only witness whose statement may be considered as falling short of this is W. A. Goodman, of Cincinnati, and he seems to have had little experience in transactions with country banks, and none in borrowing money for his own bank.

"It does not militate against our conclusion that several of the witnesses testified that it was usual and proper for the borrowing officer to consult his directors before obtaining the loan, or to report it to them afterwards. There are many important transactions of the bank concededly within the power of the executive officers, concerning which they consult their directors, or of which they make report. The question here is not what is the customary duty of a cashier or other executive officer in keeping his directors informed of what he is doing, but it is, What is his customary authority in acting on behalf of his bank and borrowing money from other banks? It does not detract from the weight of the evidence that the banks of a majority of the witnesses do not borrow money. It is the lending bank who has to decide in such cases upon the question of appearance of authority, and their officers are best able to say what is the authority, in the matter of borrowing, which well-known

usage gives to the executive officers of the borrowing bank. Moreover, three of the Cincinnati witnesses had borrowed money for their banks, and their evidence was like that of the others.

"Nor do we see how it affects the question of authority of the borrowing officer that collateral is usually demanded from the borrowing bank, and that the proceeds are credited in the books of the lending bank to the borrowing bank, to be drawn out in due course on drafts of the latter. This course of business, which operates as a check upon possible fraud by the officer assuming authority to borrow, does not indicate that he is not given, by custom, the requisite apparent authority to contract the loan on behalf of his bank; but, on the contrary, suggests a reasonable explanation why a custom, by which banks of the borrowing class might otherwise be prejudiced and exposed to risk of loss by the frauds of their executive officers, has been accepted and acquiesced in by them. The failure of the defendant to call witnesses to contradict the evidence of the complainant upon the question of usage lends most significant support to the view that it was well known and generally acquiesced in."

In affirming this judgment the supreme court in Aldrich v. Chemical Nat. Bank (1900) 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498, did not find it necessary to pass upon this point, holding that the borrowing bank, having used in its business the money obtained by the loan in question, could not escape liability to account therefor upon the ground that the loan was not negotiated by itself, or by its direction, or that it could not, itself, have legally borrowed the money.

The power to borrow money on behalf of his bank was included in such a delegation of authority to the vice president of a national bank as must be implied, where, for all practical purposes, that officer was the bank, and was recognized as such by the directors, who gave him free rein. Armstrong v. Chemical Nat. Bank (1897) 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 556, affirmed in (1900) 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498.

The vice president of a national bank intrusted with the general transaction of its business has authority to borrow money and bind the bank therefor by making or indorsing notes in its name and assigning its bills receivable as security in the usual course of business, and to bind the bank in any other matter which, in due course of business, fell under the authority of an executive officer of the bank. First Nat. Bank v. Drovers' & M. Nat. Bank (1917) 156 C. C. A. 563, 244 Fed. 135.

The vice president of a bank authorized to do business for it, having given a bond to secure county funds on deposit, could deliver notes belonging to the bank to the county treasurer as a further security, if the latter had the right to receive them. Richards v. Osceola Bank (1890) 79 Iowa, 707, 45 N. W. 294.

Such an officer of a bank as its vice president may not, without express authority from the directors, guarantee notes which the bank has never owned. Wagner v. Central Bkg. & Sav. Co. (1918) — C. C. A. —, 249 Fed. 145.

The jury had the right to infer that an assignment of a judgment belonging to a national bank was within the authority of its vice president, where there was evidence that that official was not only the acting president, but was the managing director of the bank, and the active agent in all its business affairs and transactions, and was the principal stockholder, and was accustomed to exercise the power of transferring property of the bank with the knowledge and acquiescence of the directors. Cox v. Robinson (1897) 27 C. C. A. 120, 48 U. S. App. 388, 82 Fed. 277. The court said: "It is unnecessary to attempt any general definition of the duties of the respective officers of banking corporations. The usage is not uniform in different cities, and sometimes not the same in different institutions in the same city. Country banks, and banks in small towns and cities, have different rules from those in large cities. Of course, there are certain general rules as to the duties

of the cashier, teller, president, or directors. Courts have oftentimes recognized the fact, and have frequently decided that these officers have or have not either exclusive or concurrent powers to do certain acts of the nature designated in the particular case. Customs have sprung up from the necessity and the convenience of business in certain localities, and have prevailed in duration and extent until they have acquired, in such localities, the force of law. In the present case it is the exceptional class with which we have to deal. It is now well settled by the weight of reason and authority that whenever, in the usual course of the business of the corporation, the president or other officer has been allowed to manage and control its affairs, his authority to represent and bind the corporation may be implied from the manner in which he has been permitted, by the trustees or directors of the corporation, to transact its business."

The objection to the introduction in evidence of the assignment of a note under the corporate seal of a national bank, and signed by the vice president and cashier, on the ground that it was not shown that those officers had authority to assign the note, is wholly without merit, where the vice president testified, without objection, that he and the president had such authority, the seal of the corporation itself being prima facie evidence that the officers executing the instrument were duly authorized, and the execution thereof of the act of the corporation. Stone v. Gray (1909) 10 Cal. App. 609, 103 Pac. 155.

The vice president of a bank, who was in charge and had authority to make contracts respecting its business, could bind the bank by a new and independent contract founded upon a new and valuable consideration, waiving the present right to sell collateral security on a demand note by extending the time for payment of such note. Wyckoff, Church & Partridge v. Riverside Bank (1909) 135 App. Div. 400, 119 N. Y. Supp. 937, affirmed in (1912) 204 N. Y. 561, 97 N. E. 1119.

The vice president of a bank could bind it to pay for supplies for and storage of an automobile used by him in attending to the bank's business, subsequent to a resolution of the board of directors authorizing him to take any and all steps, and employ all persons, that he may find essential in connection with the proposed resumption of business, which had temporarily been suspended. Seadale v. Montgomery (1908) 113 N. Y. Supp. 600.

A quitclaim deed signed by the vice president of a bank, and sealed with the corporate seal, is prima facie valid. Hall v. Farmers' & M. Bank (1898) 145 Mo. 418, 46 S. W. 1000.

A prima facie case in favor of the validity of a quitclaim deed, signed by the vice president of a bank and sealed with the corporate seal, is overcome by evidence that it was executed without the authority of the board of directors, which the bank's by-laws made essential to the validity of all acts by the vice president in the president's absence. Ibid.

There is no presumption of law that the vice president of a trust company which was the trustee in a corporate mortgage had authority to make representations to intending purchasers of bonds secured by such mortgage, that it was a first lien upon the corporate mortgagor's property, where the trust company had no interest in the bonds or in the mortgage, except as trustee, and was in no way the agent of the mortgagor in the sale of the bonds. Davidge v. Guardian Trust Co. (1911) 203 N. Y. 331, 96 N. E. 751.

The vice president of a bank, acting as a president in the absence of the latter, has the same authority as has the president to employ counsel to represent the bank in cases of emergency arising during his incumbency of the presidential office, demanding prompt action. Russell v. Washington Sav. Bank (1904) 23 App. D. C. 398.

The jury is justified in inferring that one of the four vice presidents of the bank, without any designation, either numerically or otherwise, of their order or precedence, was acting as president in the absence of the latter, so as to bind the bank by his employment of counsel to represent it in

an emergency arising during his incumbency of the office, where his name alone appeared as vice president in an advertisement of the bank's business introduced in evidence, and the testimony showed that the counsel had several interviews at the bank with him, as well as other officers of the institution, and found him in the private office of the bank apparently in authority there, and transacting its business, and that the bank acted on the counsel's advice after such employment, adopting a different course upon the president's subsequent order. Ibid.

Without authority from the board of directors in whom, by statute, are vested the owers of the corporation, the vice president and acting president may not employ an attorney to render professional services to the bank, in consideration of the cancelation of the attorney's note held by the bank. Pacific Bank v. Stone (1898) 121 Cal. 202, 36 Pac. 946.

The vice president of a corporation has authority, as such, to answer for the corporation in an action in which the corporation is garnished. Gerhard Hardware Co. v. Texas Cotton Press Co. (1894) — Tex. Civ. App. —, 26 S. W. 168. W. W. N.

HELEN W. PRATT
v.
HENRY L. HIGGINSON et al.

Massachusetts Supreme Judicial Court—May 24, 1918.

(230 Mass. 256, 119 N. E. 661.)

Broker — selling stolen bonds — liability.

1. The taking by a broker of a commission for selling stolen negotiable bonds does not render him liable to the true owner for their conversion if he, in good faith, acted in ignorance of the bearer's want of title, and the circumstances were not such as would put a reasonably cautious and prudent man on inquiry.

[See note on this question beginning on page 717.]

Bonds — negotiability — convertible.

2. That the bond of a telephone and telegraph company is at maturity convertible by the holder into stock does not render it non-negotiable.

REPORT by the Superior Court for Norfolk County for the determination by the full court of an action brought to recover the value of certain bonds alleged to have been converted by defendants. *Judgment for defendants.*

The facts are stated in the opinion of the court.

Mr. **George W. Abele**, for plaintiff:

The sale of the bonds by the defendants was made by order and direction of Small, who had neither title nor power, and was a conversion.

Coles v. Clark, 3 Cush. 399; Varney v. Curtis, 213 Mass. 309, L.R.A. 1916A, 629, 100 N. E. 650, Ann. Cas. 1914A, 340.

The Negotiable Instruments Act does not relieve the defendants from liability in this action.

Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

Messrs. **Ropes, Gray, Boyden, & Perkins** and **Albert A. Schaefer**, for defendants:

Brokers to whom stolen bonds payable to bearer are delivered in the ordinary course of business, without notice of any infirmity in the title and without any circumstances to put them on inquiry, cannot be held liable in conversion to the true owner for the full value of such bonds after the brokers have, in accordance with their instructions, sold the bonds and remitted the proceeds to their employer.

Scollans v. E. H. Rollins & Sons, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Barstow v. City Trust Co. 216 Mass. 330, 103 N. E. 911; L. D. Wilcutt & Sons Co. v. Driscoll, 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897.

Braley, J., delivered the opinion of of the court:

The plaintiff, the owner of a 4 per cent coupon bond of the United States of the par value of $1,000, payable to bearer, and of a 4 per cent convertible gold bond of the American Telephone & Telegraph Company of the par value of $1,000, payable to the Old Colony Trust Company, trustee, or to bearer, deposited the bonds in a safe deposit box from which they were purloined by one Bassett, who passed them over to one Small for the purpose of having them sold. The bonds were delivered by Small to the defendants, a firm of bankers and brokers, by whom they were sold in the ordinary course of business, and after deducting the customary commission and the stamp tax, remitted the balance to Small, who, after taking out his compensation, paid the remainder to Bassett. The plaintiff, upon discovery, notified the defendants of the theft, and then brought this action to recover the value of the bonds. It is agreed by the parties that neither the defendants nor their employees at the time of the transaction had any knowledge that Small was not the rightful owner, or lawfully in possession of the securities.

The question for decision, therefore, is whether the defendants, who received and sold the bonds and accounted for the proceeds to the apparent owner, without notice of any infirmity in the title, or of any circumstances which should have put them upon inquiry, can be held responsible in damages by the true owner for conversion. The defendants undoubtedly exercised dominion over the bonds by converting them into money. If the property had consisted of chattels or non-negotiable documents of which certificates of stock are an example, the plaintiff's title would not have been devested by a sale even to a purchaser for value and in good faith. Scollans v. E. H. Rollins & Sons, 173 Mass. 275, 278, 73 Am. St. Rep. 284, 53 N. E. 863, and cases there collected. But to this rule there is a well-recognized exception where the property consists of negotiable securities. Heckle v. Lurvey, 101 Mass. 344, 345, 3 Am. Rep. 366; Spooner v. Holmes, 102 Mass. 503, 507, 3 Am. Rep. 491; O'Herron v. Gray, 168 Mass. 573, 575, 576, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429. It is settled by Spooner v. Holmes that an action for the conversion of interest coupons of United States bonds payable to bearer cannot be maintained by the owner from whom they were stolen where the defendant, in good faith, received them as an agent in exchange, and without gross negligence, from a party to the theft, and paid the proceeds to his employer, receiving no benefit himself, and without any notice from the plaintiff. The grounds of the decision are that, being negotiable promises for the payment of money, issued by the government, payable to bearer, the title passed by delivery, and the coupons were "subject to the same rules as bank bills or other negotiable instruments payable in money to bearer." The rule also applies to coupons attached to state and town bonds for different instalments of interest when severed from the bonds. Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886. See 10 Cyc. p. 1172, note 42. If the coupons are negotiable promises to pay, the bond itself is in the same classification. Gibson v. Lenhart, 101 Pa. 522. As said by Mr. Justice Field in Clark v. Iowa City, 20 Wall. 583, 22 L. ed. 427: "Coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to separate bonds for the different instalments of interest."

The plaintiff in avoidance presses the argument that because the defendants received compensation they cannot escape responsibility. If profit is derived, this fact may have an important bearing, and in some cases may be found to be decisive of the recipient's good faith. Allen v. Puritan Trust Co. 211 Mass. 409, L.R.A.1915C, 518, 97 N. E. 916. But the true test is not whether compensation is received for the act which works the conversion, or whether it was gratuitous. It is whether the transaction was entered upon in ignorance of the bearer's want of title, or any circumstances sufficient to put a reasonably cautious and prudent man upon inquiry, the ignoring of which amounts to proof of bad faith. Ibid.; Fillebrown v. Hayward, 190 Mass. 472, 479, 480, 77 N. E. 45. The case of Varney v. Curtis, 213 Mass. 309, L.R.A.1916A, 629, 100 N. E. 650, Ann. Cas. 1914A, 340, is very plainly distinguishable. The pledgee was found by the trial judge and held by this court to have taken the coupon bonds with notice of the plaintiff's title, and consequently he was not a purchaser in good faith. If, however, what has been said is decisive against the plaintiff's right of recovery for the sale of the government bond, she further contends that the telegraph and telephone bond is not within the rule. It is said in Dexter v. Phillips, 121 Mass. 178, 183, 23 Am. Rep. 261: "In this country, it is well settled that bonds issued by a railroad corporation, payable to order or bearer, are negotiable instruments."

Broker—selling stolen bonds—liability.

We fail to discover any well-grounded distinction as to negotiability between a railroad bond payable to order or bearer and the bond in question. A private corporation may make and issue promissory notes, and, in the absence of an inhibiting statute, has the power to issue negotiable bonds for the payment of money. Com v. Smith, 10 Allen, 448, 87 Am. Dec. 672; Union Cattle Co. v. International Trust Co. 149 Mass. 492, 21 N. E. 962; Marine & River Mfg. Co. v. Bradley, 105 U. S. 175, 26 L. ed. 1034; Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311. The telegraph and telephone company is also a corporation charged with duties and obligations to the public, whose bonds, like those of railroad companies, are generally purchased and held as investments, and are bought and sold in the market under the same conditions as to transfer and delivery. The provision shown by the word "convertible," that the holder at maturity will receive the face of the bond in money, or, at his option, an equivalent in stock of the corporation, does not destroy negotiability. It is a negotiable instrument within the meaning of Rev. Laws, chap. 73, § 22, subsec. 4, and § 18, and possesses the essential attributes of commercial paper, for the conversion of which the defendants on the record cannot be charged. Union Cattle Co. v. International Trust Co. 149 Mass. 492, 21 N. E. 962; Evertson v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9; American Nat. Bank v. American Wood Paper Co. 19 R. I. 149, 29 L.R.A. 103, 61 Am. St. Rep. 746, 32 Atl. 305; Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 22 L. ed. 645; Cromwell v. Sac County, 94 U. S. 351, 362, 24 L. ed. 195. We are accordingly of opinion that judgment should be entered for the defendants, and it is

Bonds—negotiability—convertible.

So ordered.

ANNOTATION.

Right of purchaser of stolen bonds.

I. General rule, 717.
II. Necessity of legal inception, 718.
III. Rule as affected by maturity of bond, 718.
IV. Necessity of good faith, 718.
V. Evidence of good faith, 719.
VI. Effect of notice, 720.

I. General rule.

At common law, one who purchases property which has been stolen acquires no title thereto unless he purchased it at a public sale, or what is termed "market overt." An exception to this rule is made as to negotiable paper, and this is the rule obtaining at the present time. Bonds having a legal inception and payable to bearer or blank as to the payee, or payable to order and indorsed in blank, are negotiable paper, and the courts are agreed that the purchaser of such bonds, although they have been stolen, acquires a good title thereto as against the true owner, providing he purchased in good faith and for a valuable consideration. Morgan v. United States (1884) 113 U. S. 476, 28 L. ed. 1044, 5 Sup. Ct. Rep. 588, reversing (1883) 18 Ct. Cl. (Fed.) 386; Hotchkiss v. National Shoe & Leather Bank (1874) 21 Wall. (U. S.) 354, 22 L. ed. 645, affirming (1873) 10 Blatchf. 384, Fed. Cas. No. 6,719; Murray v. Lardner (1864) 2 Wall. (U. S.) 110, 17 L. ed. 857; Wylie v. Missouri P. R. Co. (1890) 41 Fed. 623; Gilbough v. Norfolk & P. R. Co. (1877) 1 Hughes, 410, Fed. Cas. No. 5,419; Parsons v. Utica Cement Mfg. Co. (1909) 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; Rockville Nat. Bank v. Citizens' Gaslight Co. (1900) 72 Conn. 576, 45 Atl. 361; Garvin v. Wiswell (1876) 83 Ill. 215; Jones v. Nellis (1866) 41 Ill. 482, 89 Am. Dec. 389; Greenwell v. Haydon (1880) 78 Ky. 332, 39 Am. Rep. 234; Consolidated Asso. v. Avegno (1876) 28 La. Ann. 552; PRATT v. HIGGINSON (reported herewith) ante, 714; Spooner v. Holmes (1869) 102 Mass. 503, 3 Am. Rep. 491; Com. v. Emigrant Industrial Sav. Bank (1867) 98 Mass. 12, 93 Am. Dec. 126; Adrian v. Whitney Cent. Nat. Bank (1914) 180 Mich. 171, 146 N. W. 654, Ann. Cas. 1916A, 600; New Orleans, J. & G. N. R. Co. v. Mississippi College (1873) 47 Miss. 560; Boyd v. Kennedy (1875) 38 N. J. L. 146, 20 Am. Rep. 376; Elizabeth v. Force (1878) 29 N. J. Eq. 587; Hibbs v. Brown (1907) 190 N. Y. 167, 82 N. E. 1108; Manhattan Sav. Inst. v. New York Nat. Exch. Bank (1902) 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079; affirming (1900) 53 App. Div. 653, 65 N. Y. Supp. 757; Varick v. Second Nat. Bank (1888) 15 N. Y. St. R. 127, affirmed in (1890) 121 N. Y. 667, 24 N. E. 1093; Dutchess County Mut. Ins. Co. v. Hachfield (1878) 73 N. Y. 226; Newton v. Porter (1877) 69 N. Y. 133, 25 Am. Rep. 152; Evertson v. National Bank (1876) 66 N. Y. 14, 23 Am. Rep. 9; Dinsmore v. Duncan (1874) 57 N. Y. 573, 15 Am. Rep. 534; Seybel v. National Currency Bank (1868) 54 N. Y. 288, 13 Am. Rep. 583, affirming (1868) 2 Daly, 383; Welch v. Sage (1871) 47 N. Y. 143, 7 Am. Rep. 423; Birdsall v. Russell (1864) 29 N. Y. 220; Interboro Brewing Co. v. Doyle (1915) 165 App. Div. 646, 151 N. Y. Supp. 325; Manhattan Sav. Inst. v. New York Nat. Exch. Bank (1899) 42 App. Div. 147, 59 N. Y. Supp. 51; Cochran v. Fox Chase Bank (1904) 209 Pa. 34, 103 Am. St. Rep. 976, 58 Atl. 117; Mason v. Frick (1884) 105 Pa. 162, 51 Am. Rep. 191; Carpenter v. Rommel (1862) 5 Phila. (Pa.) 34; Ehrlich v. Jennings (1907) 78 S. C. 269, 125 Am. St. Rep. 795, 58 S. E. 922, 13 Ann. Cas. 1166; Memphis Bethel v. Continental Nat. Bank (1898) 101 Tenn. 130, 45 S. W. 1072; Whiteside v. First Nat. Bank (1898) — Tenn. —, 47 S. W. 1108; Texas Bkg. & Ins. Co. v. Turnley (1884) 61 Tex. 365; London Joint Stock Bank v. Simmons [1892] A. C. (Eng.) 201, 61 L. J. Ch. N. S. 723, 66 L. T. N. S. 625, 41 Week. Rep. 108, 56

J. P. 644; Edelstein v. Schuler & Co. [1902] 2 K. B. (Eng.) 144, 71 L. J. K. B. N. S. 572, 40 Week. Rep. 493, 87 L. T. N. S. 204, 18 Times L. R. 597, 7 Com. Cas. 172; Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q. B. (Eng.) 658, 67 L. J. Q. B. N. S. 986, 79 L. T. N. S. 270, 14 Times L. R. 587, 3 Com. Cas. 285; London & C. Bkg. Co. v. London & R. P. Bank (1888) L. R. 21 Q. B. Div. (Eng.) 535, 57 L. J. Q. B. N. S. 601, 61 L. T. N. S. 37, 37 Week. Rep. 89.

II. Necessity of legal inception.

One of the elements essential to the application of the rule that a good-faith purchaser of negotiable bonds for a valuable consideration acquires title thereto as against the true owner, although he purchased from one who had stolen the bonds, is that the bonds must have been executed and delivered by the obligor as a valid obligation. For example, municipal bonds that were stolen before they were issued by the municipal authorities are not valid in the hands of a bona fide purchaser for value. Germania Sav. Bank v. Suspension Bridge (1893) 73 Hun, 590, 26 N. Y. Supp. 98.

So, where bonds are payable at one of several places, according as the place may thereafter be fixed and indorsed on the bond by the president of the company issuing the same, and they are stolen prior to such indorsement, even a good-faith purchaser for value acquires no title thereto. Parsons v. Jackson (1879) 99 U. S. 434, 25 L. ed. 457. To the same effect, see Ledwich v. McKim (1873) 53 N. Y. 307, affirming (1873) 3 Jones & S. 304.

And bonds which upon their face contain a provision that they are not obligatory until duly signed by a designated person do not pass upon transfer to a bona fide holder for value, where they have been stolen before being executed in the manner described. Maas v. Missouri, K. & T. R. Co. (1880) 83 N. Y. 223.

So, where bonds, after having been issued as a legal obligation, are surrendered by the holder and retired by the obligor, although not destroyed, and they are subsequently stolen and placed in circulation by the thief, a bona fide purchaser for value acquires no title thereto. Branch v. Sinking Fund Comrs. (1885) 80 Va. 427, 56 Am. Rep. 596; District of Columbia v. Cornell (1888) 130 U. S. 655, 32 L. ed. 1041, 9 Sup. Ct. Rep. 694.

III. Rule as affected by maturity of bond.

This general rule protecting good-faith purchasers of negotiable bonds is also limited in its application to bonds which had not matured at the time they were stolen and placed in circulation. A purchaser of stolen bonds after their maturity cannot invoke in his behalf this rule. Von Hoffman v. United States (1883) 18 Ct. Cl. (Fed.) 386; Arents v. Com. (1868) 18 Gratt. (Va.) 750; Greenwell v. Haydon (1880) 78 Ky. 332, 39 Am. Rep. 234.

Where United States bonds are redeemable at the pleasure of the government after a designated time, they do not lose their negotiable character after maturity of a call for redemption, payable at the option of the holder, without interest, however, after a certain time. Morgan v. United States (1884) 113 U. S. 476, 28 L. ed. 1044, 5 Sup. Ct. Rep. 588, reversing (1883) 18 Ct. Cl. (Fed.) 386.

It is assumed in this note that the bonds were transferable by delivery, and that hence no question of forgery is involved in this connection. However, it may be said that the fact that the serial numbers of bonds have been altered does not affect the right of the subsequent purchaser, since such alteration is an immaterial one. Wylie v. Missouri P. R. Co. (1890) 41 Fed. 623; Com. v. Emigrant Industrial Sav. Bank (1867) 98 Mass. 12, 93 Am. Dec. 126; Elizabeth v. Force (1878) 29 N. J. Eq. 587; Birdsall v. Russell (1864) 29 N. Y. 220.

IV. Necessity of good faith.

As already pointed out, a good-faith purchaser of stolen bonds acquires title as against a true owner, where the bonds had a legal inception and had not yet reached maturity. As

the term is here used, good faith means the absence of bad faith, and it is the general rule that actual bad faith must be shown; and it is not sufficient in this regard to show gross negligence on the part of the purchaser, or facts and circumstances which might or ought to have raised a suspicion in his mind. Murray v. Lardner (1864) 2 Wall. (U. S.) 110, 17 L. ed. 857; New Orleans, J. & G. N. R. Co. v. Mississippi College (1873) 47 Miss. 560; Welch v. Sage (1871) 47 N. Y. 143, 7 Am. Rep. 423; Lord v. Wilkinson (1870) 56 Barb. (N. Y.) 593.

Guilty knowledge or wilful ignorance on the part of the purchaser must appear. Hotchkiss v. National Shoe & Leather Bank (1874) 21 Wall. (U. S.) 354, 22 L. ed. 645, affirming (1873) 10 Blatchf. 384, Fed. Cas. No. 6,719.

The rights of a purchaser of bonds are not to be affected by constructive notice unless it clearly appears that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, have resulted in the discovery. If the defect existing was hidden at the time, there must appear to be, in the nature of the case, such a connection between the facts discovered and further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter. Birdsall v. Russell (1864) 29 N. Y. 220.

The purchaser will be protected unless the circumstances are such that an inference can be fairly and legitimately drawn that the purchase was made with notice of the seller's defective title. It is not sufficient that the prudent man would have been apt to inquire, or that the purchaser was negligent, or did not exercise the proper degree of caution. Dutchess County Mut. Ins. Co. v. Hachfield (1878) 73 N. Y. 226.

A purchaser is under no obligation to make an inquiry of the person offering the bonds for sale as to his right or title thereto, nor need he take any special precautionary measures; for even though chargeable with negligence, this alone will not suffice to defeat his title. Seybel v. National Currency Bank (1868) 54 N. Y. 288, 13 Am. Rep. 583, affirming (1868) 2 Daly, 383.

A purchaser of a bond in open market in the usual course of business is not bound to make a close and critical examination to discover marks upon the bond indicating that the number has been altered, in order to escape the imputation of bad faith. Even had a close inspection been made and the alteration discovered, it would not have been notice of any defect or irregularity in the bond itself, or in the seller's title to it. Birdsall v. Russell (N. Y.) supra.

V. Evidence of good faith.

Upon the question of good faith it is the general rule that the burden of proof is upon the true owner to show the bad faith of the purchaser. Murray v. Lardner (1864) 2 Wall. (U. S.) 110, 17 L. ed. 857; Hotchkiss v. National Shoe & Leather Bank (1874) 21 Wall. (U. S.) 354, 22 L. ed. 645.

But when it appears that the bonds have been stolen, a subsequent purchaser must show that he purchased in the ordinary course of business, in good faith, and for a valuable consideration. Parsons v. Utica Cement Co. (1909) 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; Curry v. Wisconsin Nat. Bank (1912) 149 Wis. 413, 136 N. W. 549.

It has been held that there is a presumption that the holder of a coupon which had been attached to a bond issued by a corporation is not a bona fide purchaser for value where it appears that the coupon was stolen, but this presumption may be rebutted by evidence that such purchaser received the bond in good faith, and without knowledge that it had been stolen. Wisner v. Osteyee Bros. (1898) 23 Misc. 123, 50 N. Y. Supp. 689.

It is not the purpose of this note to take up the question of what would constitute a valuable consideration within the rule except as that may bear upon the question of good faith. As bearing upon the question of good faith, however, it may be said that where the purchaser was a bank, and

merely gave the thief credit for the proceeds of the bonds, and, upon receiving information of the lack of title in the thief, it did not exercise a right it then had to withdraw this credit, it could not claim to be a good-faith holder of the bonds for value. Curry v. Wisconsin Nat. Bank (Wis.) supra.

VI. Effect of notice.

The good faith of the purchaser is a question for the jury where it was a bank, and it purchased the bonds without recognizing them as the ones to which a notice it had received referred, having in fact forgotten about the notice and the description of the bonds. Lord v. Wilkinson (1870) 56 Barb. (N. Y.) 593.

So, where there is evidence that the purchaser of stolen bonds had read a handbill giving information of the theft, and his testimony with reference to the matter was contradictory, his good faith was properly a question for the jury. Lord v. Wilkinson (1873) 2 Thomp. & C. (N. Y.) 179.

Where lawyers were retained by the thieves to defend them on the charge of stealing bonds which they had stolen and converted into notes and mortgages, the thieves assigned some of these notes and mortgages to the lawyers, to pay them for their services in their defense. It was held that the transferees of the notes and mortgages were not bona fide purchasers, and hence were liable to the true owner of the bonds to the extent that they had received the proceeds thereof. Newton v. Porter (1877) 69 N. Y. 133, 25 Am. Rep. 152.

In London & C. Bkg. Co. v. London & R. P. Bank (1888) L. R. 21 Q. B. Div. (Eng.) 535, 57 L. J. Q. B. N. S. 601, 61 L. T. N. S. 37, 37 Week. Rep. 89, bonds were stolen from one corporation and sold to another. The thief subsequently stole part of these bonds from the latter corporation, and also other bonds of a like kind and value, and returned them to the former corporation, which had no knowledge of these facts at the time the bonds were returned. Under these circumstances it was held that the former corporation was a good-faith holder for value. A. G. S.

STATE OF NEW MEXICO EX REL. ELIAS GARCIA, Sheriff of Rio Arriba County,

v.

BOARD OF COUNTY COMMISSIONERS OF RIO ARRIBA COUNTY, Appt.

New Mexico Supreme Court—June 28, 1917.

(22 N. M. 562, 166 Pac. 906.)

Appeal — prior appeal — law of case.

1. A decision in a prior appeal is the law of the case, and upon a subsequent appeal nothing is before the court for review but the proceedings subsequent to the mandate. Where, upon the former appeal, no question was raised as to the right of relator to proceed by mandamus, such question will not be considered upon a subsequent appeal.

[See note on this question beginning on page 725.]

Evidence — not within issues.

2. Evidence not within the issues joined is properly excluded.

Pleading — set-off.

3. A counterclaim or set-off must always be specially pleaded.

Interest — on unpaid allowance.

4. Where a board of county commissioners arbitrarily refuses to audit and allow a sheriff's claims for compensation for deputies employed by him, as required to do by the provisions of chapter 12, Laws 1915, the

Headnotes by ROBERTS, J.

court properly added interest to the amount found due the sheriff, from the date the law became effective; such law providing for the issuance of certificates of indebtedness to such officials, bearing interest at the rate of 6 per cent per annum, where there was not sufficient money in the county treasury to pay or reimburse such officers.

APPEAL by respondent from a judgment of the District Court for Rio Arriba County in favor of relator in a proceeding for a writ of mandamus to compel respondent to allow relator's claim for an amount paid out by him for deputy hire. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **A. M. Edwards, A. B. Reulhan, and Daniel K. Sadler** for appellant.

Mr. **E. P. Davies,** for appellee:

On a second or subsequent appeal or writ of error, the court will not consider matters assigned as error, which arose prior to the first appeal or writ of error, and which might have been raised thereon, but were not, nor matters appearing in the original record which might have been corrected on the first hearing, but were not urged.

McConey v. Wallace, 22 Mo. App. 377; Dormoy v. Knower, 55 Iowa, 722, 8 N. W. 670; Larison v. Polhemus, 39 N. J. Eq. 303; Green v. Carotta, 72 Cal. 267, 13 Pac. 685; Scudder v. Jones, 134 Ind. 547, 32 N. E. 221; Whetstone v. Shaw, 70 Mo. 575; Downie v. Ladd, 22 Neb. 531, 35 N. W. 388; Greager v. School Dist. 62 Mich. 101, 28 N. W. 794; McClintock v. Bolton, 6 Ariz. 370, 57 Pac. 611; Davisson v. Citizens' Nat. Bank, 16 N. M. 689, 120 Pac. 304; Barnett v. Barnett, 9 N. M. 205, 50 Pac. 337; Crary v. Field, 10 N. M. 257, 61 Pac. 118; United States v. Camou, 184 U. S. 572, 46 L. ed. 694, 22 Sup. Ct. Rep. 515; McBee v. O'Connell, 19 N. M. 565, 145 Pac. 123; Cadwell v. Higginbotham, 20 N. M. 482, 151 Pac. 315; Gray v. Taylor, 16 N. M. 171, 113 Pac. 591.

The supreme court is authorized to look to the record for the purpose of determining whether, upon consideration of the whole case, substantial justice has been done, and where error is assigned to the admission of incompetent evidence, if from the record it appears that the defendant was not harmed by such admission, it may be disregarded.

New Mexican R. Co. v. Hendricks, 6 N. M. 611, 30 Pac. 901; Pearce v. Strickler, 9 N. M. 467, 54 Pac. 748; Candelaria v. Miera, 13 N. M. 360, 84 Pac. 1020; Territory v. Sais, 15 N. M. 171, 103 Pac. 980; Territory v. Trapp, 16 N. M. 700, 120 Pac. 702; State v. Eker, 17 N. M. 479, 131 Pac. 489; State v. Lucero, 17 N. M. 484, 131 Pac. 491; Goldenberg v. Law, 17 N. M. 546, 131 Pac. 499.

Roberts, J., delivered the opinion of the court:

This is the second appeal in this case. In the first appeal, reported in 21 N. M. 632, 157 Pac. 656, this court reversed and remanded the judgment of the district court, which denied petitioner the relief sought. The second trial, from which this appeal was taken, was on the same pleadings as those involved in the first appeal. The proceeding was one in mandamus, instituted in the district court of Rio Arriba county by the petitioner Elias Garcia, sheriff of said county, seeking to compel the board of county commissioners to allow his claim for $2,158.35, for which sum it was alleged he had become liable, or had paid to the deputies employed by him in his official capacity for services rendered, and to order the same paid out of moneys in the treasury of said county, not otherwise lawfully disposed of, or, in case there were not sufficient funds on hand for the purpose, to require the board to issue certificates of indebtedness for such sum.

The petitioner claimed that he was entitled to an allowance of $700 per annum for deputy hire under the provisions of chapter 12, Laws of 1915. Section 2 of the act provided that in counties of the fourth class, in which class Rio Arriba county belonged, deputy sheriffs should receive a total of not to ex-

ceed $700 per annum. This chapter was enacted pursuant to the requirements of the Constitution that the legislature of the state should, at its first session, fix the salary of all county officials, and that such officials should be confined to the salary so fixed. No salary law was enacted, however, during the first session of the legislature, so that for more than three years there was no provision by law, by which sheriffs or their deputies could be legally paid by the county. By § 9 of said chapter it was provided that within ninety days from the date of the passage of the act each county officer should file with the board of county commissioners of his county, a true, accurate, and itemized account, under oath, showing all moneys received by such officer by virtue of his office, or by his deputies, and the amount due such officer from the county, and requiring the county to pay such officer any balance due to him. Upon the former appeal we determined that petitioner was entitled to collect from the county the maximum amount of $700 per annum for deputy hire, up to the passage and approval of the act in question, if in fact he had either paid or become liable to pay to deputies such amount. Upon the remand of the case the district court took the proofs and awarded relator judgment for the full amount claimed by him, and directed the board of county commissioners to forthwith allow and pay the same, or to issue to him certificates of indebtedness in case there were not sufficient funds on hand with which to pay such amount.

Appellant, the board of county commissioners, relies upon seven propositions for reversal. The first is that mandamus was not the proper remedy; second, that the relator had a plain, speedy, and adequate remedy by appeal to the district court from the action of the board of commissioners in disallowing his asserted claim, and hence he cannot proceed by mandamus; third, that mandamus will not lie to compel the performance of an act calling for the exercise of judgment or discretion; and, fourth, that the action of the respondent board, in passing upon the claim of relator, involved the exercise of judgment and discretion, and was therefore not subject to control by mandamus. These points relied upon are not available to the appellant, however, upon this appeal; for, while they were not raised upon the former appeal, they could have been raised, and the general rule is that on a second and subsequent appeal, or writ of error, the court will not consider matters assigned as error which arose prior to the first appeal or writ of error, and which might have been raised thereon, but were not, or matters appearing in the original record which might have been argued on the first hearing, but were not urged. 4 C. J. 1100. While there are some decisions to the contrary, the rule, as stated, is well settled in this jurisdiction. In the case of Davisson v. Citizens' Nat. Bank, 16 N. M. 689, 120 Pac. 304, upon a subsequent appeal appellant presented the proposition that neither the complaint nor the cross complaint stated facts sufficient to constitute a cause of action against the appellant bank, neither of which propositions was advanced upon the original appeal. The court said: "We are precluded from a consideration of this proposition on this appeal. This question could have been raised upon the former appeal. It is the settled law in New Mexico, as well as in the Supreme Court of the United States, that a decision in a prior appeal is the law of the case, and that upon a subsequent appeal nothing is before the court for revision but the proceedings subsequent to the mandate."

Appeal—prior appeal—law of case.

This decision was followed by this court in the case of McBee v. O'Connell, 19 N. M. 565, 145 Pac. 123. In the case of Republican Min. Co. v. Tyler Min. Co. 25 C. C. A. 178, 48 U. S. App. 213, 79 Fed. 733, 18 Mor. Min. Rep. 564, the circuit

court of appeals, ninth circuit, in discussing this question, said: "It is well settled by numerous decisions of the Supreme Court that, where a case has been brought before an appellate court and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error. In Roberts v. Cooper, 20 How. 481, 15 L. ed. 973, the court said: 'It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. See Sizer v. Many, 16 How. 98, 14 L. ed. 861; Corning v. Troy Iron & Nail Factory, 15 How. 466, 14 L. ed. 774; Himely v. Rose, 5 Cranch, 313, 3 L. ed. 111; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; The Santa Maria, 10 Wheat. 431, 6 L. ed. 359; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167.'"

In the case of United States Trust Co. v. New Mexico, 183 U. S. 535, 46 L. ed. 315, 22 Sup. Ct. Rep. 172, Mr. Justice Brewer, speaking for the court, said: "The district court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this court of such order is an adjudication that, upon the face of the petition, a valid claim was presented, and is conclusive of such prima facie validity, not merely against objections which were in fact made, but also against those which might have been made."

In fact, the overwhelming weight of authority is to the same effect, and, were this not the rule, it would be possible for a party objecting to a complaint or answer, or other pleading, on various grounds, to split up his grounds of objection, and have the same determined by the appellate court by piecemeal, and litigation would never be brought to an end. In this case, if mandamus was not the proper remedy, or if the petition failed in other respects to state a cause of action, other than those urged in the objection filed in the trial court which resulted in the appeal, it was the duty of counsel to have called such objections to the attention of the court upon the former appeal, so that the matter could have been determined and an end put to the litigation. For this reason, the above grounds of error urged will not be considered by the court, but we will treat the petition as sufficient.

It is next urged that the evidence is insufficient to support the judgment rendered. We have examined the testimony introduced upon the trial, and believe it amply supported the judgment rendered by the court. The relator Garcia testified that he had either paid or become liable to pay to his deputies more than the amount he claimed from the county, and that he had filed and presented to the board an itemized statement of his account. Appellant objects, because this itemized account was not produced before the court; but no demand was made for the account, and the court evidently regarded the evidence given by relator as sufficient to establish the validity of his claim. It is urged that relator was unable to say how much he had paid or become liable

to pay for deputy hire, from the time he took office in January 1912, up to the passage of the salary bill. He did so state, but testified, positively, that it was more than $700 per annum, the maximum amount which he was authorized to pay him. We believe, as stated, that the evidence warranted the judgment rendered.

The next objection urged is that the deputy Felipe Martinez, for whose alleged service relator makes the greater part of his claim, had never been legally appointed or qualified, and that he was a de facto officer, for whose services the county was not liable in any way. First, it may be stated that the proof did not show that Martinez was a de facto officer. Appellant attempted, upon cross-examination, to establish the fact that Martinez had never been legally appointed or qualified; but the proof was, upon objection, excluded by the court, apparently upon the ground that no such issue was presented by the pleadings. In the answer filed by the board, it was admitted that relator had filed the itemized account mentioned in his petition, but denied, as a matter of law, that relator was entitled to collect any amount of money from the county for deputy hire. No issue was tendered to the effect that relator was not entitled to collect from the county because the deputies employed by him had not taken the prescribed oath, or complied with the other requirements of the law; and, in view of the failure on the part of board to tender such an issue, the court properly excluded the evidence. Evidence, not within the issues joined, should not be admitted. No attempt was made by the appellant, in making up the issue, to question either the account which the appellee had filed with the board of county commissioners, or the qualification of the deputies employed by him.

Evidence—not within issues.

Neither was error committed by the court in excluding evidence as to money received by relator from the county, for no set-off had been pleaded. A counterclaim or set-off must, under any procedure, always be specially pleaded. 31 Cyc. 697.

Pleading—set-off.

It is lastly urged that the relator was not entitled to interest on the amount of his claim from March 6, 1915, and that it was, consequently, error for the court to award interest from such date. Under chapter 30, Laws 1915, it became the duty of the board of county commissioners of Rio Arriba county to issue certificates of indebtedness to the relator, if there was not sufficient money in the hands of the treasurer to pay his account, which certificates of indebtedness should bear 6 per cent interest. This act became a law March 9th. The court allowed relator interest from March 6th. Possibly interest should only have been allowed from the 9th of March, but the error in allowing the three days' more interest than relator was entitled to is so trivial that this court will not notice it. It would be unjust to say that he should receive interest upon certificates issued to him, and that he should be deprived of the same because of the arbitrary refusal of the board of county commissioners to audit and allow his claim as required by the statute.

Interest—on unpaid allowance.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

Hanna, Ch. J., and **Parker**, J., concur.

Petition for rehearing denied, August 4, 1917.

ANNOTATION.

Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error.

As to erroneous decision as law of the case on a subsequent appeal, see annotation to United States Annuity & L. Ins. Co. v. Peak, post, 1259.

Majority rule.

The general rule, supported by the great weight of authority, is to the effect that questions which might have been, but were not, raised or presented on a prior appeal, or error, will not be considered on a subsequent appeal, or error; or, in other words, that, where the prior judgment was on the merits, nothing is before the court on a subsequent appeal but the proceedings subsequent to the first mandate, all matters occurring prior thereto, and which could have been adjudicated on the former hearing, being regarded as controlled by the "law of the case" rule. The following cases support this general rule:

United States.—The Santa Maria (1825) 10 Wheat. (U. S.) 442, 6 L. ed. 361; Washington Bridge Co. v. Stewart (1845) 3 How. (U. S.) 413, 11 L. ed. 658; Tyler v. Magwire (1872) 17 Wall. (U. S.) 281, 21 L. ed. 583; The Lady Pike (Pearce v. Germania Ins. Co.) (1877) 96 U. S. 461, 24 L. ed. 672; United States Trust Co. v. New Mexico (1901) 183 U. S. 535, 46 L. ed. 315, 22 Sup. Ct. Rep. 172; Republican Min. Co. v. Tyler Min. Co. (1897) 25 C. C. A. 178, 48 U. S. App. 213, 79 Fed. 733, 18 Mor. Min. Rep. 564, certiorari denied in (1897) 166 U. S. 720, 41 L. ed. 1187, 17 Sup. Ct. Rep. 998; Clark v. Brown (1902) 57 C. C. A. 76, 119 Fed. 130; Burns v. Cooper (1907) 82 C. C. A. 300, 153 Fed. 151; Guaranty Trust Co. v. International Steam Pump Co. (1917) 155 C. C. A. 508, 242 Fed. 920; Sun Co. v. Vinton Petroleum Co. (1918) — C. C. A. —, 248 Fed. 623.

Alabama.—Alabama City, G. & A. R. Co. v. Bates (1908) 155 Ala. 347, 46 So. 776; McGeever v. Terre Haute Brewing Co. (1918) — Ala. —, 78 So. 66.

Arkansas.—Pelham v. Floyd (1849) 9 Ark. 530; Hollingsworth v. McAndrew (1906) 79 Ark. 185, 95 S. W. 485.

Connecticut.—Fowler v. Bishop (1864) 32 Conn. 199 (the court so stated the rule, and expressly approved the same; but then proceeded to discuss a question of jurisdiction which was really involved, but not raised or answered, on the former hearing).

Georgia.—Watkins v. Lawton (1882) 69 Ga. 671; McWilliams v. Walthall (1886) 77 Ga. 7 (holding that such is the rule, at least, where it does not appear that the failure to raise the question on the prior appeal did not result from "fraud, accident, or mistake, or from the act of his adversary"); Story v. Brown (1896) 98 Ga. 570, 25 S. E. 582; Hodgkins v. Marshall (1897) 102 Ga. 191, 29 S. E. 174; Oslin v. Telford (1899) 108 Ga. 803, 34 S. E. 168; Little Rock Cooperage Co. v. Hodge (1899) 109 Ga. 434, 34 S. E. 667; Morris v. Duncan (1906) 126 Ga. 467, 115 Am. St. Rep. 105, 54 S. E. 1045.

Illinois.—Semple v. Anderson (1847) 9 Ill. 546; Ogden v. Larrabee (1873) 70 Ill. 510; Smith v. Brittenham (1880) 94 Ill. 624; Hook v. Richeson (1886) 115 Ill. 431, 5 N. E. 98; Smyth v. Neff (1888) 123 Ill. 310, 17 N. E. 702; Harris v. People (1891) 138 Ill. 63, 27 N. E. 706; Dilworth v. Curts (1891) 139 Ill. 508, 29 N. E. 861; Union Mut. L. Ins. Co. v. Kirchoff (1894) 149 Ill. 536, 36 N. E. 1031; Roby v. Calumet & C. Canal & Dock Co. (1894) 154 Ill. 190, 40 N. E. 293; Wolverton v. George H. Taylor & Co. (1895) 157 Ill. 485, 42 N. E. 49; Bradley v. Lightcap (1903) 201 Ill. 511, 66 N. E. 546, reversed on other grounds in (1904) 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748; Christensen v. People (1914) 114 Ill. App. 40, affirmed in (1905) 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; Muren Coal & Ice

Co. v. Howell (1905) 217 Ill. 190, 75 N. E. 469, affirming (1905) 119 Ill. App. 209; Chicago, R. I. & P. R. Co. v. Steckman (1906) 125 Ill. App. 299, affirmed in (1906) 224 Ill. 500, 79 N. E. 602; Leeds v. Townsend (1906) 124 Ill. App. 582, affirmed in (1907) 228 Ill. 451, 13 L.R.A.(N.S.) 191, 81 N. E. 1069; Manternach v. Studt (1909) 240 Ill. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Jackson v. Glos (1911) 249 Ill. 388, 94 N. E. 502; Ladd v. Ladd (1912) 256 Ill. 183, 99 N. E. 916; People ex rel. Zilm v. Carr (1914) 265 Ill. 220, 106 N. E. 801; Lincoln v. Harts (1915) 270 Ill. 646, 110 N. E. 912; Doyle v. Sanford (1887) 26 Ill. App. 156; Behymer v. Odell (1892) 45 Ill. App. 616; Marriage v. Electric Coal Co. (1914) 188 Ill. App. 142; Arrowsmith v. Old Colony L. Ins. Co. (1914) 190 Ill. App. 460; National Cash Register Co. v. Jibben (1915) 200 Ill. App. 600.

Iowa.—Ellis v. State Ins. Co. (1886) 68 Iowa, 578, 56 Am. Rep. 865, 27 N. W. 762 (in this case the court laid down the rule that all questions that could have been presented on the prior appeal were concluded, but then proceeded to discuss a question which could have been raised on the former hearing); Shropshire v. Ryan (1900) 111 Iowa, 677, 82 N. W. 1035; Zalesky v. Home Ins. Co. (1901) 114 Iowa, 516, 87 N. W. 428; Re Cook (1909) 143 Iowa, 733, 122 N. W. 578; Dunshee v. Standard Oil Co. (1914) 165 Iowa, 625, 146 N. W. 830.

Kansas.—Headley v. Challis (1875) 15 Kan. 602 (rule applied to all questions existing in the record and necessarily involved in the decision, including defenses not raised); Crockett v. Gray (1884) 31 Kan. 346, 2 Pac. 809 (holding that the rule covers not merely the points expressly considered and decided, but all questions necessarily involved in the decision).

Kentucky.—Meredith v. Clarke (1802) Sneed, 189; Brasfield v. Baugh (1832) 7 J. J. Marsh. 330; Moss v. Rowland (1868) 3 Bush, 505; Mason v. Mason (1868) 5 Bush, 187; Davis v. McCorkle (1879) 14 Bush, 746 (holding that the rule applied to all available grounds which might have been presented as warranting either an affirmance or a reversal); Boone v. Gleason (1883) 4 Ky. L. Rep. 1001; Alsop v. Adams (1888) 10 Ky. L. Rep. 362; Gray v. Dickinson (1890) 11 Ky. L. Rep. 890, 13 S. W. 209; Stephens v. Rice (1893) 14 Ky. L. Rep. 669; Bean v. Maguiar (1898) 20 Ky. L. Rep. 885, 47 S. W. 771; Thompson v. Louisville Bkg. Co. (1900) 21 Ky. L. Rep. 1611, 55 S. W. 1080; Dinkelspiel v. Central Kentucky Asylum (1903) 24 Ky. L. Rep. 2240, 73 S. W. 771; McNeill v. Thompson (1905) 27 Ky. L. Rep. 289, 84 S. W. 1145; Dupoyster v. Ft. Jefferson Improv. Co. (1905) 121 Ky. 518, 89 S. W. 509; Stringfield v. Louisville R. Co. (1908) 130 Ky. 468, 113 S. W. 513; Illinois L. Ins. Co. v. Wortham (1909) — Ky. —, 119 S. W. 802; Wall v. Dimmitt (1911) 141 Ky. 715, 133 S. W. 768; Western Life Indemnity Co. v. Rupp (1912) 147 Ky. 489, 144 S. W. 743, affirmed in (1914) 235 U. S. 261, 59 L. ed. 220, 35 Sup. Ct. Rep. 37; Bauer Cooperage Co. v. Ewell (1912) 149 Ky. 838, 149 S. W. 1137; Nashville, C. & St. L. R. Co. v. Henry (1916) 168 Ky. 453, 182 S. W. 651; Castleman v. Buckner (1918) 180 Ky. 350, 202 S. W. 681.

Louisiana.—Bushnell v. Brown (1829) 8 Mart. N. S. 157.

Maine.—Bailey v. Myrick (1860) 50 Me. 171.

Massachusetts. — Booth v. Com. (1843) 7 Met. 285; Pingree v. Coffin (1858) 12 Gray, 288; Boston Bar Asso. v. Casey (1910) 204 Mass. 331, 90 N. E. 584, on subsequent appeal in (1913) 213 Mass. 549, 100 N. E. 658.

Michigan.—Great Western R. Co. v. Hawkins (1869) 18 Mich. 427; Bassett v. Shepardson (1885) 57 Mich. 428, 24 N. W. 182; Bulen v. Granger (1886) 63 Mich. 311, 29 N. W. 718; Richardson v. Richardson (1894) 100 Mich. 364, 59 N. W. 178; Quirk v. Rapid R. Co. (1904) 137 Mich. 493, 100 N. W. 815.

Minnesota.—Schleuder v. Corey (1883) 30 Minn. 501, 16 N. W. 401; Adamson v. Sundby (1892) 51 Minn. 460, 53 N. W. 761; Tilleny v. Wolverton (1893) 54 Minn. 75, 55 N. W. 822; Malmgren v. Phinney (1896) 65 Minn. 25, 67 N. W. 649; Hibbs v. Marpe (1901) 84 Minn. 178, 87 N. W. 363; Jordan v. Northwestern Electric

Equipment Co. (1912) 117 Minn. 209, 135 N. W. 529.

Mississippi. — Still v. Anderson (1886) 63 Miss. 545.

New Mexico.—Davisson v. Citizens' Nat. Bank (1911) 16 N. M. 689, 120 Pac. 304, affirmed in (1913) 229 U. S. 212, 57 L. ed. 1153, 33 Sup. Ct. Rep. 625, Ann. Cas. 1915A, 272; McBee v. O'Connell (1914) 19 N. M. 565, 145 Pac. 123; STATE EX REL. GARCIA v. RIO ARRIBA COUNTY (reported herewith) ante, 720.

New York.—Hosack v. Rogers (1840) 25 Wend. 313; Guest v. Brooklyn (1880) 79 N. Y. 624; Conable v. Smith (1892) 19 N. Y. Supp. 446; Silverstein v. Brown (1912) 153 App. Div. 677, 138 N. Y. Supp. 848 (in connection with the foregoing New York cases, see Kenneth v. Newgold (1918) 183 App. Div. 448, 170 N. Y. Supp. 803).

North Carolina. — State v. Speaks (1886) 95 N. C. 689 (but see the later case of Vann v. Edwards (1904) 135 N. C. 661, 67 L.R.A. 461, 47 S. E. 784, as set out infra).

Ohio.—Pollock v. Cohen (1877) 32 Ohio St. 514.

Oregon.—Benbow v. The James John (1912) 61 Or. 153, 121 Pac. 899.

Pennsylvania.—Adams v. Hubbard (1910) 227 Pa. 304, 76 Atl. 17; Corry v. Corry Chair Co. (1901) 18 Pa. Super. Ct. 271; Hoffman's Estate (1908) 37 Pa. Super. Ct. 548; Catts v. Catts (1908) 37 Pa. Super. Ct. 598.

South Carolina.—Brooks v. Brooks (1881) 16 S. C. 621; Warren v. Raymond (1881) 17 S. C. 163; Ellis v. Sanders (1890) 34 S. C. 236, 13 S. E. 417; Worth v. Norton (1899) 56 S. C. 479, 35 S. E. 135 (but see State v. Tucker (1899) 56 S. C. 516, 35 S. E. 215, as set out infra).

Virginia.—Burton v. Brown (1872) 22 Gratt. 1; Campbell v. Campbell (1872) 22 Gratt. 649; Blackwell v. Bragg (1884) 78 Va. 529; Effinger v. Kenney (1884) 79 Va. 551; Findlay v. Trigg (1887) 83 Va. 539, 3 S. E. 142; Stuart v. Heiskell (1889) 86 Va. 191, 9 S. E. 984; Carter v. Hough (1892) 89 Va. 503, 16 S. E. 665; Norfolk & W. R. Co. v. Duke (1908) 107 Va. 764, 60 S. E. 96; Steinman v. Clinchfield Coal Corp. (1917) 121 Va. 611, 93 S. E. 684.

Washington.—Dennis v. Kass (1895) 13 Wash. 137, 42 Pac. 540; Smith v. Seattle (1899) 20 Wash. 613, 56 Pac. 389; State v. Boyce (1901) 25 Wash. 422, 65 Pac. 763; Wheeler v. Aberdeen (1907) 47 Wash. 405, 92 Pac. 135; State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co. (1911) 62 Wash. 436, 113 Pac. 1104; Perrault v. Emporium Department Store Co. (1915) 83 Wash. 578, 145 Pac. 438.

West Virginia. — Henry v. Davis (1878) 13 W. Va. 230; Windon v. Stewart (1900) 48 W. Va. 488, 37 S. E. 603.

Wisconsin. — Pierce v. Kneeland (1859) 9 Wis. 23; South Bend Chilled Plow Co. v. George C. Cribb Co. (1900) 105 Wis. 443, 81 N. W. 675; Richter v. Leiby (1900) 107 Wis. 404, 83 N. E. 694; Nelson v. A. H. Stange Co. (1909) 140 Wis. 657, 123 N. W. 152; Lutien v. Kewaunee (1913) 151 Wis. 607, 139 N. W. 312.

And in Indiana, the later as well as some, but not all, of the earlier authorities, seem to support the majority rule. Thus, in the following cases. it was expressly held that a second appeal brings up for review nothing but the proceedings subsequent to the former decision, and, therefore, that all questions which could have been, but were not, raised on the prior appeal, must be deemed to have been waived: Hobson v. Harper (1838) 4 Blackf. (**Ind.**) 489 (holding that, upon a second appeal, the court could not examine an alleged error committed prior to the first appeal); Stevens v. Templeton (1910) 174 **Ind.** 129, 91 N. E. 563 (holding that appeals cannot be allowed by piecemeal); Ohio Valley Trust Co. v. Wernke (1912) 179 **Ind.** 49, 99 N. E. 734 (holding that, where the overruling of a demurrer to a complaint was affirmed on appeal, all objections to such complaint, except the one passed upon, must be deemed to have been waived so that they cannot be raised on a subsequent appeal, and, the court saying that any other conclusion would permit a party, against

whom a judgment had been taken on a complaint containing a number of alleged defects, to present the question of its validity in as many appeals as objections to it might be conjured, and that such a practice would be an outrageous offense against the guaranty of a speedy administration of justice); Chicago, I. & L. R. Co. v. Bloomington (1914) 182 Ind. 236, 105 N. E. 561 (holding that alleged errors in a ruling on a demurrer, which could have been presented on a former appeal by an assignment of cross errors, cannot be considered on a second appeal, since the failure to so raise the objections constituted a waiver of any right to have an examination of the same made by an appellate court); Southern Indiana R. Co. v. Moore (1904) 34 Ind. App. 154, 71 N. E. 516, affirmed on this point on rehearing in (1904) — Ind. App. —, 72 N. E. 479 (holding same as Ohio Valley Trust Co. v. Wernke (Ind.) supra); Cleveland, C. C. & St. L. R. Co. v. Lutz (1917) — Ind. App. —, 116 N. E. 429 (holding same as Chicago, I. & L. R. Co. v. Bloomington (Ind.) supra); Meridian Life & T. Co. v. Hay (1917) — Ind. App. —, 118 N. E. 147 (holding that where a ruling was made prior to a first appeal, but was not presented for consideration on that appeal as it might have been by assignment of cross error, the objection thereto must be regarded as waived, so that it cannot be presented upon a second appeal); New Albany v. Lyons (1918) — Ind. App. —, 118 N. E. 587 (holding that where a party demurs to a pleading, and receives an adverse ruling thereon, he must not only present such ruling for review at the first appeal, but he must present all reasons on which he bases his alleged error, or he will be deemed to have waived the same). And see also State ex rel. Western Constr. Co. v. Clinton County Comrs. (1905) 116 Ind. 162, 76 N. E. 986. But in New Albany v. Lyons (Ind.) supra, the court said that "some earlier cases may appear to hold the contrary," but that it regarded the case of Ohio Valley Trust Co. v. Wernke, which is set out supra, and which was decided in 1912, as decisive. None of the other above-cited Indiana cases seem to have referred to the earlier conflicting decisions; but the court in the New Albany Case undoubtedly had reference to the following Indiana cases, wherein it was expressly held that the rule of "the law of the case" does not preclude a court from considering and deciding, on a second appeal, any questions which might have been, but were not, considered and decided on the former appeal: Davis v. Krug (1883) 95 Ind. 1 (holding that any other rule seemed unreasonable, "although we are aware that it is supported by many respectable authorities, and even by the language used in some of the reported opinions of this court"); Elliott v. Cale (1887) 113 Ind. 383, 14 N. E. 708; Wine v. Woods (1901) 158 Ind. 388, 63 N. E. 759; Alerding v. Allison (1907) 170 Ind. 252, 127 Am. St. Rep. 363, 83 N. E. 1006, affirming (1907) — Ind. App. —, 82 N. E. 934. And generally, to the effect that a decision on appeal determines only such questions as are presented for decision, and are decided as essential to a just disposition of the appeal, and that the principle that a decision on appeal governs the case throughout all its subsequent stages does not apply to points not necessarily or actually decided, see Union School Twp. v. First Nat. Bank (1885) 102 Ind. 464, 2 N. E. 194. In Rinard v. West (1883) 92 Ind. 359, where a case was reversed for insufficiency of the complaint, it was held that the fact that some of the defects were pointed out and remedied by amendment did not preclude the court, on a second appeal, from considering other defects not referred to on the first appeal, the court saying that "if, upon appeal to this court, a complaint is held good upon demurrer, the decision is incontrovertibly the law of the case in all of its subsequent stages. . . . But where a complaint is held insufficient, a reference to or a discussion of some of its defects does not make the complaint good with regard to others not considered," and that such defects may be considered on a second appeal.

And in Maryland, the rule is that,

where an appeal is taken, all questions which might be raised on the then state of the record must be considered as determined, and, even though not raised and presented for determination, must be regarded as waived, so that on a second appeal only such questions can be considered as were raised on or by proceedings following the prior decision on appeal. This ruling was laid down in Smith v. Shaffer (1878) 50 **Md.** 132, and is supported by Bridendolph v. Zeller (1853) 5 **Md.** 64, wherein it was held that a party cannot, by a second appeal, bring up matters not based on proceedings had subsequent to the first appeal. But in the earlier case of Duvall v. Farmers Bank (1837) 9 Gill & J. (**Md.**) 31, it was held that, upon a second appeal in the same case, the court may decide questions involved in the record on the first appeal, when a decision of such questions was not made on the former appeal, and such questions were in fact expressly reserved. And this decision was approved in Tolson v. Tolson (1849) 8 Gill (**Md.**) 389, wherein a similar decision was reached, notwithstanding it did not appear why the questions were not considered on the first hearing, and although there was no express reservation of the same.

The general rule above treated, it has been said, has its "foundation in reason, and the policy of the law that there must be an end to litigation somewhere." Smith v. Neff (1888) 123 **Ill.** 310, 17 N. E. 702. In other words the law does not tolerate the trying of cases by "piecemeal" (Hollingsworth v. McAndrew (1906) 79 **Ark.** 185, 95 S. W. 483; Harris v. People (1891) 138 Ill. 63, 27 N. E. 706; Muren Coal & Ice Co. v. Howell (1905) 217 **Ill.** 190, 75 N. E. 469; Stevens v. Templeton (1910) 174 **Ind.** 129, 91 N. E. 563; Zalesky v. Home Ins. Co. (1901) 114 **Iowa**, 516, 87 N. W. 428; Smith v. Seattle (1899) 20 **Wash.** 613, 56 Pac. 389); or in "fragments" (Smith v. Brittenham (1880) 94 **Ill.** 624); or by instalments (Still v. Anderson (1886) 63 **Miss.** 545); or part at one time and part at another Bradley v. Lightcap (1913) 201 **Ill.** 511, 66 N. E. 546, reversed on other grounds in (1904) 195 **U. S.** 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748; Dennis v. Kass (1895) 13 **Wash.** 137, 42 Pac. 540). To hold otherwise might vexatiously prolong litigation (Bassett v. Shepardson (1885) 57 **Mich.** 428, 24 N. W. 182; Smith v. Seattle (1899) 20 **Wash.** 613, 56 Pac. 389; Henry v. Davis (1878) 13 **W. Va.** 230), and burden the courts with unnecessary labor (Smith v. Seattle (**Wash.**) supra, or, as said by the Illinois supreme court (Ogden v. Larrabee (1873) 70 **Ill.** 510), a contrary rule would introduce a "pernicious practice," since there ought to be an end to all litigation; and to permit the parties to assign successive errors on the same record would result, at least, in complicated litigations, and in no conclusive decision during the lifetime of the interested parties. Controversies would never be settled, if a contrary practice were allowed; and successive appeals would be but successive experiments, none finally disposing of the cause, and indefinitely postponing final judgment, and possibly defeating it altogether. State v. Speaks (1886) 95 **N. C.** 689. In fact, "litigation would be interminable," and a contrary practice "would violate well-settled principles of law and be against public policy." Pollock v. Cohen (1877) 32 **Ohio** St. 514. And see Dennis v. Kass (1895) 13 **Wash.** 137, 42 Pac. 540. In Illinois and Wisconsin, and in some cases in Indiana and Maryland, the rule has been put upon the ground that it will be presumed that when a case goes to an appellate court for adjudication, and the same has been determined upon the merits and errors assigned, the parties have no further objections to urge against the record; and that, if errors exist which are not so assigned, they are waived. Semple v. Anderson (1847) 9 **Ill.** 546; Richter v. Leiby (1900) 107 **Wis.** 404, 83 N. W. 694. And in the following Illinois cases, it was held that all errors existing prior to appeal, or error, and not assigned, will be considered as waived, so that they cannot afterwards be urged: Dilworth v. Curts (1891) 139 **Ill.** 508, 29 N. E. 861; Union Mut. L. Ins. Co. v. Kirchoff (1894) 149 **Ill.** 536, 36 N. E.

1031; Muren Coal & Ice Co. v. Howell (1905) 217 Ill. 190, 75 N. E. 469; Ladd v. Ladd (1912) 256 Ill. 183, 99 N. E. 916. For the Indiana and Maryland cases, in which a failure to present available matter on appeal has been held to constitute a waiver thereof, precluding examination on a subsequent appeal, see the cases from those states which are set out supra.

For the purposes of the "law of the case" rule as applied to matters which might have been, but were not, presented on a prior appeal or error, it has been held that it must appear that the decision was on the merits, and that the questions raised on the second appeal could have been raised on the former hearing. See People ex rel. Zilm v. Carr (1914) 265 Ill. 220, 106 N. E. 801; Lincoln v. Harts (1915) 270 Ill. 646, 110 N. E. 912, and Hosack v. Rogers (1840) 25 Wend. (N. Y.) 313. But that it is immaterial whether the judgment was affirmed on the merits, or for other reasons, on the prior appeal, see National Cash Register Co. v. Jibben (1915) 200 Ill. App. 600. And in the Minnesota case of Schleuder v. Corey (1883) 30 Minn. 501, 16 N. W. 401, it was held that the rule applied, where an order denying a new trial was affirmed, on appeal, for failure of the appellant to serve copies of the paper book and points, the court expressly holding that all points which might have been raised on such appeal are res judicata, on a subsequent appeal from a judgment entered upon the verdict. And in Adamson v. Sundby (1892) 51 Minn. 460, 53 N. W. 761, it was said that where an order denying a new trial is affirmed, either on the merits or "under the rules of court," all questions that might have been raised on that appeal are res judicata, and cannot be considered on a subsequent appeal; but that a mere "dismissal" of the appeal on abandonment does not have such an effect. And Jordan v. Northwestern Electric Equipment Co. (1912) 117 Minn. 209, 135 N. W. 529, contains dicta to the same effect.

And the majority rule has been applied, although the objection was to the jurisdiction of the court. Washington Bridge Co. v. Stewart (1845) 3 How. (U. S.) 413, 11 L. ed. 658 (first appeal was from an interlocutory order, and not from a final decree); Tyler v. Maguire (1872) 17 Wall. (U. S.) 253, 21 L. ed. 576 (contention made that plaintiff had remedy at law, and therefore that equity court had no jurisdiction); Pelham v. Floyd (1849) 9 Ark. 530 (alleged want of equity); Semple v. Anderson (1847) 9 Ill. 546 (declaration did not show facts essential to the jurisdiction of the trial court); Dilworth v. Curts (1891) 139 Ill. 508, 29 N. E. 861 (alleged want of equity); Norfolk & W. R. Co. v. Duke (1908) 107 Va. 764, 60 S. E. 96 (objection to jurisdiction of trial court); State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co. (1918) 62 Wash. 436, 113 Pac. 1104 (objection to jurisdiction of both trial and appellate courts). But see Steinman v. Clinchfield Coal Corp. (1917) 121 Va. 611, 93 S. E. 684.

And the rule has been held to apply to final decrees in chancery, as well as to judgments at law. Washington Bridge Co. v. Stewart (U. S.) supra; Tyler v. Magwire (1872) 17 Wall. (U. S.) 253, 21 L. ed. 576. And, generally, the same rule applies in probate proceedings. See Re Cook (1909) 143 Iowa, 733, 122 N. W. 578.

So, it has been held that it makes no difference that the decision on the first appeal was by an equally divided court. Washington Bridge Co. v. Stewart (U. S.) and Jordan v. Northwestern Electric Equipment Co. (Minn.) supra.

But of course the rule does not apply as to points which the court, on the prior appeal, expressly reserved, or left open for future litigation. See Bean v. Meguiar (1898) 20 Ky. L. Rep. 885, 47 S. W. 771; Illinois L. Ins. Co. v. Wortham (1909) — Ky. —, 119 S. W. 802; Bauer Cooperage Co. v. Ewell (1912) 149 Ky. 838, 149 S. W. 1137; and Gray v. Washington Water Power Co. (1902) 30 Wash. 154, 70 Pac. 255. And see also Duvall v. Farmers Bank (1837) 9 Gill & J. (Md.) 31, and Ward v. Haren (1914) 183 Mo. App. 569, 167 S. W. 1064, as set out supra.

And in some of the jurisdictions

which adhere to the general rule that questions which might have been, but were not, raised on a prior appeal, or error, cannot be considered on a subsequent appeal, or error, it seems that an exception is sometimes made where the judgment was one of reversal, and not a final adjudication. For instance, in Mutual L. Ins. Co. v. Hill (1903) 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538, reversing (1902) 55 C. C. A. 536, 118 Fed. 708, it was held that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided, and that, on a second review, all questions which appear on the record and have not already been decided are open for consideration, the court expressly pointing out that while, undoubtedly, an affirmance of a judgment is a conclusive adjudication on the merits, no such conclusion follows in case of a reversal upon less than all of the points involved on the merits. So in Windon v. Stewart (1900) 48 W. Va. 488, 37 S. E. 603, it was held that a judgment of reversal was not conclusive as to points not conclusively adjudicated on the merits. And see Rinard v. West (1883) 92 Ind. 359, as set out supra.

And in the Federal case of Balch v. Haas (1896) 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974, it was held that where, under circuit court of appeals rule No. 24, the counsel on both sides were required to specify the grounds on which they relied for either a reversal or affirmance, the decision was binding upon a subsequent appeal only upon points distinctly made and determined, and not upon points which might have been, but were not, raised; the court saying that, in view of the circumstances, its former decision did not preclude a determination of a point which neither party specified on the former appeal.

In Rogerson v. Fanning (1890) 38 Ill. App. 265, writ of error dismissed in (1892) 142 Ill. 478, 32 N. E. 521, where a prior decree was reversed because it did not appear to be by the consent of the parties, but the question whether or not such decree was, as a matter of fact, entered by consent, was not presented upon the former hearing in error, and a supplemental cross bill was filed after the case was remanded, setting up that the decree was by consent, it was held that the prior decision was not conclusive, on subsequent appeal from a dismissal of the cross bill, as to the fact of consent, although that question could have been presented on the original appellate hearing by a plea of release of errors; but this ruling was undoubtedly influenced by the fact that the conduct of the adverse party was "exceedingly inequitable, indeed fraudulent," the court saying that such adverse party ought not to be heard to suggest that the exercise of greater skill and vigilance on the part of the other party would have rendered the fraud unavailing and fruitless, and that, by a mere slip or oversight in pleadings, a party cannot gain such an unjust advantage as the result of his own unfair action especially in a court of equity.

However, a litigant cannot avoid the application of the general rule by pleading his own negligence in failing to discover facts which were practically wholly within his own means of ascertainment, and the discovery of which would have enabled him to have presented the point on the former hearing. Arrowsmith v. Old Colony L. Ins. Co. (1914) 190 Ill. App. 460, holding that the failure to learn the date of an insurance policy in one's possession cannot be excused by alleged misleading statements of opposing counsel.

According to the later decisions in Kansas, "the law of the case" rule, as applied to matters which might have been, but were not, raised on a former appeal, is not an inflexible one, which requires a court blindly to hold that the former decision is conclusive. Thus, in Estes v. Edgar Zinc Co. (1916) 97 Kan. 774, 156 Pac. 758, it was held that notwithstanding "the law of the case" is the prevailing rule governing appellate practice, and that a party is not entitled as a matter of right to be heard, on a second appeal, upon questions which might have been

raised on the first appeal, there may be exceptions to the general rule, so that the court in its discretion may examine assignments of error, on a second appeal, which might have been made on the prior appeal, at least, far enough to satisfy itself that a party has not been seriously prejudiced in any of his substantial rights; and this to prevent the possibility of a miscarriage of justice. And in Henry v. Atchison, T. & S. F. R. Co. (1910) 83 Kan. 104, 28 L.R.A.(N.S.) 1088, 109 Pac. 1005, it was held that the general rule is not an inflexible one, and questions were examined on a second appeal which might have been, but were not, presented on the first appeal.

And, in Missouri, it has been declared that the courts of that state have not adopted "the law of the case" rule in all its strictness, but have adopted it with the qualification that an appellate court may pass upon points which might have been raised upon former appeal, where no injustice or hardship will result from so reviewing. Boone v. Shackleford (1877) 66 Mo. 493. Applying this rule, it was held that, when a party has failed to attack the jurisdiction of the trial court on a former appeal, the appellate court, on a second appeal, will decline to pass upon the question, where a ruling adverse to the jurisdiction would permit the Statute of Limitations to be pleaded in bar of a new action. However, the other Missouri cases which have been examined do not seem to draw a similar line, there being a considerable conflict of authority, with the majority, especially of the later cases, leaning to the rule that all matters which were in the record on the first appeal, and which consequently might have been raised thereon, cannot be adjudicated on a subsequent appeal. Thus, in Williams v. Sands (1916) — Mo. —, 187 S. W. 1188, it was held that the proposition that a part of a judgment was not supported by the evidence cannot be considered on a second appeal, where the objection was one which could have been made on the first appeal. And in Pitkin v. Shacklett (1893) 117 Mo. 547, 23 S. W. 884, an action of ejectment on a tax deed, it was held that, since the defendant had failed to question the legality of the taxes on the first appeal, he could not maintain an objection on that ground on a second appeal, the court saying that the question could not be reopened. So in Dunn v. Nicholson (1917) 125 Mo. App. 725, 103 S. W. 114, it was held that a decision, on appeal, that an instrument in the nature of a demurrer to the evidence was properly refused, was a direct ruling "on every question presented, or that could have been raised, under the demurrer," and precluded examination of such questions on a subsequent appeal. And again in Roth v. St. Joseph (1914) 180 Mo. App. 381, 167 S. W. 1155, motion to transfer to supreme court denied in (1914) — Mo. App. —, 171 S. W. 944, it was held that a holding, on appeal, that a demurrer to the complaint was properly overruled, renders res judicata all questions that could have been raised under the demurrer. And in Cooley v. Kansas City, P. & G. R. Co. (1899) 149 Mo. 487, 51 S. W. 101, it was held that, on a second appeal, the court would not pass upon the validity or existence of the affidavit upon which a former appeal was ordered. So, in Connelly v. Illinois C. R. Co. (1912) 169 Mo. App. 272, 153 S. W. 79, it was held, on a second appeal, that no point could be made that the prior appeal was premature. And in Livingston v. Allen (1900) 83 Mo. App. 294, it was held that a question which was in the record on the first appeal of a case must be presumed to have been considered and determined, so that the matter would be res judicata on a second appeal. And in McGrew v. Missouri P. R. Co. (1906) 118 Mo. App. 379, 94 S. W. 719, it was held that the decision of an appellate court is the law of the case, not only as to all questions referred to in the opinion, but as to all others properly before the court, and that none of such questions could be examined on a subsequent appeal. But, as above intimated, some of the Missouri cases support the rule that all questions which were not actually decided on a prior appeal

may be considered on the later appeal. Thus, in Haynes v. Trenton (1894) 123 Mo. 326, 27 S. W. 622, it was expressly held that the fact that an instruction given on a former trial was not questioned on appeal did not estop the party from objecting to the same instruction at a second trial, and obtaining a review thereof on a subsequent appeal, the court saying that, although the injured party may then have waived its right to a reversal on that point by not raising it, he did not, thereby, consent to the same error at a later trial, or estop himself to then complain of the error. And in Lampert v. Laclede Gaslight Co. (1883) 14 Mo. App. 376, it was held that the rule that a court will not, on a second appeal, allow a question to be reopened and discussed which was decided on the former appeal, has no application to questions which, though presented by the record, were not considered on the former appeal, the court arguing that such an application of the rule would be unjust, and would conclude against the rights of a party who had invoked the decision of the court upon a meritorious question, the question itself, without the court ever having really examined or decided it. So in Walser v. Graham (1895) 60 Mo. App. 323, it was again held that, when a case has been decided by an appellate court, and again comes up by appeal, or error, such questions as were not determined or discussed upon the first hearing may be examined on the second appeal or error. And in Metropolitan Bank v. Taylor (1876) 62 Mo. 338, it was said by way of dicta that, on a second appeal or writ of error, "only such questions will generally be noticed as were not determined in the previous decision." And in Keith v. Keith (1888) 97 Mo. 223, 10 S. W. 597, the rule stated in Metropolitan Bank v. Taylor (Mo.) supra, was again laid down, and it was said that there are exceptions to the rule, but that the case under consideration did not fall within any of them; and the court proceeded to examine a point which was not considered on a prior appeal of the case. In Ward v. Haren (1914) 183 Mo. App. 569, 167 S. W. 1064, where a question was expressly reserved by an appellate court, it was held that such question could be considered on a subsequent appeal to that court.

Minority rule.

There is some authority from other jurisdictions to the effect that an appellate tribunal is bound by its decision on a prior appeal, or error, only upon the points distinctly made and determined, and not at all upon points which might have been raised, but were not. To this effect, see Klauber v. San Diego Street Car Co. (1893) 98 Cal. 105, 32 Pac. 876; People v. Thompson (1896) 115 Cal. 160, 46 Pac. 912; Re Central Irrig. Dist. (1897) 117 Cal. 382, 49 Pac. 354 (dictum); Trower v. San Francisco (1910) 157 Cal. 762, 109 Pac. 617; Alcorn v. Gieseke (1910) 158 Cal. 396, 111 Pac. 98; Parkin v. Grayson-Owen Co. (1914) 25 Cal. App. 269, 143 Pac. 257, 6 N. C. C. A. 1043; Sprague Invest. Co. v. Mouat Lumber & Invest. Co. (1899) 14 Colo. App. 107, 60 Pac. 179 (but, in connection with this case, see Taylor v. Colorado Iron Works (1905) 33 Colo. 179, 80 Pac. 129, wherein it was held that it is too late, on a second appeal, to urge that the court, on a former appeal, ought to have redocketed the cause, "even if it should have been done, for they [plaintiffs] did not seasonably ask for such order," no such request having been made on the prior appeal); Hillsborough Grocery Co. v. Leman (1911) 62 Fla. 208, 56 So. 684; Florida East Coast R. Co. v. Geiger (1914) 66 Fla. 582, 64 So. 238; Paul v. Commercial Bank (1915) 69 Fla. 62, 68 So. 68; Johns v. Bowden (1916) 72 Fla. 530, 73 So. 603 (see headnote 3); Phifer v. Abbott (1917) — Fla. —, 74 So. 488.

And in Tennessee it has been held that where it appears that a particular question was not presented on appeal, or intended by the parties to be passed upon, the court, on a subsequent appeal, is not precluded from examining the question. Reynolds v. Brandon (1870) 3 Heisk. (Tenn.) 593. But see Meyers v. Meyers (1898) — Tenn. —, 50 S. W. 775, wherein it was held that

where no appeal was taken from the disallowance of an item on an accounting by an administrator, but an appeal was taken upon other points, it was too late, on a second appeal, to raise the point that such item was improperly allowed.

And in Montana, Nebraska, and Utah, it has been held that the rule is that an appellate court is bound by a decision on a prior appeal, only upon points necessary to a determination of the cause as it was then presented; and that upon questions not considered, and not necessarily involved, it is not conclusively bound, although they might have been properly considered and determined on such prior appeal. Wastl v. Montana Union R. Co. (1900) 24 **Mont.** 159, 61 Pac. 9; Hayden v. Frederickson (1899) 59 **Neb.** 141, 80 N. W. 494; Wittenberg v. Mollyneaux (1899) 59 **Neb.** 203, 80 N. W. 824; Herriman Irrig. Co. v. Keel (1902) 25 **Utah,** 26, 69 Pac. 719. And see Vann v. Edwards (1904) 135 **N. C.** 661, 67 L.R.A. 461, 47 S. E. 784, holding that where the supreme court, on a prior appeal, did not pass upon a question which was not essential to the decision, it was not precluded, under the doctrine of the law of the case, from determining the point upon a later appeal.

In Indiana, Maryland, and Missouri, wherein, as hereinbefore pointed out, there is a seeming conflict of authority, some of the cases support the above-stated minority rule. See Rinard v. West (1883) 92 **Ind.** 359; Davis v. Krug (1883) 95 **Ind.** 1; Union School Twp. v. First Nat. Bank (1885) 102 **Ind.** 464, 2 N. E. 194; Elliott v. Cale (1887) 113 **Ind.** 383, 14 N. E. 708; Wine v. Woods (1901) 158 **Ind.** 388, 63 N. E. 759; Alerding v. Allison (1907) 170 **Ind.** 252, 127 Am. St. Rep. 363, 83 N. E. 1006; Tolson v. Tolson (1849) 8 Gill (**Md.**) 389; Metropolitan Bank v. Taylor (1876) 62 **Mo.** 338; Keith v. Keith (1888) 97 **Mo.** 223, 10 S. W. 597; Haynes v. Trenton (1894) 123 **Mo.** 326, 27 S. W. 622; Lampert v. Laclede Gaslight Co. (1883) 14 **Mo.** App. 376, and Walser v. Graham (1895) 60 **Mo. App.** 323,—all of which are set out supra. And see State v. Tucker (1899) 56 **S. C.** 516, 35 S. E. 215, holding that an adjudication on appeal of one constitutional objection to a statute does not preclude the same party from making another constitutional objection to the same statute, on a subsequent appeal of the same case.

In the Indiana case of Alerding v. Allison (1907) 170 **Ind.** 252, 127 Am. St. Rep. 363, 83 N. E. 1006, it was said that the rule known as "the law of the case," being one which tends to prevent the judicial consideration of a particular controversy, is not to be extended beyond the exigencies which demand its application. G. J. C.

HERMAN BRAUER et al., Partners, as Brauer Brothers, Respts.,
v.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appt.

New Jersey Court of Errors and Appeals—March 4, 1918.

(— N. J. —, 103 Atl. 166.)

Proximate cause — loss of property — collision.

As a result of a grade crossing collision, a horse was killed, a wagon destroyed, and the contents of the wagon scattered, and probably stolen by people at the scene of the accident. The driver, who was alone in charge for the plaintiff, was so stunned that he was found in a fit immediately after the accident. Held, that it was permissible for a jury

Headnote by SWAYZE, J.

to find that the collision was the proximate cause of the loss of the contents of the wagon.

[See note on this question beginning on page 737.]

(Garrison, Trenchard, Parker, Bergen, and Williams, JJ., dissent.)

APPEAL by defendant from a judgment of the Supreme Court in favor of plaintiffs in an action brought to recover the value of certain property alleged to have been destroyed in a collision at a grade crossing. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Vredenburgh, Wall, & Carey** for appellants.

Mr. **Clarence Kelsey**, for respondents:

Defendant was guilty of negligence.

McLean v. Erie R. Co. 69 N. J. L. 57, 54 Atl. 238, affirmed in 70 N. J. L. 337, 57 Atl. 1132; Waibel v. West Jersey & S. R. Co. 87 N. J. L. 573, 94 Atl. 951; Fernetti v. West Jersey & S. R. Co. 87 N. J. L. 268, 93 Atl. 576.

Plaintiff's servant was not guilty of contributory negligence.

Dickinson v. Erie R. Co. 81 N. J. L. 464, 37 L.R.A.(N.S.) 150, 81 Atl. 104; Goodwin v. Central R. Co. 73 N. J. L. 576, 64 Atl. 134, 20 Am. Neg. Rep. 433.

The action of the servants of defendant in scattering the barrels, cider, and blanket over the crossing, from where they were then readily carried off by thieves, and in neglecting to use care to protect them after scattering them broadcast in that manner, was the natural and proximate cause of their loss to plaintiffs.

McDonald v. Union P. R. Co. 42 Fed. 579; 21 Am. & Eng. Enc. Law, 2d ed. 494, 495; Batton v. Public Service Corp. 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. Rep. 855, 69 Atl. 164; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Davenport v. McClellan, 88 N. J. L. 653, 96 Atl. 921; Guinn v. Delaware & A. Teleph. Co. 72 N. J. L. 276, 3 L.R.A.(N.S.) 988, 111 Am. St. Rep. 668, 62 Atl. 412, 19 Am. Neg. Rep. 389.

Swayze, J., delivered the opinion of the court:

This is a case of a grade crossing collision. We are clear that the questions of negligence and contributory negligence were for the jury. If there were nothing else, the testimony of the plaintiff as to signals of the flagman would carry the case to the jury. The only question that has caused us difficulty is that of the extent of the defendant's liability. The complaint avers that the horse was killed, and the wagon and harness, and the cider and barrels with which the wagon was loaded, were destroyed. What happened was that as a result of the collision, aside from the death of the horse and the destruction of the wagon, the contents of the wagon, consisting of empty barrels and a keg of cider, were scattered, and probably stolen by people at the scene of the accident. The driver, who was alone in charge for the plaintiff, was so stunned that one of the railroad detectives found him immediately after the collision in a fit. There were two railroad detectives on the freight train to protect the property it was carrying against thieves, but they did nothing to protect the plaintiff's property. The controversy on the question of damages is as to the right of the plaintiff to recover the value of the barrels, cider, and blanket. An objection was based solely on the ground that the complaint alleged that they were destroyed; counsel said, "There is no use proving value unless they were destroyed." We think that if they were taken by thieves they were destroyed as far as was important to the case; at least the averment was sufficient to justify the evidence and the charge, since the case was fully tried. It is now argued that the defendant's negligence was not, in any event, the proximate cause of the loss of this property, since the act of the thieves intervened. The rule of law exempting the one guilty of the

original negligence from damage due to an intervening cause is well settled. The difficulty lies in the application. Like the question of proximate cause, this is ordinarily a jury question. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 475, 24 L. ed. 256, 259; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214. In his opinion in the last-named case Justice Depue, speaking for this court, says that the cases in which the responsibility is laid on the original wrongdoer, though intervening agencies without his fault have interposed, are quite numerous, and he adds that they are only instances of the application of the principle of Scott v. Shepherd, 2 W. Bl. 892, 96 Eng. Reprint, 525, 3 Wils. 403, 95 Eng. Reprint, 1124. He refers to a number of cases by way of illustration. We have recently held that a recovery can be had, although death resulted from overexertion by the decedent herself before she had completely recovered from the result of the accident. Batton v. Public Service Corp. 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. Rep. 855, 69 Atl. 164.

A more recent English case than those cited by Justice Depue in the Salmon Case is Englehart v. Farrant [1897] 1 Q. B. 240. There the defendant employed a man to drive a cart, with instructions not to leave it. A lad seventeen years old, for whose acts it was held the defendant was not responsible, went along to deliver parcels to defendant's customers. The driver left the cart and went into a house. During his absence the lad drove on, and came into collision with plaintiff's carriage. It was held that the negligence of the driver in leaving the cart was the effective cause of the damage, and that the defendant was liable. Lord Esher said: "If a stranger interferes, it does not follow that the defendant is liable; but equally it does not follow that because a stranger interferes the defendant is not liable, if the negligence of a servant of his is an effective cause of the accident."

In a later Massachusetts case the defendant was held not liable where it had allowed a platform to become saturated with oil, and fire resulted, to the plaintiff's damage, by a stranger throwing a match on the ground underneath the platform. Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490. The opinion contains an abundant citation of authorities on both sides of the line of cleavage.

In a still more recent case the defendant was held liable, although the damage complained of could not have occurred without the act of a third party at least six months after the injury. The damage complained of was the premature birth and death of a child which, it was held, might be found to have been caused by an injury fifteen months before. The court said: "The perpetuation of the human race cannot be termed a voluntary act, but it rests upon instincts and desires which are fundamentally imperative." Sullivan v. Old Colony Street R. Co. 197 Mass. 512, 125 Am. St. Rep. 378, 83 N. E. 1091.

We think these authorities justified the trial judge in his rulings as to the recovery of the value of the barrels, cider, and blanket. The negligence which caused the collision resulted immediately in such a condition of the driver of the wagon that he was no longer able to protect his employer's property; the natural and probable result of his enforced abandonment of it in the street of a large city was its disappearance; and the wrongdoer cannot escape making reparation for the loss caused by depriving the plaintiff of the protection which the presence of the driver in his right senses would have afforded.

"The act of a third person," said the supreme court of Massachusetts, "intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first

wrongdoer, if such act ought to have been foreseen." Lane v. Atlantic Works, 111 Mass. 136.

A railroad company which found it necessary or desirable to have its freight train guarded by two detectives against thieves is surely chargeable with knowledge that portable property left without a guard was likely to be made off with. Again, strictly speaking, the act of the thieves did not intervene between defendant's negligence and the plaintiff's loss; the two causes were, to all practical intent, simultaneous and concurrent; it is rather a case of a joint tort than an intervening cause. Lord Cairns dwelt on the importance of the different acts having occurred or been done continuously. Sneesby v. Lancashire & Y. R. Co. L. R. 1 Q. B. Div. 42, 44, 45 L. J. Q. B. N. S. 1, 33 L. T. N. S. 372, 24 Week. Rep. 99. An illustration will perhaps clarify the case. Suppose a fruit vendor at his stand along the street is rendered unconscious by the negligence of the defendant, who disappears, and boys in the street appropriate the unfortunate vendor's stock in trade; could the defendant escape liability for their value? We can hardly imagine a court answering in the affirmative. Yet the case is but little more extreme than the jury might have found the present case.

Proximate cause—loss of property—collision.

The judgment is affirmed, with costs.

Garrison, Trenchard, Parker, Bergen, and Williams, JJ., dissenting.

Garrison, J., dissenting:

The collision afforded an opportunity for theft, of which a thief took advantage, but I cannot agree that the collision was therefore the proximate cause of loss of the stolen articles. Proximate cause imports unbroken continuity between cause and effect, which, both in law and in logic, is broken by the active intervention of an independent criminal actor. This established rule of law is defeated if proximate cause is confounded with mere opportunity for crime. A maladjusted switch may be the proximate cause of the death of a passenger who was killed by the derailment of the train or by the fire or collision that ensued, but it is not the proximate cause of the death of a passenger who was murdered by a bandit who boarded the train because of the opportunity afforded by its derailment. This clear distinction is not met by saying that criminal intervention should be foreseen, for this implies that crime is to be presumed, and the law is directly otherwise.

There should be a new trial upon the question of damages, to which end the judgment should be reversed.

ANNOTATION.

Liability for property lost or stolen at the time of a personal injury.

The question under consideration presents one phase of the larger question of proximate cause, since the negligence of the defendant must be the proximate cause of the injury complained of, in order to entitle the plaintiff to recover. In establishing this issue, each case depends largely upon the individual facts, and this is particularly true in cases similar to the reported case (BRAUER v. NEW YORK C. & H. R. R. Co. ante, 734) where the act of a third person intervened, subsequently to the negligent act of the defendant. Under these circumstances the liability of the defendant depends upon the effect of his negligent act. If this effect is a continuing one, and is effectual in producing the loss complained of, then the injury is the proximate cause of the loss, even though the negligent or wrongful act of a third person intervenes, in point of time, subsequently to the injury.

BRAUER v. NEW YORK C. & H. R. R.

illustrates the application of this rule in a case where personal property under the control of a person injured at a railroad crossing was stolen while he was in an unconscious state, due to the injury; and it was held that the injury was properly found by the jury to have been the proximate cause of the loss of the personal property. No other case has been found, involving this specific point.

In Whitcomb v. New York, N. H. & H. R. Co. (1913) 215 Mass. 440, 102 N. E. 663, where a passenger was injured in a collision, and at the same time lost a hand bag containing a sum of money which he had retained in his possession, it was held that the recovery for the injury could not include the loss of the hand bag, in the absence of any showing that it was carried for necessary traveling expenses. This case, however, was presented on the theory of the duty of a carrier to a passenger, rather than from the point of view under consideration. And a similar case is that of Hillis v. Chicago, R. I. & P. R. Co. (1887) 72 Iowa, 228, 33 N. W. 643, where a passenger lost a sum of money from the pocket of his overcoat which he left in a sleeping car at the time the car was derailed by an accident. The court said that, the passenger having retained control of the money, recovery could not be had, in the absence of a showing of gross negligence on the part of the carrier.

It is, of course, not intended to take up the general question of the duty of a carrier with regard to the effects of a passenger, which the latter retains in his custody. The reason for referring to the two preceding cases is that they also involved the element of a loss due to an accident during transportation, and might have involved the question of liability, on the theory that the accident was the proximate cause of the loss; although, as already suggested, this specific question was apparently not raised.

A. G. S.

JAMES T. CLAY et al., Appts.,
v.
ROBERT L. THOMAS et al.

Kentucky Court of Appeals—December 4, 1917.

(178 Ky. 199, 198 S. W. 762.)

Trust — purchase by trustee — validity.

1. A trustee with power to sell cannot purchase the trust property from himself at private sale.

[See note on this question beginning on page 747.]

Equity — power to approve trustee's sale.

2. A court of equity has no power to approve a sale of trust property by a trustee to himself at private sale, in an ex parte proceeding, instituted to secure a confirmation of the sale.

Trust — infant's consent to trustee's sale.

3. Infant cestuis que trust cannot give effectual consent to a private sale of trust property by the trustee to himself.

Same — consent of adult — validity.

4. To uphold a consent given by an adult cestui que trust to a sale by the trustee to himself, the good faith of the transaction, the adequacy of the consideration, a full knowledge of the facts, and independent thought on the part of the cestui que trust must be shown.

Same — consent to sale.

5. Power conferred by will upon trustees to change investments does not include power to consent to a sale by another trustee to himself, of property the proceeds of which are to be placed in possession of the former for management.

Same — accounting — right of cestui que trust.

6. If a trustee, after selling the trust property to himself at a private sale, resells the property, the cestui que trust may compel him to account for the money realized in the transaction.

APPEAL by petitioners and certain of the respondents from a judgment of the Circuit Court for Clark County dismissing a petition filed to require the defendant trustees to account for profits realized out of the purchase and sale of trust property. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Robert B. Franklin, Robert C. Talbott, C. C. Williams, and Dennis Durden,** for appellants:

The ex parte petition and order were wholly inadequate to shield the trustees in withholding this enormous profit, realized from the purchase by the trustees of the trust estate. The proceeding should have been merely an application of the trustees for leave to bid on the trust property (which means competition).

Perry, Trusts, § 195; Lewin, Trusts, pp. 395, 397, 398; Hill, Trustees, § 536; 4 Lawson, Rights, Rem. & Pr. § 2030; 28 Am. & Eng. Enc. Law, 1025; Bispham, Eq. § 94; Hayes v. Hall, 188 Mass. 510, 74 N. E. 935; Scholle v. Scholle, 101 N. Y. 167, 4 N. E. 334; Davoue v. Fanning, 2 Johns. Ch. 252; Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; Campbell v. Walker, 5 Ves. Jr. 678, 31 Eng. Reprint, 801, 5 Revised Rep. 135; Farmer v. Dean, 32 Beav. 327, 55 Eng. Reprint, 128; Tennant v. Trenchard, L. R. 4 Ch. 537, 38 L. J. Ch. N. S. 169; Ex parte James, 8 Ves. Jr. 337, 32 Eng. Reprint, 385, 7 Revised Rep. 56; Whichcote v. Lawrence, 3 Ves. Jr. 740, 30 Eng. Reprint, 1248; Frazier v. Jeakins, 64 Kan. 615, 57 L.R.A. 575, 68 Pac. 24; Scott v. Gamble, 9 N. J. Eq. 218; DeCaters v. De Chaumont, 3 Paige, 178.

Even if a private sale of the trust estate of infant beneficiaries were allowable, there should have been a summons against the infants, and a guardian ad litem appointed, and depositions taken; or reference to the master and inquiry into the matter, upon hearing proof, where the infants were represented and protected by a guardian ad litem.

Smith v. White, 107 Va. 616, 59 S. E. 480.

The order in this ex parte proceeding was founded upon the consent of the guardian and next friend to the sale, and neither guardian nor next friend had any right to consent for the infants.

Andrews v. Hobson, 23 Ala. 219.

The court has no power to approve of a private sale of the lands of infants.

Kinslow v. Grove, 98 Ky. 266, 32 S. W. 933.

The price paid by the trustees was inadequate, hence they must account.

Lewin, Tr. & Trustees, p. 562; Price v. Thompson, 84 Ky. 227, 1 S. W. 408; Pugh v. Bell, 1 J. J. Marsh. 405; 2 Pom. Eq. Jur. § 958; 39 Cyc. 371, 372; 28 Am. & Eng. Enc. Law, 1022.

Equity will not permit trustees, in purchasing a trust estate, to profit thereby.

2 Pom. Eq. Jur. § 958, p. 1754; Bispham, Eq. 224, 323, 371–374; 28 Am. & Eng. Enc. Law, 1020–1023; Markwell v. Gray, 9 Ky. L. Rep. 679; Avery v. Avery, 90 Ky. 616, 14 S. W. 593; Grider v. Payne, 9 Dana, 188; Baker v. Lane, — Ky. —, 118 S. W. 963; Donaldson v. Barkley, 5 Ky. Ops. 779; Strow v. Curd, 6 Ky. Ops. 215; Faucett v. Faucett, 1 Bush, 511, 89 Am. Dec. 639; Covington & L. R. Co. v. Bowler, 9 Bush, 468; Richardson v. Spencer, 18 B. Mon. 465.

Messrs. **B. R. Jouett, Pendleton & Bush,** and **E. S. Jouett,** for appellees:

The judgment of a court of equity, permitting two of the three trustees who had the power to sell and convey the real estate, to purchase the same, is binding upon the parties, who all joined as petitioners in the application made to the court for this purpose.

12 Am. & Eng. Enc. Law, 392; Goff v. Renick, 156 Ky. 588, 161 S. W. 983; 16 Cyc. 88, 196; 39 Cyc. 315, 317, 588; Holbrook v. Fyffe, 164 Ky. 435, 175 S. W. 977; Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; Cullins v. Williams, 156 Ky. 57, 160 S. W. 733; Scholle v. Scholle, 101 N. Y. 167, 4 N. E. 334; Davoue v. Fanning, 2 Johns. Ch. 252; Farmer v. Dean, 32 Beav. 327, 55 Eng. Reprint, 128; Tennant v.

Trenchard, L. R. 4 Ch. 537, 38 L. J. Ch. N. S. 169; Felton v. LeBreton, 92 Cal. 457, 28 Pac. 490; Corbin v. Baker, 167 N. Y. 128, 60 N. E. 332; Faucett v. Faucett, 1 Bush, 513, 89 Am. Dec. 639; Harris v. Hopkins, 166 Ky. 147, 179 S. W. 14.

Irregularities appearing in the original action are waived, by not appealing.

Richards v. Richards, 10 Bush, 617; Ogden v. Stevens, 98 Ky. 564, 33 S. W. 932; Oliver v. Park, 101 Ky. 1, 39 S. W. 423.

The demurrer to the petition should have been sustained, because the petition does not show affirmatively that the action was begun within twelve months after the infants attained their majority.

Back v. Combs, 96 Ky. 522, 29 S. W. 352.

Thomas, J., delivered the opinion of the court:

The question involved on this appeal is the effect of a sale of trust property by a trustee under a will, with the power of sale, to himself individually. It arises in this way: James M. Thomas died testate, a resident of Clark county, Kentucky, on June 15, 1905, and on the 24th day of the same month his will was probated before the county court of that county. The testator left surviving him two daughters, Mrs. Thomas E. Moore and Mrs. Mary T. Ireland, and two sons, William R. Thomas and Robert L. Thomas, and Richard P. Thomas, an infant, the only surviving child of a deceased son of the testator. Many devises and directions are made in the will, which have nothing to do with the questions involved in this case. By the will he appointed his two sons, William R. and Robert L. Thomas, and his son-in-law Thomas E. Moore, executors thereof, and made the three trustees for his two daughters and his grandson. He owned, at the time of his death, a sawmill and mill site and appurtenances, located at Livingston, Rockcastle county, Kentucky, and also a tract of well-timbered land in Jackson county, containing more than 20,000 acres. The twelfth clause of the will is: "All of my property in Jackson and Rockcastle counties, Kentucky, I give to my sons, William R., Thomas and Robert L. Thomas, and my daughters, Mrs. Mary T. Ireland and Mrs. Tom Thomas Moore, equally, that is, a one fourth to each, the same to be held, managed and disposed of by the three trustees named in ¶ 11 of this will, for the use and benefit of my said four children, and subject to all the same conditions, limitations and trusts as appear in said 11th paragraph with reference to the interests therein given to said four children, with this exception, that same shall not be sold until after the expiration of at least three years after my death, the said trustees to have the right, in their discretion, to postpone said sale until as much as ten years after my death."

As will be seen, the only devisee of the property mentioned in the clause of the will are the two sons, who were given a one fourth each, and the two daughters, who were given a life interest in a one fourth each, with remainder to their children, and that the trustees are vested with the power to sell the property therein devised; but this power may not be exercised until after three years succeeding the testator's death, but it must not be postponed longer than ten years after his death. The 13th clause of the will authorizes any two of the trustees to execute the trust, should there be a disagreement between the three appointed. By subsection 3 of § 11 of the will, the testator nominated the Security Trust & Safety Vault Company of Lexington, Kentucky, trustee for his two daughters, with authority to take charge of the property devised to them, including the proceeds of the sales of the property mentioned in the 12th clause, after the trustees under the will should have sold it as therein directed. The trust company was authorized to pay to the two daughters the income from their respective portions during their respective lives, and at their deaths to turn over the

property to their children, with certain limitations not necessary to the decision of this case.

At the time of the testator's death, Mrs. Ireland was the mother of two infant children, appellants James T. and Laura Clay, they being children by a former husband, and Mrs. Moore was the mother of the cross appellants, William Estill Moore, Rogers Moore, and Marion Moore, who were infants. Directly after the death of the testator, Mrs. Moore died. After her death, and something near three years and five months after the death of the testator, negotiations began between Mrs. Ireland and Thomas E. Moore, one of the executors and trustees under the will, as guardian for his infant children, on the one part, and the other two trustees under the will, on the other part, looking to a sale of the two undivided one-fourth interests of the Jackson and Rockcastle county properties, devised to the two daughters and their children under the terms of the 12th clause of the will, and this finally terminated in an agreement whereby the two Thomas boys, William R. and Robert L., as trustees, agreed to pay for the interest of their two sisters $47,500 each, which was at the rate of $190,000 for the entire property. This was followed by a deed, executed by the trustees as such, to William R. and Robert L. Thomas, indvidually, conveying the one-fourth interest each in that property, devised to the two daughters and their children. This deed was made in January, 1909, although negotiations had been entered into and an agreement reached some months before that time. Within less than three years after that purchase by the two sons of the testator, they sold the property for the price of $20.66⅔ per acre for the Jackson county land, and also sold the Rockcastle county property, consisting of the mill, mill site, etc., all for a total sum of about $490,000, which, as will be seen, was an increase of $300,000 above what they had paid for it.

This suit was filed by Mrs. Ireland and her two children against her brother R. L. Thomas, and the representatives of W. R. Thomas, who had died, and their cotrustee, Thomas E. Moore, and against the latter as guardian for his children, and the children, and the trust company as trustee, seeking to charge the two brothers with the plaintiffs' proportion of the profits which defendants realized out of their purchase and sale of the trust property, upon the grounds that, as trustees, they had no right to sell to themselves individually the trust property, and, further, that, so far as Mrs. Ireland was concerned (she being the only adult interested in any of the property devised to the two sisters and their children), she was induced to agree to the terms of sale through fraudulent misrepresentations made to her by her brothers concerning the value of the property, and about which she was totally ignorant. The answer denied the allegations of the petition, alleging fraud and misrepresentation, and charged that the purchase of the two interests of their sisters was made in good faith and for an adequate consideration, and, as against Mrs. Ireland, pleaded facts alleged to constitute an estoppel as to her. In another paragraph defendants attempted to rely upon a judgment obtained in the Clark circuit court in an ex parte proceeding filed for that purpose wherein the court, by its judgment, attempted to approve of the sale by the trustees to themselves individually, which had been previously agreed to. A reply, consisting of a denial and an attack of the alleged judgment of approval of the sale, made the issues, and, after extensive preparation and submission, the court dismissed the petition; and to reverse that judgment Mrs. Ireland and her children prosecute this appeal, and an appeal is also prosecuted on behalf of the Moore children.

It will thus be seen that the precise question for determination is not the right of a trustee to pur-

chase the trust property from the cestui que trust, but it is the right of the trustee to purchase the trust property from himself as such trustee. Generally speaking, unless modified by some peculiar facts, a trustee cannot purchase from himself the trust property free from the right of the cestui que trust to either treat his purchase as a continuation of the trust, or to adopt the subsequent disposition of the property by the trustee and to ask for an accounting of the profits realized by the trustee. This general rule is of ancient origin, and is recognized by all courts with perhaps as much unanimity as any other principle of law. 2 Sugden, Vendors, 8th Am. ed. pp. 410–423; Story, Eq. Jur. 13th ed. §§ 321 and 322; 39 Cyc. 366; Lambert v. Painton, 1 Ch. Cas. 199, 22 Eng. Reprint, 760; Perry, Trusts, 6th ed. § 195; Lewin, Trusts, pp. 395–398; Bispham, Eq. § 94; Scholle v. Scholle, 101 N. Y. 167, 4 N. E. 334; Davoue v. Fanning, 2 Johns. Ch. 252; Campbell v. Walker, 5 Ves. Jr. 678, 31 Eng. Reprint, 801, 5 Revised Rep. 135; Ex parte James, 8 Ves. Jr. 337, 32 Eng. Reprint, 385, 7 Revised Rep. 56; Whichcote v. Lawrence, 3 Ves. Jr. 740, 30 Eng. Reprint, 1248; Frazier v. Jeakins, 64 Kan. 615, 57 L.R.A. 575, 68 Pac. 24; Scott v. Gamble, 9 N. J. Eq. 218; De Caters v. De Chaumont, 3 Paige, 178; Andrews v. Hobson, 23 Ala. 219, 28 Am. & Eng. Enc. Law, 1020–1023; Hindman v. O'Connor, 54 Ark. 627, 13 L.R.A. 490, 16 S. W. 1052, and innumerable other textbooks and adjudicated cases which might be cited. Illustrative of this universal rule, it is stated in 2 Sugden, on Vendors, page 409: "If persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. . . . Where the trustee buying is the trustee for sale, the purchase is absolutely void; where he is a mere trustee, he must show that the transaction was in all respects a fair one."

Trust—purchase by trustee—validity.

In the volume of Cyc. referred to, the rule as gathered from all the authorities, many of which are cited in the note, is stated: "One of the most familiar doctrines of the law of trusts is that a trustee cannot purchase from himself, or at his own sale. The law does not stop to inquire into the fairness of the sale or the adequacy of price, but stamps its disapproval upon a transaction which creates a conflict between the self-interest and integrity of the trustee. The rule embraces not only direct purchases, but also indirect purchases through third persons, and applies regardless of whether the sale is private or under decree, or whether the cestui que trust is an infant or an adult, and even though the purchaser is only one of several cotrustees, or is acting as agent for a third person."

In the case of Hindman v. O'Connor, supra, in referring to the rule, it is said, inter alia: "As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle, no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold."

The court, continuing, discusses the rights of the cestui que trust, including the remedies open to him in such cases, and finally, quoting from Imboden v. Hunter, 23 Ark. 622, 79 Am. Dec. 116, says: "It is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit, at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest

price; and as purchaser, it is his interest to get it for the lowest; and these relations are so essentially repugnant, so liable to excite a conflict between self-interest and integrity, that the law positively forbids that they shall be united in the same person. And it matters not, in the application of the rule, that the sale was bona fide and for a fair price. The inquiry is not whether there was fraud in fact. In such a case, the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the cestui que trust, if he applies in a reasonable time, will set aside the sale as of course."

In some cases, as will be found from the authorities, supra, a trustee, especially if he be one not vested with the power of sale, may be empowered by a court of equity to become a bidder at the sale of the trust property. But we think, that, practically without exception, the exercise of such authority by the court is always confined to cases where the trust property is sold at public sale, where the bidding is competitive, and where the court rightfully has jurisdiction of the persons of both the trustees and cestui que trust, as well as of the rem, in a proceeding justifiably brought for the purpose of securing the aid or procuring the advice of the court in carrying out the trust. But where the property is not already in custodia legis, in the character of proceeding just described, and where the trustee has full and complete authority from the creator of the trust to sell, we have been unable to find any authority for a court of equity, in proceedings brought for that purpose only, to remove by its judgment the disabilities of the trustee, so as to enable him to legally purchase the trust property from himself as trustee, nor have we been able to find any authority in the character of case just described, whereby a court of equity, in a proceeding brought for that purpose, might approve of a private sale of the property by the trustee to himself, so as to make it effectual and binding against the cestui que trust. The principles relating to the disabilities of trustees to purchase the trust property, hereinbefore discussed, have been adopted by this court, as will be seen from the following cases: Price v. Thompson, 84 Ky. 219, 1 S. W. 408; Markwell v. Gray, 9 Ky. L. Rep. 679; Wagner v. Swift's Iron & Steel Works, 16 Ky. L. Rep. 273, 26 S. W. 720; Avery v. Avery, 90 Ky. 613, 14 S. W. 593; Faucett v. Faucett, 1 Bush, 511, 89 Am. Dec. 639; Charles v. Daniels, 140 Ky. 379, 131 S. W. 42; Conrad v. Conrad, 152 Ky. 422, 153 S. W. 740; Baker v. Lane, — Ky. —, 118 S. W. 963; Grider v. Payne, 9 Dana, 188; and many other cases which could be cited.

Indeed, counsel for the trustees admit the existence of the general rule, as was evidenced by the procuring of the ex parte judgment; but they insist that under some modifications found in the cases, supra, including that of Faucett v. Faucett, the otherwise invalidity of the sale here attacked was cured by the ex parte judgment, and, further, that their clients made the purchase under the exception to the rule stated in the case of Price v. Thompson, supra, whereby the trustees and the cestui que trust "consciously and intentionally deal with each other, each knowingly taking a part in the transaction, from which results a contract or conveyance;" also, that the trustees paid a full and adequate consideration when they purchased the interests of the cestui que trust in the trust property.

As to the first contention, we have already incidentally referred to it. The court, when it entered the judgment approving the private sale, did not do so as an incident to its having the parties and the property before it for other recognized legal purposes. The cases wherein a trustee was even permitted to bid at a decretal sale of the trust property are cases where it was neces-

sary, in a proper proceeding, for the court to order the sale; and the granting of leave for the trustee to bid was but an incident to that proceeding. Here, the trustees had the plain and undisputed right to sell the property without going into court. There is no ambiguity in the terms of the will, necessitating the interposition of a court, nor does there exist any obstacle or difficulty which the court might be called upon to remove or solve. The ex parte proceeding had for its sole purpose the obtaining of judicial sanction of a violation of the wholesome and healthy rule which we have discussed, and to thereby deprive the cestui que trust of the benefits of its strict observance, to render competent a purchaser who was otherwise incompetent, and to create ability and capacity where there were none. The relief sought was not incidental to any matters connected with the proceeding, and we have searched the books in vain to find any authority for it. Even if there existed such authority, we would not be disposed to hold that it could be exercised through the character of proceeding employed. The petition to obtain that relief in this case was signed by the trustees, the Moore children by their guardian, the children of Mrs. Ireland by their next friend and by Mrs. Ireland, and is styled "Petition Ex Parte." There is filed with it a copy of the will and some affidavits supporting the statements made in the petition. Upon the filing of the petition and the affidavits the judgment was rendered. No contest of any kind was inaugurated by the proceeding, and no testimony in the regular way was heard; and, to our minds, it was no more efficacious to obtain the relief sought than if the judge had been met upon the streets and his consent obtained, which he afterwards filed as the judgment of his court. Long-standing and beneficial rules of equity, having for their purpose the prevention of fraud and the promotion of honesty, may not thus be set aside, and we are not disposed to give that judgment any effect whatever in this case. See Ex parte Covington, 176 Ky. 140, 195 S. W. 439.

Equity—power to approve trustee's sale.

The second defense referred to as being supported in the opinion in the case of Price v. Thompson, supra, is, under the facts of this case, equally untenable. In the opinion in that case, after stating the general rule hereinbefore discussed, it is said: "While the same general principle governs all persons occupying a fiducial character, yet there are two classes of cases controlled by 'different special rules.' The first class includes all those instances in which the fiduciary, and those with whom he stands in that relation, consciously and intentionally deal with each other, each knowingly taking a part in the transaction, from which results a contract or conveyance. Here, the contract is not necessarily voidable. It may be valid; but a presumption of its invalidity arises, and that so strong that nothing short of clear evidence of good faith, of full knowledge, of adequate consideration, and of independent thought, consent, and action, can overcome it. The second class is where the fiduciary, acting with reference to his trust, deals with himself in his private or individual character, as where an agent to sell sells the property to himself, or a sheriff buys the property at his own sale. Such transactions are always voidable at the suit of the party concerned. They are not merely presumptively invalid, as in the first class, where good faith, full knowledge, adequate consideration, independent thought, consent, and action may be proved, because the sale or purchase, if made privately, is not known, or if made publicly, by coercive authority, cannot be controlled; therefore the good faith, full knowledge, etc., do not control. For these reasons, the presumption of invalidity in the first class is rebuttable, and the presumption of invalidity in the sec-

ond class is conclusive. 3 Pom. Eq. Jur. §§ 956, 957."

It will be seen that, where the parties "consciously and intentionally deal with each other," the contract is still presumed to be invalid, and that presumption is "so strong that nothing short of clear evidence of good faith, of full knowledge, or adequate consideration, and of independent thought, consent, and action can overcome it."

In this case the only cestui que trust who was sui juris, even pretending to give consent to the sale, was Mrs. Ireland. She had only a life interest in one fourth of the property, the remainder interest being held by her infant children. As for the interest of the Moore children, not even a life tenant consented to the sale. It would be folly, in view of the authorities supra, to contend that the infant cestuis que trust could consent so as to bind them, and neither their guardian nor a next friend could any more consent to a private sale than they could to a public sale, without the formalities of obtaining a decree. Under these circumstances, this defense would not, in any event, be applicable to anyone, except as to Mrs. Ireland. In order for the sale to be sustained as to her, the evidence must show the good faith of the transaction, the adequacy of the consideration, a full knowledge of the facts, and independent thought on her part, and we think it fails in each of those particulars. It is true she made an affidavit that the price agreed to be paid by the trustees was adequate, but it clearly appears that she had no knowledge of the condition of the property or its value, and was equally ignorant of all facts necessary to a complete understanding of existing conditions. Her affidavit was based solely on information obtained from the trustees.

Trust—Infant's consent to trustee's sale.

Same—consent of adult—validity.

Referring to the adequacy of the price, the evidence heard in this case is conflicting; a greater number of witnesses testifying that, at the time of the purchase by the trustees, the price agreed to be paid was inadequate than those who testified that the price was adequate. In addition to this, we are confronted with the outstanding fact that, within less than three years after that purchase, the trustees sold the property for more than two and one-half times the sum they paid for it, and this, too, without any change in the physical conditions or surroundings of the property. No railroad had been built into that community, whereby the facilities for marketing the timber were increased, nor was there even a rumor of such an enterprise, at the time the trustees realized their enormous profit. As stated in brief of counsel for the trustees: "Shortly after this sale [the one by the trustees to themselves] Mr. W. R. Thomas died, and R. L. Thomas and the heirs of W. R. Thomas, as expressed by Mr. Moore, by accident as it were, found three wealthy gentlemen in West Virginia and Ohio, who already had options on a large acreage of lands in those counties and wanted to buy additional land," which led to negotiations finally resulting in the sale, the profits from which are sought to be reached by this suit.

The law is, as will be seen from the authorities supra, that the cestui que trust, especially where the duties of the trustee are active, is not only entitled to the exercise of perfect good faith on the part of the trustee, but he is also entitled to the business acumen and active business ability of the trustee, to discharge his duties in the same manner and to the same extent as if he were acting for himself. The very relationship of trustee and cestui que trust presupposes superior business capacity, better judgment, and broader experience in commercial transactions possessed by the trustee, and there would be no occasion for the relationship, were these facts not true. Scarcely a third of the time within

which the trustees here could sell the property under the will had expired. There was no necessity for an urgent sale. The testator contemplated a sale of the property in its entirety, and not in undivided parts. The trustees owed to their cestuis que trust the duty to bestir themselves, and to put forth real and good faith endeavors to find the most advantageous purchaser; and they cannot be allowed to postpone such action until after they acquired the entire title to the property, when they would be the sole beneficiaries of the fruits of their efforts to find an advantageous purchaser. So, under these circumstances, we see nothing in the utterances of this court, in the opinion in the case of Price v. Thompson, standing in the way of Mrs. Ireland to maintain this suit, and of course there is nothing therein militating against the right of the infants to do so.

It is also contended that the sale to the trustees was agreed to by the trust company, under the authority given to it by subsection 3 of ¶ 11 of the will, wherein it is said: "Said trustee and its successors in said trust shall have the power to change any investment at pleasure, if approved by the daughter interested."

The trouble with this contention is that the authority there attempted to be conferred relates to the property after it got into the hands of the trust company, and has no relation whatever to the *sale* of the property by the trustees, located in Jackson and Rockcastle counties. But even under the clause quoted, there is no power conferred upon the trust company to purchase the property itself, or to confer any such power upon the trustees under the will. The provision of the will referred to has to do solely with the handling of the proceeds to be derived by the trustees from the sale of the property during the lifetime of the two daughters.

Same—consent to sale.

Many other questions are discussed in briefs of counsel, but we do not regard them as of pertinent value, and will not lengthen this opinion by engaging in their discussion. Stripped of irrelevant matter, this is simply a case where trustees purchased from themselves the trust property, and, as we view the record, for an inadequate consideration. One of the remedies of the cestui que trust in such a case, recognized everywhere, is stated in 2 Sugden on Vendors, supra, p. 421, thus: "If the trustee has actually sold the estate, the cestui que trust may compel the trustee to pay him what he may have received above the original purchase money. If the cestui que trust adopt the sale by the trustee, he must submit to it altogether."

Here, the trustees have sold the property, and the cestuis que trust are seeking to make them account for the profits. They clearly have the right to do so. If it should be thought that the rule which we have applied is harsh, and in some cases apparently encroaches upon strict justice, it may be said in answer that there are many instances in the law where such seeming results occur. For instance, it would be a great disaster to a creditor, holding a perfectly solvent note for a large sum, and to which there was no other defense, to be deprived of collecting it because his right to sue was barred by limitations; but no sympathetic condolences on the part of the court could give relief. We must administer the law as we find it. Indeed, there would be a more defendable incentive to give relief, if possible, to the one whose cause of action was barred, than to a trustee in a case like the one we have here. The condition of the former was produced by mere lapse of time, arbitrarily fixed by the legislature, and nonaction by the creditor during that time, which may have, in part, been caused by innocent oversight. The trustee, however, has no such palliating circumstances in his favor. He is forbidden to profit by trad-

Same—accounting—right of cestui que trust.

ing for or trafficking with the trust property, thus arraying self-interest against that standard of good faith which the law exacts and demands of the trustee, for the protection of the confiding cestui que trust. The doctrine is founded upon the principle that the strong must be honest and the weak must be protected.

Before the filing of this suit W. R. Thomas died, and it was filed against both his personal and real representatives. It appears in the record that, as a guaranty of the title to the 20,000 acres of land in Jackson county, payment was withheld on the purchase price of 2,000 acres. Under the contract of sale made by the trustees, when the title to all the land shall have been perfected, that part of the retained purchase price will be due; but, if any part of the 2,000 acres should finally be lost to the purchaser, then nothing will be due from him for that part so lost. The court should therefore ascertain the amount of money actually collected by the trustees from the sale which they made, and the amount, if any, which is yet due, and deduct from the amount of these sums the expenses, if any, which the trustees incurred in effecting the sale, or in perfecting titles, also the amount of taxes which they may have paid after their purchase of the trust property, and allow such sums as a credit upon the purchase price, with interest, and adjudge in favor of Mrs. Ireland one fourth thereof, and to the Moore children one fourth, less $47,500, which they have been paid, and to make a complete settlement between the surviving trustee R. L. Thomas, and the representatives of the deceased, W. R. Thomas, and to take such steps as may be necessary to bring about that result.

Wherefore the judgment is reversed, with directions to proceed in accordance with this opinion.

Petition for rehearing denied.

ANNOTATION.

Power of testamentary trustee to purchase at his own sale.

I. In general, 747.
II. Sale by court, 749.
III. Indirect purchase, 750.
VI. Purchase from cotrustees, 751.
V. Rights of cestuis que trustent as to avoiding sale, 751.

I. In general.

It is a general rule, well sustained by authority, that one who holds property in a fiduciary capacity cannot purchase that property at his own sale. This rule, which applies to trustees generally, such as executors and administrators, agents, corporate officers, etc., has been applied to testamentary trustees. French v. Woodruff (1898) 25 **Colo.** 339, 54 Pac. 1015; Linsley v. Strang (1910) 149 **Iowa**, 690, 126 N. W. 941, 128 N. W. 932; Boynton v. Brastow (1865) 53 **Me.** 362; Morse v. Hill (1883) 136 **Mass.** 60; Smith v. Isaac (1848) 12 **Mo.** 106; Tiffany v. Clark (1874) 58 **N. Y.** 632; Re Hallman (1877) 13 Phila. (**Pa.**) 562; Allen v. Gillette (1888) 127 **U. S.** 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331; Hammond v. Hopkins (1891) 143 **U. S.** 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Franks v. Bollans (1868) 37 L. J. Ch. N. S. (**Eng.**) 148.

Such a sale is not, according to the weight of authority, void, but merely voidable. French v. Woodruff (1898) 27 **Colo.** 349, 54 Pac. 1015; Hammond v. Hopkins (1892) 143 **U. S.** 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Franks v. Bollans (**Eng.**) supra. As expressed by the court in Campbell v. Walker (1900) 5 Ves. Jr. 678, 31 **Eng.** Reprint, 801, 5 Revised Rep. 135, a trustee may purchase the trust property, but he is liable to have the purchase set aside if, in any reasonable time, the cestui que trust chooses to say he is not satisfied with it. The court further states that the only way the trustee can protect himself in his purchase,

against this equity, is to obtain leave of court to purchase.

In West v. Sloan (1856) 56 N. C. (3 Jones, Eq.) 102, where the trustee of a slave pretended to sell the slave at public auction, when the person who became purchaser immediately thereafter, without giving any note or paying any money, and without taking any title or possession, relinquished his purchase to the trustee at the price he had bid, the court refused to treat the transaction as a sale, but held that the possession by the trustee thereafter was his possession as trustee.

In Deegan v. Capner (1888) 44 N. J. Eq. 339, 15 Atl. 819, a purchase made by an executor, who was acting as trustee at a mortgage foreclosure sale, held under a proceeding begun by the trustee to foreclose a mortgage belonging to the trust estate, was held to be a purchase for the trust estate, where the trustee did not pay the amount of his bid out of his own funds, but used the trust funds in such purchase.

It has been held that the purchase by a trustee, holding the legal title under a bequest subject to a secret trust in favor of colleges, which cannot be enforced because the amount exceeds the limit which the statute permits to be bequeathed away from heirs and next of kin, of the rights of the latter, will inure to the benefit of the cestuis que trustent. Amherst College v. Ritch (1897) 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876.

A contract for the purchase of the trust estate will not be enforced against the next of kin, at the suit of an heir at law of the trustee. Ingle v. Richards (1890) 6 Jur. N. S. (Eng.) 117, 8 Week. Rep. 697.

The reason why a trustee is not allowed to become a buyer of the trust property at his own sale is not that bad faith necessarily characterizes the purchase, but that to permit such dealings opens the door to fraud; and the law deems that the only safe way is to put the trustee beyond temptation to serve his own interests, by declaring such sales voidable, at the option of the beneficiary. French v. Woodruff (1898) 25 Colo. 339, 54 Pac. 1015. The beneficiary may, therefore, at his election, have such a sale set aside, or hold the trustee so purchasing still a trustee for his benefit; and may require an accounting of all advantages that have accrued to the trustee from the sale. Ibid.

A surviving partner, who was one of the executors and trustees under his deceased partner's will, was held entitled to take the partnership assets at the appraised value, where the other executor and trustee consented thereto, and the court so ordered. Remmelsberg v. Mitchell (1875) 29 Ohio St. 22. The good will not having been included, he was thereafter required to account therefor.

In Hickley v. Hickley (1876) L. R. 2 Ch. Div. (Eng.) 190, 45 L. J. Ch. N. S. 401, 34 L. T. N. S. 441, 24 Week. Rep. 604, a father, upon the marriage of his daughter, conveyed to trustees in a marriage settlement certain property. Thereafter, the father died, leaving a will by which he devised certain real estate to the use of two trustees, one of whom was the husband of the daughter, upon trust to sell, and stand possessed of the proceeds for the benefit of the testator's three daughters and their children. Among other things, the testator directed his trustees to pay one third of the clear money to arise from the sale of his trust estate, to the trustees of the marriage settlement. A part of the real estate thus devised by the testator in trust consisting of residence property that was desired by the daughter and her husband, the trustee, the trustees of the marriage settlement were requested to purchase it. The trustees acceded to the application, and left the conduct of it in the hands of the husband; the husband requested an agent to act as the agent of the trustees under the marriage settlement to make the purchase; he also employed an auctioneer to fix a reserve price upon the land; the sale was made to the agent of the trustees of the marriage settlement, but they not having sufficient trust funds to complete the sale, the husband furnished funds out of his own

money; eight years afterwards some of the beneficiaries filed a bill to set the sale aside, alleging that, to the extent of the moneys supplied by the husband, he was a purchaser from himself of the trust property. In refusing to set the sale aside, the court held that the husband had properly discharged his duties as trustee and, there being no unfairness shown in the sale, the sale was allowed to stand.

A purchase by the trustee of property originally belonging to the trust estate, after a bona fide sale thereof, does not fall within the prohibition of the rule. Rammelsberg v. Mitchell (1875) 29 **Ohio** St. 22. This raises the general question of the power of the trustee to purchase trust property, which is, of course, beyond the scope of this discussion.

II. Sale by court.

It is the theory of some cases that when a sale of trust property is made under the direction of a court of equity, by officers appointed by the court, it is not a sale by the trustee, and there is no rule or principle preventing him from becoming a purchaser. Thus, in Plant v. Plant (1916) 171 **Cal.** 765, 154 Pac. 1058, a purchase of trust property by the trustee was sustained, where the property was purchased in an action begun by some of the heirs of the estate, in equity, asking for distribution, and making the trustee party defendant; and where the decree of sale provided that the master in chancery should sell the property, and that any of the parties to the proceeding might purchase it. In English v. Monypeny (1892) 6 **Ohio** C. C. 554, 3 Ohio C. D. 582, a purchase by a trustee, of an estate held by him individually, in common with himself as trustee, was sustained, where the sale took place in a proceeding begun by him for partition. The court states that, whatever may have been his powers as trustee under the will, it is entirely clear that he exercised no such power in instituting and prosecuting the suit which ended in the sale; that, in so doing, he exercised only the rights which the statute conferred upon him as a tenant in common in land; and that the rule contrived to prevent the abuse of their powers by trustees should not be applied in such a case, where no such powers are exercised. In Reid v. Clendenning (1899) 193 **Pa.** 406, 44 Atl. 500, a case in which an executor, who was also trustee, purchased at a partition sale, the court, in sustaining the validity of the purchase, states that the trustee did not buy at his own sale; that, "as executor, he had the right to make the sale in partition. If he had done so, he might have obtained permission from the court to bid. He did not do this, but instead, upon his motion, the court appointed . . . as trustee to make the sale. . . . When this sale was reported to the court and confirmed by it, the purchaser from . . . [the trustee] would have the right to assume that the power to buy has been given or ratified by the court."

Other courts, although treating a sale by a trustee under the supervision of a court, as a sale by the trustee, sustain the right of the trustee to purchase under certain conditions. The court, in Scholle v. Scholle (1886) 101 **N. Y.** 167, 4 N. E. 334, in sustaining a sale to the trustees under authority from the court, states that "where the trustee has an interest to protect by bidding at the sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested, he is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title." Accordingly, the trustees were compelled by the court to complete the sale.

The formal leave which is usually granted to parties in a foreclosure or partition sale is not sufficient to authorize the trustee to buy. Scholle v. Scholle (N. Y.) supra; Corbin v. Baker (1901) 167 N. Y. 128, 60 N. E. 332.

The theory of these decisions is that the court has the power to authorize the trustee to purchase, and if the court appears to have exercised its power, either by granting leave or

in confirmation of the purchase by the trustee, the purchase is valid. Thus, in Corbin v. Baker (N. Y.) supra, where a purchase by the trustee, in an action begun by him to partition the trust estate, was sustained, the court states that, although no authority to buy was sought prior to the sale, the same power which could authorize such a purchase could confirm; and the question in the given case is whether it was, in fact, exercised. The court concludes that, although the trustee "made no application to be authorized to buy at the partition sale, the proceedings subsequent to the sale were, necessarily, such as to present the question of the validity of his purchase to the court; which, having jurisdiction of the parties and of all interests, might confirm, or not." And that the court, upon a report to it by the referee who had conducted the sale, of the trustee's bid, in directing its consummation by the referee, necessarily adjudges that the referee's deed shall be effectual to convey to the purchaser the estate, right, title, etc., of all the parties to the action. The validity of the purchase by the trustee was accordingly affirmed.

The power of a court of equity to authorize trustees to purchase of themselves, or to ratify and confirm such a sale, is recognized in Morse v. Hill (1883) 136 **Mass.** 60; Colgate v. Colgate (1873) 23 **N. J. Eq.** 372; Markle's Estate (1897) 182 **Pa.** 378, 38 Atl. 612. Upon a bill filed by one trustee against his cotrustee and the beneficiaries, asking for an order permitting the cotrustee to purchase the trust property, such an order was granted in Farmer v. Dean (1863) 32 Beav. 327, 55 **Eng.** Reprint, 128.

See Campbell v. Walker (1800) 5 Ves. Jr. 678, 31 **Eng.** Reprint, 801, 5 Revised Rep. 135, supra.

Even where the consent of the court has been obtained to a purchase by the trustees, the sale to them has been held invalid, where trust funds were used, and the trustees derived a profit from the transaction because of a favorable purchase, resulting largely from their relation to the property. Baker's Appeal (1888) 120 **Pa.** 33, 13 Atl. 487. In one case it is stated that permission to bid cannot be used by the trustee to the prejudice of the cestui que trust. Ricker v. Ricker (1883) 7 **Ont.** App. Rep. 282.

The broad view has been taken that a trustee cannot purchase at a judicial sale, in proceedings begun by him, even though the sale is actually conducted by another. The court, in Linsley v. Strang (1910) 149 **Iowa,** 690, 126 N. W. 941, in denying the validity of a sale by the referee, in an action in partition begun by the trustee, states that "it makes no difference with the rule whether the sale be made by the trustee himself, or by a person specially appointed for that purpose. The reason for the rule is to prevent conflicting interests between the trustee and the beneficiary, and such conflict may arise as well from a sale made by another, as from a sale made by himself. For instance, the trust relation demands the exercise of care for the interests of the beneficiary. A referee or other officer might make such a sale as would seriously affect the interests of the beneficiary, and, if the trustee were permitted to become the purchaser, his interests would at once become antagonistic to the interests of the beneficiary."

See Rammelsberg v. Mitchell (1875) 29 **Ohio** St. 22, supra.

The general question of the right of a trustee to purchase trust property at a judicial sale thereof is, of course, much broader than the scope of this note, which, in general, has been limited to the right to purchase at a sale by the trustee.

III. Indirect purchase.

The rule that a trustee cannot purchase at his own sale applies, and prevents the trustee from purchasing indirectly through another. French v. Woodruff (1898) 25 **Colo.** 339, 54 Pac. 1015; Boynton v. Brastow (1865) 53 **Me.** 362; Re Postlethwaite (1888) 59 L. T. N. S. (**Eng.**) 58; Re Follis (1874) 6 **Ont.** Pr. Rep. 160.

See West v. Sloan (1856) 56 **N. C.** (3 Jones, Eq.) 102, supra.

However, a sale by a trustee to a

purchaser, who stipulated with the trustee that he should go into partnership with the purchaser, an agreement that was afterwards fulfilled, was sustained in Camsusa v. Coigdarripe (1904) 11 **B. C.** 177. This decision is based upon two grounds: One that the purchaser bought for himself, and not for the trustee, and also on the further ground, as put by the trial court and afterwards affirmed by the appellate court: "I think this action ought to be dismissed, having regard to the fact that I consider [the trustee] an honest man, and that this was an honest transaction, and that fair value was given for the property, and having regard to the great delay that has occurred in bringing this action, and the informing of the mother, the widow, of what was being done, and also of there being no loss of the corpus."

IV. Purchase from cotrustees.

It is a general rule that a trustee cannot purchase from a cotrustee. However, such a purchase has been sustained, under peculiar circumstances. Thus, in Warren v. Pazolt (1909) 203 **Mass.** 328, 89 N. E. 381, a sale by trustees to one of their number was held not voidable at the instance of the cestui que trust, where the sale was made in good faith, for the purpose of reducing the amount of a mortgage thereon, and was made as part of the plan by which the trustees originally purchased the property. The trustees in this case did not have sufficient funds to purchase the property, which they believed to be a desirable purchase. Not desiring to place a large mortgage thereon, it was arranged that, upon a sale by the one trustee who thereafter became the purchaser, of property belonging to him, the proceeds thereof should be used in a purchase of an interest in the property purchased by the trustees, and the purchase price applied in the reduction of the mortgage.

The sale involved in Morse v. Hill (**Mass.**) infra, was by four trustees, to two of their number. See Rammelsberg v. Mitchell (**Ohio**) supra.

After the trustee has ceased to act, a purchase by him from his cotrustees has been sustained. Thus, it has been held that one, who has ceased for twelve years to be a trustee, may purchase the trust property from the remaining trustees. Re Boles [1902] 1 Ch. (**Eng.**) 244, 71 L. J. Ch. N. S. 130, 50 Week. Rep. 185, 85 L. T. N. S. 607.

But the court in Shelton v. Homer (1843) 5 Met. (**Mass.**) 462, refused to specifically enforce a sale by one trustee to another, after his resignation of his office, on the general theory that such sales should be discouraged.

V. Rights of cestuis que trustent as to avoiding sale.

As stated above, a purchase by a testamentary trustee is not, according to the weight of authority, void, but, merely voidable at the instance of the cestuis que trustent. In an action to set aside a sale by trustees to themselves, brought by only a part of the beneficiaries, it has been stated to have been held "that a part only of the beneficiaries can avoid a conveyance of trust property made by a trustee to himself, although a part desire to confirm it. In such a case, it would seem that, if the interests can be separated, the avoidance should be confined to the interests of those who complain. If these interests cannot be separated from the rest, either the whole conveyance must be avoided, or the court must proceed in such manner as it may find most beneficial to the trust. Morse v. Hill (1883) 136 **Mass.** 60.

The cestuis que trustent have a cause of action against the trustee who has purchased the trust property, to enforce the trust and compel an accounting. French v. Woodruff (1898) 25 **Colo.** 339, 54 Pac. 1015.

Of course, a cestui que trust may acquiesce in the sale, and thereby waive any rights. In Warren v. Pazolt (1909) 203 **Mass.** 328, 89 N. E. 381, upon exceptions to an account of the trustees, a beneficiary was held to have acquiesced in a sale to one of the trustees, which took place five years prior to the first of the accounts in question, which covered a period of four years. In order that the bene-

ficiary may be regarded as acquiescing in the breach of trust, however, he must have full knowledge thereof. In West v. Sloan (1856) 56 N. C. (3 Jones, Eq.) 102, where the court held that there was no acquiescence by the beneficiary, the beneficiary was poor and illiterate, unable to write or to read writing, lived in another state, and was a feme covert. She had accepted payments of interest which were alleged to be on the sum received for the trust property, but there was no evidence that the trustee, who had purchased the trust property, had ever communicated to her the true facts of the transaction. On this state of facts, the court, in holding that there was no acquiescence, states that no doubt the trustee informed the beneficiary that he had sold the trust property, that the beneficiary "knew that he had the power to do so; and, believing everything to have been fairly done, she, from time to time, received the interest. This is not such a dealing with the trustee as a court of equity will look upon as amounting to acquiescence, for a fraud was practised upon her. The length of time, if it could be applied in this case, as presumption of payment, abandonment or satisfaction, is not what the statute requires to form a bar, for it was only seven years from the last payment to the filing of the bill."

A beneficiary who has approved the sale by the trustee to himself, in writing, and subsequently given a quitclaim deed of the premises to the trustee, is estopped from thereafter complaining of the breach of trust in the sale by the trustee to himself. Ungrich v. Ungrich (1910) 141 App. Div. 485, 126 N. Y. Supp. 419, affirmed in (1912) 207 N. Y. 662, 100 N. E. 1134, s. c. on earlier appeal (1909) 131 App. Div. 24, 115 N. Y. Supp. 413. It is held not necessary for the trustee to prove a ratification, as though all that was done had been done without the cestui que trust's knowledge and assent. The rule that, to fasten ratification upon a cestui que trust, he must not only have been made acquainted with all the facts, but apprised also of the law, and how such facts would be dealt with by a court of equity, is held to have no application to a situation in which he consents to the sale, and has a part in the negotiations leading up thereto.

The right to avoid the sale may also be lost by lapse of time. The Supreme Court of the United States, speaking in Hammond v. Hopkins (1891) 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418, says: "It is conceded that the proposition that where a trustee or person, acting for others, sells the trust estate and becomes himself interested in the purchase, the cestuis que trust are entitled as of course to have the purchase set aside, is subject to the qualification that the application for such relief must be made within a reasonable time, and that laches and long acquiescence cannot be excused, except by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor." It is held in this case that, where the main charge of fraud consisted in an alleged conspiracy to obtain the property for less than it was worth, if all the circumstances relied on to sustain it were actually known to the plaintiffs, or they were chargeable with such knowledge, the suit is too late after a lapse of nineteen years.

A delay of about five years in actually filing a bill to set aside a conveyance by the trustees to themselves was held not to show laches preventing relief, in Morse v. Hill (1883) 136 Mass. 60. The conveyance was avoided in this case, as against purchasers with notice.

The purchase of the trust property by the trustee, upon the foreclosure of a mortgage thereon, was sustained in Kahn v. Chapin (1897) 152 N. Y. 305, 46 N. E. 489, where more than twenty years had elapsed since the youngest of the beneficiaries had attained her majority, and there had been no objection raised to the purchase by any of the beneficiaries throughout that time.

A delay of over thirty years has been

held no bar to relief against the trustee. Re Postlethwaite (1888) 59 L. T. N. S. (Eng.) 58.

The ten-year Statute of Limitation of New York was held to bar the beneficiary in Chorrmann v. Bachmann (1907) 119 App. Div. 146, 104 N. Y. Supp. 151, where there was no actual fraud in the purchase by the trustee.

W. A. E.

PETER BROWN et al., Appts.,
v.
JOHN STECKLER et al., Respts.,
and
BROTHERHOOD OF AMERICAN YEOMEN, Garnishee.

North Dakota Supreme Court—July 6, 1918.

(— N. D. —, 168 N. W. 670.)

Constitutional law — attachment — fraternal benefit.

1. Section 5053 of the Compiled Laws of 1913, which provides that "the money or other benefit . . . provided or rendered by any" fraternal beneficiary society "shall not be liable to attachment" or garnishment, either against the association or beneficiary, is constitutional and is not in violation of § 11 of article 1 of the state Constitution, which provides that "all laws of a general nature shall have a uniform operation;" nor of § 2 of article 1, which provides that the "government is instituted for the protection, security, and benefit of the people," nor is it in violation of the 14th Amendment of the Constitution of the United States, in that it denies equal protection of the laws to citizens and persons; nor is it unconstitutional because in violation of § 208 of the Constitution of North Dakota, which provides that "the right of a debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law."

[See note on this question beginning on page 757.]

Statute — title — sufficiency.

2. The title "An Act Regulating Fraternal Beneficiary Societies, Orders, or Associations" is sufficiently comprehensive to include a provision in the act that the money or other benefit to be paid by the association and the fund for the payment thereof shall not be liable to attachment or garnishment, either as against the insured or his beneficiary, and does not violate § 61 of the Constitution, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title."

Headnotes by Bruce, Ch. J.

APPEAL by plaintiffs from a judgment of the District Court for Stark County in favor of defendants in garnishment proceeding to reach the proceeds of a fraternal benefit certificate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Thomas H. Pugh** and **Otto Thress**, for appellants:

Section 5053 of the Compiled Laws violates §§ 2 and 11 of the state Constitution and the 14th Amendment to the Constitution of the United States.

Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; State ex rel. Richards v. Hammer, 42 N. J. L. 439; Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; State v. Pugh, 43 Ohio St. 98, 1 N. E. 439;

Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; State ex rel. Mitchell v. Mayo, 15 N. D. 327, 108 N. W. 36; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Morton v. Holes, 17 N. D. 154, 115 N. W. 256; State ex rel. Dorval v. Hamilton, 20 N. D. 592, 129 N. W. 916; Re Mallou, 16 Idaho, 737, 22 L.R.A.(N.S.) 1123, 102 Pac. 374, 6 R. C. L. 406, 407, 417, 419; Ex parte Sohncke, 148 Cal. 262, 2 L.R.A. (N.S.) 813, 113 Am. St. Rep. 236, 82 Pac. 956, 7 Ann. Cas. 475; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

The statute infringes the inhibition of article 208 of the state Constitution.

11 R. C. L. 492; Williams v. Donough, 65 Ohio St. 499, 56 L.R.A. 766, 63 N. E. 84; Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; Holmes v. Marshall, 145 Cal. 777, 69 L.R.A. 67, 104 Am. St. Rep. 86, 79 Pac. 534, 2 Ann. Cas. 88; Ellison v. Straw, 116 Wis. 207, 92 N. W. 1094; Murdy v. Skyles, 101 Iowa, 549, 63 Am. St. Rep. 411, 70 N. W. 714; Bailey v. Wood, 202 Mass. 549, 25 L.R.A.(N.S.) 722, 89 N. E. 147; Re How, 59 Minn. 415, 61 N. W. 456.

And violates the inhibition of § 61 of the state Constitution.

State ex rel. Standish v. Nomland, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705; State ex rel. Poole v. Peake, 18 N. D. 101, 120 N. W. 47; Wabash R. Co. v. Young, 162 Ind. 102, 4 L.R.A.(N.S.) 1091, 69 N. E. 1003; People v. Congdon, 77 Mich. 351, 43 N. W. 986; State ex rel. Keith v. Chapel, 63 Minn. 535, 65 N. W. 940; Ives v. Norris, 13 Neb. 252, 13 N. W. 276; West Point Water Power & Land Improv. Co. v. State, 49 Neb. 223, 68 N. W. 507; Pierson v. Minnehaha County, 28 S. D. 534, 38 L.R.A.(N.S.) 261, 134 N. W. 212; Divet v. Richland County, 8 N. D. 65, 76 N. W. 993; Johnson v. Grady County, 50 Okla. 188, 150 Pac. 497; Holmberg v. Hauck, 16 Neb. 337, 20 N. W. 279; New York & G. L. R. Co. v. Montclair Twp. 47 N. J. Eq. 591, 21 Atl. 493; Pratt v. Browne, 135 Cal. 649, 67 Pac. 1082; Lamar Canal Co. v. Amity Land & Irrig. Co. 26 Colo. 370, 77 Am. St. Rep. 261, 58 Pac. 600; Burcher v. People, 41 Colo. 495, 124 Am. St. Rep. 143, 93 Pac. 14; Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873; Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128; Shepherd v. Recorder's Ct. Judge, 175 Mich. 193, 141 N. W. 556; Loomis v. Mack, 183 Mich. 674, 150 N. W. 370; Rowe v. Richards, 32 S. D. 66, L.R.A.1915E, 1069, 142 N. W. 664; Metropolitan Casualty Ins. Co. v. Basford, 31 S. D. 149, 139 N. W. 795; Malin v. Lamoure County, 27 N. D. 140, 50 L.R.A.(N.S.) 997, 145 N. W. 582, Ann. Cas. 1916C, 207; State ex rel. Gabel v. Young, 37 S. D. 196, 157 N. W. 325.

Messrs. **Casey & Burgeson**, for respondent:

Fraternal beneficiary societies are organized not for profit, but for the mutual benefit of their members and their beneficiaries.

29 Cyc. 7; Harvey v. Harrison, 89 Tenn. 470, 14 S. W. 1083; Re Heilbron, 14 Wash. 536, 35 L.R.A. 603, 45 Pac. 153.

The Exemption Laws are made for the purpose of protecting the poor and unfortunate, and should be liberally construed by the courts.

Herschbach v. Cassout, 197 Ill. App. 188; Cook v. Allee, 119 Iowa, 226, 93 N. W. 93; Ballou v. Gile, 50 Wis. 614, 7 N. W. 561; Recor v. Commercial & Sav. Bank (Recor v. Recor) 142 Mich. 479, 5 L.R.A.(N.S.) 472, 106 N. W. 82, 7 Ann. Cas. 754; Geer v. Horton, 159 Mass. 259, 34 N. E. 269; Hamilton Nat. Bank v. Amster, 134 Tenn. 537, 184 S. W. 5; Ogle v. Barron, 247 Pa. 19, 92 Atl. 1071; Craven v. Roberts, 60 Pa. Super. Ct. 140; Emmert v. Schmidt, 65 Kan. 31, 68 Pac. 1072.

The title of the act comprehensively expresses and includes the subject of the act.

First Nat. Bank v. How, 65 Minn. 187, 67 N. W. 994.

Bruce, Ch. J., delivered the opinion of the court:

In this case the proceeds of a certificate of insurance in a fraternal insurance company are sought to be garnished in an action brought to recover on a debt owing by the beneficiary, and the only question raised by the specification of errors is the constitutionality of § 5053 of the

Compiled Laws of 1913, which provides that "the money or other benefit, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under this article, shall not be liable to attachment by trustee, garnishee or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or any person who may have any right thereunder."

The first point raised is that the statute violates § 61 of the state Constitution, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title."

Section 5053 of the Compiled Laws of 1913 first appears as § 11 of chapter 90 of the Laws of 1901. The title of this act is, "An Act Regulating Fraternal Beneficiary Societies, Orders, or Associations." We think that there is no merit in the contention. In the case of First Nat. Bank v. How, 65 Minn. 187, 67 N. W. 994, the supreme court of Minnesota passed upon a similar act and a similar contention. The act was entitled, "An Act to Provide for the Incorporation and Regulation of Co-operative or Assessment Life Endowment and Casualty Insurance Associations and Societies." Laws 1885, chap. 184. The Minnesota court held that the clause in question was germane to the general subject of the act, and was so intimately connected with the subject of the incorporation and regulation of such associations that it could be properly included in the title. This case has many companions and is, no doubt, sound in its conclusions. It is certainly in accordance with the rulings of this court. State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924. See also Hamilton Nat. Bank v. Amster, 134 Tenn. 537, 184 S. W. 5.

Statute—title—sufficiency.

The appellants also claim that the statute violates § 11 of article 1 of the state Constitution which provides that "all laws of a general nature shall have a uniform operation."

They also claim that it violates § 2 of article 1, which provides that "all political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require."

They also claim that it violates the 14th Amendment to the Constitution of the United States, in that it denies the equal protection of the laws to citizens and persons. They argue, and no doubt correctly, that the contract for the payment of dues in a fraternal association is essentially a contract of insurance, and that the rights and liabilities of the parties thereto are governed accordingly. 29 Cyc. 62. They also argue, and no doubt correctly, that the beneficiary takes the money under the policy of assurance, by contract, and not by inheritance. Am. & Eng. Enc. Law, 2d ed. 999; Modern Brotherhood v. Lock, 22 Colo. App. 409, 125 Pac. 556. They argue, therefore, that the beneficiary under a policy in a fraternal association is allowed by the statute to occupy a different position from a beneficiary in a so-called old line company; in other words, that the legislature has not only attempted to create two classes of insurance companies, going so far as to confer on one class special favors and immunities, and exempting such class from the processes of law to which all citizens ordinarily are subject, but that it also creates two classes of persons called beneficiaries, and upon the one class has conferred its favors and immunities, exempting them from the usual process for the collection of debts to which all classes of citizens should be subject, and that it also creates two classes of creditors, one of which is left its right to invoke

Constitutional law—attachment—fraternal benefit.

the ordinary processes in the collection of its debts, and the other which is discriminated against. They cite from the case of Edmonds v. Herbrandson 2 N. D. 274, 14 L.R.A. 725, 50 N. W. 970, wherein this court states that "the classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation. . . . The true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject-matter of the proposed legisiation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation."

They also cite the well-known case of Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 683, 22 Sup. Ct. Rep. 431, 439, wherein the Supreme Court of the United States said: "We have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same places and in like circumstances.'"

They also cite the case of Williams v. Donough, 65 Ohio St. 499, 56 L.R.A. 766, 63 N. E. 84, wherein the supreme court of Ohio held that § 3631–18 of the Revised Statutes of Ohio, which provided that benefits rendered by fraternal associations should not be liable to be appropriated in any way to the debts of the members or beneficiaries, were in violation of the Constitution, in that they conferred upon some members of a class privileges not enjoyed by others equally situated. Although, however, we agree with much of counsel's argument and are fully conversant with the authorities cited, we are unable to believe that the statute which is before us is unconstitutional.

As far as the parties who are before this court are concerned, all that the statute does is to provide that fraternal mutual beneficiary societies, orders, and associations may create a fund which shall be exempt from execution as against the debts of its beneficiaries. It merely provides that the members of these associations may make charitable gifts to the beneficiaries. The creditors are not affected, because the donors of that fund owed them nothing and because the beneficiaries have given no consideration for the gift and have in no way dispossessed themselves of money or of property on which their creditors had a claim or a lien. It is clear that without the aid of the statute, and by the intervention of a trustee, the donors could have given to the beneficiaries the benefit of this fund exempt from seizure by the creditors of such beneficiaries, at any rate to the extent that such fund is necessary for the latter's reasonable support, and there is no proof in the case at bar that the sum provided was in excess of such wants. Not only, indeed, was the amount which was payable under the certificate only $801.61, but the courts may take judicial notice of the fact that the benefits of fraternal associations are almost always very limited in amount. See Broadway Nat. Bank v. Adams, 130 Mass. 431; Geer v. Horton, 159 Mass. 259, 34 N. E. 269; Stow v. Chapin, 51 Hun, 640, 21 N. Y. S. R. 38, 4 N. Y. Supp. 496; Brandon v. Robinson, 18 Ves. Jr. 429, 34 Eng. Reprint, 379; Comp. Laws 1913, §§ 5364, 5369. It is clear to us that the statute before us merely attempts to permit a fraternal association to accomplish this same result, and for that purpose to act as a trustee for its members, and that this can be legally done. Re How,

61 Minn. 217, 63 N. W. 627, overruling Re How, 59 Minn. 415, 61 N. W. 456.

Nor is there any merit in the charges of class legislation. The objects of the garnishee defendant (the Brotherhood of American Yeomen) are fully set forth in division 2, § 3, of its by-laws. This section provides that "the objects of this association shall be the mutual uplifting of members of the association, the practice of fraternal love, to lose no opportunity to point out to a failing or weaker member a path to success, to withhold nothing from a member that can benefit him, and especially to point out to him any danger threatening him or his beloved ones, and to bestow substantial benefits upon him and his beneficiaries as may be permitted by the laws of the state wherein this association shall operate, to care for the sick and indigent members and to comfort the sick and bereaved in times of sorrow and distress."

Not only is this true, but § 5043, Compiled Laws 1913, expressly limits the payment of death benefits "to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member."

The court also may take judicial notice that in almost all of the fraternal associations the amount of the insurance or benefit is limited to a comparatively small amount, whereas in the so-called old-line companies there is practically no limit to the policy, which has usually a cash surrender and loan value, and can be used as collateral security for the debts of the insured, and not merely for the benefit of his relatives or dependents, and is often taken out as a business venture and for business purposes. We may also judicially notice the fact that the fraternal associations serve a peculiar purpose in affording insurance for those of moderate means. These considerations fully justify the classification complained of. Such a classification, indeed, is far less arbitrary than that which was sustained in the case of the German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612, wherein the Supreme Court of the United States held that an act exempting farmers' mutual insurance companies, organized and doing business under the laws of the state of Kansas, and insuring only farm property, from a legislative scheme for the regulation of fire insurance rates, was not invalid, nor did it deny the equal protection of the laws, even though it was not applicable to other insurance companies, which also insured farm property. See also Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. ed. 1025, 38 Sup. Ct. Rep. 444; Hamilton Nat. Bank v. Amster, 134 Tenn. 537, 184 S. W. 5; Ogle v. Barron, 247 Pa. 19, 92 Atl. 1071; Craven v. Roberts, 60 Pa. Super. Ct. 140; Emmert v. Schmidt, 65 Kan. 31, 68 Pac. 1072.

The judgment of the District Court is affirmed.

ANNOTATION.

Constitutionality of statute exempting proceeds of life or benefit insurance.

I. Provisions as to equal protection of law, classification, etc., 757.
II. Impairment of vested rights, 758.
III. Violation of constitutional provisions relating to exemptions, 759.
IV. Sufficiency of title, 760.

I. Provisions as to equal protection of law, classification, etc.

It will be noticed that in the reporter case (BROWN v. STECKLER, ante, 753) a provision that money or other benefit provided or rendered by any fraternal beneficiary society should not be liable to attachment or garnishment, either against the association or beneficiary, was held not to violate the

provision of the Constitution that all laws of a general nature shall have a uniform operation, nor the provision that the "government is instituted for the protection, security and benefit of the people," nor the 14th Amendment of the Federal Constitution, forbidding legislation denying equal protection of the laws.

And in Supreme Lodge, U. B. A. v. Johnson (1904) 98 **Tex.** 1, 81 S. W. 18, reversing (1903) — Tex. Civ. App. —, 77 S. W. 661, a statute exempting the benefits of fraternal beneficiary associations from execution and garnishment was held not in conflict with the guaranties by the Federal Constitution, of the equal protection of the laws, or with § 3, art. 1, of the Texas Constitution, providing that no man or set of men is entitled to exclusive, separate public emoluments or privileges, except, in consideration of public services, although the statute in question provided that its provisions should not apply to specified railway associations, which issued benefit certificates only to their members, it being held that such classification was a valid one.

And in Hamilton Nat. Bank v. Amster (1915) 134 **Tenn.** 537, 184 S. W. 5, an act exempting from execution the benefits provided for by any association authorized to do business under the act, and declaring such associations to be charitable institutions and exempt from taxation, was held not to violate § 8 of article 1, and § 8 of article 11, of the Tennessee Constitution, forbidding arbitrary, unreasonable, or capricious classification, the court holding that such associations were in a different class from life insurance companies, carried on for profit, and other beneficial associations. And the act in question was held not invalid on the ground that it unlawfully discriminated in favor of associations organized under the act, by permitting them to offer advantages denied ordinary life companies and associations not organized under the act, the court stating that the act was a general one, and that other companies and associations might enjoy all of its rights by organizing under its provisions.

And the act was held not invalid because it provided that nothing contained therein should be construed to afford or apply to grand or subordinate lodges of Masons, Odd Fellows, or Knights of Pythias, except of the insurance branch of the Supreme Lodge, Knights of Phythias, or to similar orders which did not issue insurance certificates, nor to local lodges of an association doing business in the state, that provided death benefits not exceeding $300 to any person, or disability benefits not exceeding $300 in any one year to any one person, nor to domestic associations which limited their membership to the employees of a particular city or town, designated firm, business house, or corporation, the court having held that there was nothing showing that such classification was not justified.

But in Williams v. Donough (1902) 65 **Ohio** St. 499, 56 L.R.A. 766, 63 N. E. 84, a statute absolutely exempting from seizure for debt the money or other benefit going to the certificate holder, or beneficiary, of benefit associations organized under a certain act, was held unconstitutional, on the ground that it unlawfully discriminated in favor of certificate holders in these associations, or their beneficiaries, by giving them advantages not accorded holders of, or beneficiaries named in, certificates or policies of a similar class, and therefore violated § 2 of article 1 of the Constitution.

And the statute was also declared unconstitutional on the ground that it unlawfully discriminated in favor of beneficial associations, by permitting them to offer advantages denied to ordinary life companies and other associations not organized under the act in question.

II. Impairment of vested rights.

In Re Heilbron (1896) 14 **Wash.** 536, 35 L.R.A. 602, 45 Pac. 153, it was held that a statute exempting the proceeds of life insurance policies from liability for debts of the insured could not be given retroactive operation to antecedent insurance and indebtedness,

without unconstitutionally impairing vested rights, and that therefore it should be construed as prospective only. In this case, both the insurance and the indebtedness antedated the statute.

In Le Blanc's Succession (1917) 142 **La.** 27, L.R.A.1917F, 1137, 76 So. 223, a statute exempting the proceeds or avails of life insurance from liability for debt was held not to impair the obligations of a contract of insurance entered into before the passage of the act. It appears that the debts of the insured involved in this case were contracted after the passage of the statute.

In Williams v. Donough (**Ohio**) supra, a statute providing that the money to be paid by a benefit association should not be liable to attachment, or applied to pay any debt of the certificate holder, or of any beneficiary named therein, was held not unconstitutional on the ground that it took the property of the creditor and transferred it to the debtor, the court holding that the legislature had power, within limits of the Constitution, to declare what property should be exempt from the force of the Collection Laws, and that, when that power had been lawfully exercised, the effect was to make the law a part of subsequently enacted contracts, and stating that it did not appear that the debt involved in the case was incurred prior to the passage of the act in question.

And in Hamilton Nat. Bank v. Amster (1915) 134 **Tenn.** 337, 184 S. W. 5, an act exempting the benefits of beneficial associations, organized under its terms, from execution, was held within the legislative power, and not invalid because it did not afford creditors the same measure of relief which they were afforded under other statutes.

III. Violation of constitutional provisions relating to exemptions.

It will be noted that in the reported case (BROWN v. STECKLER, ante, 753) a provision that money or other benefit provided by any fraternal benefit association should not be liable to attachment or garnishment, either against the association or the beneficiary, was held not to violate the provision of the state Constitution that the right of a debtor to enjoy the comforts and necessities of life should be recognized by wholesome laws, exempting from forced sale to the heads of families a homestead, the value of which should be limited and defined by law, and a reasonable amount of personal property, the kind and value to be fixed by law.

But in Skinner v. Holt (1896) 9 **S. D.** 427, 62 Am. St. Rep. 878, 69 N. W. 595, a constitutional provision in those terms was held to be violated by an act providing that a policy of life insurance of an individual should inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors, and that an endowment policy should be exempt from liabilities from any of his or her debts. The court stated that a law which, without any limitation as to value, specifies a kind of property that a debtor, solvent or insolvent, might acquire by investing therein or diverting thereto his entire estate, to the exclusion of bona fide creditors, was neither "wholesome" in character nor "reasonable" as to amount, and was too generous to be just.

And in Re How (1894) 59 **Minn.** 415, 61 N. W. 456, a statute, providing that the money or other benefit to be paid, provided, or rendered by any corporation, association, or society authorized to do an insurance business in the state should be exempt from execution, was held invalid on the ground that it infringed an article of the Constitution, providing that "a reasonable amount" of property should be exempt from seizure or sale, as it fixed no limit to the amount of the exemption.

The decision in this case was subsequently modified in (1895) 61 Minn. 217, 63 N. W. 627, where it was held that the Exemption Statute was constitutional in so far as the proceeds of a policy were a gift to the beneficiary, the court stating that it was well settled that, by the intervention of a trustee, the donee of a gift might be

given the benefit thereof, exempt from seizure to satisfy her debts, and that they had no doubt that a statute which merely accomplished the same result without the intervention of a trustee was valid. And this decision was followed in First Nat. Bank v. How (1896) 65 **Minn.** 187, 67 N. W. 994.

In Holden v. Stratton (1905) 198 **U. S.** 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656, a statute, providing that the proceeds or avails of all life insurance should be exempt from all liability for any debt, was held not repugnant to a provision of the Washington Constitution that the legislature should "protect from forced sale a certain portion of the homestead and other property," the court holding that this provision imposed no limitation upon the general power of the legislature to determine the amount and character of the property which should be exempt. The decisions in Re How and Skinner v. Holt (**S. D.**) supra, were distinguished on the ground that the constitutional provisions involved in those cases were widely different from the provision in the case at bar.

In Himmel v. Eichengreen (1908) 107 **Md.** 610, 69 Atl. 511, a constitutional provision that laws should be passed to protect from execution a reasonable amount of the property of debtors, not exceeding in value the sum of $500, was held not to be violated by a statute, providing that the money or other benefits to be paid by benefit associations should not be liable to attachment by trustee, garnishee, or other process, and should not be seized, taken, appropriated, or applied, by any legal or equitable process or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or of any person who might have any right thereunder, the court holding that the constitutional provision related to the exemption of property from execution, and was inapplicable to cases of exemption from attachment of "money or other benefits," payable under a certificate of a fraternal association.

In Farmers State Bank v. Smith (1917) 36 N. D. 225, 162 N. W. 302, a statute providing that "the avails of a life insurance policy or of a contract payable by any mutual aid benevolent society, when made payable to the personal representatives of a deceased, his heirs or estate, upon the death of a member of such society or of such insured shall not be subject to the debts of the decedent except by special contract, and shall be inventoried and distributed to the heirs or the heirs at law of such decedent," was held not an exemption law, and therefore not in conflict with a constitutional provision that the right of a debtor to enjoy the necessities of life should be recognized by wholesome laws exempting a "reasonable amount of personal property." And the statute exempting the avails of insurance was held not unconstitutional because it placed the duty of inventorying and distributing such avails on the court.

IV. Sufficiency of title.

Attention is called to the decision in the reported case (BROWN v. STECKLER, ante, 753) that the title, "An Act Regulating Fraternal Beneficiary Societies, Orders or Associations," was sufficiently comprehensive to include a provision that the money or other benefit to be paid by an association, and the fund for the payment thereof, should not be liable to attachment, either as against the insured or his beneficiary, and that there was, therefore, no violation of the constitutional provision that no bill should embrace more than one subject, which should be expressed in its title.

In First Nat. Bank v. How (1896) 65 **Minn.** 187, 67 N. W. 994, the protection of a fund, secured to a beneficiary through the instrumentality of assessment life insurance associations, by a provision exempting it from execution in the hands of the beneficiary, was held so intimately connected with the subject of incorporation and regulation of such associations as to be included in the provisions of a statute, entitled, "An Act to Provide for Incorporation and Regulation of Co-operative or Assessment Life, Endowment and Casualty Insurance Associations."

And in Le Blanc's Succession (1917) 142 La. 27, L.R.A.1917F, 1137, 76 So. 223, the object of a statute, exempting "the proceeds or avails" of all life insurance from all liability for any debt, except one secured by a pledge or an assignment of the policy, or an advance payment made on the policy, was held to be expressed in the title, "An Act to Exempt the Proceeds of Life Insurance from Liability for Debt."

And in Hamilton Nat. Bank v. Amster (1915) 134 Tenn. 537, 184 S. W. 5, there was held to be no violation of the constitutional provision that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title," where a statute, providing among other things for the exemption of the proceeds of benefit associations, was entitled, "An Act to Provide for the Organization, Admission, and Regulation of Fraternal Beneficiary Associations Transacting the Business of Life Insurance, and to Repeal All Laws in Conflict with the Provisions of This Act."

In Himmel v. Eichengreen (1908) (Md.) supra, a provision of the Constitution, declaring that every law should embrace but one subject and that that should be described in its title, and that no law should be revived or amended by reference to its title or section only, was held not violated, where an act providing, among other things, for the exemption of benefit associations, and entitled, "An Act to Amend Article 23 of the Code of Public General Laws, title, Corporation, subtitle, 'Insurance Department,'" was amended by adding further new additional sections, the article of the Code Amended being similarly entitled, and containing the legislation of the state regulating insurance, the court holding that it was only the subject of the act which must be described in the title, and that neither the details of the legislation, nor the means or instrumentalities by means of which the subject is to be carried into effect, constitute the subject of the act. J. T. W.

OCTAVIUS SPENCER, Appt.,

v.

MRS. F. W. HURD.

Alabama Supreme Court—January 17, 1918.

(— Ala. —, 77 So. 683.)

Evidence — presumption of payment — adverse possession of mortgaged property.

The continuous, peaceable, adverse possession of mortgaged property by the mortgagor for twenty years, without acknowledgment of the mortgage debt or activity on the part of the mortgagee, raises a conclusive presumption of payment of the mortgage, notwithstanding the parties are closely related to each other.

[See note on this question beginning on page 779.]

APPEAL by defendant from a decree of the Circuit Court for Jefferson County in favor of complainant in a suit to quiet title to certain property. *Affirmed.*

Statement by **Gardner, J.**:

Bill filed by appellee Mrs. F. W. Hurd against appellant Octavius Spencer, to quiet title to certain property described in the bill. The answer discloses that the respondent claimed title to the property through a mortgage executed by the complainant Mrs. F. W. Hurd, and her husband W. G. Hurd, to C. H. Spencer, father of respondent. The mortgage was given as security for the recited sum of $1,525, was executed April 1, 1889, and due December 1, 1890. There were credits on the back of the note attached to the mortgage showing a reduction of the amount due thereon to the sum of $555. After the bill was filed, respondent proceeded to foreclose said mortgage. C. H. Spencer, the mortgagee, died in the year 1906—more than sixteen years after any payment had been made on the mortgage—and left a will devising his property to his wife Leona Spencer, who transferred her interest in this mortgage to the respondent Octavius Spencer, her son, in whose possession the note and mortgage now are. After the answer was filed, the bill was amended by adding paragraphs 5 and 6. Paragraph 5 sets up that she (complainant) had been in the actual, peaceable, adverse, continuous, and undisputed possession of the property described in the original bill for more than twenty years immediately preceding the foreclosure of said mortgage; and that during said time she did not admit any liability on the mortgage or recognize the same in any manner; that she knew nothing of the alleged claim of respondent until shortly before the filing of this bill. The original bill shows the ownership of the property here involved to be in the complainant, and in paragraph 6 of the amended bill it is averred that said note and mortgage are void for the reason that they were given to secure a debt of the husband, and were not given or executed to secure the payment of any debt for which she (complainant) was or is legally liable. The chancellor found complainant was entitled to relief, and entered a decree accordingly. From this decree the respondent prosecutes this appeal.

Messrs. **McEniry & McEniry** for appellant.

Messrs. **Estes & Jones** for appellee.

Gardner, J., delivered the opinion of the court:

The evidence is without dispute that complainant, the owner of the property here in controversy, has been in the actual, peaceable, and continuous adverse possession of said property since the year 1890, residing thereon as her home. She acknowledges the execution of the mortgage in question—so she states—only because of the fact that she recognizes her signature, but that she does not remember the occasion of the execution of the mortgage, or what it was for; that since she has been on the property neither the mortgagee, his wife, nor anyone, in fact, has said anything to her in regard to the mortgage, or made any demands for payment on the same; that she had nothing to do with any payments which might have been made by her husband on this mortgage, neither did she have anything to do with the creation of the indebtedness; that she knew nothing in regard to any claim of a balance due until the latter part of January, 1916, when demand was made just previous to the institution of this suit. The mortgagee C. H. Spencer died sixteen years after any payment had been made on said mortgage, and his widow was duly qualified as his executrix, and took charge of his assets, collecting all indebtedness due the estate; the will having been probated in March, 1906. The widow insists, and so does respondent her son, that they knew nothing in regard to this mortgage, and only found the same by accident while looking over some papers of C. H. Spencer, deceased; and that they immediately made claim for the balance due thereon.

Under the decisions of this court,

and under the fact presented, the mortgage will be conclusively presumed to have been satisfied. Snodgrass v. Snodgrass, 176 Ala. 276, 58 So. 201; Bailey v. Butler, 138 Ala. 153, 35 So. 111; Shockley v. Christopher, 180 Ala. 140, 60 So. 317; Goodwyn v. Baldwin, 59 Ala. 127; Loper v. Dickey, 190 Ala. 554, 67 So. 255; Gay v. Fleming, 182 Ala. 511, 62 So. 523; Roach v. Cox, 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578; Harrison v. Heflin, 54 Ala. 552; Greenlees v. Greenlees, 62 Ala. 330; Gayle v. Pennington, 185 Ala. 53, 64 So. 572; Veitch v. Woodward, — Ala. —, 76 So. 124.

Evidence—presumption of payment—adverse possession of mortgaged property.

In Snodgrass v. Snodgrass, supra, it was pointed out that this prescriptive period of twenty years is rested upon the principle of repose of society, and is a matter of public policy; that antiquated demands will not be considered by the court, for there must be a time beyond which human transactions will not be inquired into. It was there said: "The consensus of opinion in the present day is that such presumption is conclusive, and the period of twenty years, without some distinct act in recognition of the trust, a complete bar."

In Harrison v. Heflin, 54 Ala. 552, the reasoning of the rule is discussed at length, and the opinion recognizes that, perhaps in this state, "greater force and a larger operation has been given the presumption by this court, than the current of authorities sanctions," but "it has been in obedience to a well-defined public policy, which requires a fixed period of time that shall silence . . . controversies."

In Roach v. Cox, 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578, some of the earlier authorities are referred to and commented upon. The court, in further discussing this question, said: "The reason of the doctrine, and the fact that this court has established the public policy of this state in respect of the existence and the effect of the presumption, leave us no alternative, even if we were disposed to embrace it, than to affirm that the presumption of payment or extinguishment is conclusive, where twenty years have elapsed, and the creditor has been, during the period, inactive, or there has been no recognition of the liability by the debtor."

We are referred by counsel for appellant to Wanmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748, where it was held that the fact that the mortgagee and mortgagor were related, and the mortgagor was in embarrassing circumstances, was sufficient to overcome the presumption of payment; and that, in the instant case, such a holding would have application, at least as to relationship, as the evidence discloses that the mortgagor (complainant here) was closely related to the mortgagee. This argument, however, was pressed upon this court as far back as the case of Goodwyn v. Baldwin, 59 Ala. 127, and was there repudiated.

We have no occasion to examine the authorities of other jurisdictions as cited in the note of 27 Cyc. 1401, as we consider the question as settled by the decisions of this court that the presumption of payment or extinguishment is conclusive, where twenty years have elapsed, and the creditor has been inactive, or there has been no recognition of the liability by the debtor. From this settled policy we decline to now depart. It has became, as it were, a rule of property in this state, tends to the repose of society, and the quieting of litigation.

Under the undisputed evidence in the case, therefore, we are of the opinion that complainant was entitled to relief, and the decree to that effect will be, accordingly, affirmed.

Anderson, Ch. J., and **McClellan** and **Thomas**, JJ., concur.

CHARLES O. CACY, Appt.,
v.
WILLIAM M. SLAY et al.

Maryland Court of Appeals—January 14, 1916.

(127 Md. 493, 96 Atl. 690.)

Admissions — presumption of payment — affirmative relief.

1. Mere possession of mortgaged property by the mortgagor for twenty years, without acknowledgment of the mortgage, does not raise a presumption of payment which will entitle him to a cancelation of the mortgage record.

[See note on this question beginning on page 779.]

Same — effect.

2. The administrator of the assignee of a mortgage is not bound by admissions made by the mortgagee to the mortgagor after the assignment.

APPEAL by plaintiff from a decree of the Circuit Court for Kent County in favor of defendants in a suit to compel the release of a mortgage. *Remanded for further proceedings.*

The facts are stated in the opinion of the court.

Messrs. **Robert J. Gill, L. Wethered Barroll,** and **Hope H. Barroll** for appellant.

Messrs. **Lewin W. Wickes** and **William M. Slay** for appellees.

Boyd, Ch. J., delivered the opinion of the court:

A bill in equity was filed in this case by the appellant against the executors of Richard D. Hynson, deceased, and Edwin L. Maslin. It alleges that the appellant executed a mortgage to Edwin L. Maslin on May 17, 1889, to secure the sum of $600, for which five promissory notes were given, one for the principal, payable two years after date, and the other four being interest notes, one of which was payable every six months. The mortgage was on two farms in Kent county and one in Queen Anne's county. The bill further alleges that the loan was secured through Richard D. Hynson, who was at the time the appellant's attorney and drew the mortgage; that the plaintiff paid the loan to said Hynson, who was also attorney for Maslin, and he believed that the mortgage had been released by said Hynson, who told him that he would see that it was released, and who had received every dollar of the principal and interest secured by the mortgage; that, in the early part of 1914, he attempted to get a loan on the farm in Queen Anne's county, when he was informed by the attorney examining the title that the Maslin mortgage remained a lien of record on said farm, and, although twenty-one years old, and paid by the appellant to Mr. Hynson, a loan was refused until the record was cleared of said mortgage; that he saw Maslin, who said that he did not remember the occurrence, and informed the appellant he would have to consult his attorney before he could tell him anything more about it, but he had been paid in full by Richard D. Hynson, and subsequently informed the appellant's attorney that he had made an assignment of the mortgage to Mr. Hynson, and he could not remember any of the particulars concerning it; that he was advised by his attorney that he would have to apply to the administrators of Richard D. Hynson, who died in 1907, and ask them to re-

lease the mortgage; that he saw William M. Slay, one of the administrators, and was informed by him that they would not release the mortgage; that he was in ignorance of any claim made by said Hynson in his lifetime, or by his administrators, until informed by Mr. Slay that they claimed the debt was due; that he denies any and all indebtedness claimed by the administrators, but avers that if there ever was any such indebtedness due by him to said Hynson, it had been fully satisfied and discharged by payment to said Hynson in his lifetime; that if said Hynson or his administrators had any cause of action against him for any of the indebtedness claimed to be due under the mortgage, which he does not admit, such cause of action or suit did accrue or arise over twenty years before the filing of the bill, and he prays the benefit of the Statute of Limitations; that said Hynson never made any demand upon him in his lifetime for any part of the debt or interest, from the time it was paid until his death in 1907, and none of the defendants, as administrators, made any claim or demand upon him until the refusal of said Slay to release the mortgage, who stated that the estate would claim that it was a just debt due by appellant. The bill prays: (1) That the mortgage lien be removed, "as a blot," from his title to the farm in Queen Anne's county and from the lands in Kent county; (2) that a decree be passed, ordering and directing the administrator's to execute a valid release; (3) that, in the event of their refusal to release the mortgage, a trustee be appointed to release said mortgage lien of record in Queen Anne's county; and (4) for general relief. The answer denies most of the material allegations of the bill, including the alleged payment of the mortgage.

The appellant was called as a witness in his own behalf, and exceptions were filed to most of the questions in chief asked him, on the ground that he was incompetent, under the statute, to testify. He is, under § 3, art. 35, of the Code, incompetent to testify "to any transaction had with, or statement made by the testator, intestate, ancestor or party so incompetent to testify, either personally or through an agent since dead, lunatic or insane, unless called to testify by the opposite party," etc.

There can, therefore, be no doubt that most of his evidence, practically all of it that is material, must be excluded. It is said by the appellant's solicitors that he can testify as to admissions by Mr. Maslin, as he is still living, but the difficulty about that is that the bill alleges that Mr. Maslin had told appellant's attorney that he had assigned the mortgage to Mr. Hynson. If that be correct, and there is nothing to show that it is not, the administrator of Hynson cannot be bound by statements or admissions made by Maslin after he assigned the mortgage. Why the appellant did not call him as a witness is not shown, but he was not called, and if he knows any facts material to the case, the court is left in the dark as to his knowledge. The plaintiff's evidence as to what occurred between him and Mr. Slay throws but little light on the question, although he was competent to testify as to that. Mr. Slay is not incompetent as a witness because he is one of the administrators of Mr. Hynson, as the appellant contends. At one time such was the statute, subject to certain exceptions, but that has long since been changed. The difficulty is that Mr. Slay has no personal knowledge of the original transaction, and he does not know whether or not the mortgage was, in fact, paid. He did testify that he, as administrator, had this mortgage in his possession for sometime, but cannot now find it, and does not know what became of it. Then his testimony as to what he found in Mr. Hynson's check book, in answer to the general interrogatory, was not excepted to,

Admissions—effect.

and has some relevancy to the matter in issue. He said: "And perhaps I had as well give the literal copy of Mr. Hynson's check book stub, which is as follows: 'Jan. 23, 1893. To Chas. T. Westcott, for Maslin mortgage, $600, and interest paid by Miss Julia Cacy, $18—$618.' "

That looks as if Mr. Hynson made out his check to Mr. Westcott for that mortgage, but whether the check was delivered and paid, or, if it was, why he paid Mr. Westcott for it, or whether Mr. Hynson was taking an assignment of the mortgage, or paying it off, we are not informed. Mr. Westcott may have been acting as attorney for someone in receiving it, and Mr. Hynson may have been so acting in paying it. Apparently Miss Julia Cacy had at least $18 in it.

The difficulty is that we have no evidence before us to show that the appellant ever paid the mortgage, for when his testimony on that subject is excluded, as it must be, there is nothing to sustain his bill in that respect. Mr. Hynson died June, 1907,—fourteen years after the transaction above referred to, when his check book shows he made out a check to Mr. Westcott, and only seven years before this bill was filed. If that memorandum is accepted as evidence to show that Mr. Hynson obtained the mortgage, it is also evidence of the fact that it was not paid up to that time, although nearly two years overdue. But there is nothing to show that the appellant did not make some payment or payments on the interest or principal within twenty years before the bill was filed. So far as we know, he might have done so shortly before the death of Mr. Hynson. As was said in Brown v. Hardcastle, 63 Md. 484: "The presumption of payment in favor of a mortgagor in possession over twenty years is not conclusive, but may be rebutted by evidence of part payment of principal or interest, or by admissions of the debt's existence, or other circumstances from which it may be inferred the debt has not been paid. In other words, a recognition of the mortgage debt involving a promise to pay it will remove the bar of the Statute of Limitations."

Same—presumption of payment—affirmative relief.

The court quoted from Stump v. Henry, 6 Md. 209, 61 Am. Dec. 300, that "payment of part of a mortgage will prevent it from being barred by limitations for twenty years afterwards, although the mortgagor may have been in possession for ninteen years and upwards prior to the payment."

A number of other cases in this state are to the same effect as those mentioned. It is true that, such being the law, it may be all the more necessary for a mortgagor to have a mortgage release, if he had paid it, as no one examining the title would treat the mortgage as paid, merely because the twenty years had elapsed since it matured; but the appellant overlooks the fact that he is now asking the court for affirmative relief. When he comes into a court of equity to compel a release of a mortgage, he must not only allege, as he did, but must prove, that the mortgage has been paid, or at least that he is entitled to have it released by those he proceeds against. The appellant places great reliance upon Baldwin v. Trimble, 85 Md. 396, 36 L.R.A. 489, 37 Atl. 176, but that was a very different case from this. There a vendee was resisting a bill for specific performance, on the ground that the title of the vendor was not merchantable. Amongst other defenses which he relied on was a deed of trust which was on record. This court held that it must be treated as a mortgage, and, though Chief Judge McSherry, said that: "as thirty years have intervened between the maturity of the mortgage and now, without recognition of its being a subsistent lien, the bar is absolute and complete."

It was held that it was not a cloud on the title, but the owner of the property was not seeking the affirmative relief of asking that the

mortgage be released. Moreover, there is nothing in this case to show that the mortgage was *"without recognition of its being a subsisting lien."* All that we have before us is a certified copy of a mortgage which matured twenty-three years before it was filed in this case, but which the little evidence which is before us tends to show was in force at least two years after it matured.

But regardless of that, what is there to show that the administrators have any right, much less that it is their duty, to release the mortgage? We cannot be certain from this record that Mr. Hynson ever owned it. There is no assignment of it before us, and presumably there is none on the record, as the copy filed does not show any. Chief Judge McSherry said, in Demuth v. Old Town Bank, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266, that prior to the Act of 1892, chapter 392 (which does not apply to this case), the law of this state was and still is, unless subject to that act, "that the indorsement or assignment of a promissory note secured by a mortgage given to a bona fide holder of such note the benefit of the lien of the mortgage as fully as though he had been named as the actual mortgagee; and this, too, though the public records furnish no evidence of the indorsement or transfer and delivery of the note. The transfer or indorsement of the note, which is the principal, carries the mortgage, which is the incident, and effectually clothes the bona fide holder of the note with the lien of the mortgage itself."

Again Judge McSherry said: "From the moment of that indorsement and delivery, it ceased to be in the power of Price to release the mortgage so as to deprive the bank, by which the note was held, of the benefit of its security under the mortgage."

Price was the mortgagee in the mortgage involved in that case. That was changed by the Act of 1892, which was amended by chapter 719 of Act of 1910, being now § 25 of article 66 of the Code, but this mortgage was given in 1889, and the statute is not applicable.

The note for the principal is not accounted for in any way, although possibly it was not assigned to the person to whom the mortgage was assigned. The bill alleges that Mr. Maslin said he assigned the mortgage to Mr. Hynson; but, if he did, then the memorandum in Mr. Hynson's check book is peculiar—unless it be that Mr. Hynson first assigned it to Mr. Westcott, and the latter afterwards reassigned it to Mr. Hynson. There is a statement in Mr. Collins's evidence to the effect that J. P. Ahern said that W. W. Beck told him that the mortgage had been transferred by Maslin to Charles T. Westcott, and by him to Hynson, but that is purely hearsay.

But notwithstanding what we have said, there are several things in the record which lead us to believe that it may be possible to obtain more evidence than is before us; and, as it may do a great injury to the appellant if the mortgage is not released, if he has in fact paid it, we have concluded to remand the case, without affirming or reversing the decree, in order that he may have an opportunity to produce more testimony, if possible. Of course, he can call Mr. Maslin and Mr. Slay, if he desires, and could still rebut their testimony, if he has the evidence, under § 5 of article 35. The administrators should do everything possible to get at the actual facts. As Mr. Slay testified that he had this mortgage in his possession at one time, he may be able to find it, on making a more thorough search for it, or he may be at least able to state more definitely whether there was an assignment on it and, if so, from whom to whom, etc. With his testimony in chief he filed what he said was a part of the letter he wrote to Mr. Cacy on May 15, 1914, and testified that the facts therein stated are true and correct. Amongst other things contained in that paper are the following: "Mr. Hynson never got the Maslin mort-

gage until January 23, 1893, when he paid Charles Westcott and took an assignment of the same, to prevent Mr. Westcott from selling the Queen Anne's farm, and the Hynson estate still holds both mortgages, with a credit on them much less than twenty years old. He advanced these sums to you solely to accommodate you and keep your lands from being sold, and yet you claim to have paid him who never pressed a man in his life, except where it was absolutely necessary to save his money, then only in rare cases."

If such are the facts, legal evidence of them should be produced, but of course that memorandum of what Mr. Slay wrote to Mr. Cacy is not evidence on his own offer.

We have determined upon the course we will adopt in this case, because we hope, to use the language of the statute (§ 38, art. 5) that "the purposes of justice will be advanced by permitting further proceedings in the cause;" but we are aware that it will depend largely upon the parties, or their attorneys, as to how far that much to be desired end will be accomplished. There is ordinarily but little reason for controversies of this character in court, if both parties only want what they believe they are entitled to. The attorneys ought to be able to get the actual facts, if they make the proper effort to do so, and should not be governed too much by the technical rules of law in an honest effort to ascertain the truth in reference to matters which occurred so long ago. The statute is wise in excluding evidence of one party to a transaction, when the other is dead; but it was passed to prevent injustice being done, and not to cause it, if that can be avoided. Of course, the administrators must see that the estate of their decedent is protected from unjust claims, but it is also their duty to aid in reaching a just conclusion, as they have under their control the books and papers of their intestate, to which the opposite party has not equal access. On the other hand, a plaintiff, seeking such relief as this one is, ought not to be overly technical about the use of the books and papers of the decedent which may reflect on the question. If the attorneys will approach the case in that spirit, we feel confident that a just conclusion will more surely be reached than by disposing of it on such a record as is now before us.

Cause remanded, without reversing or affirming the decree, for further proceedings, in accordance with this opinion.

GEORGE F. JUDSON
v.
BERTHA J. PHELPS, Exrx., etc., of Hiram W. Adams, Deceased, Appt.

Connecticut Supreme Court of Errors—December 20, 1913.

(87 Conn. 495, 89 Atl. 161.)

Evidence — presumption of payment of judgment.

1. A judgment is presumed to be satisfied at the expiration of twenty years after rendition, which presumption may be rebutted by showing diligence in attempting to enforce it, admissions of liability, or circumstances satisfactorily accounting for delay.

[See note on this question beginning on page 779.]

Same — conclusiveness.

2. The presumption of payment of a judgment after the lapse of twenty years and the bar interposed by the Statute of Limitations are not the same.

Same — sufficiency.

3. Presumption of payment of a judgment from lapse of twenty years is not conclusive because no demand for payment was made upon the judgment

debtor, and there was no express recognition of the indebtedness or evidence of his insolvency, if the creditor is shown to have made inquiry as to property subject to levy, without success.

APPEAL by defendant from a judgment of the Superior Court for Hartford County in favor of plaintiff in an action brought to recover on a dormant judgment. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. **Theodore G. Case,** for appellant:

At common law there is a clearly defined and firmly established rule that all obligations are presumed to be satisfied and discharged after the lapse of twenty years.

2 Black, Judgm. 2d ed. § 992; Bright v. Sexton, 18 Ind. 186; Hendricks v. Wallis, 7 Iowa, 224; Smith v. Miller, 14 Wend. 188; Beekman v. Hamlin, 19 Or. 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195; Thayer v. Mowry, 36 Me. 287; Alston v. Hawkins, 105 N. C. 3, 18 Am. St. Rep. 874, 11 S. E. 164; Fagan v. Bach, 253 Ill. 588, 97 N. E. 1089, Ann. Cas. 1913A, 505.

This rule applies to judgments as well as to other obligations, and has been recognized as affording the only limitation of time to the collection of a domestic judgment.

Barber v. International Co. 74 Conn. 656, 92 Am. St. Rep. 246, 51 Atl. 857.

The presumption raised by this rule is a presumption of law, and whether or not the established facts in any case are sufficient to overcome the presumption presents a question for the court rather than for the jury.

Hendricks v. Wallis, 7 Iowa, 229; Gregory v. Com. 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Beale v. Kirk, 84 Pa. 415.

In purpose and effect, the presumption is, to a degree, analogous to the Statute of Limitations; the chief distinction being that while the statute raises an absolute bar, the presumption is rebuttable, and may be overcome by evidence of facts and circumstances which tend, in a clear and satisfactory manner, to explain the delay in prosecuting the claim.

Morey v. Farmers' Loan & T. Co. 14 N. Y. 302; Tucker v. Hunt, 6 Rich. Eq. 183; Thompson v. Thompson, 2 Head, 405; Bean v. Tonnelle, 94 N. Y. 381, 46 Am. Rep. 153; De Ford v. Green, 1 Marv. (Del.) 316, 40 Atl. 1122; Courtney v. Staudenmayer, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 760; Foulk v. Brown, 2 Watts, 215; Tudor v. Taylor, 26 Vt. 451.

Evidence in explanation of unusual delay in enforcing a claim must be so distinct and positive as to admit of no reasonable conclusion except that of nonpayment of the obligation in issue.

Gregory v. Com. 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Rhodes v. Turner, 21 Ala. 218; Bean v. Tonnelle, 94 N. Y. 386; De Ford v. Green, 1 Marv. (Del.) 316, 40 Atl. 1122; Courtney v. Staudenmayer, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 760; Foulk v. Brown, 2 Watts, 215.

The effect of the presumption is to shift the burden of proof, and to place upon the party seeking to recover the duty of accounting for his delay in a reasonable and satisfactory manner.

Maxwell v. Devalinger, 2 Penn. (Del.) 504, 47 Atl. 383; Rosenstock v. Dessar, 33 Misc. 419, 67 N. Y. Supp. 657; Platte County Bank v. Clark, 81 Neb. 255, 115 N. W. 787; Reed v. Reed, 46 Pa. 242; Luther v. Crawford, 116 Ill. App. 351; Lynde v. Denison, 3 Conn. 397.

There is manifestly nothing prejudicial to rights or interests of a creditor in requiring him to account for his long continued delay and neglect by evidence which is positive and distinct in character.

Magee v. Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Grantham v. Canaan, 38 N. H. 270; Hill v. Feeny, 90 Neb. 791, 134 N. W. 921; Whitney v. French, 25 Vt. 663; Seymour v. Alkire, 47 W. Va. 302, 34 S. E. 953.

To overcome the presumption, there must be proof either of a clear and unequivocal recognition of the claim on the part of the debtor, such as an admission of the indebtedness, either verbal or written, part payment or a promise to pay, made during the period of twenty years.

Beekman v. Hamlin, 19 Or. 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195; Lyon v. Adde, 63 Barb. 94; Olden v. Hubbard, 34 N. J. Eq. 85; Tennessee v. Virgin, 36 Ga. 388; Reynolds v. Green, 10 Mich. 355.

Or of the insolvency of the debtor, or his inability to pay his debts, during

the entire period of twenty (20) years; and such evidence is not sufficient unless it covers the entire period.

De Ford v. Green 1 Marv. (Del.) 316, 40 Atl. 1122; Boyd v. Boyd, 9 Misc. 161, 29 N. Y. Supp. 7; Beekman v. Hamlin, 19 Or. 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195; Devereux's Estate, 184 Pa. 429, 39 Atl. 225; Rogers v. Judd, 5 Vt. 236, 26 Am. Dec. 301; Jackson v. Nason, 38 Me. 85; Guillou v. Redfield, 205 Pa. 293, 54 Atl. 886.

Or of some disability which prevented the plaintiff from taking legal steps to enforce his claim during the period of twenty years.

Bartlett v. Bartlett, 9 N. H. 398; Dunlop v. Ball, 2 Cranch, 180, 2 L. ed. 246; Philippi v. Philippe, 115 U. S. 151, 29 L. ed. 336, 5 Sup. Ct. Rep. 1181.

Messrs. **P. S. Bryant** and **M. S. Falk**, for appellee:

Almost any evidence adapted to the circumstances of the case and tending directly or by implication to negative the fact of payment will answer all purposes if sufficiently strong to satisfy court and jury.

2 Black, Judgm. p. 1466, § 993.

In case of a judgment twenty years or more old, there is a presumption of payment which obtains until rebutted and overcome by evidence which satisfies the court that the judgment has not in fact been paid or discharged.

Boardman v. De Forest, 5 Conn. 1; Chapman v. Loomis, 36 Conn. 459; Fanton v. Middlebrook, 50 Conn. 44; Barber v. International Co. 74 Conn. 656, 92 Am. St. Rep. 246, 51 Atl. 857.

In the absence of an express Statute of Limitations, the common-law rule of presumption is open to rebuttal, and is rebutted by evidence satisfactory to the trier that the judgment has not in fact been paid.

Lynde v. Denison, 3 Conn. 391; Daggett v. Tallman, 8 Conn. 175; 16 Cyc. 1073; 23 Cyc. 1467–1469; Freeman, Judgm. 3d ed. 1881, § 464; Ward v. Metropolitan L. Ins. Co. 66 Conn. 238, 50 Am. St. Rep. 80, 33 Atl. 902; Vincent v. Mutual Reserve Fund Life Asso. 77 Conn. 288, 58 Atl. 963; Robinson, Elementary Law, p. 366, § 332; Greenl. Ev. 1896 ed. § 39; Walker v. Robinson, 136 Mass. 282; Day v. Crosby, 173 Mass. 436, 53 N. E. 880; Denny v. Eddy, 22 Pick. 533; Knapp v. Knapp, 134 Mass. 356.

Roraback, J., delivered the opinion of the court:

The complaint alleged that the plaintiff obtained a judgment against the defendant's decedent, Hiram W. Adams, January 10, 1890, for $384.07; that the plaintiff duly presented his claim upon the judgment to the defendant as executrix of the estate of the deceased Hiram W. Adams; that the defendant refused to allow the same; that she gave the plaintiff notice of the disallowance thereof; and that the judgment was wholly unsatisfied and unpaid. The defendant admitted all the allegations of the complaint except the one which averred that the judgment was unpaid. This was denied. Upon this issue the trial court found that the judgment was unpaid, and rendered judgment for the plaintiff.

It appears from the finding that on January 10, 1890, the plaintiff recovered a judgment against one Hiram W. Adams, in the court of common pleas in Hartford county, for $354.51 damages and $29.56 cost of suit. On August 18, 1912, Adams died. On August 22, 1912, the defendant was appointed executrix upon the estate of Adams by the court of probate for the district of Hartford, and duly qualified as executrix. On or about January 9, 1913, and within the time limited for the presentation of claims, the plaintiff duly presented in writing his claim under the judgment to the defendant as executrix, and February 17, 1913, the defendant as executrix disallowed the claim in writing and refused to pay the same. When the judgment was rendered, and for several years thereafter, the plaintiff resided in Northampton, Massachusetts. From Northhampton he removed to New Haven, Connecticut, where he has since resided. During all this time, and until his death, Adams resided in Bloomfield, Connecticut. During the several years immediately following the date of the judgment, the plaintiff was in Hartford on repeated occasions and made diligent inquiries of people whom he deemed likely to know as to the financial condition of Adams, but was unable to learn

that he was possessed of any property out of which the judgment could be satisfied, until after his death. Before the death of Adams no execution was taken out on the judgment nor were any other legal steps taken to enforce its collection. No demand was ever made upon Adams by the plaintiff for the payment of his judgment, nor was any execution ever taken out, or any other legal steps taken to collect the judgment, until the presentation of the claim to the defendant as executrix and the bringing of the present action.

The judgment now in question was rendered January 10, 1890. This action was commenced March 1, 1913, so that more than twenty-three years intervened between the date of the judgment and this attempt to enforce it. It is contended that the presumption of payment of a judgment after a lapse of twenty years can only be rebutted by proof of express recognition or acknowledgment of the debt, or by proof of a demand, or that the plaintiff has been prevented from taking action to collect his debt, or by the insolvency of the debtor. Although we have no Statute of Limitations on this subject within which an action on a judgment must be brought, it does by no means follow that such a judgment never becomes obsolete, or that it may be always enforced after an indefinite lapse of time. It is a general rule that every judgment and decree of a court of record of this state shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered. This presumption may be rebutted by showing that diligence has been used to enforce the judgment, or admissions of the defendant, or other circumstances, such as insolvency, or that the debtor was beyond the sea, or other evidence which satisfactorily accounts for the delay. Greenleaf says: "But in all these cases the presumption of payment may be repelled by any evidence of the situation of the parties, or other circumstances tending to satisfy the jury that the debt is still due." 1 Greenl. Ev. 12th ed. § 39, p. 45; 2 Whart. Ev. 3d ed. § 1364.

Evidence—presumption of payment of judgment.

In Massachusetts, where there is a statute declarative of our common-law rule, it is said that every judgment and decree of a court of record of that state shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered. This presumption may be rebutted by evidence showing that the judgment has not in fact been paid, but remains justly due. Any legal evidence having a tendency to show that the judgment has not been paid or satisfied is competent, and that, if the evidence furnished is such as to produce conviction that the judgment has not in fact been paid or satisfied, it is sufficient to rebut the presumption. Walker v. Robinson, 136 Mass. 280, 282. See also Haynes v. Blanchard, 194 Mass. 246, 120 Am. St. Rep. 551, 80 N. E. 504.

Same—conclusiveness.

The defendant contends that the presumption of a payment of a judgment after a lapse of twenty years and the bar interposed by the Statute of Limitations are essentially the same. This is not so. The bar is removed by nothing less than a new promise to pay, or an acknowledgment consistent with such promise. The presumption is rebutted, or, to speak more accurately, does not arise, where there is affirmative proof, beyond that furnished by the judgment itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor. Bentley's Appeal, 99 Pa. 504. A judgment is not strictly a contract. It imposes a civil liability; it has a more conclusive legal effect than a contract by specialty. There is seldom any reason why one who has put a claim into a domestic judgment should proceed otherwise than by execution; and never any danger that, should no suit be brought upon

it, the judgment debtor may be prejudiced by loss of evidence as to merits of the original demand. The rule of the common law, therefore, by which only a prima facie presumption of payment arises after twenty years, presents the only limitation of time to the collection of a domestic judgment which is recognized in this state. Barber v. International Co. 74 Conn. 652, 656, 92 Am. St. Rep. 246, 51 Atl. 857.

As stated, the superior court reached the conclusion that the judgment in question was unpaid. The appeal contains no exception to the finding, neither is it accompanied by the evidence as required by the statute. The only question properly presented before this court is whether the facts found warrant the conclusion of the trial court that the judgment was wholly unsatisfied. The facts found are consistent with the conclusion of the trial court that the judgment was unpaid. The plaintiff testified that it was still due. For several years after the judgment was rendered the plaintiff was a nonresident. He made diligent inquiry as to the financial credit of Adams, but was unable to ascertain that he possessed any property during his lifetime. The fact that it does not appear that a demand was made upon the judgment debtor, or that there was any express recognition of the indebtedness on his part, or that he was insolvent, does not preclude the plaintiff's recovery. These facts were all circumstances which tended to fortify the presumption of payment; they did not render this presumption conclusive.

Same—Sufficiency.

There is no error.

In this opinion the other Judges concur.

EDWARD E. TALBOT, Admr., etc., of Ursula M. Penniman, Deceased,

v.

JAMES E. HATHAWAY et al., Trustees.

Maine Supreme Judicial Court — April 20, 1915.

(113 Me. 324, 93 Atl. 834.)

Evidence — presumption of payment — rebuttal.

1. Possession by a surety at the time of his death of negotiated notes which had been paid by him, together with the fact that the maker had been out of the state for more than twenty years, rebuts the presumption of reimbursement of the surety, which arises from lapse of time.

[See note on this question beginning on page 779.]

Same — self-serving memorandum.

2. A memorandum made by a surety on a note, stating that he had paid it, is not admissible as evidence of that fact, in an action by his administrator to recover the amount from the maker.

Same — possession of notes — effect.

3. Possession by a surety at the time of his death of notes which had been negotiated is prima facie evidence that he had paid them, and had not been repaid.

Same — payment before maturity — presumption.

4. The presumption is that payments made on a note before its maturity were made by the maker rather than the surety, in an action by the surety's administrator to recover from the maker money paid by the surety on the note.

REPORT by the Supreme Judicial Court for Washington County for determination by the Law Court of an action brought to recover money,

alleged to have been paid by decedent, as surety for defendant, on certain promissory notes. *Judgment for plaintiff.*

The facts are stated in the opinion of the court.

Messrs. C. B. Donworth and E. C. Donworth for plaintiff.

Messrs. O. H. Dunbar and H. H. Gray, for defendant Hathaway:

It is a common-law presumption that a debt has been paid after twenty years, which presumption is conclusive unless rebutted by sufficient and admissible evidence.

19 Am. & Eng. Enc. Law, 149; Abbott, Proof of Facts, p. 784.

The memoranda on notes are self-serving statements, and in no way admissible.

Townsend Bank v. Whitney, 3 Allen, 455; Libby v. Brown, 78 Me. 492, 7 Atl. 114; Hancock v. Cook, 18 Pick. 30; Scribner v. Adams, 73 Me. 541; Handly v. Call, 30 Me. 9; Pulsifer v. Crowell, 63 Me. 22; State v. Sandford, 99 Me. 448, 59 Atl. 597.

Mr. H. W. Sawyer for defendant trustees.

King, J., delivered the opinion of the court:

The case comes up on report. It is an action by the administrator de bonis non, with the will annexed, of the estate of Ursula M. Penniman, late of Machias, Maine, to recover sums alleged to have been paid by her, as surety for the defendant, on two promissory notes, one, dated July 10, 1865, for $100, payable "in October next with interest," and the other, dated July 13, 1865, for $100, payable "in one year from date with interest."

Miss Penniman, the decedent, was the defendant's aunt. She died March 3, 1893. The notes in question were in her possession at the time of her death, were included in the inventory of her estate filed by her first administrator, and came into the possession of the plaintiff as her administrator de bonis non.

The defendant has resided continuously out of the state of Maine since the autumn of 1865. His plea is the general issue and the Statute of Limitations. He offered no evidence, except his deposition taken in the state of Washington; but he was disqualified as a witness to facts happening before the death of the testatrix, because the plaintiff is prosecuting the suit as an administrator, and that objection was raised both at the taking of the deposition and at the trial. Rev. Stat. chap. 84, § 112.

The plaintiff offered in evidence a memorandum on the back of each note, in the handwriting of the decedent, to the effect that she paid the note. We find no authority for the admission of those entries. The fact that they were written on the back of the notes, instead of on a separate paper or private book, is immaterial. They are nothing more than private memoranda, made by the surety herself in her own favor. A party is not permitted to introduce such entries made by himself, in support of his own case. Libby v. Brown, 78 Me. 492, 7 Atl. 114; Townsend Bank v. Whitney, 3 Allen, 455.

Evidence—self-serving memorandum.

But the plaintiff contends that the decedent's possession of the notes at the time of her death is prima facie evidence that she paid them. We think that contention is sustainable. The notes had been negotiated. The decedent had signed them as surety. She was liable to pay them. If she paid them, we should expect to find them in her possession until she was repaid. They were in her possession at the time of her death, and that fact, unexplained, is presumptive evidence that she paid them, and had not been repaid. In M'Gee v. Prouty, 9 Met. 547, 551, 43 Am. Dec. 409, the court said: "We have no doubt that where a promissory note has been negotiated, and afterwards comes into possession of one of the parties liable to pay it, such possession is prima facie evidence of payment, and that he is to be treated as the bona fide holder, unless the contrary is made to appear. Dugan v.

Same—possession of notes—effect.

United States, 3 Wheat. 172, 4 L. ed. 362; Baring v. Clark, 19 Pick. 220; Northampton Bank v. Pepoon, 11 Mass. 288."

The same rule was recognized in Heald v. Davis, 11 Cush. 318, 59 Am. Dec. 147.

The fact that the defendant has resided continuously out of the state since the latter part of the year 1865 renders unavailing his plea of the Statute of Limitations, because the time of his absence from the state is not to be taken as a part of the time limited for the commencement of the action. Rev. Stat. chap. 83, § 106.

Independently, however, of the Statute of Limitations, the defendant urges in bar of the action the common-law presumption of payment arising after the lapse of twenty years. In other words, he urges that, if he ever became indebted to the decedent on account of her payment of the notes in question, that indebtedness is more than twenty years old, and is presumed to have been paid. And it is true that more than twenty years elapsed after the decedent paid the notes, before the action was commenced. But the presumption of payment arising from the lapse of time is a matter of evidence. It is the presumption of a fact, and may be rebutted by evidence of other facts and circumstances tending to show nonpayment, or sufficiently accounting for the delay of the creditor. The presumption may be repelled by any facts which destroy the reason for it. Nor is it essential that the evidence to rebut the presumption should contain any new promise on the part of the debtor, or positive act of unequivocal recognition of the debt by him within the period. Jenkins v. Andover Theological Seminary, 205 Mass. 376, 382, 91 N. E. 552.

It appears, as above noted, that the defendant has resided continuously out of the state since the autumn of 1865. There are cases in some jurisdictions holding that the nonresidence of the debtor during the time relied on to create the presumption of payment does not prevent that presumption arising; but in other cases, including those in this state, it is held that continued non-residence of the debtor rebuts the presumption of payment. 30 Cyc. 1280, and cases cited. It was so expressly held in McLellan v. Crofton, 6 Me. 307, 334, where the court approved an instruction that the debtor's absence from the country during the twenty years was sufficient to control and repel the presumption of payment from lapse of time. But of more significance than the debtor's continuous absence from the state is the fact that the notes were in the possession of the decedent up to the time of her death, the place where we should expect them to be if she paid them as surety, and had not been repaid therefor, and where we should not expect them to be if he had repaid her. This fact of her possession of the notes stands unexplained by any other fact or circumstance, and therefore renders it most improbable that he paid his liability to her, arising on account of those notes. We are, therefore, constrained to the conclusion that the facts and circumstances appearing in this case are sufficiently strong to repel the presumption, arising from lapse of time, that the defendant paid the decedent the amounts she paid as his surety on the notes.

Same—presumption of payment—rebuttal.

It remains to determine the amount for which the plaintiff is entitled to judgment. There are no indorsements of payments on the first note. But on the second note there are two, one dated November 3, 1865, for $20, and the other dated December 20, 1865, for $30. The note, however, was not due till July 13, 1866, and, accordingly, both payments appear to have been made before its maturity. It is not to be expected, in the usual course of business, that a surety on a note would pay it until after the default of the principal. And if partial

payments appear to have been made on a note before its maturity, we think the prima facie inference is that they were made by the maker rather than by the surety. The payment of the balance due on this note by the decedent would account for her possession of it, and we think the presumption of payment arising from her possession of it should be limited to the balance due on it at its maturity.

Same—payment before maturity—presumption.

It is, therefore, the opinion of the court that the plaintiff is entitled to judgment for the amount due on both notes, the defendant to have the benefit of the partial payments made on the second note, as they appear by the indorsements thereon.

So ordered.

A. W. SHEAFER et al., Exrs., etc., of Peter W. Sheafer, Deceased, Appts.,

v.

A. B. WOODSIDE et al.

Pennsylvania Supreme Court—March 19, 1917.

(257 Pa. 276, 101 Atl. 753.)

Evidence — presumption of payment — rebuttal.

1. The presumption of payment arising from lapse of time may be rebutted by any competent evidence tending to show that the debt was not, in fact, paid.

[See note on this question beginning on page 779.]

Trial — sufficiency of evidence — question for court.

2. The court must decide whether or not evidence offered to rebut the presumption of payment from lapse of time is, if true, adequate for that purpose.

APPEAL by plaintiffs from a judgment of the Court of Common Pleas for Schuylkill County in favor of defendants non obstante veredicto, in an action brought to enforce payment of a debt secured by mortgage. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **John G. Johnson** and **Woodbury & Woodbury**, for appellants:

The evidence was sufficient to overcome the presumption of payment from lapse of time, and the question was properly submitted to the jury by the court.

Eby v. Eby, 5 Pa. 435, 47 Am. Dec. 418; Reed v. Reed, 46 Pa. 239; Porter v. Nelson, 121 Pa. 628, 15 Atl. 852; Re Hagan, 33 Pittsb. L. J. N. S. 49; Troxell v. Troxell, 19 York Leg. Rec. 20; White v. White, 200 Pa. 565, 50 Atl. 157; O'Hara v. Corr, 210 Pa. 341, 59 Atl. 1099; Wilson v. Eckman, 55 Pa. Super. Ct. 403; Rothrock v. Gallaher, 91 Pa. 108; Adams v. Edwards, 115 Pa. 211, 8 Atl. 425; Hoffer's Estate, 156 Pa. 473, 27 Atl. 11.

Mr. **John Robert Jones** for appellees.

Frazer, J., delivered the opinion of the court:

In 1876, Mrs. A. B. Woodside and her three daughters, Virginia, Geraldine, and Fannie, executed a bond and mortgage to Peter W. Sheafer, to secure the payment of $2,650 in two years, covering property owned by them in the borough of Pottsville. The mortgage was duly recorded in the office for recording deeds in Schuylkill county, on June 24, 1876, in Mortgage Book 1 A. H., page 395. Peter W. Sheafer, the mortgagee, died in 1891, leaving a will in which Arthur W. Sheafer and Henry W. Sheafer were named as executors. At the time of his death the bond

and mortgage above referred to were found among his papers; the bond having indorsed thereon, in the writing of Peter W. Sheafer, a payment of $56, under date of December 22, 1877. There is no evidence that demand for payment of the indebtedness secured by the mortgage was made until after the death of the last survivor of the mortgagors, when the executors of the estate of Peter W. Sheafer, on August 25, 1915, issued a scire facias, to which the administrator of the estate of Geraldine Woodside, the last survivor, pleaded payment, and in support of this plea, at the trial, relied upon the presumption of payment by reason of lapse of time, and presented a point for binding instructions for defendant. The trial judge reserved the point, and submitted to the jury the facts presented by plaintiffs to rebut presumption of payment. A verdict was rendered in plaintiffs' favor for the amount of the mortgage, with interest, aggregating, after deducting the payment indorsed on the bond, the sum of $8,727.87. Judgment was subsequently entered in favor of defendant non obstante veredicto, whereupon plaintiffs appealed.

A period of thirty-six years elapsed from the maturity of the mortgage until the beginning of foreclosure proceedings. Dr. O'Hara, a practising physician in Pottsville for twenty years called by plaintiffs, who had been a family physician of the Woodsides, although only Fannie and Geraldine were living when he first attended them, testified that, in 1914, shortly after the death of Fannie, Geraldine the survivor spoke to him in reference to the mortgage due the Sheafer estate, and, while the witness was unable to recall the exact language of the conversation, he stated: "She told me she did not know what would happen to them, or what would happen to her, or would become of her; I do not exactly know the verbatim statement, but she wept, and so forth, and she said that the Sheafers held a mortgage, or that she was in a great debt to them, in other words."

He testified further she told him: "She did not know what would become of them now; she did not know whether Sheafers will push the mortgage or not, and she was in a very nervous state, not knowing what would become of her."

He also testified the family had been in straitened financial circumstances, and had received assistance from neighbors, and further that Geraldine requested him to speak to the Sheafers about the mortgage, which he subsequently did by informing Lesley Sheafer that—"one of those Miss Woodsides is worried to death about what will become of her now, since the other sister is gone; she did not know what will become of the place now."

Lesley Sheafer, called as witness by plaintiffs, corroborated Dr. O'Hara's testimony as to the conversation in relation to the Woodside mortgage, and testified to bringing the subject to the attention of A. W. Sheafer, one of the executors of the Sheafer estate, who, following that conversation, on December 22, 1914, wrote Miss Woodside, as follows:

Dear Miss Woodside:—Information has come to us through Dr. O'Hara that you are worried in regard to the mortgage which we hold on your property at 219 South Center street. We therefore take this opportunity of assuring you that we have no intention of in any way endeavoring to collect this mortgage or any interest thereon during your lifetime, or so long as it remains your property. We trust, therefore, that you will not allow this matter to trouble you in the least. Extending to you our sympathy in your recent bereavement, we are,

Yours very truly,
A. W. Sheafer,
For the Executors of Estate of P. W. Sheafer, Deceased.

A copy of this letter was also sent

to Dr. O'Hara, who subsequently saw Miss Woodside, and was informed by her of having received the letter from Mr. Sheafer, and that it gave her much relief.

The above is the evidence relied upon by plaintiff to rebut the presumption of payment arising from lapse of time. The rule that after the lapse of twenty years debts of every kind are presumed to be paid is a rule of convenience and policy, resulting from a necessary regard for the peace and security of society, and also for the debtor, who should not be called upon to defend stale claims, at a time when witnesses are dead and papers lost or destroyed. Foulk v. Brown, 2 Watts, 209; Eby v. Eby, 5 Pa. 435, 47 Am. Dec. 418. This presumption does not bar the debt, however. Unlike the Statute of Limitations, it is merely a rule of evidence affecting the burden of proof, and no new promise is required as the basis of an action. Eby v. Eby, supra. Within twenty years the burden of proving payment is on the debtor; after that time it shifts to the creditor. Reed v. Reed, 46 Pa. 239. To rebut the presumption, any competent evidence tending to show the debt is not, in fact, paid, will be received. Although it need not be of the same quality as required to remove the bar of the Statute of Limitations (Gregory v. Com. 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Devereux's Estate, 184 Pa. 429, 39 Atl. 225) it should, however, be clear and convincing, especially where suit is not brought until aftter the death of the debtor, as in the present case (Fidelity Title & T. Co. v. Chapman, 226 Pa. 312, 75 Atl. 428). In Foulk v. Brown, supra, the rule was stated as follows: "Within the twenty years, the onus of proving payment lies on the defendant; after that time, it devolves on the plaintiff to show the contrary, by such facts and circumstances as will satisfy the minds of the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment. And if these facts are sufficient satisfactorily to account for the delay, then the presumption of payment, not being necessary to account for it, does not arise. Slighter circumstances are sufficient to repel the presumption than are required to take the case out of the Statute of Limitations, the latter being a positive enactment of the legislature; the former merely an inference on which legal belief is founded."

Evidence—presumption of payment—rebuttal.

In Reed v. Reed, 46 Pa. 239, 242, it was said: "The presumption is rebutted, or, to speak more accurately, does not arise, where there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor."

Whether the proof is ample to rebut the presumption of payment must necessarily depend on the particular circumstances of each case, and it is primarily for the court to decide whether the facts, if true, are adequate for the purpose for which offered, and whether the facts relied upon are true is a question for the jury. Fidelity Title & T. Co. v. Chapman, supra. In Gregory v. Com. supra, the plaintiff, to rebut the presumption of payment, relied upon acknowledgments by the debtor, made to third persons at various times, to the effect that there was something between him and plaintiff which "had never been thoroughly settled." It appeared, however, that the reference might have been to the settlement of certain other matters concerning an estate in which the debtor was interested, and it was held the testimony was too uncertain and equivocal in meaning to rebut the presumption of payment; the court saying: "Any competent evidence which tends to show that the debt is, in fact, unpaid, is admissible for that

Trial—sufficiency of evidence—question for court.

purpose. The evidence may consist of the defendant's admission made to the creditor himself, Eby v. Eby, supra; or to his agent, or even to a stranger, Morrison v. Funk, 23 Pa. 423; Reed v. Reed, 46 Pa. 239; but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to demand for a debt (Bentley's Appeal, 99 Pa. 500). It is of no consequence that the admission of nonpayment is accompanied by refusal to pay; the action is not founded on a new promise, but on the original indebtedness; the question, as against presumption, is whether or not the debt is, in fact, unpaid."

In Runner's Appeal, 121 Pa. 649, 15 Atl. 647, statements made by the debtor of an intention to pay were held sufficient for the purpose of rebutting the presumption of payment. In Smith v. Schoenberger, 176 Pa. 95, 34 Atl. 954, declarations by defendant to the effect that the debt was not paid, made in the presence of plaintiff, were held enough to take the case to the jury. In White v. White, 200 Pa. 565, 50 Atl. 157, an admission by the debtor, in the presence of a witness, that he had no money to pay the interest on the debt in question, was held ample to overcome the presumption of payment. In O'Hara v. Corr, 210 Pa. 341, 59 Atl. 1099, it was held that the case was for the jury, where witnesses for the plaintiff testified that the deceased mortgagor stated he had purchased the mortgaged premises, but could not pay the mortgage, and would have to let the property go. It has also been held that proof of the inability of the debtor to pay during the whole period of the existence of the debt is such circumstance as would explain the delay, and prevent the presumption of payment arising. For instance, in Taylor v. Megargee, 2 Pa. St. 225, 226, it was said that mere poverty or insolvency, alone, was insufficient to overthrow the presumption of payment, arising from lapse of time, "unless it be such as to have created an abiding inability to pay during all the time;" and in Devereux's Estate, supra, it was said: "The ability of the obligor to pay and the pressing need of the obligee for money have been recognized as circumstances which aid the presumption of payment. Hughes v. Hughes, 54 Pa. 240. On the other hand, it was held in Tilghman v. Fisher, 9 Watts, 441, that one of the intervening circumstances which may rebut the presumption is the inability of the debtor to pay within twenty years; and proof of a continued inability to pay was recognized in Taylor v. Megargee, 2 Pa. St. 225, as sufficient to rebut the presumption. There are convincing reasons for the ruling that proof of the insolvency of the debtor, alone, will not rebut the presumption. An insolvent may be possessed of property, or be in receipt of an income, and have the means of payment; but proof of positive inability to pay is, in effect, proof that payment could not have been made."

In the present case we have proof of a long-continued inability of the debtors to pay; that the surviving debtor recognized the existence of the indebtedness in 1914, stating in effect her inability to pay, and requesting the witness to see the creditor and ask indulgence; that the witness complied with the wishes of the mortgagor, and, as a result of the interview, the debtor received the letter in evidence, informing her that no steps to enforce payment of the indebtedness would be taken during her lifetime, or so long as the property remained in her possession. This evidence the jury accepted as true, and was sufficient, under the decisions, to overcome the presumption of payment arising from lapse of time.

The judgment is reversed, and the record remitted, with direction that judgment be entered on the verdict.

ANNOTATION.

Presumption of payment from lapse of time.

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I. Scope and introduction.

Questions as to the applicability of the presumption of payment from lapse of time as against a sovereign or governmental body are excluded.

The note does not cover cases decided merely on the ground of laches or staleness of the plaintiff's claim. And it should be observed that the note does not cover such questions as whether a continuing covenant in a deed to pay rent, or to pay an annuity, may be presumed to be extinguished from lapse of time, the question in this class of cases being not merely whether the payments past due will be presumed to have been made, but whether the obligation itself is extinguished so as also to avoid future payments.[1] There are certain classes of indebtedness, such as payment of servants' wages, which seem to rest on special considerations, so far as the presumption of payment is concerned, and which are, therefore, not covered in the note;[2] and in this connection it may be said that the general purpose of the note is not so much to treat questions peculiar to special forms of indebtedness, as it is to deal with the more fundamental questions relating to the presumption of payment as it applies generally to all kinds of indebtedness.

The note does not, in general, purport to cover questions of pleading and practice; for example, whether advantage can be taken by demurrer of the presumption of payment, as to which there appears to be a conflict of authority.[3]

[1] See, for instance, Lyon v. Chase (1867) 51 Barb. (N. Y.) 13; Lyon v. Adde (1872) 63 Barb. (N. Y.) 89; Cole v. Patterson (1841) 25 Wend. (N. Y.) 456.

[2] See, for example, the recent case of Flaccus v. Wood (1918) 260 Pa. 161, 103 Atl. 549.

[3] See, for instance, Olden v. Hubbard (1881) 34 N. J. Eq. 85, in which it was held that the debtor might take advantage of the presumption of payment arising from lapse of time, on demurrer to the bill to enforce payment; and that an allegation in the bill that principal and interest were due should be regarded as a conclusion, and not admitted by the demurrer.

So, in Beekman v. Hamlin (1890) 19 Or. 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195, it was held that, to avoid objection by demurrer, the plaintiff must allege in his complaint the facts and circumstances on which he relies to rebut the presumption of payment.

See also, among other cases, Snodgrass v. Snodgrass (1912) 176 Ala. 276, 58 So. 201, to the effect that the

II. Distinction between presumption of payment and limitation statutes.

The presumption of payment from lapse of time is to be distinguished from the bar created by statutes of limitation.[4]

It has been said that the presumption doubtless had its origin in the absence of statutes of limitations,[5] but it is not abrogated by the enactment of such statutes.[6]

Distinguishing between the bar of the Statute of Limitations and the presumption of payment from lapse of time, it was said in a Pennsylvania case:[7] "That presumption which the law raises after the lapse of twenty years, that a bond or specialty has been paid, is, in its nature, essentially different from the bar interposed by the Statute of Limitations to the recovery of a simple contract debt. The latter is a prohibition of the action; the former, prima facie, obliterates the debt. The bar is removed by nothing less than a new promise to pay, or an acknowledgment consistent with such a promise. The presumption is rebutted, or, to speak more accurately, does not arise, where there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor."

Although, doubtless, the enactment of the various statutes of limitation has operated to diminish somewhat the necessity of resort to the common-law presumption of payment, the latter is still an important principle in the law, because it is, in some respects, much broader than statutes of limitation, going, as it does, not only to the right to maintain actions, but to the very existence, prima facie, of the claim itself, irrespective of the form of the proceeding or the parties who invoke it. Again, it is not subject to the exceptions of statutes of limitation.[8] There are statements in a number of cases to the effect that no presumption of payment can arise within any period of time less than that fixed by the Statute of Limitations as a bar, or that the debt will not be presumed

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presumption of payment may be raised by demurrer to the bill.

But in Payne v. Hathaway (1831) 3 Vt. 212, it was held that the question of presumption of payment could not be raised on demurrer to the bill.

[4] The presumption of payment arising from lapse of twenty years was said, in Gaines v. Miller (1884) 111 U. S. 395, 28 L. ed. 466, 3 Sup. Ct. Rep. 426, to be a rule of evidence, and not a limitation; and not subject to the exceptions and incidents of statutes of limitation.

The presumption of payment arising from lapse of time differs from the bar of the Statute of Limitations in this, that the latter prohibits the action, while the former, prima facie, obliterates the debt. Tunstall v. Withers (1890) 86 Va. 892, 11 S. E. 565.

"There is a recognized distinction between the Statute of Limitations, and the presumption of payment from lapse of time. . . . In the former case the bar is absolute; in the latter it is a rule of evidence, not of pleading, and simply raises a presumption of payment." Clendenning v. Thompson (1895) 91 Va. 518, 22 S. E. 233.

[5] Hale v. Pack (1877) 10 W. Va. 145.

[6] Courtney v. Staudenmayer (1896) 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; Carr v. Dings (1873) 54 Mo. 95; Booker v. Booker (1877) 29 Gratt. (Va.) 605, 26 Am. Rep. 401; Breiws v. Lawson (1881) 76 Va. 36; Hale v. Pack (1877) 10 W. Va. 145; Sanderson v. Olmsted (1849) 1 Chand. (Wis.) 190, 2 Pinney, 224.

"There is certainly no such inconsistency between statutes of limitation and the common-law doctrine of presumption of payment as to make them incongruous, when applicable at the same time to the same cause of action." Brian v. Tims (1850) 10 Ark. 597.

"The presumption of payment from lapse of time differs essentially from a statute of limitations. The presumption may be rebutted by sufficient evidence, no matter how long the time may be; but a statute of limitations cuts off the right of action, although it may be admitted that no payment has ever been made." Courtney v. Staudenmayer (Kan.) supra.

[7] Reed v. Reed (1863) 46 Pa. 239.

[8] See Gaines v. Miller (1884) 111 U. S. 395, 28 L. ed. 466, 3 Sup. Ct. Rep. 426, cited in note 4, supra.

paid unless the statutory bar has run.[9] In many of these cases, however, it appears that less than twenty years had elapsed from the time the cause of action accrued, so that the presumption would not, in any event, have arisen. It was conceded, in a Virginia case,[10] that the presumption of payment of a judgment did not, as matter of law, arise within the statutory period of limitations, although the lapse of time might be relied on, in connection with other circumstances, as evidence of payment. More than twenty years had elapsed in this case from the date of recovery of the judgment; but the Statute of Limitations did not apply, because of the debtor's removal from the state. But although the action was not barred by the Statute of Limitations, because of nonresidence and absence of the debtor, it was held, in a Kansas case,[11] that a debt secured by mortgage would be presumed paid, in view of the lapse of nearly thirty years from the time of its maturity.

The question whether the evidence to rebut the presumption of payment must be of the same nature and force as that required to remove a case from the bar of statutes of limitation is considered elsewhere.[12]

III. Rule of presumption of payment in general.

The doctrine that, in the absence of rebutting circumstances, debts will be presumed paid after twenty years from the time they were due, is too well settled to require authority to support it. For convenient reference, however, the cases have been, to a considerable extent, classified as regards the various classes of indebtedness. Thus, the doctrine of presumption of payment from lapse of twenty years or more has been applied, or at least recognized, where the indebtedness was evidenced by instruments in the nature of bonds, or coupons,[13] notes, bills of

[9] Locke v. Caldwell (1879) 91 Ill. 417; Aultman & Co. v. Connor (1888) 25 Ill. App. 654; Poston v. Smith (1871) 8 Bush (Ky.) 589; Adair v. Adair (1858) 5 Mich. 204, 71 Am. Dec. 779; Smith's Appeal (1884) 52 Mich. 415, 18 N. W. 195; Snediker v. Everingham (1858) 27 N. J. L. 143; Newcombe v. Fox (1896) 1 App. Div. 389, 37 N. Y. Supp. 294, affirmed without opinion in (1897) 154 N. Y. 754, 49 N. E. 1101; Grafton Bank v. Doe (1847) 19 Vt. 463, 47 Am. Dec. 697.

[10] Cheatham v. Aistrop (1899) 97 Va. 457, 34 S. E. 57.

[11] Courtney v. Staudenmayer (1896) 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758.

[12] See notes 68 and 69, infra.

[13] Kirkpatrick v. Langphier (1802) 1 Cranch, C. C. 85, Fed. Cas. No. 7,849; Goldhawk v. Duane (1808) 2 Wash. C. C. 323, Fed. Cas. No. 5,511; Lynde v. Denison (1820) 3 Conn. 387; Durham v. Greenly (1836) 2 Harr. (Del.) 124; State use of Lobb v. Lobb (1842) 3 Harr. (Del.) 421; Rogers v. Bishop (1839) 5 Blackf. (Ind.) 108; Shields v. Pringle (1811) 2 Bibb. (Ky.) 387; Edmondson v. Frazier (1822) 1 Bland, Ch. (Md.) 92, note; Boyd v. Harris (1850) 2 Md. Ch. 210; Smith v. Benton (1852) 15 Mo. 371; Bartlett v. Bartlett (1838) 9 N. H. 398; Mease v. Stevens (1793) 1 N. J. L. 433; Arden v. Arden (1814) 1 Johns. Ch. (N. Y.) 313; Quince v. Ross (1801) 1 N. C. pt. 2, p. 97 (Taylor, 155); Ridley v. Thorpe (1805) 3 N. C. (2 Hayw.) 343; M'Bride v. Moore (1834) Wright (Ohio) 524; Penrose v. King (1794) 1 Yeates (Pa.) 344; M'Cullough v. Montgomery (1821) 7 Serg. & R. (Pa.) 17; Boyd v. Grant (1825) 13 Serg. & R. (Pa.) 124; McLean v. Findley (1830) 2 Penr. & W. (Pa.) 97; Galbraith v. Galbraith (1837) 6 Watts (Pa.) 112; Tilghman v. Fisher (1840) 9 Watts (Pa.) 441; Delaney v. Robinson (1837) 2 Whart. (Pa.) 503; Ankeny v. Penrose (1851) 18 Pa. 190; Kline v. Kline (1853) 20 Pa. 503; Lash v. Von Neida (1885) 109 Pa. 207; Re Vanderslice (1885) 109 Pa. 211; Porter v. Nelson (1888) 121 Pa. 628, 15 Atl. 852; Philadelphia Trust Co. v. Philadelphia & E. R. Co. (1894) 160 Pa. 590, 28 Atl. 960; White v. White (1901) 200 Pa. 565, 50 Atl. 157; Guillou v. Redfield (1903) 205 Pa. 293, 54 Atl. 886; Yocum's Estate (1913) 242 Pa. 82, 88 Atl. 919; McDowell v. North Side Bridge Co. (1915) 247 Pa. 190, 93 Atl. 280; Finfrock v. Kahl (1892) 9 Lanc. L. Rev. (Pa.) 313; Hunter v. Thurlow (1909) 18 Pa. Dist. R. 661; Barnhart v. Barnhart (1903) 22 Pa. Super. Ct. 206; Griffith's Estate (1884) 14 W. N. C.

exchange, or other negotiable paper,[14] mortgages, or deeds of trust,[15] the

(Pa.) 486; Brewton v. Cannon (1795) 1 Bay (S. C.) 482; Palmer v. Dubois (1817) 1 Mill. Const. (S. C.) 178; Haskell v. Keen (1819) 2 Nott & M'C. (S. C.) 160; Levy v. Hampton (1821) 1 M'Cord, L. (S. C.) 145; Ordinary v. Steedman (1824) Harp. L. (S. C.) 287, 18 Am. Dec. 652; Tucker v. Hunt (1853) 6 Rich. Eq. (S. C.) 183; Willingham v. Chick (1880) 14 S. C. 93; Shubrick v. Adams (1883) 20 S. C. 49; Langston v. Shands (1885) 23 S. C. 149; Dickson v. Gourdin (1886) 26 S. C. 391, 2 S. E. 303, later appeal (1888) 29 S. C. 343, 1 L.R.A. 628, 7 S. E. 510; Gibson v. Lowndes (1888) 28 S. C. 285, 5 S. E. 727; Rogers v. Judd (1833) 5 Vt. 236, 26 Am. Dec. 301; Tinsley v. Anderson (1802) 3 Call (Va.) 329; Perkins v. Hawkins (1853) 9 Gratt. (Va.) 649; Booker v. Booker (1877) 29 Gratt. (Va.) 605, 26 Am. Rep. 401; Updike v. Lane (1883) 78 Va. 132; Norvell v. Little (1884) 79 Va. 141; Doyle v. Beasley (1901) 99 Va. 428, 39 S. E. 152; Allison v. Wood (1906) 104 Va. 765, 52 S. E. 559, 7 Ann. Cas. 721; Hale v. Pack (1877) 10 W. Va. 145; Anonymous (1703) 6 Mod. 22, 87 Eng. Reprint, 786; Carpenter v. Tucker (1634) 1 Rep. in Ch. 78, 21 Eng. Reprint, 512; Moreland v. Bennett (1725) 1 Strange, 652, 93 Eng. Reprint, 760; Humphreys v. Humphreys (1735) 3 P. Wms. 395, 24 Eng. Reprint, 1116; Gratwick v. Simpson (1740) 2 Atk. 144, 26 Eng. Reprint, 491; Oswald v. Legh (1786) 1 T. R. 271, 99 Eng. Reprint, 1089; Morley v. Morley (1855) 35 Eng. L. & Eq. Rep. 220. See also Geofrey v. Thorn (1634) 1 Rep. in Ch. 88, 21 Eng. Reprint, 515.

[14] Denniston v. McKeen (1840) 2 McLean, 253, Fed. Cas. No. 3,803; Perkins v. Kent (1791) 1 Root (Conn.) 312; Daggett v. Tollman (1830) 8 Conn. 168; Hudson v. Williams (1908) 6 Penn. (Del.) 550; Parsons v. Cannon (1912) 4 Boyce (Del.) 298, 88 Atl. 470; Langworthy v. Baker (1860) 23 Ill. 484; Waters v. Waters (1859) 1 Met. (Ky.) 519; Mansfield v. Cheever (1796) 3 Dane, Abr. (Mass.) 506; Re Searles (1795) 5 Dane, Abr. (Mass.) 401; and Sawyer v. Smith (1797) 5 Dane, Abr. (Mass.) 405, 6 Mass. Dig. 1804–1905, col. 11,810; Clark v. Clement (1856) 33 N. H. 563; Ayres v. Ayres (1905) 69 N. J. Eq. 343, 60 Atl. 422; Bean v. Tonnele (1884) 94 N. Y. 381, 46 Am. Rep. 153; Rodman v. Hoops (1784) 1 Dall. (Pa.) 85; M'Dowell v. McCullough (1827) 17 Serg. & R. (Pa.) 51; Sellers v. Holman (1853) 20 Pa. 321; Runner's Appeal (1888) 121 Pa. 649, 15 Atl. 647; Geiger's Estate (1900) 14 Pa. Super. Ct. 523; Keller v. Trout (1907) 17 Pa. Dist. R. 326; Jackson v. Utz (1908) 18 Pa. Dist. R. 163; Rickert v. Geiswite (1854) 1 Pittsb. (Pa.) 153; Shaw v. Boure (1814) 3 Brev. (S. C.) 409; Boyce v. Lake (1882) 17 S. C. 481, 43 Am. Rep. 618; Wallace v. Campbell (1882) 17 S. C. 596; Campbell v. Sloan (1884) 21 S. C. 301; Wright v. Mars (1884) 22 S. C. 585; White v. Moore (1885) 23 S. C. 456; Sartor v. Beaty (1886) 25 S. C. 293; Hall v. Woodward (1887) 26 S. C. 557, 2 S. E. 401; Wilson v. Wilson (1888) 29 S. C. 260, 7 S. E. 490; Weems v. Masterson (1891) 80 Tex. 45, 15 S. W. 595; Buckley v. Runge (1909) 57 Tex. Civ. App. 322, 122 S. W. 596, later appeal in (1911) — Tex. Civ. App. —, 136 S. W. 533; Perez v. Maverick (1918) — Tex. Civ. App. — , 202 S. W. 199; Wells v. Washington (1820) 6 Munf. (Va.) 532; Taylor v. Carter (1915) 117 Va. 845, 86 S. E. 120; Sanderson v. Olmsted (1849) 1 Chand. (Wis.) 190; (1849) 2 Pinney (Wis.) 224; Holway v. Sanborn (1911) 145 Wis. 151, 130 N. W. 95; Anonymous (1703) 6 Mod. 23, 87 Eng. Reprint, 786; Duffield v. Creed (1803) 5 Esp. (Eng.) 52.

[15] (See, in this connection, note 33, infra, for cases where the mortgagor was not in possession.)

United States.—Higginson v. Mein (1808) 4 Cranch, 415, 2 L. ed. 664; Hughes v. Edwards (1824) 9 Wheat. 489, 6 L. ed. 142; Burnham v. Hewey (1871) 1 Haskell, 372, Fed. Cas. No. 2,175.

Alabama.—Coyle v. Wilkins (1876) 57 Ala. 108; Goodwyn v. Baldwin (1877) 59 Ala. 127; Bailey v. Butler (1902) 138 Ala. 153, 35 So. 111; Braun v. Pettyjohn (1912) 176 Ala. 592, 58 So. 907; Shockley v. Christopher (1912) 180 Ala. 140, 60 So. 317; Gay v. Fleming (1913) 182 Ala. 511, 62 So. 523; Loper v. Dickey (1914) 190 Ala. 554, 67 So. 255; SPENCER v. HURD (reported herewith) ante, 761; Graham v. Graham (1918) — Ala. —, 79 So. 450 (mortgagor and mortgagee resided together upon mortgaged property as husband and wife).

California.—Gage v. Downey (1889) 79 Cal. 140, 21 Pac. 527.

Illinois.—Blaisdell v. Smith (1878) 3 Ill. App. 150,

Kansas.—Courteney v. Staudenmayer (1896) 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758.

Kentucky.—Hunt v. Forman (1834) 2 Dana, 471; Murray v. Fishback (1845) 5 B. Mon. 403.

Maine.—Joy v. Adams (1846) 26 Me. 330; Sweetser v. Lowell (1851) 33 Me. 446; Blethen v. Dwinal (1853) 35 Me. 556; Mathews v. Light (1855) 40 Me. 394; Chick v. Rollins (1857) 44 Me. 104; Crooker v. Crooker (1862) 49 Me. 416; Jarvis v. Albro (1877) 67 Me. 310; Philbrook v. Clark (1885) 77 Me. 176; Knight v. McKinney (1891) 84 Me. 107, 24 Atl. 744; Abbott v. Fellows (1917) 116 Me. 173, 100 Atl. 657.

Maryland.—Boyd v. Harris (1850) 2 Md. Ch. 210; Brown v. Hardcastle (1885) 63 Md. 484; CACY v. SLAY (reported herewith) ante, 764.

Massachusetts.—Inches v. Leonard (1815) 12 Mass. 379; Bacon v. McIntire (1844) 8 Met. 87; Howland v. Shurtleff (1840) 2 Met. 26, 35 Am. Dec. 384; Ayres v. Waite (1852) 10 Cush. 76; Cheever v. Perley (1866) 11 Allen, 584; Kellogg v. Dickinson (1888) 147 Mass. 432, 1 L.R.A. 436, 18 N. E. 223; Anthony v. Anthony (1894) 161 Mass. 343, 37 N. E. 386; Welsh v. Briggs (1910) 204 Mass. 540, 90 N. E. 1146; Jenkins v. Andover Theological Seminary (1910) 205 Mass. 376, 91 N. E. 552; Crowley v. Adams (1917) 226 Mass. 582, 116 N. E. 241.

Michigan. — Abbott v. Godfroy (1849) 1 Mich. 178; Michigan Ins. Co. v. Brown (1863) 11 Mich. 265; Curtis v. Goodenow (1871) 24 Mich. 18; Baent v. Kennicutt (1885) 57 Mich. 268, 23 N. W. 808; Cowie v. Fisher (1881) 45 Mich. 629, 8 N. W. 586.

Missouri.—Moreau v. Detchemendy (1853) 18 Mo. 522; Chouteau v. Burlando (1855) 20 Mo. 482; Cape Girardeau County use of Road & Canal Fund v. Harbison (1874) 58 Mo. 90; Wilson v. Albert (1886) 89 Mo. 537, 1 S. W. 209.

New Hampshire.—Howard v. Hildreth (1846) 18 N. H. 105; Tripe v. Marcy (1859) 39 N. H. 439; Green v. Cross (1864) 45 N. H. 574; Barker v. Jones (1883) 62 N. H. 497, 13 Am. St. Rep. 586; Clark v. Clough (1883) 65 N. H. 73, 23 Atl. 526; Frye v. Hubbell (1907) 74 N. H. 358, 17 L.R.A.(N.S.) 1197, 68 Atl. 325.

New York.—Collins v. Torrey (1810) 7 Johns. 278, 5 Am. Dec. 273; Jackson ex dem. People v. Pierce (1813) 10 Johns. 414; Jackson ex dem. People v. Wood (1815) 12 Johns. 242, 7 Am. Dec. 315; Giles v. Baremore (1821) 5 Johns. Ch. 545; Jackson ex dem. Mackay v. Slater (1830) 5 Wend. 295; Swart v. Service (1839) 21 Wend. 36, 34 Am. Dec. 211; Dunham v. Minard (1834) 4 Paige, 441; Newcomb v. St. Peter's Church (1845) 2 Sandf. Ch. 636; Mutual L. Ins. Co. v. United States Hotel Co. (1913) 82 Misc. 632, 144 N. Y. Supp. 476; Belmont v. O'Brien (1855) 12 N. Y. 394; Barnard v. Onderdonk (1885) 98 N. Y. 158; Forbes v. Reynard (1906) 113 App. Div. 306, 98 N. Y. Supp. 710; Ouvrier v. Mahon (1907) 117 App. Div. 749, 102 N. Y. Supp. 981; Greenfield v. Mills (1907) 123 App. Div. 43, 107 N. Y. Supp. 705. See also, among other cases decided under statute expressly providing for presumption of payment after lapse of twenty years; Knapp v. Crane (1897) 14 App. Div. 120, 43 N. Y. Supp. 513; Katz v. Kaiser (1896) 10 App. Div. 137, 41 N. Y. Supp. 776, affirmed in (1897) 154 N. Y. 294, 48 N. E. 552.

New Jersey.—Wanamaker v. Van Bulkirk (1832) 1 N. J. Eq. 685, 23 Am. Dec. 748; Evans v. Huffman (1846) 5 N. J. Eq. 354; Barned v. Barned (1870) 21 N. J. Eq. 245; Downs v. Sooy (1877) 28 N. J. Eq. 55; Murphy v. Coates (1881) 33 N. J. Eq. 424; Olden v. Hubbard (1881) 34 N. J. Eq. 85; Ward v. Greinlds (1887) — N. J. Eq. —, 10 Atl. 374; Stimis v. Stimis (1895) 54 N. J. Eq. 17, 33 Atl. 468; Magee v. Bradley (1892) 54 N. J. Eq. 326, 35 Atl. 103; Blue v. Everett (1897) 55 N. J. Eq. 329, 36 Atl. 960, affirmed in (1897) 56 N. J. Eq. 455, 39 Atl. 765; Swinley v. Force (1910) 78 N. J. Eq. 52, 78 Atl. 249; Wallace v. Coward (1911) 79 N. J. Eq. 243, 81 Atl. 739.

North Carolina.—Roberts v. Welch (1852) 43 N. C. (8 Ired. Eq.) 287; Ray v. Pearce (1881) 84 N. C. 485.

Pennsylvania.—Levers v. Van Buskirk (1844) 7 Watts & S. 70, later appeal in (1846) 4 Pa. 309; Green v. Fricker (1844) 7 Watts & S. 171; Frear v. Drinker (1848) 8 Pa. 520; Hart v. Bucher (1897) 182 Pa. 604, 38 Atl. 472, later appeal in (1898) 186 Pa. 384, 40 Atl. 511; Sawyer v. Link (1899) 193 Pa. 424, 44 Atl. 457; O'Hara v. Corr (1904) 210 Pa. 341, 59 Atl. 1099; Richards v. Walp (1908) 221 Pa. 412, 70 Atl. 815; Fidelity Title & T. Co. v. Chapman

mortgagor remaining in possession, and judgments.[16] And the doctrine is

(1910) 226 Pa. 312, 75 Atl. 428; Wilson v. Eckman (1913) 55 Pa. Super. Ct. 403; Michener v. Michener (1886) 1 Sadler, 391, 17 W. N. C. 266, 2 Atl. 508; Lancaster v. Flowers (1902) 11 Pa. Dist. R. 495; Duggan v. Strange (1911) 22 Pa. Dist. R. 638; McCrudden's Estate (1878) 12 Phila. 69; Philadelphia v. Comber (1885) 15 W. N. C. 502; Brown v. Wagner (1889) 1 Monaghan, 102, 23 W. N. C. 250, 16 Atl. 834.

Rhode Island.—Staples v. Staples (1897) 20 R. I. 264, 38 Atl. 498; Glezen v. Haskins (1902) 23 R. I. 601, 51 Atl. 219.

South Carolina.—Agnew v. Renwick (1887) 27 S. C. 563, 4 S. E. 223; Simms v. Kearse (1894) 42 S. C. 43, 20 S. E. 19.

Tennessee.—Vaugn v. Tate (1896) — Tenn. Ch. App. —, 36 S. W. 748.

Texas.—Fulshear v. Deadman (1913) — Tex. Civ. App. —, 154 S. W. 616; Mensing v. Fidelity Lumber Co. (1917) — Tex. Civ. App. —, 194 S. W. 208.

Vermont.—Atkinson v. Patterson (1874) 46 Vt. 750.

Virginia.—Jones v. Comer (1834) 5 Leigh, 350; King v. King (1893) 90 Va. 177, 17 S. E. 894; Bell v. Wood (1897) 94 Va. 677, 25 S. E. 504; Turnbull v. Mann (1900) 99 Va. 41, 37 S. E. 288.

West Virginia.—Edwards v. Chilton (1870) 4 W. Va. 352; Pitzer v. Burns (1873) 7 W. Va. 63; Camden v. Alkire (1884) 25 W. Va. 674; Criss v. Criss (1886) 28 W. Va. 388; Pickens v. Love (1898) 44 W. Va. 725, 29 S. E. 1018.

Canada.—Doe ex dem. McGregor v. Hawke (1823) 5 U. C. Q. B. O. S. 496.

England.—Trash v. White (1791) 3 Bro. Ch. 289, 29 Eng. Reprint, 542. See also Christophers v. Sparke (1820) 2 Jac. & W. 223, 37 Eng. Reprint, 612, in which the court does not directly decide the question, but criticizes the doctrine that the presumption of payment from lapse of time does not arise in the case of mortgages, and cites Hales v. Hales (1636) 1 Rep. in Ch. 105, 21 Eng. Reprint, 520, and Sibson v. Fletcher (1632) 1 Rep. in Ch. 59, 21 Eng. Reprint, 507, as holding that mortgages should stand on the same footing as bonds, with respect to the presumption of payment.

There are, however, several earlier English cases to the effect that a mortgage will not be presumed paid, merely from lapse of twenty years, as the mortgagor in possession would be regarded as the tenant at will of the mortgagee. Leman v. Newnham (1747) 1 Ves. Sr. 51, 27 Eng. Reprint, 384; Toplis v. Baker (1787) 2 Cox. Ch. Cas. 118, 30 Eng. Reprint, 55, 2 Revised Rep. 21.

[16] **United States.**—Morris's Estate (1836) Crabbe, Fed. Cas. No. 9,825; Gaines v. Miller (1884) 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426.

Connecticut.—Chapman v. Loomis (1870) 36 Conn. 459; Fanton v. Middlebrook (1882) 50 Conn. 44; Barber v. International Co. (1902) 74 Conn. 652, 92 Am. St. Rep. 246, 51 Atl. 857; JUDSON v. PHELPS (reported herewith) ante, 768.

Delaware.—Farmers Bank v. Leonard (1847) 4 Harr. (Del.) 536; Burton v. Cannon (1848) 5 Harr. (Del.) 13; Campbell v. Carey (1852) 5 Harr. (Del.) 427; Robinson v. Tunnell (1861) 2 Houst. (Del.) 387; Morrow v. Robinson (1872) 4 Del. Ch. 521; De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120; Moore v. Carey (1895) 1 Marv. (Del.) 401, 41 Atl. 75; Maxwell v. Devalinger (1900) 2 Penn. (Del.) 504, 47 Atl. 381; Knowles v. Waller (1905) 7 Penn. (Del.) 220, 78 Atl. 611.

Georgia.—Burt v. Casey (1851) 10 Ga. 178; Tennessee v. Virgin (1867) 36 Ga. 388; Willingham v. Long (1873) 47 Ga. 540.

Iowa.—Hendricks v. Wallis (1858) 7 Iowa, 224.

Maine.—Noble v. Merrill (1861) 48 Me. 140.

Missouri.—Clemens v. Wilkinson (1846) 10 Mo. 97; West v. Brison (1889) 99 Mo. 684, 13 S. W. 95; McFaul v. Haley (1901) 166 Mo. 56, 65 S. W. 995; Wencker v. Thompson (1902) 96 Mo. App. 59, 69 S. W. 743; Chiles v. School Dist. (1903) 103 Mo. App. 240, 77 S. W. 82; Cobb v. Houston (1906) 117 Mo. App. 645, 94 S. W. 299.

Nebraska.—Alberts v. Courtland Wagon Co. (1913) 94 Neb. 313, 143 N. W. 313.

New Jersey.—Buchanan v. Rowland (1820) 5 N. J. L. 721; Gulick v. Loder (1832) 13 N. J. L. 68, 22 Am. Dec. 711; Bird v. Inslee (1873) 23 N. J. Eq. 363.

New York.—Miller v. Smith (1836) 16 Wend. 425, reversing (1835) 14 Wend. 188.

Ohio.—Allen v. First Nat. Bank (1873) 23 Ohio St. 97.

Oregon.—Beekman v. Hamlin (1890) 19 Or. 383, 10 L.R.A. 454, 20 Am. St.

applicable to legacies and distributive shares.[17] So, a settlement and an ac-

Rep. 827, 24 Pac. 195, rehearing in (1891) 20 Or. 352, 10 L.R.A. 457, 25 Pac. 672, later appeal in (1892) 23 Or. 313, 31 Pac. 707; Bowman v. Holman (1909) 53 Or. 456, 99 Pac. 424.

Pennsylvania.—Cope v. Humphreys (1825) 14 Serg. & R. 15; Taylor v. Megargee (1845) 2 Pa. St. 225; Van Loon v. Smith (1883) 103 Pa. 238; Biddle v. Girard Nat. Bank (1885) 109 Pa. 349; Breneman's Estate (1888) 121 Pa. 641, 15 Atl. 650; Devereux's Estate (1898) 184 Pa. 429, 39 Atl. 225; Hummel v. Lilly (1898) 188 Pa. 463, 68 Am. St. Rep. 879, 41 Atl. 613, subsequent ruling to same effect in (1901) 16 Pa. Super. Ct. 327; Roberts v. Powell (1905) 210 Pa. 594, 60 Atl. 258; Coleman v. Erie Trust Co. (1916) 255 Pa. 63, 99 Atl. 217; Camp v. John (1917) 259 Pa. 38, 102 Atl. 285; Hitchcock v. Washburn (1900) 9 Pa. Dist. R. 272; Van Eman v. Walker (1911) 20 Pa. Dist. R. 1101; Miller v. Williamsport (1901) 17 Pa. Super. Ct. 159; Maitland v. Landis (1885) 1 Pa. Co. Ct. 144; Green v. Plattsburg (1893) 13 Pa. Co. Ct. 335; Davis v. McHenry (1882) 11 W. N. C. 304.

South Carolina.—Kennedy v. Denoon (1814) 2 Treadway, Const. 617, (1814) 3 Brev. 476; Cohen v. Thomson (1818) 2 Mill, Const. 145; Stover v. Duren (1849) 3 Strobh. L. 448, 51 Am. Dec. 634; McQueen v. Fletcher (1851) 4 Rich. Eq. 152; Pratt v. McLure (1858) 10 Rich. Eq. 301; Dillard v. Brian (1852) 5 Rich. L. 501; Tobin v. Myers (1882) 18 S. C. 324; Kinard v. Baird (1884) 20 S. C. 377; McNair v. Ingraham (1883) 21 S. C. 70; Roberts v. Smith (1884) 21 S. C. 455; Adams v. Richardson (1889) 32 S. C. 139, 10 S. E. 931; Patterson v. Baxley (1890) 33 S. C. 354, 11 S. E. 1065; Du Bose v. Kell (1911) 90 S. C. 196, 73 S. E. 371.

Vermont.—Tudor v. Taylor (1853) 26 Vt. 444.

Virginia.—Hutsonpiller v. Stover (1855) 12 Gratt. 579; Scott v. Isaacs (1889) 85 Va. 712, 8 S. E. 678.

England.—Flower v. Bolingbroke (1725) 1 Strange, 639, 93 Eng. Reprint, 750; Willaume v. Gorges (1808) 1 Campb. 217.

[17] **Alabama.**—Rhodes v. Turner (1852) 21 Ala. 210; Barnett v. Tarrence (1853) 23 Ala. 463; Blackwell v. Blackwell (1858) 33 Ala. 57, 70 Am. Dec. 556; Austin v. Jordan (1860) 35 Ala. 642; Worley v. High (1866) 40 Ala. 171; McCartney v. Bone (1867) 40 Ala. 533; Ragland v. Morton (1867) 41 Ala. 344, 91 Am. Dec. 516; Harrison v. Heflin (1875) 54 Ala. 552; Greenlees v. Greenlees (1878) 62 Ala. 330; Bonner v. Young, 68 Ala. 35.

Georgia.—Hooper v. Howell (1874) 52 Ga. 315; Hodges v. Stuart Lumber Co. (1907) 128 Ga. 733, 58 S. E. 354.

Indiana.—Smith v. Calloway (1844) 7 Blackf. 86.

Massachusetts.—Andrews v. Sparhawk (1833) 13 Pick. 393; Kingman v. Kingman (1876) 121 Mass. 249.

New Jersey.—Peacock v. Black (1845) 5 N. J. Eq. 535, affirming (1837) 4 N. J. Eq. 61; Hayes v. Whitall (1861) 13 N. J. Eq. 242; Betts v. Van Dyke (1885) 40 N. J. Eq. 149; Magee v. Bradley (1896) 54 N. J. Eq. 326, 35 Atl. 103; Paterson General Hospital Asso. v. Blauvelt (1907) 72 N. J. Eq. 725, 66 Atl. 1055.

New York.—Arden v. Arden (1814) 1 Johns. Ch. 313; Conkling v. Weatherwax (1905) 181 N. Y. 258, 73 N. E. 1028, 2 Ann. Cas. 740; Sweeney v. Sweeney (1890) 32 N. Y. S. R. 156, 10 N. Y. Supp. 178.

North Carolina.—Bird v. Graham (1840) 36 N. C. (1 Ired. Eq. 196; Shearin v. Eaton (1842) 37 N. C. (2 Ired. Eq.) 282; Wilkerson v. Dunn (1859) 52 N. C. (7 Jones, L.) 125; Cox v. Brower (1894) 114 N. C. 422, 19 S. E. 365; Outlaw v. Garner (1905) 139 N. C. 190, 51 S. E. 925.

Pennsylvania.—Durdon v. Gaskill (1798) 2 Yeates, 268; Diemer v. Sechrist (1830) 1 Penr. & W. 419; Summerville v. Holliday (1833) 1 Watts, 507; Foulk v. Brown (1834) 2 Watts, 209; Hubley's Appeal (1842) 19 Pa. 138; Com. use of Miller v. Snyder (1869) 62 Pa. 153; Bentley's Appeal (1882) 99 Pa. 500; Phillip's Appeal (1888) 10 Sadler, 249, 13 Atl. 906; Okeson's Appeal (1854) 2 Grant, Cas. 303; Wilkinson's Estate (1845) 1 Pars. Sel. Eq. Cas. 170; Parker's Estate (1892) 12 Pa. Co. Ct. 436; Barr's Estate (1907) 33 Pa. Co. Ct. 647; Brown's Estate (1871) 8 Phila. 197; Bentley's Estate (1873) 9 Phila. 344.

South Carolina.—Winstanley v. Savage (1827) 2 M'Cord, Eq. 435; Barnwell v. Barnwell (1835) 2 Hill, Eq. 228; Weatherford v. Tate (1848) 2 Strobh. Eq. 27.

counting by an administrator will be presumed, after the lapse of twenty years, in the absence of evidence tending to show the contrary.[18] And the application of the rule of presumption of payment from lapse of time cannot be defeated on the ground that the administrator was a trustee.[19] But payment to the heirs, by the administrator, of a private debt due from him to the testator, without an order of the probate court, will not be presumed from lapse of time, since the law will not presume that the administrator did that which he had no right to do.[20]

The doctrine of presumption of payment from lapse of time has also been applied, or recognized, in many cases of indebtedness of a miscellaneous nature.[21] It applies to the settlement

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Texas.—Grimes v. Smith (1888) 70 Tex. 217, 8 S. W. 33.

Virginia.—Burwell v. Anderson (1831) 3 Leigh, 348.

England.—Campbell v. Graham (1831) 1 Russ. & M. 453, 39 Eng. Reprint, 175, 9 L. J. Ch. 234; Ravenscroft v. Frisby (1844) 1 Colly. Ch. Cas. 16, 63 Eng. Reprint, 302, 13 L. J. Ch. N. S. 153; Jones v. Turberville (1792) 2 Ves. Jr. 11, 30 Eng. Reprint, 498, 4 Bro. Ch. 115, 29 Eng. Reprint, 806.

[18] Bass v. Bass (1889) 88 **Ala.** 408, 7 So. 243; Diemer v. Sechrist (1830) 1 Penr. & W. (**Pa.**) 419; Ingraham v. Cox (1843) 1 Pars. Sel. Eq. Cas. (**Pa.**) 70.

[19] Ingraham v. Cox (**Pa.**) supra.

[20] Potter v. Titcomb (1831) 7 **Me.** 302.

[21] **United States.**—Philippi v. Philippe (1884) 115 U. S. 151, 29 L. ed. 336, 5 Sup. Ct. Rep. 1181; Ransdale v. Grove (1847) 4 McLean, 282, Fed. Cas. No. 11,570 (recognizing rule); Idler v. Borgmeyer (1895) 13 C. C. A. 198, 28 U. S. App. 332, 65 Fed. 910; Chesapeake & D. Canal Co. v. United States (1915) L.R.A.1916B, 734, 139 C. C. A. 406, 223 Fed. 926; Martin v. United States (1893) 28 Ct. Cl. 137 (lapse of thirty-four years, with other circumstances, held to raise presumption of payment).

Alabama.—Solomon v. Solomon (1887) 83 Ala. 394, 3 So. 679; Semple v. Glenn (1890) 91 Ala. 245, 24 Am. St. Rep. 894, 6 So. 46, 9 So. 265; Roach v. Cox (1909) 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578; Snodgrass v. Snodgrass (1912) 176 Ala. 276, 58 So. 201.

Connecticut.—Boardman v. De Forest (1823) 5 Conn. 1; Belknap v. Gleason (1836) 11 Conn. 160, 27 Am. Dec. 721; Agawan Canal Co. v. Edwards (1870) 36 Conn. 476; Blakeslee v. Tyler (1887) 55 Conn. 395, 11 Atl. 291; O'Connor v. Waterbury (1897) 69 Conn. 206, 37 Atl. 206.

Georgia.—Woolfolk v. Beatly (1885) 18 Ga. 520; Arline v. Miller (1857) 22 Ga. 330; Coleman v. Lane (1858) 26 Ga. 515; Patterson v. Campbell (1911) 136 Ga. 664, 71 S. E. 1117.

Illinois.—McCoy v. Morrow (1857) 18 Ill. 519, 68 Am. Dec. 578; McCormick v. Evans (1864) 33 Ill. 327; Luther v. Crawford (1904) 116 Ill. App. 351, affirmed in (1905) 213 Ill. 596, 73 N. E. 430; Fagan v. Bach (1912) 253 Ill. 588, 97 N. E. 1087, Ann. Cas. 1913A, 505.

Indiana.—O'Brien v. Coulter (1831) 2 Blackf. 421; O'Brien v. Holland (1834) 3 Blackf. 490; Blair v. Kiger (1887) 111 Ind. 193, 12 N. E. 293 (appropriation of land for canal purposes; presumption that damages were tendered or waived).

Kentucky.—Tibb v. Clark (1827) 5 T. B. Mon. 527; Taylor v. Bate (1836) 4 Dana, 198; Anderson v. Smith (1861) 3 Met. (Ky.) 491; Doty v. Jameson (1906) 29 Ky. L. Rep. 507, 93 S. W. 638.

Louisiana.—Goddard v. Urquhart (1834) 6 La. 659; Wooten v. Harrison (1854) 9 La. Ann. 234; Kuhn v. Bercher (1905) 114 La. 602, 38 So. 468.

Massachusetts.—Bass v. Bass (1829) 8 Pick. 187; Jenkins v. Hopkins (1830) 9 Pick. 543 (claim for damages).

Michigan.—Longe v. Kinney (1912) 171 Mich. 312, 137 N. W. 119.

Mississippi.—Doe ex dem. Stark v. Gildart (1841) 5 How. (Miss.) 606.

Missouri.—Carr v. Dings (1873) 54 Mo. 95; Williams v. Mitchell (1892) 112 Mo. 300, 20 S. W. 647.

New Jersey.—Parisen v. New York & L. B. R. Co. (1900) 65 N. J. L. 413, 47 Atl. 477.

New York.—Grant v. Duane (1812) 9 Johns. 591; Bailey v. Jackson (1819) 16 Johns. 210, 8 Am. Dec. 309; Jackson ex dem. Marvin v. Hotchkiss (1826) 6 Cow. 401; Morris v. Wadsworth (1837) 17 Wend. 103; Rosenstock v. Dessar (1903) 85 App. Div. 501, 83 N. Y. Supp. 334, later appeal in

of a guardian's account.[22] In fact, many cases are to the general effect

(1905) 109 App. Div. 10, 95 N. Y. Supp. 1064; Berger v. Waldbaum (1904) 46 Misc. 4, 93 N. Y. Supp. 352, affirmed without opinion in (1905) 110 App. Div. 915, 96 N. Y. Supp. 1114; Hall v. Roberts (1892) 63 Hun, 473, 18 N. Y. Supp. 480; Van Ness v. Ransom (1913) 83 Misc. 178, 144 N. Y. Supp. 420, affirmed in (1914) 164 App. Div. 483, 150 N. Y. Supp. 251, which is affirmed in (1917) 220 N. Y. 597, 115 N. E. 1046; Morey v. Farmers' Loan & T. Co. (1856) 14 N. Y. 302; Lawrence v. Ball (1856) 14 N. Y. 477; Central Bank v. Heydorn (1872) 48 N. Y. 260; Lyon v. Odell (1875) 65 N. Y. 28; Re Neilley (1884) 95 N. Y. 382; Macaulay v. Palmer (1891) 125 N. Y. 742, 26 N. E. 912; Dorgeloh v. Bassford (1884) 18 Jones & S. 450 (assessment); Brotherson v. Jones (1843) Hill & D. Supp. 171; Owen v. Calhoun (1890) 55 Hun, 608, 29 N. Y. S. R. 302, 8 N. Y. Supp. 447; Lyon v. Adde (1872) 63 Barb. 89.

North Carolina.—Graham v. Davidson (1838) 22 N. C. (2 Dev. & B. Eq.) 155; Olds v. Richmond Cedar Works (1917) 173 N. C. 161, 91 S. E. 846.

Ohio.—Wright v. Hull (1911) 83 Ohio St. 385, 94 N. E. 813.

Pennsylvania.—Bull v. Towson (1842) 4 Watts & S. 569; Unangst v. Kraemer (1845) 8 Watts & S. 391; Cook's Appeal (1848) 8 Pa. 508; Re Darlington (1850) 13 Pa. 430; Coate's Estate (1851) 2 Pars. Sel. Eq. Cas. 258; Drysdale's Appeal (1850) 14 Pa. 531; Webb v. Dean (1853) 21 Pa. 29; Morrison v. Funk (1854) 23 Pa. 421; Holman's Appeal (1854) 24 Pa. 174; Prior v. Wood (1858) 31 Pa. 142; McQuesney v. Hiester (1859) 33 Pa. 435; Reed v. Reed (1863) 46 Pa. 239; Re Potter (1867) 54 Pa. 465; Peter's Appeal (1884) 106 Pa. 340; Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Breneman's Appeal (1888) 121 Pa. 641, 15 Atl. 650; Smith's Estate (1892) 152 Pa. 102, 25 Atl. 315; Cannon v. Hileman (1911) 229 Pa. 414, 78 Atl. 932; Ingraham v. Cox (1843) 1 Pars. Sel. Eq. Cas. 70, 1 Clark, 464; Wilkinson's Estate (1845) 1 Pars. Sel. Eq. Cas. 170; Hair v. Thomas (1909) 19 Pa. Dist. R. 424; Fasig's Estate (1910) 29 Pa. Dist. R. 77; Second Nat. Bank v. Thompson (1910) 44 Pa. Super. Ct. 200 (bank deposit); Ashton v. Philadelphia Nat. Bank (1883) 2 Chester Co. Rep. 479 (bank deposit); Higgs v. Stimmel (1831) 3 Penr. & W. 115; Eckert's Appeal (1878) 6 W. N. C. 21.

South Carolina.—Roberts v. Johns (1885) 24 S. C. 580; McKinlay v. Gaddy (1887) 26 S. C. 573, 2 S. E. 497; Nobles v. Hogg (1891) 36 S. C. 322, 15 S. E. 359; Brown v. M'Call (1837) 3 Hill, L. 335; Blake v. Quash (1825) 3 M'Cord, L. 340; Sager v. Warley (1838) Rice, Eq. 26; Williams v. Sims (1843) 1 Rich. Eq. 53; Gibbes v. Holmes (1859) 10 Rich. Eq. 484.

Tennessee.—Lovelace v. Buckner (1911) 2 Tenn. C. C. A. 337.

Texas.—Mills v. Alexander (1858) 21 Tex. 154; State v. Sais (1883) 60 Tex. 87; Foot v. Silliman (1890) 77 Tex. 268, 13 S. W. 1032; Owen v. New York & T. Land Co. (1895) 11 Tex. Civ. App. 284, 32 S. W. 189, 1057; Milwee v. Phelps (1909) 53 Tex. Civ. App. 195, 115 S. W. 891; Leake v. Dallas (1917) — Tex. Civ. App. —, 197 S. W. 472.

Vermont.—Payne v. Hathaway (1831) 3 Vt. 212.

Virginia.—Eustace v. Gaskins (1793) 1 Wash. 188; Young v. Price (1811) 2 Munf. 534; Tomlin v. How (1820) Gilmer, 1; Tunstall v. Withers (1890) 86 Va. 892, 11 S. E. 565; White v. Offield (1893) 90 Va. 336, 18 S. E. 436; Jameson v. Rixey (1897) 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861; Ross v. Darby (1815) 4 Munf. 428; Robertson v. Read (1867) 17 Gratt. 544, where from lapse of time, with other circumstances, the debt was presumed paid.

West Virginia.—Smith v. Tharp (1880) 17 W. Va. 235; Burbridge v. Sadler (1899) 46 W. Va. 39, 32 S. E. 1028; Seymour v. Alkire (1899) 47 W. Va. 302, 34 S. E. 953.

Wisconsin.—Pritchard v. Howell (1853) 1 Wis. 131, 60 Am. Dec. 363 (recognizing rule).

England.—Dennis v. Nourse (1636) 1 Rep. in Ch. 106, 21 Eng. Reprint, 521; Standish v. Radley (1741) 2 Atk. 177, 26 Eng. Reprint, 511; Smallman v. Hamilton (1760) 2 Atk. 71, 26 Eng. Reprint, 443.

[23] Garrett v. Garrett (1881) 69 Ala. 429; Re Lewis (1902) 36 Misc. 741, 74 N. Y. Supp. 469 (it being held that, where more than twenty years had elapsed after the ward became of age before demand for payment was made of guardian's estate, payment would be presumed).

After a lapse of twenty years from the allowance of a guardian's account, without demand for payment by those entitled to the fund in the guardian's possession, payment will be presumed.

that the doctrine includes debts of all kind, however arising, or evidenced.[23]

The rule as to presumption of payment from lapse of time applies in courts of equity, as well as in courts of law; indeed, it is said to have originated in courts of equity.[24] But it has been held that the rule does not apply to direct trusts, as between the trustee and cestui que trust.[25] The courts apparently follow, in this respect, the rule that statutes of limitation do not ordinarily apply to such trusts.[26] The rule fixing twenty years as the time from which debts will be presumed paid was probably adopted in accordance with the limitation of real actions in the common-law courts,[27] not so much because of the analogy, as because of the reasonableness of the period, and of the fact that its adoption would not be so arbitrary as an uneven number of years.[28] But the reduction of the time for bringing

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Mathews v. Kelly (1906) 70 N. J. Eq. 796, 67 Atl. 1075.

[23] Idler v. Borgmeyer (1895) 13 C. C. A. 198, 28 U. S. App. 332, 65 Fed. 910, writ of error dismissed in (1895) 159 U. S. 199, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; Garrett v. Garrett (1881) 69 Ala. 429; Woodruff v. Sanders (1854) 15 Ark. 143; SHEAFER v. WOODSIDE (reported herewith) ante, 775; Diemer use of Sechrist v. Sechrist (1830) 1 Penr. & W. (Pa.) 419; Hayes's Appeal (1886) 113 Pa. 380, 6 Atl. 144; Cannon v. Hileman (1911) 229 Pa. 414, 78 Atl. 932; Camp v. John (1917) 259 Pa. 38, 102 Atl. 285; Keller v. Trout (1907) 17 Pa. Dist. R. 326; Miller v. Williamsport (1901) 17 Pa. Super. Ct. 159; Foulk v. Brown (1834) 2 Watts (Pa.) 209; Criss v. Criss (1886) 28 W. Va. 388.

[24] "Originally, in the absence of a statute of limitation, a debt was, at common law, presumed to continue until its satisfaction or extinguishment was shown. However long it may have lain dormant, and in whatever of obscurity and uncertainty its origin, from the lapse of time, may have been involved, evidence of its existence at any particular time carried with it the presumption of continuance, and cast on the debtor the burden of proving its satisfaction or extinguishment. In courts of equity a different principle prevailed, and acting, as is said, 'upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands,' they refused to interfere when there had been 'gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights' . . . Against bonds, on which demand had not been made for twenty years, and upon which the obligees were proceeding at law, these courts were accustomed to grant relief on the presumption of their payment or satisfaction. Sir Matthew Hale was the first judge to adopt and apply the presumption at law, and he was followed by Lord Holt. Since, it has prevailed in law and in equity." Harrison v. Heflin (1875) 54 Ala. 552.

The presumption of payment from lapse of time is of equitable origin, and was adopted by the law in the interests of repose and the ending of litigation. Ash's Estate (1902) 202 Pa. 422, 90 Am. St. Rep. 658, 51 Atl. 1030. See also, to a similar effect, Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452.

[25] Cartmell v. Perkins (1845) 2 Del. Ch. 102; McHardy v. McHardy (1857) 7 Fla. 301; Williams v. Williams (1892) 82 Wis. 393, 52 N. W. 429.

But see Philips v. State (1855) 5 Ohio St. 122, 64 Am. Dec. 635, where the court stated that the doctrine that a direct trust is not barred by lapse of time is subject to the qualification that the rule is, in equity, dispensed with, in the absence of fraud and concealment, where circumstances exist calculated to raise a presumption, from lapse of time, of a discharge or extinguishment of the trust.

[26] "In case of a technical, or in other words, direct, express continuing trust, such as is exclusively within the jurisdiction of a court of equity, the general rule is that the Statute of Limitations does not run between trustee and cestui que trust as long as the trust subsists, for the possession of the trustee is the possession of the cestui que trust, and the trustee holds according to his title." 25 Cyc. 1149, 1150.

[27] Michigan Ins. Co. v. Brown (1863) 11 Mich. 265.

[28] "All that is properly meant by analogy in saying that these presumptions were based on analogy to the time within which an action of ejectment must, by the Statute of Limita-

an action of ejectment below twenty years will not, it seems, reduce the time from which payment will be presumed.[29]

The rule, it has been said,[30] "is founded on the common experience of the conduct of men in relation to the transaction of business, and was intended for the security and repose of society, by discouraging suits for stale demands, and discouraging the laches and negligence of parties in delaying to prosecute their claim for an unreasonable length of time, when they had the means and opportunity of enforcing them. This rule was also intended for the protection of the debtor, whose receipts or vouchers may perhaps be lost, or witnesses be dead or removed, or the true state of the transaction be otherwise obscured by the lapse of time. It is better for the peace and repose of society, and the ends of justice, that the presumption arising from the lapse of time should be adhered to, and not be easily rebutted, although, in many cases, it may be contrary to the actual truth."

In the cases before cited,[31] to the effect that a debt evidenced by mortgage will be presumed to be paid after the lapse of twenty years, it generally appears that the mortgagor, or those claiming under him, were in possession of the mortgaged premises. And there is authority for the view that the presumption does not arise if the premises are wild and unoccupied, or the mortgagee, or a stranger, is in possession.[32]

Where a debt is payable in instal-

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tions, be brought, is that the courts felt themselves bound, after a great lapse of time, to raise these presumptions; and, the legislature having named no length of time in which they should be raised, the courts fixed upon twenty years, because they thought that time was a reasonable time in which to raise such presumption, and they regarded it as less arbitrary to fix on twenty years, the bar to an action of ejectment, than on nineteen years, for instance; which, if fixed on, they would have had to do so arbitrarily; and in selecting the twenty years, the bar to our action of ejectment, rather than the fifty or more years which was the bar to a writ of right, the courts must have been influenced, not by a greater analogy to the action of ejectment than to the writ of right, but simply that they deemed twenty years a more reasonable time for the purpose than fifty or more years." Criss v. Criss (1886) 28 W. Va. 388.

[29] Criss v. Criss (W. Va.) supra.

[30] De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120.

The presumption of payment arising from lapse of time is based on the idea that, in the ordinary course of human affairs, it is not usual to allow well-founded claims to lie dormant a great length of time. Booker v. Booker (1877) 29 Gratt. (Va.) 605, 26 Am. Rep. 401; Clendenning v. Thompson (1895) 91 Va. 518, 22 S. E. 233.

It is founded on the rational ground that a person naturally desires to possess and enjoy his own, and that an unexplained neglect to enforce an alleged right, for a long period, casts suspicion on the existence of the right itself. Bean v. Tonnele (1884) 94 N. Y. 381, 46 Am. Rep. 153.

"The presumption of payment is based upon the experience of mankind that vouchers, acquittances, and evidences of payment are not usually preserved from one generation to another; that creditors usually desire their own, without waiting a score of years upon their debtors; and that, where there has been no recognition of the claim by the debtor, and the creditor has forborne to assert a right for so long a time, it is most probable that his claim has been in some way satisfied." Courtney v. Staudenmeyer (1896) 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758.

The chief reason for the doctrine of presumption of payment after the lapse of twenty years was regarded, in Harrison v. Heflin (1875) 54 Ala. 552, to be the suppression of frauds, and the advantages to the public generally of an end of litigation, rather than laches on the part of the creditor.

[31] See note 15, supra.

[32] The presumption of payment of a mortgage does not arise as against a mortgagee in possession. Crooker v. Jewell (1850) 31 Me. 306; Creighton v. Proctor (1853) 12 Cush. (Mass.) 437; Becker v. McCrea (1912) 149 App. Div. 211, 133 N. Y. Supp. 651, affirmed in (1915) 214 N. Y. 632, 108 N. E. 1089.

ments, the presumption of payment will attach to each instalment, in twenty years from the time it became due.[33] It has been held, however, in case of a mortgage debt evidenced by a single instrument, and covering a single indebtedness payable by instalments, that the fact that more than twenty years have elapsed since part of the instalments became due will not raise the presumption of payment, so as to prevent the mortgagee from recovering the entire debt by enforcement of the mortgage, if the action is brought within twenty years after the last instalment matures.[34]

IV. Where less than twenty years have elapsed.

Although there are a few decisions to the contrary,[35] some of which, it appears, are based on analogous stat-

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See also Brobst v. Brock (Doe ex dem. Brobst v. Roe) (1870) 10 Wall (U. S.) 519, 19 L. ed. 1002, containing intimations to the same effect.

And the presumption of payment of a mortgage debt does not arise, where the mortgaged property has been vacant or in the possession of a stranger. Appleton v. Edson (1836) 8 Vt. 239. The court said: "It is true, no doubt, that the lapse of time in this case, being more than twenty years, is, unexplained, sufficient to bar all recovery upon the bond. It is also true that the mortgage is but an incident to the bond. But it is never true that mere lapse of time will raise a presumption of payment of the debt. If the possession has all along been vacant, no presumption in relation to the payment of the debt, or the title, would arise; but this circumstance, of itself, would be sufficient to rebut any such presumption. . . . The same is true where the possession of the mortgaged premises is in a stranger."

The cases of Chouteau v. Burlando (1855) 20 Mo. 482, and Locke v. Caldwell (1878) 91 Ill. 417, also support the view that if the mortgagor is not in possession during the period relied on to create the presumption of payment of the mortgage debt, the land being wild and uncultivated, no presumption of payment arises from lapse of time.

The fact that the mortgaged premises are not occupied by any person claiming under the mortgagor (Jackson ex dem. Mackay v. Slater (1830) 5 Wend. (N. Y.) 295), or that they are a forest and uncultivated (Jackson ex dem. People v. Pierce (1813) 10 Johns. (N. Y.) 414), is a circumstance tending to rebut the presumption of payment of the mortgage from lapse of time.

The rule that payment of a mortgage will be presumed from the lapse of twenty years has been held not to apply, where the mortgaged premises, during this time, were in the possession of a life tenant, who held under a title superior to the mortgage, since the mortgagee was not authorized to take possession during the life estate. Crooker v. Crooker (1860) 49 Me. 416.

In Mahar v. Fraser (1867) 17 U. C. C. P. 408, the majority of the court was of the opinion that presumption of payment of a mortgage, given on a vacant lot, did not arise merely from lapse of time, as the effect of the mortgage was to put the mortgagee into possession by operation of law.

[33] State use of Lobb v. Lobb (1842) 3 Harr. (Del.) 421; Miller v. Evans (1813) 2 Cranch C. C. 72, Fed. Cas. No. 9,569.

[34] Smith v. Timmons (1912) 50 Pa. Super. Ct. 486. See note 185, infra.

[35] Didlake v. Robb (1874) 1 Woods, 680, Fed. Cas. No. 3,899 (the court stating that the lapse of sixteen years was prima facie evidence of payment, and that the presumption of payment became conclusive after the lapse of twenty years); Clark v. Hopkins (1811) 7 Johns. (N. Y.) 556; Jackson ex dem. Sackett v. Sackett (1831) 7 Wend. (N. Y.) 94; Spear v. Newell (1841) 13 Vt. 288; Martin v. Bowker (1847) 19 Vt. 526; Whitney v. French (1853) 25 Vt. 663 (presumption of payment of mortgage in fifteen years); Smith v. Niagara F. Ins. Co. (1888) 60 Vt. 682, 1 L.R.A. 216, 6 Am. St. Rep. 144, 15 Atl. 353 (same); Sowles v. Minot (1904) 82 Vt. 344, 137 Am. St. Rep. 1010, 73 Atl. 1025 (same); Fessenden v. Barrett (1853) 9 Tex. 475; Duncan v. Rawls (1856) 16 Tex. 478; Rivers v. Washington (1870) 34 Tex. 267.

In Tennessee, the doctrine has been adopted that presumption of payment will arise, in the absence of rebutting circumstances, from the lapse of sixteen years: Blackburn v. Squib (1823)

utes of limitations, and although, by statute, a different period has, in some states, been prescribed as sufficient to raise the presumption of payment,[36] it is settled by the overwhelming weight of authority that, in the absence of statute, the presumption of payment does not arise, as matter of law, from the lapse of any time short of twenty years.[37] It has been so held

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Peck. (Tenn.) 60; Atkinson v. Dance (1836) 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422 (instruction approved to the effect that, if the debt had lain dormant for sixteen years, the jury might, from the mere lapse of time alone, presume payment); Anderson v. Settle (1857) 5 Sneed (Tenn.) 202; Thompson v. Thompson (1859) 2 Head (Tenn.) 405; Carter v. Wolfe (1870) 1 Heisk. (Tenn.) 700; Lyon v. Guild (1871) 5 Heisk. (Tenn.) 175; Fisher v. Philips (1874) 4 Baxt. (Tenn.) 243; Stanley v. McKinzer (1881) 7 Lea (Tenn.) 454; Connecticut Mut. L. Ins. Co. v. Dunscomb (1902) 108 Tenn. 724, 91 Am. St. Rep. 769, 58 L.R.A. 694, 69 S. W. 345 (recognizing rule).

The rule of presumption of payment from lapse of sixteen years applies to judgments and decrees. McDaniel v. Goodall (1865) 2 Coldw. (Tenn.) 391; Yarnell v. Moore (1866) 3 Coldw. (Tenn.) 173; Kilpatrick v. Brashear (1873) 10 Heisk. (Tenn.) 372.

In Love v. Love (1905) 72 Kan. 658, 83 Pac. 201, the court seems to consider that the lapse of ten years after a guardian had received money belonging to the ward was sufficient to raise a presumption of payment.

The fact that the creditor, who had received for collection and credit on the debt, a bond belonging to the debtor, executed by a third party, failed for thirteen years to return or offer to return it, was held in Day v. Clarke (1819) 1 A. K. Marsh. (Ky.) 521, sufficient to authorize a presumption by the jury that the bond had been paid.

And in Hunt v. Stephenson (1819) 1 A. K. Marsh. (Ky.) 570, the court regarded a draft as presumably paid, where it was delivered to the drawee and not returned, although less than twenty years had elapsed.

The court in Denniston v. McKeen (1840) 2 McLean, 253, Fed. Cas. No. 3,803, in instructing the jury that a shorter period than twenty years would raise a presumption of payment, under peculiar circumstances, apparently confused the presumption of payment which the law raises from the lapse of twenty years, with the inference which the jury may draw that the debt has been paid, arising from certain circumstances, aided by lapse of less than twenty years.

[36] See note 45, infra.

[37] (See also cases cited in notes 38 and 39 infra).

Rhodes v. Turner (1852) 21 Ala. 210; McMahan v. Crabtree (1857) 30 Ala. 470; Relfe v. Relfe (1859) 34 Ala. 500, 73 Am. Dec. 467; Greenlees v. Greenlees (1878) 62 Ala. 330; Davidson v. Dennis (1912) 176 Ala. 435, 58 So. 401; Shockley v. Christopher (1912) 180 Ala. 140, 60 So. 317; Woodruff v. Sanders (1854) 15 Ark. 143; Ringold v. Randolph (1855) 16 Ark. 212; Brearly v. Peay (1861) 23 Ark. 172; Cottle v. Payne (1808) 3 Day (Conn.) 289; Janvier v. Culbreth (1905) 5 Penn. (Del.) 505, 63 Atl. 309; Green v. Lockwood (1834) 1 Harr. (Del.) 331; Dodds v. Dodds (1877) 57 Ind. 293; Smith v. McDonald (1891) 3 Ind. App. 49, 28 N. E. 994; Forsyth v. Ripley (1849) 2 G. Greene (Iowa) 181; Nash v. Gibson (1864) 16 Iowa, 305; Herndon v. Bartlett (1828) 7 T. B. Mon. (Ky.) 449; Stockton v. Johnson (1846) 6 B. Mon. (Ky.) 409; Chiles v. Monroe (1862) 4 Met. (Ky.) 72; Moore v. Pogue (1864) 1 Duv. (Ky.) 327; Loze v. Zanico (1818) 5 Mart. (La.) 391; Thayer v. Mowry (1853) 36 Me. 287; Cony v. Barrows (1859) 46 Me. 497; Michigan Ins. Co. v. Brown (1863) 11 Mich. 265; Lewis v. Schwenn (1884) 15 Mo. App. 342; Hensler v. Gordon (1910) 152 Mo. App. 498, 133 S. W. 631; Clark v. Clement (1856) 33 N. H. 563; Paterson General Hospital Asso. v. Blauvelt (1907) 72 N. J. Eq. 725, 66 Atl. 1055; Clark v. Bogardus (1834) 2 Edw. Ch. (N. Y.) 387; Redmond v. Hughes (1912) 151 App. Div. 99, 135 N. Y. Supp. 843; Lowe v. Leary (1918) 184 App. Div. 421, 171 N. Y. Supp. 637; Boyd v. Boyd (1894) 9 Misc. 161, 29 N. Y. Supp. 7; Prouty v. Eaton (1863) 41 Barb. (N. Y.) 409; Alexander v. Dutcher (1876) 7 Hun (N. Y.) 439, affirmed in (1877) 70 N. Y. 385; Penrose v. King (1794) 1 Yeates (Pa.) 344; Boltz v. Bullman (1795) 1 Yeates (Pa.) 584; Henderson v. Lewis (1828) 9 Serg. & R. (Pa.) 379, 11 Am. Dec. 733; Adlum v. Yord (1829) 1 Rawle (Pa.) 163, 18 Am.

in a number of cases where the period which had expired was almost twenty years.[38] Indeed, it is said in a number of cases, the statement generally being obiter, however, that if a shorter period, even a single day, less than twenty years has elapsed, the presumption of payment from mere lapse of time does not arise.[39]

But while the lapse, after a debt is

Dec. 608; M'Carty v. Gordon (1839) 4 Whart. (Pa.) 321; Tilghman v. Fisher (1840) 9 Watts (Pa.) 441; Webb v. Dean (1853) 21 Pa. 29; Strohm's Appeal (1854) 23 Pa. 351; Rogers v. Burns (1856) 27 Pa. 525; Hughes v. Hughes (1867) 54 Pa. 240; Brubaker v. Taylor (1874) 76 Pa. 83; Moore v. Smith (1876) 81 Pa. 182; Briggs's Appeal (1880) 93 Pa. 485; Murphy v. Philadelphia Trust Co. (1883) 103 Pa. 379; Lash v. Von Neida (1885) 109 Pa. 213; Morrison v. Collins (1889) 127 Pa. 28, 14 Am. St. Rep. 827, 17 Atl. 753; Brownell v. Oviatt (1906) 215 Pa. 514, 64 Atl. 670; King v. Coulter (1853) 2 Grant, Cas. (Pa.) 77; Kohler's Estate (1896) 18 Pa. Co. Ct. 184; Schoonover's Estate (1910) 44 Pa. Super. Ct. 76; Ramirez v. Schroeder (1910) 16 P. R. R. 589; Kennedy v. Denoon (1814) 3 Brev. (S. C.) 476, 2 Treadway Const. 617; Palmer v. Dubois (1817) 1 Mills, Const. (S. C.) 178; Levy v. Hampton (1821) 1 M'Cord, L. (S. C.) 145; Wightman v. Butler (1844) 2 Speers, L. (S. C.) 357; Barnwell v. Waring (1832) Rich. Eq. Cas. (S. C.) 283; Smithpeter v. Ison (1850) 4 Rich. L. (S. C.) 203, 53 Am. Dec. 732; Hinton v. Kennedy (1872) 3 S. C. 459; Robinson v. Robinson (1883) 20 S. C. 567; Montgomery v. Cloud (1887) 27 S. C. 188, 3 S. E. 196; Adams v. Richardson (1889) 32 S. C. 139, 10 S. E. 931; Mattocks v. Bellamy (1836) 8 Vt. 463; Sparhawk v. Buell (1837) 9 Vt. 41; Graves v. Weeks (1847) 19 Vt. 178; Fletcher v. Fletcher (1900) 72 Vt. 268, 47 Atl. 777; Updike v. Lane (1883) 78 Va. 132; Norvell v. Little (1884) 79 Va. 141; Massie v. Heiskell (1885) 80 Va. 789; Alexander v. Byrd (1889) 85 Va. 690, 8 S. E. 577; James v. Life (1896) 92 Va. 702, 24 S. E. 275; Erskine v. North (1857) 14 Gratt (Va.) 60; Pitzer v. Burns (1873) 7 W. Va. 63; Sadler v. Kennedy (1844) 11 W. Va. 187; Caldwell v. Prindle (1877) 11 W. Va. 307, later appeal to same effect in (1882) 19 W. Va. 604; Criss v. Criss (1886) 28 W. Va. 388; Colsell v. Budd (1807) 1 Campb. (Eng.) 27.

[38] Lapse of nineteen years will not raise the presumption of payment: Barned v. Barned (1870) 21 N. J. Eq. 245; Boone v. Pierpont (1877) 28 N. J. Eq. 7; Lesley v. Nones (1821) 7 Serg. & R. (Pa.) 410; Foulk v. Brown (1834) 2 Watts (Pa.) 209; Clapier v. Maupay (1837) 2 Miles (Pa.) 137; Wherry v. McCammon (1866) 12 Rich. Eq. (S. C.) 337, 91 Am. Dec. 240.

In other cases, although the twenty-year period had almost elapsed, the presumption of payment was held not to arise (the time which was lacking to complete the period being indicated in parenthesis): Hendricks v. Wallis (1858) 7 Iowa, 224 (two months); Peck v. Mallams (1853) 10 N. Y. 543 (eight months); Daby v. Ericsson (1871) 45 N. Y. 786 (four months); Smith v. Richardson (1819) 2 Nott & M'C. (S. C.) 166 (three months); Foster v. Hunter (1851) 4 Rich. Eq. (S. C.) 16 (one month); Bradley v. Jennings (1867) 15 Rich. L. (S. C.) 34 (three months).

Although only three days were lacking to complete the twenty-year period between the date of an indorsement of a credit by the obligee on a bond and the bringing of the action, the credit having been made about a year after the bond became due, the court in Tilgham v. Fisher (1840) 9 Watts (Pa.) 441, stated that doubtless the indorsement was sufficient, if made at the time of its date, to repel the presumption of payment; but that, as it was made so near to the beginning of the twenty-year period before the bringing of the action, very slight circumstances would be sufficient to do away with its repelling effect.

And under a statute providing that, "after the expiration of twenty years from the time the right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have seen extinguished by payment," it was held in Ingraham v. Baldwin (1853) 9 N. Y. 45, that payment would not be presumed from a lapse of time short of twenty years, even though only about ten days were lacking to complete the twenty-year period.

[39] Ayres v. Waite (1852) 10 Cush. (Mass.) 76; Clapier v. Maupay (1837) 2 Miles (Pa.) 137; Anderson v. Settle (1857) 5 Sneed (Tenn.) 202; Hutson-

due, of a considerable period of time, less than twenty years, will not raise the legal presumption of payment, it may be evidence of payment sufficient to warrant the jury in inferring payment, when considered in connection with other circumstances.[40] Thus, although the lapse of seventeen years after a bond became due is not, per se, sufficient to authorize the legal pre-

piller v. Stover (1855) 12 Gratt. (Va.) 579; Booker v. Booker (1877) 29 Gratt. (Va.) 605, 26 Am. Rep. 401; Sadler v. Kennedy (1877) 11 W. Va. 187; Caldwell v. Prindle (1882) 19 W. Va. 604.

[40] Goldhawk v. Duane (1808) 2 Wash. C. C. 323, Fed. Cas. No. 5,511; Denniston v. McKeen (1840) 2 McLean, 253, Fed. Cas. No. 3,803; Renwick v. Wheeler (1880) 4 McCrary, 119, 48 Fed. 431; Jones v. Wilkey (1897) 78 Fed. 532; May v. Wilkinson (1884) 76 Ala. 543; Phillips v. Adams (1884) 78 Ala. 225; Woodruff v. Sanders (1854) 15 Ark. 143; Fleming v. Rothwell (1848) 5 Harr. (Del.) 46; Cloud v. Temple (1879) 5 Houst. (Del.) 587; Janvier v. Culberth (1905) 5 Penn. (Del.) 505, 63 Atl. 309; Buckmaster v. Kelley (1875) 15 Fla. 180; Milledge v. Gardner (1863) 33 Ga. 397; Norton v. Aiken (1910) 134 Ga. 21, 67 S. E. 425; Garnier v. Renner (1875) 51 Ind. 372; Long v. Straus (1890) 124 Ind. 84, 24 N. E. 664; Jacobs v. State (1891) 127 Ind. 77, 26 N. E. 675; Swatts v. Bowen (1895) 141 Ind. 322, 40 N. E. 1057; Hendricks v. Wallis (1858) 7 Iowa, 224; Fuller v. Lendrum (1882) 58 Iowa, 353, 12 N. W. 340; Manning v. Meredith (1886) 69 Iowa, 430, 29 N. W. 336; Walker v. Russell (1887) 73 Iowa, 340, 35 N. W. 443; Ludwig v. Blackshere (1897) 102 Iowa, 366, 71 N. W. 356; Herndon v. Bartlett (1828) 7 T. B. Mon. (Ky.) 449; Moore v. Pague (1864) 1 Duv. (Ky.) 327; Poston v. Smith (1871) 8 Bush (Ky.) 589; Endies v. Harrison (1883) 4 Ky. L. Rep. 618; Russell v. Pedigo (1895) 17 Ky. L. Rep. 68, 30 S. W. 393; Burns v. Ross (1895) 17 Ky. L. Rep. 181, 30 S. W. 641; Bethany v. Creditors, 7 Rob. (La.) 61; Wells v. Compton (1831) 3 La. 164; Denaule v. Munez (1833) 6 La. 27; Mann v. Manning (1849) 12 Smedes & M. (Miss.) 615; Baker v. Stonebraker (1865) 36 Mo. 338; West v. Brison (1889) 99 Mo. 684, 13 S. W. 95; Mercantile Bank v. Hawe (1888) 33 Mo. App. 214; Gould v. White (1852) 26 N. H. 178; Bander v. Snyder (1848) 5 Barb. (N. Y.) 63; Sheldon v. Heaton (1897) 22 App. Div. 308, 47 N. Y. Supp. 1124; Flagg v. Ruden (1850) Bradf. (N. Y.) 192; Jackson ex dem. Martin v. Pratt (1813) 10 Johns. (N. Y.) 381; Re Bedell (1888) 1 N. Y. Supp. 287; Jacoby v. Stephenson Silver Min. Co. (1869) 3 Silv. Sup. Ct. 130, 6 N. Y. Supp. 371; McMurray v. McMurray (1892) 17 N. Y. Supp. 657; Boyd v. Boyd (1894) 9 Misc. 161, 29 N. Y. Supp. 7 (evidence of debtor's ability to pay, or of his poverty, is admissible, where less than twenty years have elapsed on issue of payment); Imgard v. Ashley (1902) 37 Misc. 857, 76 N. Y. Supp. 987; Levy v. Merrill (1876) 52 How. Pr. (N. Y.) 360, affirmed in (1878) 14 Hun, 145; Lenox v. Greene (1815) 4 N. C. (2 Car. Law Repos. 281); Penrose v. King (1794) 1 Yeates (Pa.) 344; Henderson v. Lewis (1823) 9 Serg. & R. (Pa.) 379, 11 Am. Dec. 733; Tilghman v. Fisher (1840) 9 Watts (Pa.) 441; Diamond v. Tobias (1849) 12 Pa. 312; Hamilton v. Hamilton (1851) 18 Pa. 20, 55 Am. Dec. 585; Webb v. Dean (1853) 21 Pa. 29; Hughes v. Hughes (1867) 54 Pa. 240; Brubaker v. Taylor (1874) 76 Pa. 83; Moore v. Smith (1876) 81 Pa. 182; Briggs's Appeal (1880) 93 Pa. 485; Lee v. Newell (1884) 107 Pa. 283; Morrison v. Collins (1889) 127 Pa. 28, 14 Am. St. Rep. 827, 17 Atl. 753; Young v. Doherty (1897) 183 Pa. 179, 38 Atl. 587; Brownell v. Oviatt (1906) 215 Pa. 514, 64 Atl. 670; King v. Coulter (1853) 2 Grant, Cas. (Pa.) 77; Shepherd's Appeal (1854) 2 Grant, Cas. (Pa.) 402; Winton v. Mulley (1889) 1 Lack. Leg. News (Pa.) 276; Cobb v. Cobb (1880) 2 Lack. Leg. News (Pa.) 217; Wall v. Stone (1885) 3 Lack. Leg. News (Pa.) 314; Clapier v. Maupay (1837) 2 Miles (Pa.) 137; Kohler's Estate (1896) 18 Pa. Co. Ct. Rep. 184; Schoonover's Estate (1910) 44 Pa. Super. Ct. 76; Kennedy v. Denoon (1814) 3 Brev. (S. C.) 476; Cohen v. Thompson (1818) 2 Mills, Const. (S. C.) 145; Levy v. Hampton (1821) 1 M'Cord, L. (S. C.) 145; Smith v. Richardson (1819) 2 Nott & M'C. (S. C.) 166; Winstanley v. Savage (1827) 2 M'Cord, Eq. (S. C.) 435; Frazer v. Perdrieau (1829) 1 Bail. L. (S. C.) 172; Barnwell v. Barnwell (1835) 2 Hill, Eq. (S. C.) 228; Wightman v. Butler (1844) 2 Speers, L. (S. C.) 357; Barnwell v. Waring

sumption of payment by obligors of undoubted solvency, continued during that entire period, yet it is a persuasive circumstance, in the absence of any demand, or recognition or partial payment of principal or interest, and may, when even slightly corroborated by extraneous facts, be sufficient evidence of payment.[41] And, for the purpose of proving payment, evidence is admissible in connection with lapse of a period of less than twenty years, that during this time the creditor was constantly pressed for money, while the debtor was abundantly able to pay.[42] But where less than twenty years have elapsed since the maturity of the debt, it has been held that evidence merely of the debtor's ability to pay taken in connection with the lapse of time, is insufficient to show payment.[43]

The strength of the evidence necessary to enable the jury to infer payment from lapse of less than twenty years, in connection with other circumstances, diminishes as the period after the maturity of the debt approaches twenty years; in other words, the evidence required to establish the fact of payment, in combination with lapse of time less than twenty years, must be more or less strong, as the time is more or less short of twenty years.[44]

V. Statutory provisions.

Statutes in some states govern the question of presumption of payment, expressly providing that the presumption shall arise after a prescribed time.[45] It is not the purpose of the note to cover exhaustively the cases construing these statutes. And it

(1831) Rich. Eq. Cas. (S. C.) 283; Williams v. Sims (1844) 1 Rich. Eq. (S. C.) 53; Foster v. Hunter (1851) 4 Rich. Eq. (S. C.) 16; Session v. Stevenson (1860) 11 Rich. Eq. (S. C.) 282; Wherry v. McCammon (1866) 12 Rich. Eq. (S. C.) 337, 91 Am. Dec. 240; Smithpeter v. Ison (1850) 4 Rich. L. (S. C.) 203, 53 Am. Dec. 732; Bradley v. Jennings (1867) 15 Rich. L. (S. C.) 34; Kinsler v. Holmes (1871) 2 S. C. 483; Butler v. Washington (1887) 28 S. C. 607, 5 S. E. 601; Leiper v. Erwin (1833) 5 Yerg. (Tenn.) 97; Crank v. Flowers (1871) 4 Heisk. (Tenn.) 629; Blackburn v. Squib (1823) Peck (Tenn.) 60 (recognizing rule); Husky v. Maples (1865) 2 Coldw. (Tenn.) 25, 88 Am. Dec. 588; Walker v. Emerson (1858) 20 Tex. 707, 73 Am. Dec. 207; Johnson v. Lockhart (1899) 20 Tex. Civ. App. 596, 50 S. W. 955; Hume v. Le Compte (1912) — Tex. Civ. App. —, 142 S. W. 934; Hutton v. Pederson (1913) — Tex. Civ. App. —, 153 S. W. 176; Norvell v. Little (1884) 79 Va. 141; Tunstall v. Withers (1890) 86 Va. 892, 11 S. E. 565; Clendenning v. Thompson (1895) 91 Va. 518, 22 S. E. 233; Sadler v. Kennedy (1844) 11 W. Va. 187; Caldwell v. Prindle (1877) 11 W. Va. 307, later appeal to the same effect in (1882) 19 W. Va. 604.

[41] Moore v. Pogue (1864) 1 Duv. (Ky.) 327.

[42] Re Keenan (1893) 73 Hun, 177, 25 N. Y. Supp. 877; Morrison v. Collins (1889) 127 Pa. 28, 17 Atl. 753; Perkins v. Hawkins (1853) 9 Gratt. (Va.) 649.

[43] Daby v. Ericsson (1871) 45 N. Y. 786; Alexander v. Dutcher (1876) 7 Hun, 439, affirmed in (1877) 70 N. Y. 385; Rogers v. Burns (1856) 27 Pa. 525; Morrison v. Collins (1889) 127 Pa. 28, 17 Atl. 753; Hutton v. Pederson (1913) — Tex. Civ. App. —, 153 S. W. 176.

[44] Woodruff v. Sanders (1854) 15 Ark. 143; Wells v. Compton (1831) 3 La. 164; Baker v. Stonebraker (1865) 36 Mo. 338; Hughes v. Hughes (1867) 54 Pa. 240; Kohler's Estate (1896) 18 Pa. Co. Ct. 184.

"The presumption strengthens as the time approaches to twenty years, and the circumstances needed to establish it may be measured by a diminishing scale. The further the time stops short of twenty years, the more cogent and decisive must be the circumstances relied on; just as, the further we advance beyond twenty years, we require more persuasive circumstances to rebut the legal presumption. Twenty years assumed as the point for that presumption, the scale is reversed by which we measure the circumstances that tend to establish or countervail it." King v. Coulter (1853) 2 Grant, Cas. (Pa.) 77.

[45] Among other cases construing and applying the New York statute, providing that a judgment or decree directing payment of a sum of money shall be presumed paid after the expiration of twenty years from the time

should be observed that the note does not attempt to represent the statute law of any state at the present time. Questions arising under statutes creating a presumption of payment from the lapse of time, and making the presumption conclusive, except in case of part payment or acknowledgment in writing, see the following:

New York.—Kennedy v. Mills (1857) 4 Abb. Pr. 132; Henderson v. Henderson (1846) 3 Denio, 314; Barnard v. Onderdonk (1885) 98 N. Y. 158; Re Kendrick (1887) 107 N. Y. 104, 13 N. E. 762; Van Rensselaer v. Wright (1890) 121 N. Y. 626, 25 N. E. 3; Sheldon v. Mirick (1895) 144 N. Y. 498, 39 N. E. 647, reversing (1893) 70 Hun, 41, 23 N. Y. Supp. 1081; Holland v. Grote (1908) 193 N. Y. 262, 86 N. E. 30; Raphael v. Mencke (1898) 28 App. Div. 91, 50 N. Y. Supp. 920; Seaman v. Clarke (1901) 60 App. Div. 416, 69 N. Y. Supp. 1002, affirmed without opinion in (1902) 170 N. Y. 594, 63 N. E. 1122; Belfer v. Ludlow (1911) 143 App. Div. 147, 127 N. Y. Supp. 623, appeal dismissed in (1911) 202 N. Y. 539, 95 N. E. 1123; Re Watson (1914) 163 App. Div. 41, 148 N. Y. Supp. 525; Brinkman v. Cram (1916) 175 App. Div. 372, 161 N. Y. Supp. 965; Palen v. Bushnell (1889) 51 Hun, 423, 4 N. Y. Supp. 63 (see also subsequent proceedings in this case in (1889) 18 N. Y. Civ. Proc. Rep. 56, 13 N. Y. Supp. 785); Grey v. Seeber (1889) 53 Hun, 611, 6 N. Y. Supp. 802, 917; Hyde Park Flint Bottle Co. v. Miller (1917) 179 App. Div. 73, 166 N. Y. Supp. 110; Re Hoes (1918) 183 App. Div. 38, 170 N. Y. Supp. 543.

Among other cases construing a similar provision with reference to sealed instruments for the payment of money, see the following: Ingraham v. Baldwin (1853) 9 N. Y. 45; Morey v. Farmers' Loan & T. Co. (1856) 14 N. Y. 302; Martin v. Stoddard (1891) 127 N. Y. 61, 27 N. E. 285; Katz v. Kaiser (1896) 10 App. Div. 137, 41 N. Y. Supp. 776.

The period of time, from the lapse of which the presumption of payment arose, was changed from twenty to ten years, as to the presumption of payment of judgments, by a statute enacted in Arkansas, in 1838. See Woodruff v. Sanders (1854) 15 Ark. 143, and Rector v. Morehouse (1856) 17 Ark. 131. This statute was, however, repealed in 1844, and it was held that, where the repeal occurred before any vested right of defense under the statute accrued, the debtor could derive no benefit from it, and that the common-law period of 20 years must elapse in order to raise the presumption of payment, although the statute was in force at the time the judgment was rendered. Ringgold v. Randolph (1855) 16 Ark. 212.

The Arkansas statute was construed in Woodruff v. Sanders (Ark.) supra, as applicable to judgments rendered prior to, as well as those rendered after, the passage of the act, although the presumption of payment as to judgments rendered prior to the passage of the act could be repelled by all means allowed at common law, while the statute itself provided that, as to judgments thereafter rendered, the presumption should only be repelled by proof of part payment, or a written acknowledgment made within the ten-year period.

The Colorado Statute of 1891, providing that after ten years from the entry of any final judgment in any court in the state the same should be considered as satisfied in full, unless revived as provided by law, was held in Jones v. Stockgrowers Nat. Bank (1902) 17 Colo. App. 79, 67 Pac. 177, to be prospective only, and not to apply to a judgment rendered before its enactment.

The common-law rule as to presumption of payment from the lapse of twenty years was enacted into statute in Missouri in 1835, it being provided that every judgment and decree of any court thereafter rendered should be presumed paid, after the expiration of twenty years from the time the judgment or decree was rendered. Gaines v. Miller (1884) 111 U. S. 395, 28 L. ed. 466, 3 Sup. Ct. Rep. 426.

This statute was held in Clemens v. Wilkinson (1846) 10 Mo. 97, to be cumulative as to judgments rendered prior thereto; in other words, as to such judgments, the common-law rule of presumption of payment from lapse of twenty years applied, and it was not necessary that twenty years should have elapsed from the date the statute was enacted. To the same effect is Smith v. Benton (1852) 15 Mo. 371, except that it construed a similar provision of the statute, ap-

ing a presumption of payment are treated in the note under the appropriate headings.[46]

VI. Presumption as rebuttable or conclusive, in general.

Although there are several cases in

plicable to presumption of payment of bonds.

By statute enacted in 1911, in Kansas, it was provided that the record of a mortgage, showing that by the terms thereof the debt matured at least fifteen years prior to the bringing of the action to enforce it, should be prima facie evidence that the mortgage was in default, and that the lien had ceased to exist. Wingard v. Smith (1915) 95 Kan. 84, 148 Pac. 250.

It was held in Collins v. Boyd (1848) 14 Ala. 505, that presumption of payment of a judgment from the lapse of ten years was not created by a statute of that state, providing that when execution was issued on a judgment within a year and a day after the rendition thereof, and not returned satisfied, it should be lawful at any time thereafter to issue execution on the judgment without suing out a scire facias to revive the same; and that the judgment should not be presumed paid, without payment entered of record, unless no execution had been issued thereon for ten years. The court said: "By the common law, if no execution had issued upon a judgment in a year and a day, it must have been renewed by scire facias, or by action of debt, before execution could be issued thereon. The object of this statute was, to supersede the necessity of bringing a suit, either by scire facias or action of debt, before an execution could issue, if an execution had been issued in a year and a day, and returned not satisfied, unless ten years had intervened between the return on said execution, issued within the year and the day, and the time of issuing the alias. But this statute was not intended to create a bar to a recovery on a judgment, although no execution had issued on the judgment within ten years, nor did it intend to create a presumption of payment, and to throw the burthen of proving it had not been paid on the plaintiff, in a proceeding to revive the judgment by scire facias, or in an action of debt. It merely intended to authorize the plaintiff in the judgment, if he had sued out an execution which had been returned not satisfied, to sue out an alias fieri facias at any time within ten years from the return of the original fieri facias. This being the just construction of the act, the lapse of ten years would not have created the presumption of payment." The statute was previously construed to the opposite effect by the Louisiana court, in Tilghman's Succession (1844) 7 Rob. (La.) 387.

In North Carolina, the time necessary to raise the presumption of payment was reduced by statute, it appears, to ten years. Among other cases involving the statutory presumption in that state, see the following:

North Carolina.—Holly v. Freeman (1842) 24 N. C. (2 Ired. L.) 218; Sprull v. Davenport (1845) 27 N. C. (5 Ired. L.) 663; Threadgill v. West (1852) 35 N. C. (13 Ired. L.) 310; Roberts v. Welch (1852) 43 N. C. (8 Ired. Eq.) 287; Wilfong v. Cline (1854) 46 N. C. (1 Jones, L.) 499; McKeethan v. Atkinson (1854) 46 N. C. (1 Jones, L.) 421; Woodbury v. Taylor (1856) 48 N. C. (3 Jones. L.) 504; Haws use of Thompson v. Cragie (1857) 49 N. C. (4 Jones, L.) 394; Brown v. Becknall (1860) 58 N. C. (5 Jones, Eq.) 423; Rowland v. Windley (1882) 86 N. C. 36; Hall v. Gibbs (1882) 87 N. C. 4; Crawford v. McLellan (1882) 87 N. C. 169; Kerlee v. Corpening (1887) 97 N. C. 330, 2 S. E. 664; Pemberton v. Simmons (1888) 100 N. C. 316, 6 S. E. 122; Currie v. Clark (1888) 101 N. C. 329, 7 S. E. 805; Summerlin v. Cowles (1888) 101 N. C. 473, 7 S. E. 881; Wilson v. Pearson (1889) 102 N. C. 290, 9 S. E. 707; Herman v. Watts (1890) 107 N. C. 646, 12 S. E. 437.

See, however, Boone v. Peebles (1900) 126 N. C. 824, 36 S. E. 193, to the effect that there was no statutory presumption of payment under the Code then in force.

And it was said in Brown v. Harding (1916) 171 N. C. 686, 89 S. E. 222, that the Statute of Limitations had taken the place of the former Statute of Presumption, in respect to judgments.

[46] See, for example, as to the question whether the presumption arising under statute is conclusive or rebuttable, notes 55 and 56, infra; as to acknowledgment of the debt as sufficient to rebut the statutory presumption, note 82, infra; as to nonresidence of the debtor as rebutting the statu-

which the court uses language not in harmony with this rule,[47] it is well settled that the presumption of payment arising from lapse of time is not conclusive, but is rebuttable.[48] And the doctrine that the presumption may be rebutted has been applied, or at least recognized, in actions involving various classes of debts, such as judgments,[49] bills and notes, and

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tory presumption, note 138, infra; as to relationship as a circumstance to rebut the presumption of payment of a bond executed by a husband, under statute, to a trustee for payment of a debt owing by him to his wife, note 161, infra.

[47] See Gaines v. Miller (1884) 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426; Roach v. Cox (1909) 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578; Snodgrass v. Snodgrass (1912) 176 Ala. 276, 58 So. 201, and Graham v. Graham (1918) — Ala. —, 79 So. 450.

The presumption of payment is conclusive, where more than twenty years have elapsed since the debt became due, and the creditor has been inactive, and there has been no recognition of the liability by the debtor. SPENCER v. HURD (reported herewith) ante, 761.

Didlake v. Robb (1874) 1 Woods, 630, Fed. Cas. No. 3,899, is to the effect that the lapse of sixteen years is prima facie evidence of payment, and that the presumption of payment becomes conclusive after the lapse of twenty years.

[48] Leary v. Jersey City (1911) 189 Fed. 419, affirmed in (1913) 126 C. C. A. 12, 208 Fed. 854; Chesapeake & D. Canal Co. v. United States (1917) 153 C. C. A. 589, 240 Fed. 903; Helm v. Jones (1835) 3 Dana (Ky.) 86; McLellan v. Crofton (1830) 6 Me. 307; Bass v. Bass (1829) 8 Pick. (Mass.) 187; Jenkins v. Hopkins (1830) 9 Pick. (Mass.) 543; Kingman v. Kingman (1876) 121 Mass. 249; Grantham v. Canaan (1859) 38 N. H. 268; Tripe v. Marcy (1859) 39 N. H. 439; Christy v. New York C. & H. R. R. Co. (1917) 90 N. J. L. 540, 101 Atl. 372; Arden v. Arden (1814) 1 Johns. Ch. (N. Y.) 313; Bailey v. Jackson (1819) 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; M'Dowl v. Charles (1822) 6 Johns. Ch. (N. Y.) 132; Jackson ex dem. Marvin v. Hotchkiss (1826) 6 Cow. (N. Y.) 401; Morris v. Wadsworth (1837) 17 Wend. (N. Y.) 103; People v. Freeman (1906) 110 App. Div. 605, 97 N. Y. Supp. 343; Williams v. Clements (1892) 46 N. Y. S. R. 448, 19 N. Y. Supp. 613; Cox v. Brower (1894) 114 N. C. 422, 19 S. E. 365; M'Bride v. Moore (1834) Wright (Ohio) 524; Durdon v. Gaskill (1798) 2 Yeates (Pa.) 268; Summerville v. Holliday (1833) 1 Watts (Pa.) 507; Foulk v. Brown (1834) 2 Watts (Pa.) 209; Unangst v. Kraemer (1845) 8 Watts & S. (Pa.) 391; Re Darlington (1850) 13 Pa. 430; Morrison v. Funk (1854) 23 Pa. 421; McQuesney v. Hiester (1859) 33 Pa. 435; Reed v. Reed (1863) 46 Pa. 239; Smith's Estate (1896) 177 Pa. 437, 35 Atl. 680; Barr's Estate (1907) 33 Pa. Co. Ct. 647; Hair v. Thomas (1909) 19 Pa. Dist. R. 424; Second Nat. Bank v. Thompson (1909) 20 Pa. Dist. R. 39, affirmed in (1910) 44 Pa. Super. Ct. 200; Brown's Estate (1871) 8 Phila. (Pa.) 197; Gibbes v. Holmes (1859) 10 Rich. Eq. (S. C.) 484; McKinlay v. Gaddy (1887) 26 S. C. 573, 2 S. E. 497; Burnside v. Donnon (1890) 34 S. C. 289, 13 S. E. 465; Smith v. Steen (1893) 38 S. C. 361, 16 S. E. 1003; Newman v. Clyburn (1894) 41 S. C. 534, 19 S. E. 913; Shotwell v. McCardell (1898) 19 Tex. Civ. App. 174, 47 S. W. 39; Rix v. Smith (1834) 6 Vt. 348; Evarts v. Nason (1839) 11 Vt. 122; Spear v. Newell (1841) 13 Vt. 288; Graves v. Weeks (1847) 19 Vt. 178; Eustace v. Gaskins (1793) 1 Wash. (Va.) 188; Com. v. Lilly (1829) 1 Leigh (Va.) 525; Jameson v. Rixey (1897) 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861; Erskine v. North (1857) 14 Gratt. (Va.) 60; Toplis v. Baker (1789) 2 Cox, Ch. Cas. 118, 30 Eng. Reprint, 55, 2 Revised Rep. 21; Ravenscroft v. Frisby (1844) 1 Colly. Ch. Cas. 16, 63 Eng. Reprint, 302, 13 L. J. Ch. N. S. 153.

Failure of the creditor to make demand on the judgment debtor for payment, or to show insolvency or express recognition by the latter of the debt during the 20-year period, does not necessarily render conclusive the presumption of payment. JUDSON v. PHELPS (reported herewith) ante, 768.

[49] Morris's Estate (1836) Crabbe, 70, Fed. Cas. No. 9,825; Chapman v. Loomis (1870) 36 Conn. 459; Fanton v. Middlebrook (1882) 50 Conn. 44; JUDSON v. PHELPS; De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120; Moore v. Carey (1895) 1 Marv. (Del.) 401, 41 Atl. 75; Maxwell v. Devalinger (1900) 2 Penn. (Del.) 504,

other negotiable instruments,[50] bonds or coupons, and recognizances,[51] and

47 Atl. 381; Knowles v. Waller (1905) 7 Penn. (Del.) 220, 78 Atl. 611; Farmer's Bank v. Leonard (1847) 4 Harr. (Del.) 536; Noble v. Merrill (1861) 48 Me. 140; Clemens v. Wilkinson (1846) 10 Mo. 97; Henderson v. Cairns (1852) 14 Barb. (N. Y.) 15; Johnson v. Tuttle (1853) 9 N. J. Eq. 365; Beekman v. Hamlin (1890) 19 Or. 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195, rehearing in (1891) 20 Or. 352, 10 L.R.A. 457, 25 Pac. 672, later appeal in (1892) 23 Or. 313, 31 Pac. 707; Bowman v. Holman (1909) 53 Or. 456, 99 Pac. 424; Bissell v. Jaudon (1866) 16 Ohio St. 498; Allen v. Everly (1873) 24 Ohio St. 97; James v. Jarrett (1851) 17 Pa. 370; Van Loon v. Smith (1883) 103 Pa. 238; Biddle v. Girard Nat. Bank (1885) 109 Pa. 349; Breneman's Appeal (1888) 121 Pa. 641, 15 Atl. 650; Devereux's Estate (1890) 184 Pa. 429, 39 Atl. 225; Roberts v. Powell (1905) 210 Pa. 594, 60 Atl. 258; Miller's Estate (1914) 243 Pa. 328, 90 Atl. 77; Coleman v. Erie Trust Co. (1916) 255 Pa. 63, 99 Atl. 217; Van Eman use of Barnes v. Walker (1911) 20 Pa. Dist. R. 1101; Miller v. Williamsport (1901) 17 Pa. Super. Ct. 159; Dillard v. Brian (1852) 5 Rich. L. (S. C.) 501; McNair v. Ingraham (1883) 21 S. C. 70; Roberts v. Smith (1884) 21 S. C. 455; Tudor v. Taylor (1853) 26 Vt. 444; Hutsonpiller v. Stover (1855) 12 Gratt. (Va.) 579.

[50] Hopkirk v. Page (1822) 2 Brock. 20, Fed. Cas. No. 6,697; Parsons v. Cannon (1912) 4 Boyce (Del.) 298, 88 Atl. 470; Waters v. Waters (1859) 1 Met. (Ky.) 519; Howe v. Saunders (1854) 38 Me. 350; Mansfield v. Cheever (1796) 3 Dane, Abr. (Mass.) 506; Re Searles (1795) 5 Dane, Abr. (Mass.) 401, and Sawyer v. Smith (1797) 5 Dane, Abr. (Mass.) 405, 6 Mass. Dig. 1904–1905, col. 11,810; Clark v. Clement (1856) 33 N. H. 563; Ayres v. Ayres (1905) 69 N. J. Eq. 343, 60 Atl. 422, affirmed in (1906) 69 N. J. Eq. 842, 66 Atl. 1133; M'Dowell v. McCullough (1827) 17 Serg. & R. (Pa.) 51; Sellers v. Holman (1853) 20 Pa. 321; Geiger's Estate (1900) 14 Pa. Super. Ct. 523; Boyce v. Lake (1882) 17 S. C. 481, 43 Am. Rep. 618; Hall v. Woodward (1886) 26 S. C. 557, 2 S. E. 401; Carter v. Wolfe (1870) 1 Heisk. (Tenn.) 700; Lyon v. Guild (1871) 5 Heisk. (Tenn.) 175; Fisher v. Philips (1874) 4 Baxt. (Tenn.) 243; Anderson v. Settle (1857) 5 Sneed (Tenn.) 202; Stanley v. McKinzer (1881) 7 Lea (Tenn.) 454; Buckley v. Runge (1909) 57 Tex. Civ. App. 322, 122 S. W. 596, later appeal in (1911) — Tex. Civ. App. —, 136 S. W. 533; Perez v. Maverick (1918) — Tex. Civ. App. —, 202 S. W. 199; Wells v. Washington (1820) 6 Munf. (Va.) 532; Taylor v. Carter (1915) 117 Va. 845, 86 S. E. 120; Sanderson v. Olmsted (1849) 1 Chand. (Wis.) 190, 2 Pinney (Wis.) 224; Hodway v. Sanborn (1911) 145 Wis. 151, 130 N. W. 95.

[51] **Delaware.**—Durham v. Greenly (1836) 2 Harr. (Del.) 124; State use of Lobb v. Lobb (1842) 3 Harr. (Del.) 421.

Indiana.—Smith v. Buskirk (1845) 7 Blackf. 478.

Kentucky.—Shields v. Pringle (1811) 2 Bibb, 387.

New Jersey.—Mease v. Stevens (1793) 1 N. J. L. 433.

New York.—Arden v. Arden (1814) 1 Johns. Ch. 313.

Pennsylvania.—Boyd v. Grant (1825) 13 Serg. & R. 124; McLean v. Findley (1830) 2 Penr. & W. (Pa.) 97; Delany v. Robinson (1837) 2 Whart. 503; Tilghman v. Fisher (1840) 9 Watts, 441; Eby v. Eby (1846) 5 Pa. 435; Ankeny v. Penrose (1851) 18 Pa. 190; Lash v. Von Neida (1885) 109 Pa. 211; Porter v. Nelson (1888) 121 Pa. 628, 15 Atl. 852; Philadelphia Trust Co. v. Philadelphia & E. R. Co. (1894) 160 Pa. 590, 28 Atl. 960; White v. White (1901) 200 Pa. 565, 50 Atl. 157; McDowell v. North Side Bridge Co. (1915) 247 Pa. 190, 93 Atl. 280; Finfrock v. Kahl (1894) 9 Lanc. L. Rev. 313; Barnhart v. Barnhart (1903) 22 Pa. Super. Ct. 206; Griffith's Estate (1889) 14 N. W. C. 486.

South Carolina.—Palmer v. Dubois (1817) 1 Mill, Const. 178; Haskell v. Keen (1819) 2 Nott. & M'C. 160; Tucker v. Hunt (1854) 6 Rich. Eq. 183; Langston v. Shands (1885) 23 S. C. 149; Dickson v. Gourdin (1886) 26 S. C. 391, 2 S. E. 303, later appeal in (1888) 29 S. C. 343, 1 L.R.A. 628, 7 S. E. 510; Gibson v. Lowndes (1887) 28 S. C. 285, 5 S. E. 727.

Virginia.—Tinsley v. Anderson (1802) 3 Call (Va.) 329; Dabney v. Dabney (1844) 2 Rob. (Va.) 622, 40 Am. Dec. 761; Booker v. Booker (1877) 29 Gratt. 605, 26 Am. Rep. 401; Updike v. Lane (1883) 78 Va. 132; Coles v.

mortgages and deeds of trust.[52] The fact that the judgment was rendered in another state does not alter the rule.[53]

In this respect, viz., that the presumption of payment arising from lapse of time is merely prima facie evidence, subject to rebuttal, and does not absolutely prohibit the maintenance of the action, it is distinguishable from the bar of statutes of limitation.[54] And the presumption of payment arising under statute is also ordinarily rebuttable,[55] although, of course, the statute may and sometimes does expressly limit the evidence by

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Ballard (1883) 78 Va. 139; Allison v. Wood (1906) 104 Va. 765, 52 S. E. 559, 7 Ann. Cas. 721.

West Virginia.—Hale v. Pack (1877) 10 W. Va. 145.

England.—Barrington v. Searles (1729) 3 Bro. P. C. 535, 1 Eng. Reprint, 1518, 2 Strange, 827, 93 Eng. Reprint, 876, 2 Ld. Raym. 1370, 92 Eng. Reprint, 392; Fladong v. Winter (1812) 19 Ves. Jr. 196, 34 Eng. Reprint, 491.

[52] **United States.**—Higginson v. Mein (1808) 4 Cranch, 415, 2 L. ed. 664; Burnham v. Hewey (1871) 1 Haskell, 372, Fed. Cas. No. 2,175.

Maine.—Joy v. Adams (1846) 26 Me. 330; Sweetser v. Lowell (1851) 33 Me. 446; Jarvis v. Albro (1877) 67 Me. 310; Philbrook v. Clark (1885) 77 Me. 176; Knight v. McKinney (1891) 84 Me. 107, 24 Atl. 744.

Maryland.—Brown v. Hardcastle (1885) 63 Md. 484; CACY v. SLAY (reported herewith) ante, 764.

Massachusetts.—Ayres v. Waite (1852) 10 Cush. 76; Cheever v. Perley (1866) 11 Allen, 584; Anthony v. Anthony (1894) 161 Mass. 343, 37 N. E. 386; Jenkins v. Andover Theological Seminary (1910) 205 Mass. 376, 91 N. E. 552.

Michigan.—Abbott v. Godfroy (1849) 1 Mich. 178; Michigan Ins. Co. v. Brown (1863) 11 Mich. 265; Cowie v. Fisher (1888) 45 Mich. 629, 8 N. W. 586; Baent v. Kennicut (1885) 57 Mich. 268, 23 N. W. 808.

Missouri.—Chouteau v. Burlando (1855) 20 Mo. 482; Lewis v. Schwenn (1887) 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391; Bobb v. Taylor (1916) — Mo. —, 184 S. W. 1028.

New Hampshire.—Howard v. Hildreth (1846) 18 N. H. 105; Barker v. Jones (1883) 62 N. H. 497, 13 Am. St. Rep. 586; Frye v. Hubbell (1907) 74 N. H. 358, 17 L.R.A.(N.S.) 1197, 68 Atl. 325.

New Jersey.—Wanmaker v. Van Buskirk (1832) 1 N. J. Eq. 685, 23 Am. Dec. 748; Murphy v. Coates (1881) 33 N. J. Eq. 424; Stimis v. Stimis (1895) 54 N. J. Eq. 17, 33 Atl. 468; Magee v. Bradley (1892) 54 N. J. Eq. 326, 35 Atl. 103; Swinley v. Force (1910) 78 N. J. Eq. 52, 78 Atl. 249.

New York.—Jackson ex dem. Mackey v. Slater (1830) 5 Wend. 295; Jackson ex dem. People v. Pierce (1813) 10 Johns. 414; Jackson ex dem. Livingston v. De Lancey (1814) 11 Johns. 365, affirmed in (1816) 13 Johns. 537, 7 Am. Dec. 403.

Pennsylvania.—Levers v. Van Buskirk (1844) 7 Watts & S. 70; Frear v. Drinker (1848) 8 Pa. 520; O'Hara v. Carr (1904) 210 Pa. 341, 59 Atl. 1099; Fidelity Title & T. Co. v. Chapman (1910) 226 Pa. 312, 75 Atl. 428; SHEAFER v. WOODSIDE (reported herewith) ante, 775; Brown v. Wagner (1889) 1 Monaghan, 102, 16 Atl. 834; Wilson v. Eckman (1913) 55 Pa. Super. Ct. 403.

Rhode Island.—Glezen v. Haskins (1902) 23 R. I. 601, 51 Atl. 219.

Tennessee.—Vaughn v. Tate (1896) — Tenn. Ch. App. —, 36 S. W. 748.

Texas.—McCamant v. Roberts (1894) — Tex. Civ. App. —, 25 S. W. 731.

Virginia.—Bowie v. Poor School Soc. (1881) 75 Va. 300.

West Virginia.—Criss v. Criss (1886) 28 W. Va. 388; Pickens v. Love 1898) 44 W. Va. 725, 29 S. E. 1018.

Wisconsin.—Delaney v. Brunette (1885) 62 Wis. 615, 23 N. E. 22.

England. — Stewart v. Nicholls (1829) Tamlyn, 307, 48 Eng. Reprint, 122.

[53] Fanton v. Middlebrook (1882) 50 Conn. 44.

[54] Courtney v. Staudenmayer (1896) 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; Adair v. Adair (1858) 5 Mich. 204, 71 Am. Dec. 779; Thorpe v. Corwin (1844) 20 N. J. L. 311; Ash's Estate (1902) 202 Pa. 422, 90 Am. St. Rep. 658, 51 Atl. 1030; Fidelity Title & T. Co. v. Chapman (1910) 226 Pa. 312, 75 Atl. 428; Palmer v. Dubois (1817) 1 Mill, Const. (S. C.) 178; Allison v. Wood (1906) 104 Va. 765, 52 S. E. 559, 7 Ann. Cas. 721.

[55] See also note 56, infra.

Reddington v. Julian (1850) 2 Ind. 224; Barker v. Adams (1853) 4 Ind. 574; Bright v. Sexton (1862) 18 Ind. 186; Tilghman's Succession (1844)

which the presumption may be rebutted.[56]

Where there are several obligors, the presumption of payment in favor of one will operate as a presumption also in favor of the other; in other words, payment as to one cannot be presumed, while it is rebutted as to the others.[57]

It has been said that after what length of time beyond twenty years, if ever, the presumption of payment from lapse of time, which is rebuttable, will be conclusive, has never been deterimned.[58]

VII. Evidence to rebut presumption.

a. In general.

It is well settled that any competent evidence tending to show improbability of payment is admissible for the purpose of rebutting the presumption of payment, which would otherwise arise from lapse of time.[59] Thus, the presumption may be rebutted by evidence that the debtor, during the time

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7 Rob. (La.) 387; Brewer v. Thomes (1848) 28 Me. 81; Jackson v. Nason (1854) 38 Me. 85; Knight v. Macomber (1868) 55 Me. 132; Denny v. Eddy (1839) 22 Pick. (Mass.) 533; Knapp v. Knapp (1883) 134 Mass. 353; Walker v. Robinson (1884) 136 Mass. 280; Day v. Crosby (1899) 173 Mass. 433, 53 N. E. 880; Haynes v. Blanchard (1907) 194 Mass. 244, 120 Am. St. Rep. 551, 80 N. E. 504. Among other North Carolina cases to this effect are: Hall v. Gibbs (1882) 87 N. C. 4; Long v. Clegg (1886) 94 N. C. 763; Currie v. Clark (1888) 101 N. C. 329, 7 S. E. 805; Wilson v. Pearson (1889) 102 N. C. 290, 9 S. E. 707; Grant v. Gooch (1890) 105 N. C. 278, 11 S. E. 571; Ex parte Walker (1890) 107 N. C. 340, 12 S. E. 136; Herman v. Watts (1890) 107 N. C. 646, 12 S. E. 437.

In holding that the presumption created by a statute, providing that every judgment shall be presumed to be paid at the expiration of twenty years after it is rendered, was rebuttable, the court in Denny v. Eddy (1839) 22 Pick. (Mass.) 533, said: "The language of this section of the statute is unlike that used in the limitations of actions on contracts, or torts. In the latter, it is provided that the action shall be brought within a prescribed period from the time when the cause of action shall accrue; but this prescribes no limit for instituting an action on a judgment of a court of record, but merely declares that the legal presumption of payment of such a judgment shall arise after the expiration of twenty years. This presumption may, as we think, be rebutted by the plaintiff."

[56] Under the New York statute, providing that, after the expiration of twenty years from the time a right of action shall accrue on a sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment, but that such presumption may be repelled by proof of part payment, or of a written acknowledgment of such right of action, within that period, it was held in Morey v. Farmers' Loan & T. Co. (1856) 14 N. Y. 302, that, to rebut the presumption, evidence was admissible only of a payment or of a written acknowledgment; and that other evidence tending to show a nonpayment, which, under the common law, would have been admissible to rebut the presumption, was inadmissible. To a similar effect is Fisher v. New York (1876) 67 N. Y. 73. See also Re Kendrick (1887) 107 N. Y. 104, 13 N. E. 762, cited in note 82, infra.

Proof that, in fact, the debt was not paid, does not rebut the presumption under such a statute. Fisher v. New York (N. Y.) supra.

See also note 138, infra. And see Woodruff v. Sanders (1854) 15 Ark. 143, cited in note 45, supra.

[57] Pearsall v. Houston (1856) 48 N. C. (3 Jones, L.) 346.

[58] Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452.

[59] De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120; Allison v. Wood (1906) 104 Va. 765, 52 S. E. 559, 7 Ann. Cas. 721.

It was said in Marshall, Ch. J., in Dunlop & Co. v. Ball (1804) 2 Cranch (U. S.) 180, 2 L. ed. 246, that "the principle upon which the presumption of payment arises from the lapse of time is a reasonable principle, and may be rebutted by any fact which destroys the reason of the rule."

The presumption of payment of a debt from lapse of time may be repelled by any circumstance inconsistent with it, or which tends to destroy or impair its force. Waters v. Waters (1859) 1 Met. (Ky.) 519.

relied on to create the presumption of payment, had not the opportunity or means of paying.[60] And evidence that after the last distribution of the estate, in which the legatees participated, but did not receive payment of the legacies in full, there was no fund out of which the legacies could have been paid, will rebut the presumption of payment in full of the legacies.[61] And the same conclusion was reached where, within the twenty years relied on to create the presumption of payment to the residuary legatees, an action was pending against the executor of the debtor for a greater sum than the claims of such legatees, since they could have no right to payment until the debts were paid.[62]

But ignorance of the legacy on the part of the legatee has been considered insufficient to rebut the presumption,[63] and the same conclusion was reached as to evidence that, during several years of the twenty-year period, the creditor was confined as a prisoner in jail, on an execution.[64]

The evidence to rebut the presumption must be clear and convincing,[65] especially where the action is brought after the death of the debtor or creditor.[66] But the view taken in a New Jersey case, that evidence of nonpayment in fact is insufficient to rebut the presumption, unless the delay is accounted for,[67] does not seem sound.

The majority rule appears to be that the evidence necessary to rebut the

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[60] Fladong v. Winter (1812) 19 Ves. Jr. 196, 34 Eng. Reprint, 491.

[61] Burr's Estate (1907) 33 Pa. Co. Ct. 647.

[62] Winston v. Street (1856) 2 Patton & H. (Va.) 169.

[63] The court was of the opinion, in Congregational Church v. Benedict (1899) 59 N. J. Eq. 136, 44 Atl. 878, affirmed on opinion below in (1901) 62 N. J. Eq. 812, 48 Atl. 1117, that ignorance of the legacy on the part of the legatee, during the period relied upon to create the presumption of payment of the legacy, was not sufficient to rebut the presumption of payment, arising from lapse of more than twenty years after it was payable, as against bona fide purchasers, for value, of property on which it was sought to charge the legacy. The court held, however, that in this case the proof did not satisfactorily show ignorance on the part of the legatee.

[64] Rogers v. Judd (1833) 5 Vt. 236, 26 Am. Dec. 301.

[65] The presumption of payment from lapse of time is equal to direct proof of payment, and will prevail, until overcome by direct proof of nonpayment, or of facts and circumstances from which nonpayment may be clearly inferred. Richards v. Walp (1908) 221 Pa. 412, 70 Atl. 815.

While a conclusive presumption of payment from lapse of time does not arise, yet the presumption is so strong that clear and decisive proof should be required to rebut it. Cowie v. Fisher (1881) 45 Mich. 629, 8 N. W. 586.

[66] SHEAFER v. WOODSIDE (reported herewith) ante, 775; Hunter v. Thurlow (1909) 18 Pa. Dist. R. 661; Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Fidelity Title & T. Co. v. Chapman (1910) 226 Pa. 312, 75 Atl. 428.

[67] The position was taken in Blue v. Everett (1897) 55 N. J. Eq. 329, 36 Atl. 960, that proof of nonpayment, in fact, of a debt secured by mortgage, would not rebut the presumption of payment arising from lapse of more than twenty years, in a foreclosure suit, but that the presumption of payment was conclusive, if the delay was not accounted for, or explained; in other words, that the creditor, to rebut the presumption, must do more than introduce evidence merely that the debt had not, in fact, been paid, but must also show that his conduct in delaying enforcement of the debt was reasonable. Although the decision was affirmed in (1897) 56 N. J. Eq. 455, 39 Atl. 765, the appellate court placed its decision on different grounds, and intimated that it did not approve the view of the lower court.

And in Swinley v. Force (1910) 78 N. J. Eq. 52, 78 Atl. 249, the rule above laid down in Blue v. Everett, supra, that, "unless the delay for twenty years is satisfactorily accounted for or explained, the presumption of the payment of the bond and mortgage, or other pecuniary debt, is conclusive, and cannot be rebutted simply by proof in fact of nonpayment, without accounting for the delay," was approved.

presumption of payment arising from lapse of time need not be of the same nature, or of equal force, as that required to take a case out of the Statute of Limitations,[68] although a different conclusion has been reached in South Carolina.[69]

Evidence to repel the presumption of payment arising from lapse of time, such as proof of insolvency or of actual nonpayment, must run through the entire period relied upon to create the presumption.[70] And as the presumption of payment from lapse of

[68] In this connection see notes 86 and 87, infra.

SHEAFER v. WOODSIDE (reported herewith) ante, 775; Foulk v. Brown (1834) 2 Watts (Pa.) 209; Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Devereux's Estate (1898) 184 Pa. 429, 39 Atl. 225; Griffith's Estate (1884) 14 W. N. C. (Pa.) 486; Finfrock v. Kahl (1888) 9 Lanc. L. Rev. (Pa.) 313; Day v. Crosby (1899) 173 Mass. 433, 53 N. E. 880; Cape Girardeau County use of Road & Canal Fund v. Harbison (1874) 58 Mo. 90; Chiles v. School Dist. (1902) 103 Mo. App. 240, 77 S. W. 82.

In JUDSON v. PHELPS (reported herewith) ante, 768, the court said that the bar of the statute was removed by nothing less than a new promise to pay, or an acknowledgment consistent with such promise, while the presumption of payment from lapse of time was rebutted or, to speak more accurately, did not arise, where there was affirmative proof that the debt had not been paid, or where the circumstances sufficiently accounted for the delay of the creditor.

One seeking to avoid the effect of a statute of limitations must bring himself within its savings; whereas, to avoid the effect of the presumption of payment arising from lapse of time, he may show any circumstances which outweigh the presumption. Abbott v. Godfroy (1849) 1 Mich. 178.

It was said in Walker v. Robinson (1884) 136 Mass. 280, that evidence might be amply sufficient to rebut the presumption of payment from lapse of time under the statute, providing that every judgment shall be presumed paid after twenty years, which would be of no avail under the general Statute of Limitations.

[69] In Boyce v. Lake (1882) 17 S. C. 481, 43 Am. Rep. 618, the court said: "Our conclusion is that the lapse of twenty years raises a presumption of payment as to sealed notes and bonds, which, though not a presumption of law, and therefore not conclusive, yet is a presumption of fact which has acquired an artificial force; subject to be rebutted, it is true, but the facts relied on for this rebuttal must be stronger than mere belief, deduced from the weight of testimony being on that side. They must be of a character which would revive an unsealed note barred by the Statute of Limitations." And this case is cited in Shubrick v. Adams (1883) 20 S. C. 49, as holding that the presumption of payment arising from lapse of time cannot be rebutted merely by the preponderance of testimony as to the actual fact of payment; in other words, the question, where more than twenty years since the debt was due has elapsed, is not one of payment, to be decided by the weight of the testimony, with the burden of proof on the creditor, but, on account of the artificial force which the lapse of time has given to the presumption, it is conclusive, unless overthrown by testimony of the character required to resist a debt barred by the Statute of Limitations.

And the rule that to rebut the presumption of payment, arising from lapse of time, after the presumption has attached, the evidence must be sufficient to take the case out of the Statute of Limitations, is recognized in Dickson v. Gourdin (1886) 26 S. C. 391, 2 S. E. 303, later appeal in (1888) 29 S. C. 343, 1 L.R.A. 628, 7 S. E. 510, although it was held that a different rule applied, where the evidence of payment relied on to rebut the presumption was a payment before the twenty-year period had expired.

And in Colvin v. Phillips (1886) 25 S. C. 229, and Stover v. Duren (1849) 3 Strobh. L. (S. C.) 448, 51 Am. Dec. 634, the view was taken that, in considering admissions which rebut the presumption of payment, the same principles are applicable as in considering admissions which go to take a cause of action out of the Statute of Limitations.

[70] Rowland v. Windley (1882) 86 N. C. 36.

And in Grant v. Gooch (1890) 105 N. C. 278, 11 S. E. 571, it was said that, ordinarily, the admissions, or other evidence to rebut the presumption of

time goes to the whole debt, the rebuttal of it, by proof that any part of the debt was outstanding within the twenty years, as by proof of an acknowledgment that a part of the debt is due, or payment on the debt, goes to the whole presumption; that is, for instance, an acknowledgment that a part of the debt is due, made within the period relied upon to create the presumption of payment, entitles the creditor to recover not only that part, but the whole of the debt, unless payment is proved by other evidence than lapse of time.[71]

Although a bond is, on its face, payable on demand, parol evidence that it was the understanding of the parties that the bond was not to be sued on for a considerable time,[72] is admissible, for the purpose of rebutting the presumption of payment arising from lapse of twenty years after its execution.

After twenty years, the presumption of payment from lapse of time gathers strength with each succeeding year, and the evidence to overthrow it must be correspondingly increased.[73]

b. Possession by creditor of written evidence of indebtedness.

It has been held that the fact that the written evidence of the indebtedness remains, until the time of the trial, in the possession of the creditor, is evidence at least tending to rebut the presumption of payment from lapse of time.[74] It was in these cases it appears, generally, unnecessary to

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payment, must be such in their scope, meaning, and effect as will embrace the entire period, the lapse of which raises the presumption.

[71] Kitchen v. Deardoff (1846) 2 Pa. St. 481.

[72] Hale v. Pack (1877) 10 W. Va. 145. The court said: "Such evidence is offered not to explain or alter the bond, but to explain a matter arising after the execution of the bond; that is, to explain the nonenforcement of the bond promptly. The bond in this case was given by the members of a mercantile firm to a brother of one of the obligors. It was given for money advanced to them, to be used in their business. . . . The whole object of this arrangement would have been defeated by the obligee demanding the payment of the bond promptly. The understanding was, obviously, that this was to be a permanent loan to this firm. . . . Presumption of payment under such circumstances would be as unreasonable as a presumption that a bond was paid before it was due. Abating therefore, such reasonable time after the bond was given, before, according to the understanding of the parties, it was to be paid, and also the time during which the war was pending, and the time during which the presumption of payment could arise in this case, would be much less than twenty years."

[73] Peters's Appeal (1884) 106 Pa. 340; Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 450; Porter v. Nelson (1888) 121 Pa. 620, 15 Atl. 852; Richards v. Walp (1908) 221 Pa. 412, 70 Atl. 815; Cannon v. Hileman (1911) 229 Pa. 414, 78 Atl. 932; King v. Coulter (1853) 2 Grant, Cas. (Pa.) 77; Bentley Estate (1873) 9 Phila. (Pa.) 344; Geiger's Estate (1900) 14 Pa. Super. Ct. 523; Miller v. Williamsport (1901) 17 Pa. Super. Ct. 159; Van Eman v. Walker (1911) 20 Pa. Dist. R. 1101; Luther v. Crawford (1904) 116 Ill. App. 351, affirmed in (1905) 213 Ill. 596, 73 N. E. 430.

[74] Connecticut Mut. L. Ins. Co. v. Dunscomb (1902) 108 Tenn. 724, 58 L.R.A. 694, 91 Am. St. Rep. 769, 69 S. W. 345; Joy v. Adams (1846) 26 Me. 330; TALBOT v. HATHAWAY (reported herewith) ante, 772.

The possession of a note by the payee down to the time of his death, and the finding of it among his valuable papers, apparently unpaid, tends to rebut the presumption of payment, from lapse of time. Holway v. Sanborn (1911) 145 Wis. 151, 130 N. W. 95.

And the fact that a husband permitted a note given by him to his wife to remain with her papers, to which he had access, was considered in Ayres v. Ayres (1905) 69 N. J. Eq. 343, 60 Atl. 422, affirmed in (1906) 69 N. J. Eq. 842, 66 Atl. 1133, as tending to rebut the presumption of payment, arising from lapse of time.

The possession by a bona fide holder of interest coupons due more than twenty years before the bringing of the action, is evidence tending to rebut the presumption of payment of the

decide whether this fact alone would rebut the presumption. That it should have this effect does not seem probable, in view of the great number of cases in which the presumption has been applied, notwithstanding the fact that the written evidence of the indebtedness apparently had remained in the creditor's possession, no point being made of this circumstance. And it has been held that the presumption of payment of a mortgage from lapse of time was not repelled by evidence that the mortgagee lived with the mortgagor, and retained exclusive possession of the mortgage up to the time of his death, which occurred more than twenty years after the mortgage became due.[74½]

c. Admissions generally.

It is well settled that an acknowledgment by the debtor of the debt as subsisting will rebut the presumption of payment; or, in other words, will constitute a new starting point from which the time necessary to raise the presumption will begin to run.[75] The

coupons. McDowell v. North Side Bridge Co. (1915) 247 **Pa.** 190, 93 Atl. 280. The court said: "When the purpose of the interest coupon is considered, and the legal incidents which attached to them, the fact that plaintiff is a bona fide holder of the coupons on which the present claim is based is entitled to greater weight than it would be, did the claim rest on an individual obligation. . . . The fact that the payee is the holder of the obligation is a circumstance always to be considered when such questions as this arise. In some cases it may be of little significance, while in others it may materially lighten the burden resting on the plaintiff, to overcome the adverse presumption. It is of varying force, depending on the general facts. In determining the weight to be allowed it, regard is to be had to the nature and character of the instrument, or instruments, about which the contention is raised."

[74½] Hart v. Bucher (1898) 186 **Pa.** 384, 40 Atl. 511.

[75] Goldhawk v. Duane (1808) 2 Wash. C. C. 323, **Fed.** Cas. No. 5,511; Hughes v. Edwards (1824) 9 Wheat. (U. S.) 489, 6 L. ed. 142; Braun v. Pettyjohn (1912) 176 **Ala.** 592, 58 So. 907; Maxwell v. Devalinger (1900) 2 Penn. (**Del.**) 504, 47 Atl. 381; Hudson v. Williams (1908) 6 Penn. (**Del.**) 550, 72 Atl. 985; Durham v. Greenly (1836) 2 Harr. (**Del.**) 124; Burton v. Cannon (1848) 5 Harr. (**Del.**) 13; Robinson v. Tunnell (1861) 2 Houst. (**Del.**) 387; O'Brien v. Coulter (1831) 2 Blackf. (**Ind.**) 421; Roberts v. Armstrong (1867) 1 Bush (**Ky.**) 263, 89 Am. Dec. 624; Brown v. Hardcastle (1885) 63 **Md.** 484; Brewer v. Thomes (1848) 28 **Me.** 81 (acknowledgment, and other circumstances); Cheever v. Perley (1866) 11 Allen (**Mass.**) 584; Baent v. Kennicutt (1885) 57 **Mich.** 268, 23 N. W. 808; Mease v. Stevens (1793) 1 **N. J. L.** 433; Johnson v. Tuttle (1853) 9 **N. J. Eq.** 365; Murphy v. Coates (1881) 33 **N. J. Eq.** 424; Ayres v. Ayres (1905) 69 **N. J. Eq.** 343, 60 Atl. 422; Metlar v. Williams (1916) 86 **N. J. Eq.** 330, 97 Atl. 961; Smedes v. Hooghtaling (1805) 3 Caines (**N. Y.**) 48, 2 Am. Dec. 250; Arden v. Arden (1814) 1 Johns. Ch. (**N. Y.**) 313; Morris v. Wadsworth (1837) 17 Wend. (**N. Y.**) 103; Park v. Peck (1829) 1 Paige (**N. Y.**) 477; Heyer v. Pruyn (1839) 7 Paige (**N. Y.**) 465, 34 Am. Dec. 355; Harrington v. Slade (1856) 22 Barb. (**N. Y.**) 161; Hinsaman v. Hinsaman (1860) 52 **N. C.** (1 Jones, L.) 510; Tucker v. Baker (1886) 94 **N. C.** 162; Morris v. Osborne (1889) 104 **N. C.** 609, 10 S. E. 476; Cartwright v. Kerman (1890) 105 **N. C.** 1, 10 S. E. 870; Bissell v. Jaudon (1866) 16 **Ohio** St. 498; Beekman v. Hamlin (1890) 19 **Or.** 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195, rehearing in (1891) 20 Or. 352, 10 L.R.A. 457, 25 Pac. 672, later appeal in (1892) 23 Or. 313, 31 Pac. 707; Boyd v. Grant (1825) 13 Serg. & R. (**Pa.**) 124; M'Dowell v. M'Cullough (1827) 17 Serg. & R. (**Pa.**) 51; Tilghman v. Fisher (1840) 9 Watts (**Pa.**) 441; Delany v. Robinson (1837) 2 Whar. (**Pa.**) 503; Postens v. Postens (1842) 3 Watts & S. (**Pa.**) 127; Kitchen v. Deardoff (1846) 2 **Pa.** St. 481; Stout v. Lavan (1846) 3 **Pa.** St. 235; Eby v. Eby (1846) 5 **Pa.** 435; Frear v. Drinker (1848) 8 **Pa.** 520; Porter v. Nelson (1888) 121 **Pa.** 628, 15 Atl. 852; Re Breneman's Appeal (1888) 121 **Pa.** 641, 15 Atl. 650; Smith v. Shoenberger (1896) 176 Pa. 95, 34 Atl. 954; White v. White (1901) 200 **Pa.** 565, 50 Atl. 157; Budd v. Conard (1856) 2 Phila. (**Pa.**) 175; North v. Drayton (1824) Harp. Eq. (**S. C.**) 34; Kinard v.

general rule seems to be that the acknowledgment will have this effect, though made after the presumption has attached,[76] provided it is made within twenty years of the bringing of the action.[77] But in South Carolina, where it is held that the evidence to rebut the presumption must be of such a character as would take a case out of the bar of statutes of limitations,[78] a distinction is made between acknowledgment of the debt before, and acknowledgment after, the presumption has attached; it being held that, while an acknowledgment before the presumption has attached will prevent such presumption from arising until the lapse of twenty years after the acknowledgment, yet that a mere acknowledgment made after the presumption has attached will not rebut it.[79]

Any action of the debtor which constitutes an enequivocal recognition of the debt will rebut the presumption.[80] The recognition of the debt

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Baird (1884) 20 S. C. 377; Shaw v. Barksdale (1886) 25 S. C. 204; Colvin v. Phillips (1886) 25 S. C. 228; Sartor v. Beaty (1886) 25 S. C. 293; Nobles v. Hogg (1891) 36 S. C. 322, 15 S. E. 359; Fisher v. Philips (1874) 4 Baxt. (Tenn.) 243; Stanley v. McKinzer (1881) 7 Lea (Tenn.) 454; Connecticut Mut. L. Ins. Co. v. Dunscomb (1902) 108 Tenn. 724, 58 L.R.A. 694, 91 Am. St. Rep. 769, 69 S. W. 345; Vaughn v. Tate (1896) — Tenn. Ch. App. —, 36 S. W. 748; Martin v. Bowker (1847) 19 Vt. 526; Erskine v. North (1857) 14 Gratt. (Va.) 60; Brewis v. Lawson (1881) 76 Va. 36.

[76] See, for example, Metlar v. Williams (1916) 86 N. J. Eq. 330, 97 Atl. 961.

[77] An admission of the existence of the debt, made by the debtor more than twenty years before the bringing of the action, will not rebut the presumption of payment. Simms v. Kearse (1894) 42 S. C. 43, 20 S. E. 19.

[78] See note 69, supra.

[79] Roberts v. Smith (1884) 21 S. C. 455.

Where twenty years have elapsed after a debt becomes due, an admission of the existence of the indebtedness, in order to rebut the presumption of payment, must be such as would take the case out of the Statute of Limitations. McQueen v. Fletcher (1851) 4 Rich. Eq. (S. C.) 152.

So, it is stated in Colvin v. Phillips (1886) 25 S. C. 228, that, in considering the effect of admissions relied on to rebut the presumption of payment arising from lapse of time, the same principles are applicable which apply when admissions or subsequent promises are relied on to take a case out of the operation of the Statute of Limitations; the rule being, in the latter case, that while a debt already barred by the statute cannot be revived, except by an express promise to pay it, or by unequivocal admissions that it is still due and unpaid, from which the law would imply a promise to pay, yet, before the debt is barred, a naked admission of the subsisting legal obligation is sufficient.

And in Stover v. Duren (1849) 3 Strobh. L. (S. C.) 448, 51 Am. Dec. 634, the court approved an instruction to the effect that a mere acknowledgment that the debt had not been paid, made after the expiration of twenty years from the date it was due, was insufficient to rebut the presumption of payment; and that if there was no payment of interest, or promise to pay, or other sufficient rebutting circumstance, an acknowledgment, to suffice for rebutting the presumption of payment, should be a distinct admission of the subsisting legal obligation of the debt, unaccompanied by any conduct or expression indicative of an unwillingness to pay. And it was said that, in considering admissions which rebut the presumption of payment, the same principles are applicable as in considering admissions to take a cause of action out of the Statute of Limitations.

[80] Frye v. Hubbell (1907) 74 N. H. 358, 17 L.R.A.(N.S.) 1197, 68 Atl. 325.

It was held that the presumption of payment of a mortgage did not arise where, in a conveyance of the land in question about thirteen years before the bringing of the action, the mortgage was treated as subsisting. McIntosh v. Rogers (1888) 12 Ont. Pr. 389.

So, the conveyance of mortgaged lands, with the express provision in the deed that it was subject to the mortgage, was considered in Braun v. Pettyjohn (1912) 176 Ala. 592, 58 So. 907, as an acknowledgment of the debt by the mortgagor, which, oc-

need not be made directly to the creditor, or to some person with the intent that it should be communicated to him,[81] although a different rule has been held to apply, where the statute created the presumption, but permitted rebuttal by proof of an acknowledgment of the debt.[82] But generally, in the absence of statute, the debtor's unequivocal acknowledgment of the debt is effectual to rebut the presumption, although it is not made to the creditor, but to a third person who is a stranger to the debt.[83] The acknowledgment, to rebut the presumption, must be an unequivocal admission of the debt as subsisting;[84] and an admission of the debt will not be as read-

curring during the twenty-year period, would rebut the presumption of payment.

That a bankrupt debtor, in his schedule of liabilities, included a note executed by him as unpaid, is such an admission of the indebtedness as will prevent the presumption of payment from arising, where twenty years have not elapsed between the date of the maturity of the note and the admission, or between the time of the admission and the bringing of the action. Sartor v. Beaty (1886) 25 S. C. 293.

Acknowledgment by the debtor in pleadings in certain proceedings in court, during the twenty-year period, was held, in Chiles v. School Dist. (1903) 103 Mo. App. 240, 77 S. W. 82, sufficient to repel the presumption of payment, under a statute providing that every judgment should be presumed paid after the expiration of twenty years from its rendition; but that the presumption might be repelled by proof of a written acknowledgment of the indebtedness, made within twenty years.

[81] Stanley v. McKinzer (1881) 75 Tenn. 454; Fisher v. Philips (1874) 4 Baxt. (Tenn.) 243; Vaughn v. Tate (1896) — Tenn. Ch. App. —, 36 S. W. 748; Swinley v. Force (1910) 78 N. J. Eq. 52, 78 Atl. 249.

[82] An acknowledgment of a judgment as subsisting, made by the judgment debtor to a stranger, and not intended to be communicated to the judgment creditor, or to influence his conduct, was held in Re Kendrick (1887) 107 N. Y. 104, 13 N. E. 762, not effectual to rebut the presumption of payment of the judgment, under a statute declaring that a judgment shall be presumed to be paid after twenty years from the time the party recovering it was entitled to a mandate to enforce it, and that the presumption shall be conclusive, except as against one who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered.

[83] Braun v. Pettyjohn (1912) 176 Ala. 592, 58 So. 907; Burton v. Cannon (1848) 5 Harr. (Del.) 13; Cape Girardeau County use of Road & Canal Fund v. Harbison (1874) 58 Mo. 90; Reed v. Reed (1863) 46 Pa. 239; Runner's Appeal (1888) 121 Pa. 649, 15 Atl. 647; Porter v. Nelson (1888) 121 Pa. 628, 15 Atl. 852; O'Hara v. Corr (1904) 210 Pa. 341, 59 Atl. 1099; Wilson v. Eckman (1913) 55 Pa. Super. Ct. 403.

[84] A statement by the debtor that he has paid the debt at a particular time and place, or in a particular manner, which is disproved at the trial, is not such an acknowledgment of the debt as will rebut the presumption of payment, arising from lapse of time. Lowe v. Sowell (1856) 49 N. C. (4 Jones, L.) 235.

So, an admission by the maker of a note that she remembered giving it, but "believed" she had paid it, is not evidence tending to rebut the presumption of payment arising, under statute, from lapse of time. Holly v. Freeman (1842) 24 N. C. (2 Ired. L.) 218.

And it has been held that the presumption of payment of a legacy, arising from lapse of time, is not rebutted by evidence of a statement, made by the executor to a third party, that he would not pay the legacy because the legatee was rich enough without it. Bentley's Appeal (1882) 99 Pa. 500. The court said that this was far short of a direct admission of nonpayment, and that, when one in conversation with a stranger respecting the claim of another says he will not pay it, there is not the same reason for inferring recognition that exists when the creditor requests and the debtor refuses payment. See cases in note 85, infra, on the latter point.

But to rebut the presumption of

ily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to a demand for payment of the debt.[85] But it is generally held that the admission need not be accompanied by a promise to pay.[86] Indeed, it has been held that an admission by the debtor to a third party that the debt is unpaid, made within the period relied upon to create the presumption of payment, will rebut such presumption, although it is accompanied by a declaration of an intention not to pay the debt.[87]

The acknowledgment must be of the debt in question; but if the creditor proves a general acknowledgment of indebtedness, the burden of proof lies on the debtor to show that the acknowledgment related to a different demand from the one in controversy.[88]

An admission by one of two codebtors that he has not paid the debt is not such an acknowledgment as will rebut the presumption of payment as to the other debtor; for it does not follow that the latter may not have paid it.[89] But an admission by the principal in a bond that neither he nor

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payment of a bond from lapse of time, it was held in Smith v. Buskirk (1845) 7 Blackf. (Ind.) 478, that evidence was admissible that, after the bringing of the action, the debtor had offered to pay the bond in property.

[85] Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Porter v. Nelson (1888) 121 Pa. 628, 15 Atl. 852; Bentley's Appeal (1882) 99 Pa. 500.

[86] The acknowledgment of the debt by the mortgagor, within the period relied upon to create the presumption of payment, need not be accompanied by a promise to pay the debt, as would be necessary in order to avoid a statute of limitations. Cape Girardeau County use of Road & Canal Fund v. Harbison (1874) 58 Mo. 90. It was said: "There is no sort of propriety in confounding the Statute of Limitations with the presumption of payment arising from lapse of time. As defenses, the two are wholly distinct in their applications and incidents. When the statute affects a right of action, it operates simply a blight, as it were, upon its recoverable energy. It matters not in the least whether the demand has been previously paid or not; the statute destroys forever, upon the last day of the allotted period, its vitality in a court of justice. Hence, if there be not a new contract in the promise or acknowledgment upon which the creditor relies, he has still nothing to stand upon. But in the other defense, the fact of payment, real or supposed, is the only matter to be considered. The law first presumes payment. An acknowledgment by the debtor merely removes this presumption, by furnishing evidence to prove that the debt has not been paid. There is no new contract, express or implied. The recovery must be upon the original demand or nothing."

And the acknowledgment of the indebtedness required by statute, providing that every judgment shall be presumed to be paid after twenty years from the time it was rendered, but that such presumption may be repelled by proof of payment or written acknowledgment of indebtedness made within the twenty years, need not be accompanied by a promise to pay the debt; or, in other words, need not be of such a character as would take the case out of a statute of limitations. Chiles v. School Dist. (1903) 103 Mo. App. 240, 77 S. W. 82.

[87] It is of no consequence that the admission by the debtor of nonpayment is accompanied by a refusal to pay, so far as rebuttal of the presumption of payment from lapse of time by the admission is concerned; since the action for the debt, after the lapse of twenty years, is not founded on a new promise, and the question is whether the debt is in fact unpaid. Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452. To a similar effect is Reed v. Reed (1863) 46 Pa. 239.

[88] Burton v. Cannon (1848) 5 Harr. (Del.) 13.

[89] Wilfong v. Cline (1854) 46 N. C. (1 Jones, L.) 499; Rowland v. Windley (1882) 86 N. C. 36; Campbell v. Brown (1882) 86 N. C. 376, 41 Am. Rep. 464; Rogers v. Clements (1885) 92 N. C. 81; Rogers v. Clements (1887) 98 N. C. 180, 3 S. E. 512; Haskell v. Keen (1819) 2 Nott & M'C. (S. C.) 160. See, in this connection, note 103, infra.

the surety had paid it has been held to rebut the presumption of payment, as against the principal.[90]

A recognition of the indebtedness by an administrator, or executor, may be sufficient to rebut the presumption of payment.[91] But the mere admission by the administrator of the maker of a bond, who died about seventeen years after it became due, that he, the administrator, has not paid it, is not sufficient to rebut the presumption, which would otherwise arise under statute, of payment from lapse of time; since the intestate may have paid it in his lifetime.[92]

An acknowledgment of a debt of the decedent by a devisee, made within the twenty-year period relied on to create the presumption of payment, will operate to prevent such presumption arising in favor of the devisee's mortgagee, claiming under him.[93] And the presumption of payment of a mortgage, arising in favor of purchasers of the equity of redemption, may be rebutted by admissions by their grantor, previous to the conveyance, that the debt is unpaid.[94]

An admission on the part of one who has no interest is, of course, not evidence to rebut the presumption.[95]

d. Partial payments and indorsements of credit.

It is well settled that a voluntary payment on the debt, by the debtor, within the period relied on to create the presumption of payment, will rebut such presumption, or, in other words, will constitute a new starting point for the running of the presumption; for it is an acknowledgment by him of the debt as a subsisting obligation.[96] This rule applies to pay-

[90] Cartwright v. Kerman (1890) 105 N. C. 1, 10 S. E. 870.

[91] Latimer v. Peterson (1838) 2 Harr. (Del.) 366; Grant v. Gooch (1890) 105 N. C. 278, 11 S. E. 571; Werborn v. Austin (1886) 82 Ala. 498, 8 So. 280 (where, in suit for an accounting and settlement by the defendant as executor and trustee of the estate of complainant's father, it appeared that three years before the bringing of the suit the defendant, in a settlement in the probate court, had recognized the trust as then continuing); Girard v. Futterer (1887) 84 Ala. 323, 4 So. 292 (where executrix, within twenty years prior to the suit, recognized the continued existence of the trust, and made partial payment on it).

A promise to pay, made by the debtor's executor, which will remove the bar of the Statute of Limitation, will also remove the bar of the presumption of payment. Wright v. Mars (1884) 22 S. C. 585.

While, after the lapse of twenty years from the time an administrator should have settled the estate, the law, under ordinary circumstances, would presume a settlement and payment of the distributive shares, yet when the administrator, as trustee, holds not in his own right, but in subordination to and recognition of the rights of the cestui que trust, the presumption from mere lapse of time is repelled. Blackwell v. Blackwell (1858) 33 Ala. 57, 70 Am. Dec. 556.

[92] Grant v. Gooch (1890) 105 N. C. 278, 11 S. E. 571.

[93] Shaw v. Barksdale (1886) 25 S. C. 204.

[94] Heyer v. Pruyn (1839) 7 Paige (N. Y.) 465, 34 Am. Dec. 355. See, in this connection, note 102, infra.

[95] In Jones v. Turberville (1792) 2 Ves. Jr. 11, 30 Eng. Reprint, 498, 4 Bro. Ch. 115, 29 Eng. Reprint, 806, it was held that an admission by one of the defendants, who was found at the trial not to be an interested party, that a legacy was not paid, made about thirteen years before the trial, was not evidence to rebut the presumption of payment of the legacy, arising from lapse of time.

[96] Duke v. State (1892) 56 Ark. 485, 20 S. W. 600; Burton v. Cannon (1848) 5 Harr. (Del.) 13; Vaughan v. Marshall (1858) 1 Houst. (Del.) 604; Estes v. Blake (1849) 30 Me. 164; Brown v. Hardcastle (1885) 63 Md. 484; Cheever v. Perley (1866) 11 Allen (Mass.) 584; Howard v. Hildreth (1846) 18 N. H. 105; Frye v. Hubbell (1907) 74 N. H. 358, 17 L.R.A.(N.S.) 1197, 68 Atl. 325; Hayes v. Whitall (1861) 13 N. J. Eq. 242; Betts v. Van Dyke (1885) 40 N. J. Eq. 149; Metlar v. Williams (1916) 86 N. J. Eq. 330, 97 Atl. 961; Kitchen v. Deardoff (1846) 2 Pa. St. 481; Re Darlington (1850) 13 Pa. 430; Jenkins v. Ander-

ments of interest,[97] as well as of principal. It also applies to payments by an administrator or executor of the debtor,[98] or by his assignee in bankruptcy;[99] although, in a Connecticut case, a different conclusion was reached.[100] And it has been held that a partial payment by the heirs, or devisees, after the death of the debtor, will not arrest the running of the presumption of payment, as against the debtor's estate.[101]

Part payments by a mortgagor will rebut the presumption of payment of the mortgage, which might otherwise arise in favor of a purchaser of the equity of redemption.[102] And a payment by one of two or more codebtors will rebut the presumption of payment, from lapse of time, as to all the debtors.[103] But the death of one of the obligors on a joint and several bond severs the obligation, so that a payment thereafter made by the sur-

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son (1887) 8 Sadler (Pa.) 363, 11 Atl. 558; White v. Beaman (1887) 96 N. C. 122, 1 S. E. 789; Beekman v. Hamlin (1890) 19 Or. 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195, rehearing in (1891) 20 Or. 352, 10 L.R.A. 457, 25 Pac. 672, later appeal in (1892) 23 Or. 313, 31 Pac. 707; Pyles v. Bell (1884) 20 S. C. 365; Kinard v. Baird (1884) 20 S. C. 377; Patterson v. Baxley (1890) 33 S. C. 354, 11 S. E. 1065; Jennings v. Parr (1902) 62 S. C. 306, 40 S. E. 683; Martin v. Bowker (1847) 19 Vt. 526; Hollister v. York (1886) 59 Vt. 1, 9 Atl. 2; Wells v. Washington (1820) 6 Munf. (Va.) 532; Updike v. Lane (1883) 78 Va. 132; Camden v. Alkire (1884) 24 W. Va. 674.

[97] Brown v. Hardcastle (1885) 63 Md. 484; Hughes v. Blackwell (1860) 59 N. C. (6 Jones, Eq.) 73; Nixon v. Bynum (1829) 1 Bail. L. (S. C.) 148; Dickson v. Gourdin (1886) 26 S. C. 391, 2 S. E. 303, later appeal (1888) 29 S. C. 343, 1 L.R.A. 628, 7 S. E. 510; Wells v. Washington (1820) 6 Munf. (Va.) 532; Coles v. Ballard (1883) 78 Va. 139.

[98] Latimer v. Peterson (1838) 2 Harr. (Del.) 366; Bell v. Wood (1897) 94 Va. 677, 27 S. E. 504.

[99] Payment on a bond within ten years after it becomes due, by the assignee in bankruptcy of one of the obligors, will repel the presumption of payment arising from lapse of time. Belo v. Spach (1881) 85 N. C. 122 (statutory presumption, in this state, of payment, from lapse of ten years).

Payment of a part of the debt by the debtor's assignee in bankruptcy, with the debtor's assent, during the period relied upon to create the presumption of payment, will rebut such presumption. Hamlin v. Hamlin (1867) 56 N. C. (3 Jones, Eq.) 191.

[100] Payment on the debt of trustees in insolvency was considered in Boardman v. De Forest (1823) 5 Conn. 1, as not such part payment as would repel the presumption of payment from lapse of time. The court said: "It is going unreasonably far to construe payment by assignees, or trustees, who are not parties to the contract, or under any personal obligation to pay or contribute, as meaning more than it plainly imports, or as carrying with it sufficient evidence of a renewed personal promise of the original debtor to pay. Such special trusts were not created for any such purpose; and it is preventing the intention of the parties, and is plainly repugnant to the reason and equity of the trust, to make the ordinary execution of the trust the ground of a constructive new assumption of the debt, by the debtor."

[101] Gibson v. Lowndes (1887) 28 S. C. 285, 5 S. E. 727; Blake v. Quash (1825) 3 M'Cord, L. (S. C.) 340.

[102] Hughes v. Edwards (1824) 9 Wheat. (U. S.) 489, 6 L. ed. 142; Wright v. Eaves (1858) 10 Rich. Eq. (S. C.) 582; New York L. Ins. & T. Co. v. Covert (1867) 6 Abb. Pr. N. S. (N. Y.) 154 (payment made after conveyance by mortgagor, but within the twenty-year period; statute provided that presumption of payment should arise after expiration of twenty years from accrual of right of action on sealed instruments; but that such presumption might be repelled by proof of part payment within that period).

In this connection, see the case of Heyer v. Pruyn (1839) 7 Paige (N. Y.) 465, 34 Am. Dec. 355, holding that an acknowledgment of a mortgage debt as subsisting, made by the purchaser of the equity of redemption within twenty years after the mortgage was executed, would rebut the presumption of payment which would otherwise arise in favor of subsequent purchasers from him.

[103] (See in this connection note 89, supra.)

Hunt v. Bridgham (1824) 2 Pick.

viving obligor, or the recovery of a judgment against him, will not rebut a presumption of payment which would otherwise arise in favor of the representatives of the decedent.[104]

The entry of a credit by the obligee on a bond, within the time from the lapse of which the bond would be presumed paid, is evidence to rebut the presumption.[105] But an indorsement by the creditor of a partial payment on the written evidence of indebtedness is not evidence of actual payment on the debt, so as to rebut the presumption of payment from lapse of time, unless it is shown that the indorsement was made before the presumption had attached, and, therefore, at a time when it was against his interest to make it; and the mere fact that the indorsement bears date prior to the time the presumption could arise is insufficient evidence that it was made at that time.[106] Of course,

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(Mass.) 581, 13 Am. Dec. 458; Denny v. Eddy (1839) 22 Pick. (Mass.) 533; McKeethan v. Atkinson (1854) 46 N. C. (1 Jones, L.) 421; Lowe v. Sowell (1855) 48 N. C. (3 Jones, L.) 67, later appeal in (1856) 49 N. C. (4 Jones, L.) 235; Belo v. Spach (1881) 85 N. C. 122; Hall v. Woodward (1886) 26 S. C. 557, 2 S. E. 401; Dickson v. Gourdin (1886) 26 S. C. 391, 2 S. E. 303, later appeal to same effect in (1888) 29 S. C. 343, 1 L.R.A. 628, 7 S. E. 510.

See also Pearsall v. Houston (1856) 48 N. C. (3 Jones, L.) 346, to the effect that, where there are several obligors, the presumption of payment in favor of one will operate as a presumption also in favor of the other; in other words, payment as to one cannot be presumed, while it is rebutted as to the others.

In holding that, in the absence of evidence of collusion, a payment on a note by the principal, within the twenty years relied on to create the presumption of payment, would rebut such presumption as to the surety on the note as well as to the principal, the court in Hunt v. Bridgham (1824) 2 Pick. (Mass.) 581, 13 Am. Dec. 458, said: "As to the legal effect of these payments, the two defendants stand on the same footing. The contract being proved, the admission of one is the admission of both. If one of several joint promisors acknowledges the debt within six years, it will take the case out of the Statute of Limitations as to the other promisors. . . . A fortiori, will a like admission, whether express or implied, be sufficient to repel a mere presumption. If there were any proof of collusion between the creditors and the principal, to throw the debt on the surety and to deprive him of his indemnity, without doubt he would be entitled to relief; but nothing of this is pretended."

[104] It was held in Shubrick v. Adams (1883) 20 S. C. 49, that the death of one of several obligors on a joint and several bond severed the obligation, so that payments thereafter made by the surviving obligor would not rebut the presumption of payment which would otherwise arise in favor of the representatives of the deceased obligor.

And it was held in Langston v. Shands (1885) 23 S. C. 149, that a judgment against an obligor on a bond, recovered after the death of a co-obligor, and during the twenty-year period relied upon to create the presumption of payment, would not rebut such presumption as to the representatives of the latter. The court stated merely that the judgment was several and conclusive only as to the party sued, and in any other action against other parties to the bond, there must be proof de novo as to every issue involved. To a similar effect is Hall v. Woodward (1887) 26 S. C. 557, 2 S. E. 401.

[105] Williams v. Alexander (1858) 51 N. C. (6 Jones, L.) 137; Tilghman v. Fisher (1840) 9 Watts (Pa.) 441; Searle v. Barrington (1729) 2 Strange, 826, 93 Eng. Reprint, 875.

[106] Woodhouse v. Simmons (1875) 73 N. C. 30; Grant v. Burgwyn (1881) 84 N. C. 560; Cremer's Estate (1843) 5 Watts & S. (Pa.) 331; Lash v. Von Neida (1885) 109 Pa. 211; Runner's Appeal (1888) 121 Pa. 649, 15 Atl. 647; Hart v. Bucher (1897) 182 Pa. 604, 38 Atl. 472, later appeal in (1898) 186 Pa. 384, 40 Atl. 511 (holding that from the fact that the indorsement bore date prior to the time when the presumption of payment would arise, in connection with proof of the genuineness of the signature of the obligee, who died more than twenty years after the bond became due, the trial court erroneously assumed that

if the obligee dies before the presumption of payment could arise from lapse of time, the indorsement of a partial payment on the written evidence of indebtedness, in his handwriting, is evidence of a payment made at that time, so as to rebut the presumption, for it shows conclusively that the indorsement was made before the presumption arose.[107]

The indorsement by the creditor on the written evidence of indebtedness of a credit of a counterclaim, or set-off, which the debtor holds against him, is not evidence of a payment on the debt, so as to rebut the presumption of payment from lapse of time, unless it is shown that the indorsement was made with the privity of the debtor.[108] On this point, it was well said, in a North Carolina case:[109] "A part payment is necessarily made by the obligor, or with his privity. It may be fairly construed as an acknowledgment of the bond as a valid subsisting debt, and as equivalent to a promise to pay the residue. But this cannot be said of an appropriation by the obligee alone, and without the privity of the obligor, of a set-off in favor of the obligor, as a part payment on a bond. This is exclusively the act of the obligee, of which the obligor has no knowledge, and it cannot be held as an acknowledgment by him of the validity of the debt, or as his promise to pay it."

e. Poverty and insolvency.

Evidence of the creditor's poverty is admissible to strengthen the presumption of payment, arising from lapse of more than twenty years.[110] So, evidence of the debtor's poverty, during the period relied on to create the presumption of payment, tends to rebut such presumption;[111] and if it

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the payment of interest credited on the bond was made at the time the indorsement bore date, or, at least, before the presumption of payment arose); Rose v. Bryant (1809) 2 Campb. (Eng.) 321.

In Woodhouse v. Simmons (1875) 73 N. C. 30, supra, the court said: "It must be noted that there is no evidence, other than the date given in the entry itself, that it was made within ten years after the bond became due. The reason why the entry by the obligee of the payment is received as evidence is because it was against his interest when made, and, by reason of his death or incompetency as a witness, the fact cannot be proved in any other way. Evidently this reason requires and presumes that there is evidence aliunde that the entry was made at a time when it was against the interest of the holder to make it; that is to say, before the presumption had arisen. . . . Otherwise the presumption might be evaded by a false entry at any time. For this reason we are of opinion that the entry (supposing it to have been an entry of a part payment) was not evidence that it was made at the date stated in it, or before the presumption had arisen, and was therefore insufficient by itself to rebut the presumption."

[107] Dabney v. Dabney (1844) 2 Rob. (Va.) 622, 40 Am. Dec. 761. See also, as recognizing the rule, Hart v. Bucher (1897) 182 Pa. 604, 38 Atl. 472, later appeal in (1898) 186 Pa. 384, 40 Atl. 511.

[108] Kirkpatrick v. Langphier (1802) 1 Cranch, C. C. 85, Fed. Cas. No. 7,849; Vaughan v. Marshall (1858) 1 Houst. (Del.) 604; Woodhouse v. Simmons (N. C.) supra.

[109] Woodhouse v. Simmons (N. C.) supra.

[110] Bean v. Tonnele (1884) 94 N. Y. 381, 46 Am. Rep. 153; Levers v. Van Buskirk (1846) 4 Pa. 309.

[111] Brewer v. Thomes (1848) 28 Me. 81; Mansfield v. Cheever (1796) 3 Dane, Abr. (Mass.) 506, 6 Mass. Dig. 1804–1905, col. 11,810; Rockhill v. Rockhill (1888) — N. J. Eq. —, 14 Atl. 760; Connecticut Mut. L. Ins. Co. v. Dunscomb (1902) 108 Tenn. 724, 58 L.R.A. 694, 91 Am. St. Rep. 769, 69 S. E. 345.

In Re Searles (1795) 5 Dane, Abr. (Mass.) 401, 6 Mass. Dig. 1804–1905, col. 11,810, it was held that the fact that the debtor was poor, and absented himself for a time from the state in order to avoid creditors, was proper for the jury's consideration, as tending to rebut the presumption of payment of a note, arising from lapse of more than twenty years.

amounts to inability to pay, the presumption of payment will not arise.[112]

But it has been held that evidence merely of poverty or insolvency of the debtor during the period relied on to create the presumption of payment will not rebut such presumption, unless it amounts to a positive inability to pay the debt.[113] And mere notorious reputation of insolvency, if unfounded,

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Whether this alone would rebut the presumption, it was not necessary to decide.

The question whether the defendant's insolvency rebutted the presumption of payment of the bond sued on was submitted to the jury, and a judgment for the plaintiff affirmed, in Wood v. Deen (1840) 23 N. C. (1 Ired. L.) 230. The court instructed the jury that if they believed the defendant was in insolvent circumstances at the time the bond became due, and had since continued so, and that the plaintiff had for that reason forborne to sue, they might find that it rebutted the presumption, which would otherwise arise from lapse of time, that the bond had been paid. In affirming the judgment, that court said: "The inference from insolvency will, indeed, be more or less forcible, according to its notoriety and duration, and the degree or hoplessness of it, if the expression may be allowed. Suppose it to be proved that the debtor was discharged on his oath of insolvency before the debt fell due, and that ever since he had been a beggar in the street, or a pauper on the parish; the conclusion would be so morally and obviously certain that there could be no danger in telling the jury that there could not be a presumption of the payment in such a case. No one ought to be required to commit the folly of suing a beggar. The facts here are indeed not so strong. But they partake of the same nature, and are therefore fit for the consideration of the jury, as tending to satisfy them that, in fact and truth, the debt was never paid."

It was held that presumption of payment of the mortgage did not arise where, before the mortgage was due, the mortgagor became insolvent and died, and the purchaser of the equity of redemption also became insolvent; and removed from the state several years after the mortgage was due, and never returned. Brobst v. Brock (Doe ex dem. Brobst v. Roe) (1870) 10 Wall. (U. S.) 519, 19 L. ed. 1002.

[112] Boardman v. De Forest (1823) 5 Conn. 1; Robinson v. Tunnell (1861) 2 Houst. (Del.) 387; De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120; Farmers' Bank v. Leonard (1847) 4 Harr. (Del.) 536; Mease v. Stevens (1793) 1 N. J. L. 433; Austin v. Tompkins (1849) 3 Sandf. (N. Y.) 22; Woodbury v. Taylor (1856) 48 N. C. (3 Jones, L.) 504; Devereux's Estate (1898) 184 Pa. 429, 39 Atl. 225; Griffith's Estate (1884) 14 W. N. C. (Pa.) 486.

[113] Taylor v. Megargee (1845) 2 Pa. St. 225; Kline v. Kline (1853) 20 Pa. 503; Guillon v. Redfield (1903) 205 Pa. 293, 54 Atl. 886; Griffith's Estate (1884) 14 W. N. C. (Pa.) 486; Hunter v. Thurlow (1909) 18 Pa. Dist. R. 661.

It was held in Willaume v. Gorges (1808) 1 Campb. (Eng.) 217, that the presumption of payment of a judgment, arising from lapse of more than twenty years, was not rebutted by evidence that, during this time, the debtor was in very embarrassing financial condition, and, in the opinion of his most intimate friends, did not have the means of satisfying the judgment.

And in Walker v. Wright (1855) 47 N. C. (2 Jones, L.) 155, the court approved an instruction that if the jury were satisfied that the debtor had the ability and means to pay the debt sued for, although he could not pay any other of his debts, the law presumed the debt in question was paid, and they should find for the defendant.

Where more than thirty years had elapsed after the last payment on a mortgage debt, and the premises had passed to bona fide purchasers, it was held that the presumption of payment of the debt from lapse of time was not rebutted by allegations that the mortgagor, up to the time of his death, which occurred about seven years before the bringing of the action, was virtually insolvent, and that any attempt to enforce the mortgage would have resulted in the absolute ruin or great financial distress of the mortgagor, who was the brother of the beneficiary in the mortgage. Goodwyn v. Baldwin (1877) 59 Ala. 127.

Although it was held that actual inability to pay the debt because of lack of resources on the part of the

will not rebut the presumption of payment.[114]

Insolvency not shown to amount to absolute inability to pay, and residence of the debtor in another state than that in which the creditor resides, during the period relied on to create the presumption of payment, are not, taken together, sufficient to rebut the presumption of payment from lapse of more than twenty years.[115]

It has been held that the insolvency of the mortgagor during the period relied on to create the presumption of payment of the debt will not rebut the presumption, since, with respect to the mortgagee, the debtor is not insolvent because of the security resulting from the mortgage.[116] And the insolvency of the debtor will not rebut the presumption of payment from lapse of time in the case of a judgment, if the debtor had sufficient property to pay the judgment, and debts having priority over it.[117]

Insolvency of the debtor after the maturity of the indebtedness, not shown to have continued, is insufficient to rebut the presumption of payment from lapse of time.[118] And the mere fact that at one time during the twenty years the debtor was a bankrupt, or failed in business, is not sufficient to rebut the presumption of payment.[119]

But the fact that for a short time during the period relied on to create the presumption of payment the debtor was solvent may be insufficient to counteract the effect of insolvency as a circumstance repelling the presumption of payment, where the debtor and creditor reside at a considerable distance from each other, so that knowledge of the fact that the debtor was temporarily in possession of property may not have come to the creditor.[120]

Insolvency of the debtor, to rebut the presumption of payment from lapse of time, must apply to the last twenty years preceding the bringing of the action.[121]

The insolvency of one of two or more joint debtors will not rebut the

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debtor would repel the presumption of payment arising from lapse of time, the court in Devereux's Estate (1898) 184 Pa. 429, 39 Atl. 225, stated: "There are convincing reasons for the ruling that proof of the insolvency of the debtor, alone, will not rebut the presumption. An insolvent may be possessed of property, or be in receipt of an income, and have the means of payment; but proof of positive inability to pay is, in effect, proof that payment could not have been made."

[114] Walker v. Wright (N. C.) supra.

[115] Kline v. Kline (1853) 20 Pa. 503.

[116] Hunt v. Forman (1834) 2 Dana (Ky.) 471; Blake v. Lane (1860) 58 N. C. (5 Jones, Eq.) 412. In the latter case, the court said that the proof in regard to the insolvency of the debtor was beside the question, because the property conveyed by the mortgage constituted a fund, out of which the payment of the mortgage could at any time have been enforced.

The mere fact of the continued insolvency of the debtor after conveyance of land in trust to pay the debt will not rebut the presumption of payment arising from lapse of time, because, as to the particular debt, the debtor may not be insolvent. Wiley v. Lineberry (1883) 89 N. C. 15.

It was intimated in Evans v. Huffman (1846) 5 N. J. Eq. 354, that the insolvency of the mortgagor during the period relied on to create the presumption of payment of the mortgage from lapse of time would not rebut the presumption.

[117] Farmers' Bank v. Leonard (1847) 4 Harr. (Del.) 536.

[118] Grant v. Burgwyn (1881) 84 N. C. 560; Alston v. Hawkins (1890) 105 N. C. 3, 18 Am. St. Rep. 874, 11 S. E. 164; Guillou v. Redfield (1903) 205 Pa. 293, 54 Atl. 886.

[119] Daggett v. Tallman (1830) 8 Conn. 168; Jackson v. Nason (1854) 38 Me. 85.

[120] McKinder v. Littlejohn (1843) 26 N. C. (4 Ired. L.) 198, where the debtor moved to another state, and there was evidence that for eighteen months during the twenty-year period he was in possession of property which might have been subjected to payment of the debt.

[121] De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120.

presumption of payment, where the other debtors are solvent.[122]

f. Disabilities in general.

In an action on a bond involving disabilities to enforce payment growing out of the Revolutionary War, the rule was laid down by the Federal Supreme Court in an early case that, to create the presumption of payment from lapse of time, twenty years must have elapsed exclusive of the period of the plaintiff's disability, although Marshall, Ch. J., expressed doubt as to whether in such a case, the bond being nearly thirty years old, the same length of time after the removal of disabilities should be necessary to raise the presumption of payment as would be required if the obligation bore date at the time of such removal.[123]

On the question of the effect of infancy of the creditor to rebut the presumption of payment from lapse of time, the authorities are conflicting. On the one hand, infancy of the creditor has been regarded as not sufficient to prevent the presumption from arising,[124] particularly if a guardian has been appointed,[125] although in the same state the opposite conclusion was reached, where a guardian had not been appointed.[126] Of course, if payment is not required until the one to whom it is to be made becomes of age, as, in some instances, in the case of legacies and distributive shares, the presumption of payment from lapse of time does not begin to run during infancy.[127]

It has been held that presumption of payment of a legacy from lapse of

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[122] Boardman v. De Forest (1823) 5 Conn. 1.

[123] Dunlop v. Ball (1804) 2 Cranch (U. S.) 180, 2 L. ed. 246.

[124] The court was of the opinion in Garrett v. Garrett (1881) 69 Ala. 429, that the infancy of the ward would not rebut the presumption of payment or settlement of the guardian's accounts from lapse of time. (See this case in note 182, infra.) The same view is expressed in Roach v. Cox (1909) 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578.

And in McCartney v. Bone (1867) 40 Ala. 533, the court said: "Without asserting that the lapse of twenty years raises a conclusive presumption of such a settlement [by administrator], . . . we are satisfied that the evident result of the decisions of this court, and of the reasoning employed in the opinions thereof, is the establishment of the rule that, after the lapse of twenty years from the time when an administrator may be called upon to make distribution of the estate of his intestate, he cannot be compelled to make a distribution thereof, unless he has made some admission binding in law, or done some act which will remove the bar created by the presumption in favor of a settlement with the distributees; and no disability on their part, such as infancy or marriage, will avail to rebut the presumption."

[125] The presumption of payment from lapse of more than twenty years was held to arise as against one who, during the greater part of this period, was an infant, where a guardian had been appointed. Galbraith v. Galbraith (1837) 6 Watts (Pa.) 112. The court said: "Without laying down any general principle as to the exemption of infants from this presumption, the present case must be decided upon the nature of the authority and duty of guardians under our acts of assembly, concerning the partition and disposition of intestate's estates. By these, the guardian is fully empowered and required to act for his ward; he might have sued on this recognizance for the share coming to him in the infant's right, at any time after the expiration of one year from . . . [the date of the recognizance], and the rule is that the presumption runs where the party is under no disability to sue. . . . The policy of our law is opposed to the long duration of liens on real estate; and yet, by the exemption contended for, the lien of the recognizance, in the case of an infant heir, might continue for upwards of forty years without legal demand, and then be enforced when all who were conversant of its payment were departed, and every document lost."

[126] Kohler's Estate (1896) 18 Pa. Co. Ct. 184.

[127] The presumption of payment by an administrator does not arise

time is not rebutted by evidence of the infancy, during the time relied on to create the presumption, of those who came into possession of the testator's estate.[128]

Although it cannot be said that a definite rule is established as to the length of time, after an infant becomes of age, which is necessary to raise the presumption of payment against him, assuming that he cannot be precluded from enforcing his claim because of a presumption of payment arising during infancy, the courts in several cases have considered the question as analogous to one arising under the saving clauses in favor of infants, in statutes of limitations; so that, according to this view, the presumption would arise if more than twenty years had elapsed since the debt was payable, although during a part of this time the creditor was an infant, provided that, since he became of age, such time had elapsed as would prevent his bringing an action, in analogous cases, under limitation statutes.[129]

Disability of the creditor to sue because of coverture has been held to

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against an infant distributee, where the latter brings the action within twenty years after becoming of age, and the administrator was not bound to make payment until the distributee became of age. Brown v. M'Call (1836) 3 Hill, L. (S. C.) 335. The court said: "Can we presume that he [the administrator] has paid off the distributee, who was an infant for twenty years after the date of the bond, and who instituted this proceeding in the court of ordinary within about seven years after he came of legal age? This question is answered by the inquiry, When was he bound to pay over the surplus to the distributee? It is very clear that, during his infancy, the distributee was incapable of settling with the administrator. It would have been not only imprudent, but a violation of the administrator's duty, to have paid over the estate to the infant. I assume, therefore, that he was not bound to pay until the appellee was twenty-one years old. Since which period only seven years, instead of twenty years, have elapsed."

The presumption of payment of a legacy will not arise during the minority of the legatees, because of their incompetency to receive the legacy. Barnwell v. Barnwell (1835) 2 Hill, Eq. (S. C.) 228.

And in an action on an administrator's bond, it was held in Threadgill v. West (1852) 35 N. C. (13 Ired. L.) 310, that the presumption of payment of the sum due the plaintiff as next of kin of the intestate did not arise, although more than twenty years had elapsed from the date of execution of the bond, where the action was brought within two years of the plaintiff's becoming of age; since the bond was conditioned for payment when the infant became of age.

Perhaps the case of Wilkerson v. Dunn (1859) 52 N. C. (7 Jones, L.) 125, holding that the presumption of payment of a distributive share did not begin to run until the distributee became of age, can be explained on grounds above indicated.

[128] Jones v. Turberville (1792) 2 Ves. Jr. 11, 30 Eng. Reprint, 498. It was said: "The length of time in this case is sufficient, prima facie, to produce the presumption. The only qustion is, whether anything appears to oust it; and there is no reason for that. First, it is said there were many infancies on the side of those in possession. If there was infancy on the part of the plaintiff, that is an answer; but he might have preferred a bill against the infant, therefore, that is no reason."

[129] Where more than twenty years had elapsed from the date a bond became due, and more than sixteen years from the time a claimant thereon became of age, it was held that a presumption of payment arose, even if a court of equity, in applying the presumption of payment, would grant the claimant the benefit of the proviso in a statute of limitations, in analogous cases, saving the rights of infants who brought their actions within ten years after the removal of disability. Boyd v. Harris (1850) 2 Md. Ch. 210.

Although it does not seem necessary to the decision, the court, in Bartlett v. Bartlett (1838) 9 N. H. 398, expressed the opinion that if the obligee in a bond was an infant when the cause of action thereon accrued, by analogy to the Statute of Limitations, the presumption of payment of

prevent the presumption of payment from arising,[130] although the opposite conclusion was reached in an Alabama case,[131] disability generally being regarded in this state, it seems, as insufficient to prevent the presumption from arising.[132]

g. Effect of death of debtor or creditor.

The running of the presumption of payment from lapse of time is not suspended or arrested by the death of the debtor.[133]

In several cases, the fact that after the creditor's death no administrator was appointed for his estate for a considerable time, has been regarded as sufficient explanation of the failure to pay interest or principal during this period, as there was no one to whom to make payment, so that, in computing the time necessary to raise the presumption of payment, such period should not be considered.[134] But the position taken by other courts apparently has much force, that a mere failure, on the part of those entitled to payment, to take out letters of administration, should not be permitted to operate to their advantage by overthrowing the rule of presumption of payment from lapse of time, especially in view of the purpose of the rule, to safeguard the peace and security of society.[135]

The facts that the debtor died, and

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the bond would arise in five years after he became of age, provided twenty years had elapsed from the time of the accruing of the cause of action.

[130] Lynde v. Denison (1820) 3 **Conn.** 387.

[131] Coverture on the part of a distributee was regarded by the court in McCartney v. Bone (1867) 40 **Ala.** 533, as not available to rebut the presumption, arising from the lapse of twenty years, of settlement of the estate by the administrator.

[132] See Greenlees v. Greenlees (1878) 62 **Ala.** 330.

[133] Jackson v. Utz (1908) 18 **Pa.** Dist. R. 163; Bentley's Appeal (1882) 99 **Pa.** 500; White v. Moore (1887) 23 S. C. 456.

[134] McLellan v. Crofton (1836) 6 **Me.** 307.

The fact that for more than thirty years after the death of the mortgagee, which occurred in the year that the mortgage became due, no administrator was appointed for his estate, was held in Abbott v. Godfroy (1849) 1 **Mich.** 178, to rebut the presumption of payment of the mortgage, which would otherwise arise from lapse of time.

Where, for more than twenty years after the death of one who deposited money with the defendant, no administrator was appointed for her estate, it was held in Sheldon v. Heaton (1895) 88 Hun, 535, 34 **N. Y. Supp.** 856, that no presumption of payment arose so as to justify withdrawal of the case from the jury, as the jury was not bound, on these facts, to presume payment. On a later appeal in (1897) 22 App. Div. 308, 47 N. Y. Supp. 1124, it was held that lapse of time, with the other circumstances, was sufficient to justify the jury in finding that payment had been made.

The fact that no administrator was appointed for the estate of a legatee, and that there was no one to receive the legacy during the period relied on to create the presumption of its payment, is a circumstance tending to repel such presumption. Burwell v. Anderson (1831) 3 Leigh (Va.) 348. It was unnecessary to decide whether such evidence, alone, would repel the presumption, as it was held that the presumption was repelled by this and other circumstances.

[135] Idler v. Borgmeyer (1895) 13 C. C. A. 198, 28 U. S. App. 332, 65 **Fed.** 910.

Where an action to recover a legacy was brought by the husband of the legatee, as her administrator, twenty-five years after the legacy was payable, it was held that the fact that twenty-three years elapsed after the death of the legatee before the appointment of an administrator for her estate was not a circumstance tending to repel the presumption of payment of the legacy. Foulk v. Brown (1834) 2 Watts (**Pa.**) 209.

And, assuming that legatees were alive when the legacies became due, the court in Cox v. Brower (1894) 114 N. C. 422, 19 S. E. 365, held that the presumption of payment of the legacies was not rebutted by evidence that, excluding the interval between the death of the legatees and the appointment of an administrator, twenty years had not elapsed.

that, during the time relied on to create the presumption of payment, there was no one against whom to bring suit, no administrator having been appointed, have been held to prevent the presumption from arising.[136]

h. Absence or nonresidence.

In some cases, it has been held that the presumption of payment which would otherwise arise from lapse of time is not rebutted by evidence of the nonresidence of the debtor during a great part, or even the whole, of the period relied on to raise the presumption.[137] And this rule has been applied where the presumption arose under statute.[138]

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[136] It was held in Buie v. Buie (1841) 24 N. C. (2 Ired. L.) 87, that the presumption of payment arising, under statute, from lapse of time, was rebutted by evidence that, during the period relied on to create the presumption, there was no one against whom to bring suit, owing to the facts that the debtor died, and no administrator was appointed for his estate.

To the same effect is Long v. Clegg (1886) 94 N. C. 763, holding that the statutory presumption of payment, arising from expiration of ten years, was repelled by the fact that within a year after the debt became due the debtor died, and no administration was granted on his estate until thirteen years later, the action being brought in about a month after an administrator was appointed.

[137] It was held in Kline v. Kline (1853) 20 Pa. 503, that the fact that, about seven years after the debt became due, the debtor removed from Pennsylvania to Ohio, where he continued to reside until the bringing of the action more than twenty years after his removal, did not rebut the presumption of payment, arising from lapse of time. It was held also that it did not have this effect even when coupled with evidence of the debtor's insolvency, where the latter was not shown to amount to utter inability to pay the debt.

And it was held in Sanderson v. Olmsted (1849) 1 Chand. (Wis.) 190, 2 Pinney, 224, that, for the presumption of payment of a note to arise from the lapse of twenty years, it was not necessary that the maker, during the whole of that period, should have resided in the state. In this case, it appears that the debtor was a resident of the state for ten years or more before the bringing of the action, but the court was apparently of the opinion that the place of residence of the parties during the twenty-year period was immaterial, as was also the place where the debt was contracted.

In Roach v. Cox (1909) 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578, the court, in holding that the effect of the presumption of payment from lapse of twenty years was not avoided by the facts that during this period the debtor was absent from the state, and the creditor did not know in what state he was living, and knew of no property belonging to him subject to payment of the debt, said: "It is settled with us that the period necessary to raise the presumption was not interrupted by the state of war prevailing for four years in this state; and it is also settled that infancy, though covering the whole period, will not avail to prevent the running of the requisite time and the consequent raising of the presumption as a bar to the recovery of land. In view of these consequences, both operating a disability to sue, we cannot see how ignorance of a debtor's place of living, or that he has no property, can avail to prevent the running of the period, to the exemption of the inert creditor from the consequence of the perfected presumption. The ability to sue has been given effect to suspend, in defined instances, the running of the Statutes of Limitation; but the presumption under consideration is an wholly different matter. To hold otherwise, the reason therefor must be referred to the suspension of the running of the requisite time to raise the presumption of the nonresidence of the debtor of the state of the suing creditor, and of the creditor's ignorance of the place of residence of his debtor, or of any estate the debtor has, subject to the claim of the creditor. That would be wholly inconsistent with the motive for the presumption, viz., a measure of repose. If that were ruled, infancy, or other disability, would necessarily suspend the running of the requisite time."

[138] The fact that, about four years after the recovery of a judgment against him, the debtor removed to a distant state, where he thereafter re-

But the majority of the cases hold that the absence of the debtor from the state during the whole or the greater part of the period relied on to create the presumption of payment will rebut such presumption, or, in other words, prevent it from arising,[139] even though the absence is in an adjoining state.[140]

But the occasional absence of the debtor from the state will not rebut the presumption.[141]

Nonresidence of the debtor may be evidence from which, with other circumstances, nonpayment may be inferred, even if, of itself, it would not justify that conclusion.[142] And nonresidence of the creditor appears to

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sided, was held in Cobb v. Houston (1906) 117 Mo. App. 645, 94 S. W. 299, not to be evidence admissible to rebut the presumption of payment of the judgment, arising from lapse of twenty years, where the statute provided that every judgment should be presumed to be paid after the expiration of twenty years from the date it was rendered, and that such presumption might be repelled by proof of payment, or of written acknowledgment of the indebtedness, made within the twenty years.

And the fact that an obligor on a bond, before its maturity, removed to a distant state, where he thereafter resided, was held in Campbell v. Brown (1882) 86 N. C. 376, 41 Am. Rep. 464, not of itself to prevent the statutory presumption of payment of the bond, from lapse of time, from arising.

[139] Kibbe v. Thompson (1873) 5 Biss. 226, Fed. Cas. No. 7,754; De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120; McLellan v. Crofton (1830) 6 Me. 307 (residence in foreign country, and poverty); TALBOT V. HATHAWAY (reported herewith) ante, 772; Clark v. Clement (1856) 33 N. H. 563; Latimer v. Trowbridge (1897) 52 S. C. 193, 68 Am. St. Rep. 893, 29 S. E. 634.

Where, because of removal to and residence in another state, the Statute of Limitations does not run against the debtor, although more than twenty years have elapsed from the time the cause of action accrued, the law will not presume payment of the debt. Cheatham v. Aistrop (1899) 97 Va. 457, 34 S. E. 57.

It was held in Newman v. Newman (1815) 1 Starkie (Eng.) 101, that the presumption of payment of a bond arising from lapse of more than twenty years did not arise, where during this period the obligor resided in America.

And where the debtor absconded shortly after the debt accrued, and thereafter resided in parts unknown, and the creditor had not seen him until the time of beginning the action for the debt, it was held that no presumption of payment arose. Dunning v. Chamberlin (1834) 6 Vt. 127. In this case, less than twenty years had elapsed from the time the cause of action accrued, but apparently the same result would have been reached had the time exceeded twenty years.

[140] Absence of the debtor in an adjoining state during almost the whole of the twenty years is sufficient to rebut the presumption of payment. Daggett v. Tallman (1830) 8 Conn. 168. See also Mann v. Manning (1849) 12 Smedes & M. (Miss.) 615, which seems to support this rule, although it appears that, apart from nonresidence, the time which had elapsed was insufficient to raise the presumption.

[141] The absence of a debtor for a day or for a week, or for the ordinary time of a West India voyage, is not of that character and permanency which will constitute a disability to be taken into account, to repel the presumption of payment from lapse of time. Boardman v. De Forest (1823) 5 Conn. 1.

[142] In these cases it was generally unnecessary to decide whether nonresidence, alone, would rebut the presumption. Joy v. Adams (1846) 26 Me. 330; Bailey v. Jackson (1819) 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; Budd v. Conard (1856) 2 Phila. (Pa.) 175; Dehart v. Gard (1797) Addison (Pa.) 344; Holway v. Sanborn (1911) 145 Wis. 151, 130 N. W. 95.

The residence of the debtor in another state during the period relied upon to create the presumption of payment is not itself sufficient to rebut such presumption, although it is evidence which, with other circumstances, may rebut the presumption. Alston v. Hawkins (1890) 105 N. C. 3, 18 Am. St. Rep. 874, 11 S. E. 164.

So, although the continued nonresidence during the period relied upon to create the presumption of payment, under statute, arising from lapse of time, was held in Campbell v. Brown (1882) 86 N. C. 376, 41 Am. Rep. 464,

be, under some circumstances, evidence at least tending to rebut the presumption of payment.[143] But the wording of the statute creating the presumption may, of course, preclude consideration of the fact of nonresidence, to rebut it.[144]

The absence from the state of one of two joint debtors will not rebut the presumption.[145] And nonresidence of the debtor, in order to rebut the presumption of payment from lapse of time, must exist as to the twenty years last preceding the bringing of the action.[146]

i. War or invasion.

It has been held that a presumption of payment does not arise from the lapse of time during which, because of the condition of the country or the situation of the parties on account of war, it is highly improbable that the debt was collected, although there may have been no actual impossibility of collecting it, even by legal proceedings.[147] And so, a state of war existing in the country in which the debtor and creditor, or one of them, reside, is generally evidence, at least, tending to explain the delay in bringing suit, and hence is admissible to rebut the presumption of payment from lapse of time.[148] And the period during which the courts are closed to the enforcement of the debt on account of war should be deducted in computing the time for raising the presumption of payment.[149] But conditions may be such that the period of war should

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not of itself sufficient to rebut the presumption of payment, it was considered evidence which, with other circumstances, might have this effect.

And where, in an action on a bond, the plaintiff proved that at the time the bond was executed he resided in Pennsylvania, and had continued to do so to the date of bringing the action, and that the defendant, during this time, had resided in Kentucky, it was held that the court properly refused an instruction that the presumption of payment from lapse of time was not applicable to the case. Such evidence was held admissible, however, for the purpose of rebutting the presumption, its weight being for the jury to determine. Shields v. Pringle (1811) 2 Bibb. (Ky.) 387.

[143] The residence of the creditor in another state during the period relied upon to raise the presumption of payment from lapse of time will not, of itself, rebut such presumption, although it is evidence proper for consideration, on the question whether the presumption is rebutted. Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452.

And the fact that the obligee in a bond was a British subject, and removed from America during the Revolutionary War, was considered, in Gee v. Cumming (1806) 3 N. C. (2 Hayw.) 398, as evidence tending strongly to rebut the presumption of payment of the bond, from lapse of more than twenty years, including the period of the war.

But the fact that, at the date of the death of the testatrix, the legatees were nonresidents of the state, was considered, in Cox v. Brower (1894) 114 N. C. 422, 19 S. E. 365, as of no importance whatever to rebut the presumption of payment of the legacies, arising from lapse of twenty years.

[144] See Cobb v. Houston, cited in note 138, supra.

[145] Boardman v. DeForest (1823) 5 Conn. 1.

[146] De Ford v. Green (1894) 1 Marv. (Del.) 316, 40 Atl. 1120.

[147] Hale v. Pack (1877) 10 W. Va. 145. There was evidence in this case that the county in which the parties to the bond in question resided had several times during the Civil War been in the possession of the Federal troops, and was subject to raids during the entire war, and that the courthouse had been burned, although court was held in different parts of the county which were in possession of the Confederate forces. It was held that the time during the war should not be considered in computing the period from which the presumption of payment might arise.

[148] Gee v. Cumming (1806) 3 N. C. (2 Hayw.) 398; McNair v. Ragland (1830) 16 N. C. (1 Dev. Eq.) 533; Brewton v. Cannon (1795) 1 Bay. (S. C.) 482; Lyon v. Guild (1871) 5 Heisk. (Tenn.) 175.

[149] Dunlop v. Ball (1804) 2 Cranch (U. S.) 180, 2 L. ed. 246 (holding that the period of the Revolution and the years following, up to 1793, during which time the courts were closed or were generally supposed to be closed

not be deducted, as, for instance, if the war is not flagrant in the neighborhood in which the parties reside, and presents no obstacle to the enforcement of payment.[150]

Because of the suspension in certain instances, by statute or constitutional provision, of statutes of limitation during the Revolutionary and Civil Wars, and the enactment of stay laws against the enforcement of a debt against the debtor's property, the majority of the courts have held that, by analogy, the period during which such stay laws were in force, and statutes of limitation were suspended, should be deducted, in computing the period from which payment would be presumed,[151] although there are several cases to the contrary.[152]

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to the enforcement of claims by British subjects, should be deducted from the twenty-year period); Re Searles (1795) 5 Dane Abr. (Mass.) 411 (period of Revolutionary War deducted), and Sawyer v. Smith (1797) 5 Dane Abr. (Mass.) 405, 6 Mass. Dig. 1904–1905 col. 11,810 (same); Bailey v. Jackson (1819) 16 Johns. (N. Y.) 210, 8 Am. Dec. 309 (period of Revolutionary War deducted, where creditor resided in England, and debtor in United States); Jackson ex dem. People v. Pierce (1813) 10 Johns. (N. Y.) 414 (recognizing rule that period of Revolutionary War should be deducted); Gwyn v. Porter (1871) 5 Heisk. (Tenn.) 253; Kilpatrick v. Brashear (1873) 10 Heisk. (Tenn.) 372; Bender v. Mongomery (1881) 8 Lea (Tenn.) 586; Stanley v. McKinzer (1881) 7 Lea (Tenn.) 454 (recognizing rule); Higginson v. Air (1795) 1 Desauss. Eq. (S. C.) 427 (Civil War period deducted, as regards claims between citizens of America and England).

The fact that courts are closed to the enforcement of a debt, on account of war, is a proper matter to be taken into consideration for the purpose of rebutting the presumption of payment from lapse of time. Montgomery v. Bruere (1818) 4 N. J. L. 266.

[150] The period of the Civil War, it was held in Criss v. Criss (1886) 28 W. Va. 388, should not be deducted, in computing the time from which the law would raise a presumption of payment of a debt, where the place of residence of the debtor and creditor was far removed from the active operations of the war, and there was no evidence that either of them was ever actively engaged in the war, or that the courts in the county in which they resided were closed, or that the war was any obstacle in the way of enforcing payment.

[151] Penrose v. King (1794) 1 Yeates (Pa.) 344; Tucker v. Baker (1886) 94 N. C. 162; Boltz v. Bullman (1795) 1 Yeates (Pa.) 584; Gwyn v. Porter (1871) 5 Heisk. (Tenn.) 255; Carter v. Wolfe (1870) 1 Heisk. (Tenn.) 694 (it being said that "perhaps" there should be a deduction); Mason v. Spurlock (1874) 4 Baxt. (Tenn.) 554; Stanley v. McKinzer (1881) 7 Lea (Tenn.) 454 (recognizing rule); Norvell v. Little (1884) 79 Va. 141; Tunstall v. Withers (1890) 86 Va. 892, 11 S. E. 565; Ginter v. Breeden (1894) 90 Va. 565, 19 S. E. 656; Pitzer v. Burns (1873) 7 W. Va. 63; Hale v. Peck (1877) 10 W. Va. 145.

The Stay Law of 1866, providing that the period during which the act remained in force should be excluded from the computation of time within which, by the operation of any statute, or "rule of law," it might be necessary to commence any proceeding, was held in Tunstall v. Withers (1890) 86 Va. 892, 11 S. E. 565, to apply to the presumption of payment arising from lapse of time, it being said that this presumption was a rule of law.

The Georgia Statute of 1856, providing that a judgment on which no execution had issued within seven years from its date should be presumed satisfied, was in the nature of a Statute of Limitation, and was suspended during the period of the Civil War. Black v. Burton (1872) 47 Ga. 362; Akin v. Freeman (1873) 49 Ga. 51; Solomon v. Hinton (1873) 50 Ga. 163.

[152] Harrison v. Heflin (1875) 54 Ala. 552; Black v. Pratt Coal & Coke Co. (1888) 85 Ala. 504, 5 So. 89; Roach v. Cox (1909) 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578 (recognizing doctrine that Civil War period should not be deducted).

Stay Laws, enacted during the Civil War to prevent a sale of the debtor's property on execution, were held, in Shubrick v. Adams (1883) 20 S. C. 49, not to suspend the operation of the presumption of payment from lapse of time, where the presumption had begun to run before the enactment of the statutes. The above was decided on the assumption that the Stay Laws

j. Relationship.

Although there are cases supporting the proposition that the presumption of payment from lapse of time is not rebutted by evidence merely of relationship between the debtor and creditor,[153] even though the relationship is that of brother and sister,[154] yet other cases are to the effect that, relationship between the debtor and creditor is an element to be considered, in determining whether the presumption of payment from lapse of time is rebutted,[155] and that the presumption does not arise where the parties are very closely related; as, for example, in the case of parent and child, especially, if earlier enforcement would have embarrassed the debtor.[156] There seems, however, to be much force in the reasoning of the lower court in a Pennsylvania case,[157] in which, with reference to the argument that the presumption of payment was rebutted by the relationship of the parties, a father, in this instance, who

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created a disability to enforce the debt; but it was held also that no such disability existed, for the reason that the laws were, in 1866, declared unconstitutional.

In Harrison v. Heflin (1875) 54 Ala. 552, cited supra, the court stated that the suspension of the Statute of Limitations by the Convention of 1865 rested on the difficulty or impossibility of suit while the community was harassed and perplexed by war, and courts were closed or embarrassed in the exercise of their authority; that, while this might acquit suitors from the imputation of laches, the presumption of payment rested not only on the want of diligence in asserting right, but on the higher ground that it was necessary to suppress fraud, and conduced to the peace of society; and that, while the war rendered suits difficult or impossible, there also resulted from it the destruction or loss of records and other evidence, which would make judicial investigation difficult.

[153] Swinley v. Force (1910) 78 N. J. Eq. 52, 78 Atl. 249; Buie v. Buie (1841) 24 N. C. (2 Ired. L.) 87.

That the mortgagor is "closely related" to the mortgagee will not rebut the presumption of payment of the mortgage, arising from lapse of more than twenty years' undisturbed possession by the mortgagor after the mortgage debt was due. SPENCER v. HURD (reported herewith) ante, 761.

[154] The mere fact that the mortgagor and mortgagee are related as brother and sister will not rebut the presumption of payment of the mortgage, arising from lapse of twenty years. Magee v. Bradley (1892) 54 N. J. Eq. 326, 35 Atl. 103.

See also Goodwyn v. Baldwin (1877) 59 Ala. 127, in note 113, supra, as to the effect on the presumption of payment, of the fact that the mortgagor is a brother of the beneficiary in the mortgage.

[155] Johnson v. Tuttle (1853) 9 N. J. Eq. 365; Rockhill v. Rockhill (1888) — N. J. Eq. —, 14 Atl. 760; Lyon v. Guild (1871) 5 Heisk. (Tenn.) 175; Vaughn v. Tate (1896) — Tenn. Ch. App. —, 36 S. W. 748; Holway v. Sanborn (1911) 145 Wis. 151, 130 N. W. 95.

[156] Evidence of near relationship between the debtor and creditor, as that of father and son, together with proof of the debtor's poverty, and of facts showing that he would have been seriously disturbed by earlier enforcement, will rebut the presumption of payment arising from lapse of time. Coleman v. Erie Trust Co. (1916) 255 Pa. 63, 99 Atl. 217.

And it was held in Philbrook v. Clark (1885) 77 Me. 176, that the presumption of payment of a mortgage, from lapse of twenty years, was rebutted by evidence that, during the greater part of this time, the holder of the mortgage was a son of the mortgagor, who testified that nothing had been paid on the debt, but that he permitted his mother and sister to live on the mortgaged premises, without enforcing payment.

It was held in Wanmaker v. Van Buskirk (1832) 1 N. J. Eq. 685, 23 Am. Dec. 748, that the presumption of payment of a mortgage, arising from lapse of twenty years after it was due, was repelled by evidence that the mortgagor married a daughter of the mortgagee, that they lived on the mortgaged premises until his death, and she continued thereafter in possession of them, and that the enforcement of the mortgage would have brought hardship upon herself and children.

[157] Devereux's Estate (1898) 184 Pa. 429, 39 Atl. 225.

was in embarrassed circumstances, having incurred a debt to his son, the court said: "That species of reasoning is always illusive, because it works with equal efficiency in either direction. A son would not be likely to harass his parent with demands for payment, which the father was unable to meet, and this circumstance would favor the presumption of nonpayment. On the other hand, a father in failing fortunes would be tempted to protect his son, even at the expense of other creditors, and this would strengthen the theory of payment."

The authorities seem to agree that the doctrine of presumption of payment from lapse of time does not apply to claims between husband and wife, while they are living together as such.[158] Thus, it has been held that the presumption of payment of a mortgage, arising from lapse of twenty years, was rebutted by evidence that a year after the mortgage was due it was assigned to the wife of the mortgagor, who had since held the mortgage and been in possession of the premises, and that the mortgagor was insolvent,[159] so it has been held that payment of a mortgage would not be presumed from the mortgagee's failure to bring an action of foreclosure against his wife, the mortgagor, while he was living with her, nor even after their separation, occurring about six years before the bringing of the action.[160]

But the presumption has been held to apply to a bond executed by a husband, under statute, to a trustee for payment of a debt owing by him to his wife; in other words, the presumption arose notwithstanding the marriage relation, in view of the fact that the trustee had a right of action on the bond, the court relying, however, largely on the particular statutory provisions in question.[161]

k. Demand for payment.

The view has been taken that in the absence of evidence to fortify the presumption of payment from lapse of twenty years, a demand for payment made by the creditor within that period will rebut the presumption.[162] The soundness of this view seems doubtful, however, and other cases hold that demands by the creditor within the period relied on to create the presumption of payment will not alone rebut such presumption,[163] especially where the demand is met by a distinct refusal to pay, and a claim that the debt had been paid.[164]

A demand for payment, made within the period relied on to create the presumption of payment, may be evidence of nonpayment, its weight being for

[158] Dice v. Irvin (1886) 110 **Ind.** 561, 11 N. E. 488, the court citing Barnett v. Harshbarger (1885) 105 **Ind.** 410, 5 N. E. 718; Metlar v. Williams (1916) 86 **N. J. Eq.** 330, 97 Atl. 961; Kraus v. Kraus (1908) 37 **Pa. Co. Ct.** 194; Second Nat. Bank v. Merrill (1891) 81 **Wis.** 151, 29 Am. St. Rep. 877, 50 N. W. 505.

The fact that the payee of a note was the wife of the maker of the note was considered in Ayres v. Ayres (1905) 69 **N. J. Eq.** 343, 60 Atl. 422, as evidence tending to rebut the presumption of payment from lapse of time, it being unnecessary to decide whether this alone would rebut the presumption, as it was held that the presumption was rebutted by this fact, combined with evidence of the husband's acknowledgment of the indebtedness during the twenty-year period, and the fact that he permitted the note to remain in the wife's possession.

[159] Knight v. McKinney (1891) 84 **Me.** 107, 24 Atl. 744.

[160] Stelts v. Martin (1911) 90 **S. C.** 14, 72 S. E. 550.

[161] Yocum's Estate (1913) 242 **Pa.** 82, 88 Atl. 919.

[162] Waters v. Waters (1859) 1 Met. (**Ky.**) 519. There were the additional circumstances in this case that the debtor and creditor were brothers, and that the debtor at the time of the demand denied the justice of the claim, but on a different ground from that of previous payment. But the court said it was clear that a demand of payment within the period of twenty years is sufficient to repel the presumption, especially in the absence of any circumstance tending to fortify it.

[163] Miller v. Williamsport (1901) 17 **Pa. Super. Ct.** 159; Sellers v. Holman (1853) 20 **Pa.** 321.

[164] Sellers v. Holman (**Pa.**) supra.

the jury.[165] But although frequent demands for payment, made by the creditor within the time relied upon to create the presumption of payment, on a debtor who is a private individual, if met by no denial of liability or allegation of payment, would be a circumstance tending to corroborate the nonpayment of the debt, the same inference cannot be drawn where the debtor is a public corporation, or a municipal division of the state, governed by a board whose members are constantly changing, and who may be and probably are, more or less, ignorant of what has been done by their predecessors in office.[166]

l. Institution of proceedings to enforce payment.

Presumption of payment does not arise where, within the period relied on to raise the presumption, the creditor institutes and prosecutes legal proceedings to enforce payment of the debt, if he does so in good faith, and not for the purpose of repelling the presumption;[167] and this is true, even though the proceedings are irregular or erroneous.[168] The rule does not apply, however, if the proceedings are

[165] Brewer v. Thomas (1848) 28 Me. 81.

[166] Miller v. Williamsport (1901) 17 Pa. Super. Ct. 159.

[167] Kibbe v. Thompson (1873) 5 Biss. 226, Fed. Cas. No. 7,754; McCormick v. Eliot (1890) 43 Fed. 469; Jones v. Wilkey (1897) 78 Fed. 532; M'Cullough v. Montgomery (1821) 7 Serg. & R. (Pa.) 17; Levers v. Van Buskirk (1844) 7 Watts & S. (Pa.) 70, later appeal in (1846) 4 Pa. 309; Hair v. Thomas (1908) 19 Pa. Dist. R. 424; Anderson v. Baughman (1904) 69 S. C. 38, 48 S. E. 38; Perkins v. Hawkins (1853) 9 Gratt. (Va.) 649 (recognizing rule). See also St. Francis Mill Co. v. Sugg (1907) 206 Mo. 148, 104 S. W. 45, where the action in which the presumption was relied on was instituted before the presumption arose, but was pending for many years.

A fair though unsuccessful effort to enforce payment by suing out legal process for that purpose, within the twenty-year period relied upon to create the presumption of payment, will rebut such presumption. Miller's Estate (1914) 243 Pa. 328, 90 Atl. 77; James v. Jarrett (1851) 17 Pa. 370.

In Cook v. Parham (1879) 63 Ala. 456, it was held that the presumption of payment of a mortgage debt from lapse of twenty years did not arise, because judgment was obtained within the twenty-year period, and payments were made on the debt.

So, in Gay v. Fleming (1913) 182 Ala. 511, 62 So. 523, it was held that the presumption of payment of a mortgage debt from lapse of twenty years did not arise, because the mortgagee had, within that time, taken steps to foreclose the mortgage, and his heirs were in possession of the land for several years before the expiration of the twenty-year period.

And in a proceeding in chancery between partners, to settle partnership accounts and recover the defendant's share of the loss resulting from the partnership business, it was held that from the period relied on to create the presumption of payment, or settlement, there should be deducted the time consumed in an unsuccessful action at law by the plaintiffs against the defendant for an accounting, decided on the ground of mistake as to the remedy. Spear v. Newell (1841) 13 Vt. 288.

[168] The doctrine of presumption of payment of a mortgage from lapse of time does not arise where, within twenty years after the mortgage became due, it was foreclosed, and there was no subsequent adverse holding under the mortgagor, even though the sale was invalid as against the mortgagor, because all the parcels were sold for a gross sum. Baldwin v. Cullen (1883) 51 Mich. 33, 16 N. W. 191.

It was held in Loper v. Dickey (1914) 190 Ala. 554, 67 So. 255, that the presumption of payment of a mortgage, from lapse of time, was rebutted, where it appeared that, within the twenty-year period relied upon to raise the presumption, there had been an attempted foreclosure of the mortgage, and possession taken under a sale, even if the mortgage had not been regularly foreclosed.

So, it was held that the presumption of payment of a bond secured by a mortgage did not arise, where, within the time relied on to create the presumption, the obligor was duly notified of the intended foreclosure of

not prosecuted in good faith, but are abandoned.[169] The rule has been applied or at least recognized in many cases, where the question was whether the levy of an execution or a proceeding to revive a judgment, within the period relied on to create the presumption of payment of the judgment, would rebut such presumption. A number of cases of this class are cited in the footnote; but, as was stated at the beginning, the annotation does not purport to cover questions of this kind, which are peculiar to the particular class of indebtedness involved.[170]

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the mortgage to secure payment of a judgment recovered on a note for which the bond and mortgage had been assigned as collateral, and made default, and an order was made, though never executed, for the foreclosure of the mortgage, even though the decree of foreclosure was reversible, for the reason that judgment had not been recovered on the note. Tucker v. Hunt (1854) 6 Rich. Eq. (S. C.) 183.

And it was held that, to rebut the presumption of payment arising from lapse of time, evidence was admissible of the bringing of an action to recover the debt, within the period relied on to create the presumption, and of attempts to enforce, by execution, the judgment erroneously rendered in behalf of the plaintiff in that action, the defendant having never been legally served with process. Allison v. Wood (1906) 104 Va. 765, 52 S. E. 559, 7 Ann. Cas. 721.

[169] The presumption of payment arising from lapse of more than twenty years is not rebutted by the bringing of an action, within that period, to enforce payment, if there has been a failure to prosecute the suit, and it has been stricken off the calendar. Langsdon v. Shands (1885) 23 S. C. 149.

To a similar effect is Palmer v. Dubois (1817) 1 Mill, Const. (S. C.) 178, holding that the bringing of an action to enforce the demand within the twenty-year period relied on to raise the presumption of payment will not rebut such presumption, if the action is abandoned before judgment is obtained.

And the mere fact that the obligee on a bond has applied for or even obtained a writ to enforce payment of the bond will not rebut the presumption of payment, where the writ is never served, even though such failure is due to the obligee's poverty, which renders him unable to procure bail for the prosecution of the suit. Rogers v. Judd (1833) 5 Vt. 236, 26 Am. Dec. 301.

The institution by the creditor of a suit, during the twenty-year period, against one as executor of the debtor, who has renounced the office of executor, with the result that the suit is discontinued, will not rebut the presumption of payment. Quince v. Ross (1801) 1 N. C. pt. 2, p. 97 (Taylor, 155).

[170] Presumption of payment of a judgment may be rebutted by the levy of an execution, and sale, within the period relied on to create the presumption. Henderson v. Cairns (1852) 14 Barb. (N. Y.) 15 (where two executions were levied within the twenty-year period, and one was partly satisfied; and, on the levy of the other execution, the debt was not denied, but the property levied on was claimed by the debtor's wife); Robinson v. Tunnell (1861) 2 Houst. (Del.) 387 (issuance of execution and sale thereunder, and credit of the proceeds on the judgment debt, within the twenty-year period, will rebut the presumption of payment of judgment).

The presumption may also be rebutted by the levy of executions, and return of no property found. Chiles v. Monroe (1862) 4 Met. (Ky.) 72.

The issuance of an execution on a judgment, and return unsatisfied, within the period relied on to create the presumption of payment of the judgment, is, at least, a circumstance tending to rebut such presumption. Black v. Carpenter (1874) 3 Baxt. (Tenn.) 350; Knight v. Macomber (1868) 55 Me. 132 (it being unnecessary to decide, in these cases, whether this circumstance, alone, would rebut the presumption).

The institution of a proceeding to revive a judgment, in which summons is served on the defendant before the presumption of payment from lapse of time has attached, stops the running of time as to the presumption of payment. Adams v. Richardson (1890) 32 S. C. 139, 10 S. E. 931; Wood v. Milling (1890) 32 S. C. 378, 10 S. E. 1081; Leitner v. Metz (1890) 32 S. C. 383, 10 S. E. 1082; James v. Jarrett

It has been held that the presumption of payment of a mortgage, from lapse of twenty years, may be rebutted by a decree of court made within that period, reforming the mortgage so as to convey a fee instead of a life estate.[171] And it has been held also that the legal presumption of payment of a judgment, from lapse of about forty-five years after its recovery, is repelled by the pendency of an injunction during this time, which prevented its enforcement, although for nearly forty years no action was taken in the injunction proceedings.[172]

If the debt is reduced to judgment, twenty years must elapse after the recovery of the judgment before the presumption of payment will arise.[173] But the institution of legal proceedings to enforce payment is not available for the purpose of rebutting the presumption of payment, unless it occurred within twenty years preceding the bringing of the action in which the presumption is relied on.[174] And a judgment by default, after the presumption of payment of the debt which is the basis of the judgment has attached, will not rebut the presumption.[175] But a statutory foreclosure, though after the lapse of such a time as would raise the presumption of payment of the mortgage, has been held to rebut the presumption, as against a stranger in possession.[176]

(1851) 17 Pa. 370; Miller's Estate (1914) 243 Pa. 328, 90 Atl. 77.

But it has been held that an ex parte renewal of an execution, made during the twenty-year period relied on to create the presumption of payment of the judgment, will not rebut such presumption. Dillard v. Brian (1852) 5 Rich. L. (S. C.) 501; Tobin v. Myers (1882) 18 S. C. 324; Colvin v. Phillips (1886) 25 S. C. 228.

However, where, after the lapse of twenty years from the time of recovery of the judgment, the judgment creditor procured the issuance of a summons against the judgment debtor, to show cause why execution should not be renewed thereon, and the judgment debtor was served with summons, but failed to make any defense, it was held that such failure constituted such an acknowledgment of the judgment as an existing obligation as would rebut the presumption of payment from lapse of time. McNair v. Ingraham (1883) 21 S. C. 70. The court distinguished the case from Tobin v. Myers (1882) 18 S. C. 324, on the ground that the attempted renewal in the latter case was only the act of the plaintiff in execution, without service on the defendant, or the giving of opportunity to the latter to be heard on the question.

[171] Glezen v. Haskins (1902) 23 R. I. 601, 51 Atl. 219.

[172] Hutsonpiller v. Stover (1855) 12 Gratt. (Va.) 579. But it seems that this lapse of time may be considered by the jury, under such circumstances, as tending to raise the inference of payment.

[173] Wright v. Eaves (1858) 10 Rich. Eq. (S. C.) 582; Sartor v. Beaty (1886) 25 S. C. 293.

Where a creditor of an estate, in good faith, recovers judgment against the legal representative of the debtor, on a bond or other like obligation, before the twenty years have expired, such judgment constitutes a demand for the payment of the debt and a finding that it is unpaid, and constitutes a new point from which the period necessary to presume payment begins, not only in favor of the legal representative of the debtor, but also in favor of the latter's heir, or devisee. Shaw v. Barksdale (1886) 25 S. C. 204.

[174] Hair v. Thomas (1909) 19 Pa. Dist. R. 424; Levers v. Van Buskirk (1844) 7 Watts. & S. (Pa.) 70, later appeal in (1846) 4 Pa. 309.

[175] Campbell v. Sloan (1884) 21 S. C. 301.

[176] The presumption of payment of a mortgage, arising from a lapse of nearly thirty years, may be rebutted by evidence of a statutory foreclosure after the lapse of twenty years, where the statute provides that a foreclosure under it shall be an absolute bar of the equity of redemption, and shall have the like effect as if the mortgage had been foreclosed in chancery, by decree against all parties at interest; especially, where it appears that the premises are not occupied by any person claiming under the mortgagor, but by mere strangers. Jackson ex dem. Mackey v. Slater (1830) 5 Wend. (N. Y.) 295.

VIII. Presumption as basis of affirmative relief.

The doctrine is supported by a number of cases that the presumption of payment, arising from lapse of time, can be used only as a shield, and not as a basis for affirmative relief.[177] This rule has been applied so as to prevent the holders of an equitable title to land from setting it up to defeat an action of ejectment by the holder of the legal title.[178] It has also been applied in several cases in which a landowner sought, under statute, to vacate an assessment for street improvements on the ground of a prior

[177] Rankin v. Dean (1908) 157 Ala. 490, 47 So. 1015; CACY v. SLAY (reported herewith ante, 764); Morey v. Farmers' Loan & T. Co. (1856) 14 N. Y. 302; Lawrence v. Ball (1856) 14 N. Y. 477; Johnson v. Albany & S. R. Co. (1873) 54 N. Y. 416, 13 Am. Rep. 607 (recognizing doctrine that presumption of payment, under statute, can be used only as a shield, and not as the basis for affirmative relief); Re Willett (1877) 70 N. Y. 490; Re Serrill (1876) 9 Hun (N. Y.) 233; Griswold v. Little (1895) 13 Misc. 281, 34 N. Y. Supp. 703; Brady v. Begun (1862) 36 Barb. (N. Y.) 533; Townshend v. Townshend (1875) 1 Abb. N. C. (N. Y.) 81 (recognizing doctrine that statutory presumption of payment of mortgage cannot be made the basis of affirmative relief, but holding the rule inapplicable to this case); Re Eiscle (1875) 1 N. Y. Week. Dig. 257; Outlaw v. Garner (1905) 139 N. C. 190, 51 S. E. 925; Allen v. Everly (1873) 24 Ohio St. 97.

In holding that the presumption of payment from lapse of time cannot be made the basis of affirmative relief, the court in Allen v. Everly (Ohio) supra, said: "In this case the plaintiffs seek, in effect, a cancelation of the mortgage decree, and a transfer to them of the legal title held by those standing in the shoes of the mortgagee. This they ask, not that they have affirmatively shown payment of the amount of the decree in fact; but it is sought upon the ground of presumptive payment only. . . . If, however, the presumption were not repelled, is the mere presumption of payment, arising from lapse of time only, sufficient to entitle a party to affirmative relief? It does not follow, because such presumption may be successfully used as a defensive weapon, that it is equally available as an instrument of attack. While, on the one hand, a court of equity will not enforce a stale claim, on the other, it will not, as a general rule, grant relief upon a mere presumption of fact. A party must show affirmatively that he is entitled to the relief invoked. He does not stand in this position, without he establishes the fact which entitles him to the relief sought. If it is payment of a claim, actual payment must be shown."

And it has been held that a presumption of payment of a legacy, from lapse of more than twenty years after the legacy was payable, cannot arise so as to create a liability on the part of the legatee to a third person, as, for example, a remainderman; but that, to create a liability to the latter from the legatee, there must be proof that the legacy was actually paid. Outlaw v. Garner (1905) 139 N. C. 190, 51 S. E. 925.

The question whether the presumption of payment from lapse of time can serve as the basis of affirmative relief was considered in Ellison v. Torpin (1898) 44 W. Va. 414, 30 S. E. 183; but the court was divided on the question.

[178] Thus, it was held, in an action of ejectment by heirs of the vendor, that the vendee could not rely on the presumption of payment of the purchase money, from lapse of time, to defeat the action, where this was the only evidence of payment. Griswold v. Little (1895) 13 Misc. 281, 34 N. Y. Supp. 703.

To a similar effect is Brady v. Begun (1862) 36 Barb. (N. Y.) 533, in which the court said: "It is insisted that a legal presumption arises in this case, of payment by the defendant for the premises, arising from lapse of time. This proposition is sought to be established by, or rather inferred from, the principle which authorizes such an inference in the case of a sealed instrument, from the fact that no payment has been claimed or made thereon for a period of twenty years. The effect of the rule is that of a statute of limitations, and it has usually been employed to defeat a recovery upon the instrument itself. I know of no case in which it has been effectually interposed as an affirmative defense to an action of ejectment to recover

assessment for the same purpose, the presumption being held insufficient evidence of payment of the prior assessment to grant the relief sought.[179] But, although no case has been found distinctly holding that the presumption of payment from lapse of time can be made the basis of affirmative relief, this seems to be the effect of the holding in some cases.[180]

IX. When presumption begins to run.

The computation of the twenty-year period, from the lapse of which payment will be presumed, begins when the debt is due or demandable.[181] Ordinarily, of course, there is no question as to when the presumption begins to run under this rule. But in a few instances the question has arisen under special circumstances.[182] Thus,

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the possession of land. If it is so interposed, the fact upon which it proceeds must be affirmatively proved. Such is, substantially, the principle established in the case of Lawrence v. Ball (1856) 14 N. Y. 477. There the vendor had executed a written contract for the sale of the premises, stipulating for various payments. More than twenty years having elapsed, the vendor brought ejectment, treating the contract as forfeited for nonpayment, and the court held that the presumption of payment arising from lapse of time was not sufficient to maintain the defendant's equitable claim to the land, and that, to establish such a defense, payment, in fact, of the purchase money by the defendant must be proved. The mere fact of nonpayment gives no title to equitable relief, and consequently constitutes no defense to an action of ejectment by the party holding the legal title."

And in Rankin v. Dean (1908) 157 Ala. 490, 47 So. 1015, the court said: "The presumption of payment, after twenty years from maturity of the notes, relied upon by appellees, cannot avail them in this character of action—ejectment by the vendor's grantee. That presumption is, in nature, a statute of limitations, which, were the action for the unpaid purchase money, would be serviceable to defeat a recovery thereof by the vendor, or his successor in right. But the action here involves the legal title, and the presumption stated cannot effect to devest and invest that title. Such presumption is, as said in the books, a shield, and cannot be converted into a weapon of offense. . . . The relation between the vendee in possession and the vendor is that of trust; the vendee being the trustee, for the vendor, of the unpaid balance of the purchase money, and the vendor being the trustee, for the vendee, of the legal title remaining in such vendor. Sellers v. Hayes (1850) 17 Ala. 749. This is the foundation for the doctrine that inhibits the creation of any right, affecting the title of the vendor, by mere lapse of time, or presumptions usually arising therefrom."

[179] In Re Willett (1877) 70 N. Y. 490, it was held that one seeking affirmative relief in a proceeding to vacate an assessment for repaving a street, where the relief could be granted only in case an assessment for paving the same street had previously been paid, and it appeared that an assessment had been made for paving the street, but there was no proof that it had, in fact, been paid, it was held that the petitioner could not succeed merely upon reliance on the presumption of payment of the prior assessment, arising from lapse of more than twenty years, but must show actual payment of the prior assessment by competent proof. To a similar effect are Re Serrill (1876) 9 Hun (N. Y.) 233, and Re Eiscle (1875) 1 N. Y. Week. Dig. 257.

[180] In Downs v. Sooy (1877) 28 N. J. Eq. 55, the presumption of payment of a debt secured by mortgage was indulged, where more than thirty years had elapsed after the mortgage was given, although the mortgagor was seeking to restrain a sale of the mortgaged premises as the property of the mortgagee, at the instance of a judgment creditor of the latter. It was held that the mortgagor was entitled to an injunction, and also to a reconveyance of the property.

And in Spencer v. Hurd (1918) — Ala. —, 77 So. 683, the court affirmed a decree quieting title in a mortgagor, on the ground that the mortgage would be presumed to be paid from lapse of time, no point being made as to whether the presumption should be made the basis of affirmative relief.

[181] Diemer v. Sechrist (1830) 1 Penr. & W. (Pa.) 419.

[182] In discussing the question as to when the period of twenty years could begin to run as against the presumption of settlement of a guardian's ac-

as to claims against executors and administrators, it has been held that the twenty-year period is computed not from the date when administration was granted, but from eighteen months thereafter, when proceedings for a settlement of the administration could be properly instituted,[183] or from the time when the administrator became personally liable.[184] And in the case of a mortgage evidenced by a single instrument and covering a single indebtedness payable by instalments, it has been held that the twenty-year period from which the payment of the mortgage debt will be presumed begins to run from the maturity of the last instalment, and not from the maturity of the first instalment, although the mortgage provides that on default of payment of any instalment the entire debt shall become due; this provision being a mere optional authority to the mortgagee to proceed for the

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counts, the court in Garrett v. Garrett (1881) 69 Ala. 429, said: "It is a question of gravest difficulty as to the time when the period of twenty years shall commence to run. Shall it be only when the ward becomes of age, thus allowing a possible period of over forty years to transpire, in many cases, before the settlement of the trust can be presumed, as would happen when the guardian qualifies when a minor is but six months old? Or can it safely be allowed to commence from the last item on the guardian's account, the last partial settlement, or other like recognition of the existing trust? We confess that we can see objections to the establishment of either rule, but are inclined to adopt the latter as being less fraught with evil results, and as being more readily justified on principle. . . . We are inclined to adopt the rule, therefore, that if a period of twenty years be permitted to elapse from the last item on the guardian's account, or the last partial settlement, or other clear recognition of the guardianship, as a subsisting and undischarged trust, the claim of the ward is stale, and he is barred of his right to coerce the guardian to a settlement. This point, however, is not absolutely necessary to be decided for the purpose of this case, and we leave it undetermined at present." A decision of the question was not necessary because twenty years had not elapsed from the date of the last partial settlement of the guardian's account, nor from the date that the ward attained majority.

The presumption of payment of a judgment by confession, which, by its terms, is to be liquidated by the prothonotary on notice, does not arise until twenty years after such liquidation. Wills v. Gibson (1847) 7 Pa. 154.

Where a judgment was entered by confession on a bond and warrant of attorney, it was held that the presumption of payment from lapse of time began to run from the date of the judgment, and not from the date of the bond. Cloud v. Temple (1879) 5 Houst. (Del.) 587.

Presumption of the payment of a mortgage debt, so as to bar foreclosure of the mortgage, will not arise, where less than twenty years has elapsed from the time the mortgage was executed, even if there could be no recovery on the note secured by the mortgage because of the presumption arising from the lapse of more than twenty years after the note became payable; as the twenty-year period in a suit to foreclose the mortgage does not begin with the date when the note, for the security of which the mortgage was executed, became due. Braun v. Pettyjohn (1912) 176 Ala. 593, 58 So. 907.

And under statute providing that a judgment shall be presumed paid after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it, it was held in Belfer v. Ludlow (1911) 143 App. Div. 147, 127 N. Y. Supp. 623, affirming (1910) 69 Misc. 486, 126 N. Y. Supp. 130, that the twenty-year period began to run, only from the date of the docketing of the judgment.

[183] Greenlees v. Greenlees (1878) 62 Ala. 330. See also as supporting this rule, Rhodes v. Turner (1852) 21 Ala. 210, and McCartney v. Bone (1867) 40 Ala. 533.

[184] The time from which the presumption of payment of an obligation under an administrator's bond begins to run is not that when the debt is first demandable from the administrator, but that when he becomes personally liable for it. Backestoss v. Com. (1839) 8 Watts (Pa.) 286.

collection of the debt, and one which he may waive.[185]

X. Question for court or jury.

There is much confusion among the authorities regarding the functions of the court and of the jury in passing on the question of presumption of payment from lapse of time. There are many cases supporting the rule, which appears sound, that the question whether the evidence in any case, if true, is sufficient to rebut the presumption of payment arising from lapse of time, is one of law for the court.[186] This rule has been applied in cases involving the statutory presumption of payment.[187] And in the absence of rebutting evidence, the presumption is one of law, which should be declared by the court.[188] The confusion in the authorities arises largely from the fact that, in some cases, the courts, in dealing with the question of presumption of payment, from lapse of time, have improperly used the term "presumption of fact," [189] and have taken the view that the presumption cannot be declared by the court, but must be drawn by the jury,[190] and that the

[185] Smith v. Timmons (1918) 50 Pa. Super. Ct. 486.

[186] As expressly supporting this view, see the following cases, there being, of course, many other decisions in which it was assumed that the question was one of law: Mease v. Stevens (1793) 1 N. J. L. 433; Buie v. Buie (1841) 24 N. C. (2 Ired. L.) 87; Woodbury v. Taylor (1856) 48 N. C. (3 Jones, L.) 504; Grant v. Burgwyn (1881) 84 N. C. 560; Rowland v. Windley (1882) 86 N. C. 36; Alston v. Hawkins (1880) 105 N. C. 3, 18 Am. St. Rep. 874, 11 S. E. 164; Cox v. Brower (1894) 114 N. C. 422, 19 S. E. 365; SHEAFER v. WOODSIDE (reported herewith, ante, 775); Ankeny v. Penrose (1851) 18 Pa. 190; Reed v. Reed (1864) 46 Pa. 239; Beale v. Kirk (1877) 84 Pa. 415; Peters's Appeal (1884) 106 Pa. 340; Gregory v. Com. (1888) 121 Pa. 611, 6 Am. St. Rep. 804, 15 Atl. 452; Porter v. Nelson (1888) 121 Pa. 628, 15 Atl. 852; Richards v. Walp (1908) 221 Pa. 412, 70 Atl. 815; Fidelity Title & T. Co. v. Chapman (1910) 226 Pa. 312, 75 Atl. 428; Camp v. John (1917) 259 Pa. 38, 102 Atl. 285; Delany v. Robinson (1837) 2 Whart. (Pa.) 503; Wilson v. Eckman (1913) 55 Pa. Super. Ct. 403; Hutsonpiller v. Stover (1855) 12 Gratt. (Va.) 579.

It was said in Ankeny v. Penrose (1851) 18 Pa. 190, that the rebuttal of the presumption of payment from lapse of time, by circumstances, is for the court, but the truth of the fact from which the rebuttal is alleged to arise is for the jury; but that the question is often so mixed and complicated with law and fact that the whole matter of repelling the presumption ought to be left to the jury.

[187] See North Carolina cases cited in note 186, supra, the statute in that state creating a presumption of payment.

[188] It is generally assumed, in the cases, that the presumption is one of law. As particularly recognizing this doctrine, see the following cases: Lyon v. Adde (1872) 63 Barb. (N. Y.) 89; Cox v. Brower (1894) 114 N. C. 422, 19 S. E. 365; Beekman v. Hamlin (1890) 19 Or. 383, 10 L.R.A. 454, 20 Am. St. Rep. 827, 24 Pac. 195; Cope v. Humphreys (1825) 14 Serg. & R. (Pa.) 15; Hayes's Appeal (1886) 113 Pa. 380, 6 Atl. 144.

The question whether the presumption of payment from lapse of time arises on conceded facts is one of law for the court. Adams v. Richardson (1888) 30 S. C. 215, 9 S. E. 95, later appeal in (1890) 32 S. C. 139, 10 S. E. 931.

[189] See Wigmore on Evidence, vol. 4, § 2491, in which it is pointed out that the term, "presumption of fact," is a misnomer, and should be discarded.

[190] The view is taken in Smith v. Steen (1892) 38 S. C. 361, 16 S. E. 1003, that the presumption of payment is not a rule which the courts can apply in cases on trial before a jury, as the presumption of payment is one of fact, and, the jury being the triers of facts in issue, the court can only announce the rule and allow the jury to apply it to the facts; but that this rule does not obtain in cases where a jury is dispensed with.

In Macaulay v. Palmer (1891) 125 N. Y. 742, 26 N. E. 912, the court said that the presumption of payment, arising from lapse of time, "is not one of law that is available to a defendant as a bar to the action on the claim, but one of fact for the jury. Under the defense of payment, the lapse of time may be considered in connection with

question whether the evidence is sufficient to rebut the presumption is also a question for the jury.[191] Yet even in those jurisdictions in which the presumption has been regarded as one of fact, which, strictly speaking, should be drawn by the jury, it has been held that the court may give effect to it if a verdict against it must have been set aside,[192] and that, in the absence of

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all the facts and circumstances of the case, and it may sometimes, with the other circumstances, warrant the inference that the claim was paid. The nonsuit in this case cannot be upheld upon the ground that, from lapse of time, there is a conclusive presumption that the claim was paid. . . . The most that the defendant was entitled to, on the question of the lapse of time, was to have it submitted to the jury as evidence, in support of the defense of payment."

In M'Bride v. Moore (1834) Wright (Ohio) 524, the position is taken that it is for the jury, and not for the court, to draw the presumption of payment arising from lapse of time, and that the court should not grant a nonsuit because of such presumption.

In Brinkman v. Cram (1916) 175 App. Div. 372, 161 N. Y. Supp. 965, the court stated that the presumption of payment from lapse of time was one of fact, and not of law, and that it was for the jury to draw the conclusion, upon all the facts and circumstances of the case.

And it was said in Flagg v. Ruden (1850) 1 Bradf. (N. Y.) 192, that the presumption of payment is always a question for the jury.

Also in St. Mary's Church v. Miles (1835) 1 Whart. (Pa.) 229, the court stated that the lapse of twenty years, without repelling circumstances, was, at most, only evidence from which the jury, and not the court, were to draw the inference of payment. More recent cases in this state have, however, overruled this doctrine.

See also, to the effect that the presumption of payment arising from lapse of time is one of fact for the jury: Hall v. Roberts (1892) 63 Hun, 473, 45 N. Y. S. R. 355, 18 N. Y. Supp. 480; Rosenstock v. Dessar (1903) 85 App. Div. 501, 83 N. Y. Supp. 334, later appeal in (1905) 109 App. Div. 10, 95 N. Y. Supp. 1064; Blackburn v. Squib (1823) Peck (Tenn.) 60; Atkinson v. Dance (1836) 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; Lyon v. Guild (1871) 5 Heisk. (Tenn.) 175; see, however, McDaniel v. Goodall (1865) 2 Coldw. (Tenn.) 391, in which it was said, without special notice of the fact that the proceeding was in equity, that the rule as to presumption of payment from lapse of time was a fixed and stable rule of evidence, and the court would apply it without the aid of a jury.

[191] Whether the evidence was sufficient to rebut the presumption of payment arising from lapse of time was said in Booker v. Booker (1879) 29 Gratt. (Va.) 605, 26 Am. Rep. 401, to be a question exclusively for the jury, and not for the court.

Circumstances tending to rebut the presumption of payment, from lapse of time, are ordinarily referable to a jury to determine, whether, on the whole, it is reasonable to believe that the debt, notwithstanding the lapse of time, has not been paid. Joy v. Adams (1846) 26 Me. 330.

Whether the testimony of the legatee was sufficient to overcome the presumption of payment of the legacy, arising from lapse of time, was said to be a question of fact, in Kingman v. Kingman (1876) 121 Mass. 249.

[192] The view was taken in Brotherson v. Jones (1843) Hill & D. Supp. (N. Y.) 171, that, although the inference of payment is strictly for the jury, the court may dismiss the complaint, if, in view of the presumption of payment from lapse of time, a verdict of nonpayment would have been set aside.

And in Owen v. Calhoun (1890) 55 Hun, 608, 29 N. Y. S. R. 302, 8 N. Y. Supp. 447, the court said: "It is true that presumption of payment after twenty years is a presumption of fact, and not of law, and therefore must ordinarily be found by a jury; yet where the evidence is of such a character that the jury must give effect to the presumption, and a contrary verdict would be set aside as against the weight of evidence, the court may dispose of the question by dismissing the complaint, or directing a verdict." And it was held in this case that the court properly dismissed the complaint, where the claims sued on were twenty-one years old, and the creditor, during the period relied on to create the presumption of payment, was in needy circumstances, having at one time during this period gone into

rebutting circumstances, the jury must give effect to the presumption.[193]

bankruptcy, and it further appeared that the note evidencing part of the claim in question could not be produced, the failure to produce it being explained merely by the plaintiff's testimony that it was lost.

[193] The position is taken in Thompson v. Thompson (1859) 2 Head (Tenn.) 405, that the presumption of payment, arising from lapse of sixteen years, in the case of a bond or judgment, is an artificial or legal presumption which the jury cannot disregard, in the absence of rebutting circumstances. As approving this rule, see also Yarnell v. Moore (1866) 3 Coldw. (Tenn.) 173, and Kilpatrick v. Brashear (1873) 10 Heisk. (Tenn.) 372.

It was said in Stover v. Duren (1849) 3 Strobh. L. (S. C.) 448, 51 Am. Dec. 634, that "the presumption of payment, which, in reference to debts not embraced by the Statutes of Limitations, arises after the lapse of twenty years, is not a presumption of law, that is, a rule which the court itself may apply; but is a presumption of fact, recognized by law, from which a conclusion ought to be deduced by a jury. It is, however, one of those strong presumptions which shift the burden of proof; which, from frequent occurrence, have become familiar to the courts; and which, being constantly recommended to juries from motives of policy, have acquired an artificial force, and become as important as presumptions of law. Although the court itself cannot make such a presumption, a new trial will usually be granted, if a jury disregards it."

In Foulk v. Brown (1834) 2 Watts (Pa.) 209, the court stated that the lapse of twenty years was evidence from which, when not rebutted, the jury was bound to draw a conclusion, through the court could not. More recent decisions in this state, however, hold that the presumption is one of law for the court. R. E. H.

L. F. NILES, Respt.,

v.

ROBERT P. KAVANAGH and Wife, Appts.

California Supreme Court (In Banc)—October 2, 1918.

(— Cal. —, 175 Pac. 462.)

Usury — payment of insurance premium — effect.

1. Requiring one procuring a loan upon a chattel mortgage to keep the property insured for the benefit of the mortgagee does not, where the premium does not go to the lender, and is in no sense compensation for the use of the money, render the transaction usurious, although the lender receives full legal interest for the loan.

[See note on this question beginning on page 834.]

Same — compensation to broker.

2. A loan is not made usurious by a commission paid the broker who procures it, although the borrower pays the lender the full legal interest and the statute provides that no further or other charge than the interest allowed shall be paid or in any way received for any services or upon any pretext whatsoever.

APPEAL by defendants from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to foreclose a chattel mortgage. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. C. Flannery for appellants.

Mr. Henry B. Lister, for respondent:

The allegations of the answer fail to show that more than 2 per cent was charged, or that there was any intent to commit usury. It does not properly plead usury.

22 Enc. Pl. & Pr. 438, 452.

Sloss, J., delivered the opinion of the court:

The plaintiff brought this action to foreclose a chattel mortgage executed by the defendants to secure the payment of their promissory note for $600, with interest at 2 per cent per month. From the judgment, which was in favor of the plaintiff, the defendants appeal.

The execution of the note and mortgage, and the nonpayment of the amount for which judgment was given, are not questioned; the sole claim of the defendants being that the loan evidenced by the note and mortgage was void under the terms of "an act to define personal property brokers and regulate their charge and business." Stat. 1909, p. 969, as amended by Stat. 1911, p. 978. That act defines "personal property brokers" as including, among others, all persons engaged in the business of loaning money upon the security of chattel mortgages. It authorizes such brokers to charge and receive 2 per cent per month as a benefit or percentage upon money advanced, and declares (§ 3) that "no further or other charges either for recording, insuring or examining the security or property, or for the drawing, executing or filing of papers, or for any services or upon any pretext whatsoever beyond the aforesaid charge for interest or discount shall be asked, charged, or in any way received, where the same would thereby make a greater charge for the money or thing advanced than the aforesaid rate of 2 per centum per month, and where made, all such charges shall be considered and be of the same effect as so much added interest. . . ."

Section 4 of the act provides that no such contract of a personal property broker, by which any greater interest rate than 2 per centum per month is charged, received, or contracted for, "shall be valid or of any force, virtue, or effect."

The court found that the plaintiff was not a personal property broker, or engaged in the business of loaning or advancing money as such, and found further, in effect, that she had not charged or received any rate of interest in excess of that permitted by law. These findings are assailed as unsupported. We need not consider the first of them, which becomes immaterial if there was sufficient evidence to justify the findings that the plaintiff had not charged or received interest beyond the lawful rate.

It appears that the plaintiff was a widow, who had been, for a number of years, in the habit of loaning small sums of money upon the security of chattel mortgages. Her transactions were conducted through one Winston, a broker. In the instance under consideration, there was no direct communication between her and the defendants. The latter applied to Winston for a loan upon the security of their household furniture. The loan was made upon the following day, the defendants executing their note for $600 and their mortgage. They received from Winston the amount specified in the note, less $30, which he claimed as a commission for obtaining the loan. From the sum so advanced, the defendants subsequently paid the sum of $12 as a premium upon a policy insuring the mortgaged property against fire; the loss, if any, being made payable to the plaintiff, as her interest might appear. The mortgage required the borrowers to keep the property thus insured for the protection of the mortgagee.

With reference to the $30 charged by Winston, the court's finding was that Winston acted as agent of both parties, and received the $30 from the defendants as commission for services rendered to them in ob-

taining the loan. The statute seeks to prevent the lender from receiving as compensation for the use of money anything in excess of 2 per cent per month. Any device by means of which a greater compensation is exacted is forbidden, despite any attempt to cloak its character under the name of "bonus" or "commission." A payment to an agent of the lender is, in effect, a payment to the lender himself. But where the lender is in no way interested in a charge, or connected with it, the transaction is not to be denounced as usurious. The evidence in this case justified the court in concluding that the defendants employed Winston as their agent to obtain a loan for them, and agreed to pay him $30 for the services rendered by him to them in obtaining it. The plaintiff was not concerned with this charge, she herself paying a separate compensation to Winston for his services to her. The rule generally applied under statutes similar to ours is that under such circumstances commissions paid by borrowers to loan brokers "do not render loans made through them usurious, even though the lender may receive the full legal rate of interest." 39 Cyc. 979, and cases cited.

Usury—compensation to broker.

The only other ground upon which the validity of the loan is assailed is that the borrowers, pursuant to the terms of the mortgage, paid a premium for insuring the property. The insurance was for $1,000, an amount considerably in excess of the loan, and ran for three years,—a period which would expire long after the maturity of the note. In the absence of anything to show bad faith, the requirement that the security be protected by insurance, and compliance with this requirement, did not violate the act. The prohibition of the statute against the making of charges for "insuring" the security of property applies only "where the same would thereby make a greater charge for the money or thing advanced than the aforesaid rate of 2 per centum per month." Where a payment does not go to the lender, and is in no sense a compensation to him for the use of his money, the requirement that it be made does not violate the law. It is a very usual and entirely legitimate practice for one lending money upon mortgage of real or personal property to require that the borrower insure the security against loss. By so insuring, the borrower is protecting his own property. He is not paying any additional compensation for the use of the money. Even where the lender is an insurance company, and requires, as a condition of making a loan at full legal interest, that the borrower take out insurance with it, the loan is not to be deemed usurious in the absence of evidence that the premium is in excess of the usual or fair rate for insurance, or that in some other respect the provision for insurance was designed as a cover for unlawful interest. 39 Cyc. 983; Washington L. Ins. Co. v. Paterson Silk Mfg. Co. 25 N. J. Eq. 160; Homeopathic Mut. L. Ins. Co. v. Crane, 25 N. J. Eq. 418; Utica Ins. Co. v. Cadwell, 3 Wend. 296, 301; New England Mortg. Secur. Co. v. Gay (C. C.) 33 Fed. 636. These decisions go upon the ground that the premium is not a payment for the loan of the borrowed money, but is simply compensation to the insurer for the risk incurred. If this be so where the lender is the insurer, there is much less reason for claiming illegality where the insurance is issued, and the premium received, by a third party.

Same—payment of insurance premium—effect.

No other points are made.

The judgment is affirmed.

We concur: **Angellotti,** Ch. J.; **Shaw,** J.; **Wilbur,** J.; **Melvin,** J.; **Lorigan,** J.; **Richards,** Judge pro tem.

ANNOTATION.

Usury: requiring borrower to pay insurance premium on property mortgaged as security.

The correctness of the decision in the reported case (NILES v. KAVANAGH, ante, 831) to the effect that an agreement by the borrower of money to pay the insurance premiums on property mortgaged to secure the loan does not make the contract usurious, particularly where the premium is received by a third party who has no interest in the loan, seems to be incontrovertible, since in such a case the lender certainly receives no additional compensation for the use of his money by reason of the insurance of the security. And the decision is supported by all of the authorities which a search discloses to have passed upon the question. In fact, most of the decisions go even farther, for in some instances the insurance was placed with the lender and the premium paid to him.

Thus, in Matthews v. Georgia State Sav. Asso. (1918) 132 Ark. 219, 200 S. W. 130, where a loan bearing the highest legal rate of interest was made, and in addition the borrower agreed "to take out and keep paid" a specified amount of insurance on the property mortgaged to secure the loan, it was expressly held that the agreement did not constitute usury unless it be shown that the policy was taken out as a cloak or device to evade the usury statutes. In this case it does not appear with whom the insurance was to be placed.

And in New England Mortg. Secur. Co. v. Gay (1888) 33 Fed. 636, where property was conveyed to secure a loan, it was held that the payment of the insurance premiums on the property by the borrower, in addition to the full legal rate of interest on the loan, did not render the transaction usurious, since in such a case the premiums are a lawful expense incurred in protecting the property conveyed to secure the debt.

So, in New York F. Ins. Co. v. Donaldson (1838) 3 Edw. Ch. (N. Y.) 199, where an insurance company made a loan secured by a mortgage on condition that the borrower keep the mortgaged property insured in the lender company, it was held that the transaction was not usurious, it not appearing that the agreement was intended by the mortgagees as a device or means to evade the statute against usury. This decision was upon the ground that when the insurance is made at the usual rate of premium, the premium is not for the loan, but for the risk which the company incurs by the contract of insurance, and for which the borrower receives an equivalent for his premium independent of the loan, which was the position taken by the court in the earlier case of Utica Ins. Co. v. Cadwell (1829) 3 Wend. (N. Y.) 296, in which it merely appeared that the borrower was required to insure certain property with the lender, no reference being made to any mortgage of such property as security.

And in Craig v. McMullin (1840) 9 Dana (Ky.) 311, where a loan was made on the security of a slave, with interest and a sum not exceeding a specified amount per annum for risk of the slave's death, it was held that the stipulation of the premium for insurance did not render the loan usurious, it not appearing that the assumption of risk for the premium was a shift or device to cover usury.

G. J. C.

STELLA MAY BROWN
v.
DES MOINES STEAM BOTTLING WORKS et al., Appts.

Iowa Supreme Court—March 14, 1916.

(174 Iowa, 715, 156 N. W. 829.)

Evidence — res ipsa loquitur — running truck onto sidewalk.

1. Permitting a heavy auto truck to be diverted without warning from the street onto the sidewalk, to the injury of a person standing there, is prima facie evidence of negligence, to overcome which by proof of due care the burden is on the owner of the truck.

[See note on this question beginning on page 840.]

Trial — jury — negligence of one hit by auto truck.

2. The jury must determine whether one hit by an auto truck while standing on a sidewalk waiting to cross the street was guilty of contributory negligence.

Appeal — failure to comply with rule — effect.

3. Failure to set out in the brief the error, propositions, and authorities, as required by the rules of court, will prevent consideration of the assignment by the appellate court.

APPEAL by defendants from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover damages for personal injuries, alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **George Wambach and Read & Read**, for appellants:

Mere negligence will not render one person liable to another for a loss which the latter would not have sustained had there been no such negligence, unless the negligence consists in some violation of duty which the one person owes to the other.

Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. 130 Iowa, 123, 5 L.R.A. (N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45; Sjogren v. Hall, 53 Mich. 277, 18 N. W. 812; Case v. Chicago, R. I. & P. R. Co. 64 Iowa, 762, 21 N. W. 30; O'Connor v. Illinois C. R. Co. 83 Iowa, 111, 48 N. W. 1002; Dillon v. Iowa C. R. Co. 118 Iowa, 649, 92 N. W. 855; Stearns v. Ontario Spinning Co. 184 Pa. 519, 39 L.R.A. 844, 63 Am. St. Rep. 807, 39 Atl. 292, 3 Am. Neg. Rep. 485; Wall v. Lit, 195 Pa. 375, 46 Atl. 4, 7 Am. Neg. Rep. 573; New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 38 L.R.A. 134, 22 So. 680.

Unless the liability of the motor truck to be thrown or made to slide or run upon the sidewalk, or the place where plaintiff stood, could reasonably have been anticipated by the driver of the truck, or unless an ordinarily prudent person would have anticipated such result there can be no recovery.

Gould v. Slater Woolen Co. 147 Mass. 315, 17 N. E. 531; Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 394; Cressy v. Postville, 59 Iowa, 62, 12 N. W. 757; Jerolman v. Chicago G. W. R. Co. 108 Iowa, 179, 78 N. W. 855.

If the accident is one which an ordinarily prudent person could not have anticipated, then the accident is "an unavoidable one," and there can be no recovery.

Nelson v. Chicago, M. & St. P. R. Co. 30 Minn. 74, 14 N. W. 360.

Ordinary care is to be used at all times and in all places by persons using the sidewalk or streets of a city. Where any want of ordinary care, however slight, contributes to the injury as an efficient cause thereof, recovery cannot be had; for the law will not undertake to determine which of two wrongdoers is more at fault.

Jerolman v. Chicago G. W. R. Co. 108

Iowa, 179, 78 N. W. 855; Buchholtz v. Radcliffe, 129 Iowa, 30, 105 N. W. 336, 19 Am. Neg. Rep. 219; Munger v. Marshalltown, 56 Iowa, 216, 9 N. W. 192; Cressy v. Postville, 59 Iowa, 62, 12 N. W. 757; Tuffree v. State Center, 57 Iowa, 538, 11 N. W. 1; McLaughlin v. Griffin, 155 Iowa, 302, 135 N. W. 1109.

Plaintiff failed to exercise ordinary diligence and care.

Beem v. Tama & T. Electric R. & Light Co. 104 Iowa, 566, 73 N. W. 1045; McLaughlin v. Griffin, 155 Iowa, 302, 135 N. W. 1109.

The question of negligence is to be determined from the facts and circumstances in each case.

Hanley v. Ft. Dodge Light & P. Co. 133 Iowa, 329, 107 N. W. 593, 110 N. W. 579; Dillon v. Iowa C. R. Co. 118 Iowa, 649, 92 N. W. 855; Stearns v. Ontario Spinning Co. 184 Pa. 519, 29 L.R.A. 844, 63 Am. St. Rep. 807, 39 Atl. 292, 3 Am. Neg. Rep. 485.

Messrs. **Dunshee & Haines**, for appellee:

The defendants waived any error that may have been involved in the action of the trial court in refusing to sustain the motion to direct a verdict, by offering evidence and failing to renew the motion at the close of all the evidence.

Hanson v. Kline, 136 Iowa, 101, 113 N. W. 504; Underwood v. Oskaloosa Traction & Light Co. 157 Iowa, 352, 137 N. W. 933.

Defendants have not presented the record in this court in such a manner as to entitle them to have the court pass upon the sufficiency of the evidence to sustain the verdict.

Supreme Court Rules, Rule 53.

The evidence sufficiently establishes freedom from contributory negligence on the part of the plaintiff.

Gaynor, J., delivered the opinion of the court:

This is an action to recover damages for personal injury. It is claimed that the defendants negligently and carelessly ran into and struck the plaintiff with their auto truck while she was standing upon the sidewalk at the southwest corner of Fifth and Locust streets. Locust street runs east and west; Fifth street north and south, intersecting Locust street. The defendant was driving an auto truck, proceeding eastward on Locust street, south of the middle of the center of the street. Plaintiff, at the time of the injury, was standing at the corner of Locust and Fifth streets on the sidewalk, at a distance variously estimated at from 18 inches to 3 feet from the outer edge of the walk. On Locust street, near the center of the street, are street-car tracks, which, as they approach Fifth street, are, by means of a switch, turned onto Fifth street, and passing south on Fifth, the main line on Locust street proceeding east from that point. On this particular morning, plaintiff came from the south on Fifth street to the corner of Fifth and Locust streets. She proceeded on her journey northward, and attempted to pass over Locust street, but, on discovering defendants' car approaching from the west, stepped back upon the sidewalk, and remained standing there until she was struck. Defendants' car, as it came from the west on Locust street, reached a point where the rails of the street railway track divide. At this point, cars on that street are switched onto Fifth street. There the evidence tends to show defendants' car struck a frog or curve in the track, and was diverted from its main course eastward, and came upon the sidewalk where plaintiff was standing, causing her injuries; that the frog in the Locust street track, by which the cars are diverted from Locust street onto the curve leading on Fifth street, is about 47 feet west of the Fifth street curb line, and from 12 to 18 feet north of the curb line on Locust street. At the point of the frog, the track begins to curve around the corner onto Fifth street. The sidewalks are 12 feet wide. The defendants' car, while being operated on Locust street, was driven with the north wheel a little south of the railway track on Locust street, and the evidence tends to show that the left front wheel of the car struck this frog and dropped into the flange, and the wheels were twisted towards the south. The car thereafter ran in a southeasterly direc-

tion until it struck the plaintiff, who was standing on the sidewalk at the corner of Locust and Fifth streets.

The jury might have found from the testimony that the truck was running 7 or 8 miles an hour. There is a difference of opinion as to this point among the witnesses. The jury might have found that the speed was not reduced as it approached this curved track. The jury might also have found that the driver of the truck was not looking ahead, but to one side, and was driving with but one hand upon the wheel. The evidence discloses that the driver observed the plaintiff when she attempted to cross the track, and her return to the sidewalk. The jury might have found that he made no further observation upon this matter until he struck her.

The party in charge of the truck testified that he had crossed this track at this point frequently before with the same truck. He says it was the flange of the switch that caused the machine to be thrown upon the sidewalk; that he had noticed this flange before, when crossing at this point; that, when he struck the flange, his steering wheel was thrown out of his hands; that the car came with such terrific force against the flange that he was unable to hold the wheel; that he had used this car on previous occasions.

It appears that this was a Reo truck; that the lightest truck Reo people make weighs from 1,800 to 2,000 pounds. It appears that Locust street had a wood block pavement; that the day was warm and dry. There is evidence that a Reo truck, traveling at 4 or 5 miles an hour, may be stopped within 5 or 6 feet; that when moving at 7 or 8 miles an hour, it may be stopped in 10 or 12 feet.

The evidence discloses the following facts without dispute: That the defendants' car was traveling eastward on Locust street; that plaintiff was standing on the sidewalk at the corner of Locust and Fifth streets; that the defendants' car, without notice or warning to anyone, left the street upon which it was traveling and came upon the sidewalk, where plaintiff was standing, and injured her. From this the jury could have found, nothing further appearing, that the driver of the car was negligent in allowing it to depart from its main course eastward, turning abruptly to the right, and, without warning, upon the sidewalk where people were standing, and where they had a right to stand. The jury could have found that the defendants, nothing further appearing, violated a duty that they owed to the general public to exercise reasonable care in the management of their automobile so as not to inflict injury unnecessarily upon those who were in the exercise of their right to be upon the sidewalk. Therefore, proof that the driver permitted his machine to be diverted from its main course of travel on the street to the sidewalk, without any warning to the people standing there of the fact of its coming, would be proof of such negligence, prima facie, as would, in and of itself, entitle the one injured by the act to recover as for negligence. Negligence presupposes a duty to do or not to do a particular thing. It was the duty of the driver of the automobile upon the traveled part of the street, to control and manage his automobile with such reasonable care and prudence as not to divert or permit its course to be diverted from the main street onto the sidewalk, upon which people were standing. Therefore, when it is shown that one who is traveling upon the portion of the street set apart for the use of vehicles, suddenly, and without warning, diverts his course and comes upon the sidewalk upon which people are standing, he violates that duty which he owes to those rightfully on the sidewalk,

Evidence—res ipsa loquitur—running truck onto sidewalk.

and thus, prima facie, becomes involved in negligence. This involves the doctrine of res ipsa loquitur, and says: You violated your duty to those rightfully standing upon the sidewalk by allowing your car to be diverted suddenly from its course, and to come upon the sidewalk, without warning to those rightfully congregated there. It would be a doctrine against all reason to hold that one driving upon the traveled portion of a street, with a dangerous, heavy, and fast-moving vehicle, may permit his vehicle to be suddenly diverted from its course upon the traveled street onto and over a sidewalk set apart for the use of pedestrians. It is not going too far to say that such an act not only involves negligence, but it would have a tendency to show a reckless and wanton disregard of the rights of those upon the sidewalk, and a violation of a palpable duty which the law enjoins upon every man, to so exercise his own right that he may not unreasonably or unnecessarily imperil the safety of others in the exercise of their rights.

It is claimed, however, that, without any fault on the part of the driver of this automobile, the machine was diverted from its course by the interposition of a distinct, independent agency over which the defendants had no control, and which, operating upon its movement, forced the machine, without any fault on his part, onto the sidewalk, to the injury of the plaintiff. It is claimed that the interposition of this new and independent agency was unforeseen and unanticipated by the defendants; could not have been foreseen and anticipated by them; that they were in no way in fault for its existence or interposition; and that this, and not the defendants' act, was the proximate cause of the injury. This contention, however, is answered by the record. The jury might well have found that the defendants knew of the existence of this independent agency, which it is claimed intervened and caused the injury; that, as the driver approached the place where this agency existed, he did not slacken his speed; that he did not look to observe the manner in which he approached it; that he was not looking in front, but looking to one side; that he had but one hand upon the steering gear, and that, by the exercise of reasonable care on his part in the control and management of the machine, he could have avoided, or might have avoided, the impact with and the consequences that followed the interposition of this new agency, and thereby prevented the machine from being diverted from its course onto the sidewalk. It is a matter of common knowledge that the movements of these heavy, fast-moving vehicles upon the street are required to be kept under reasonable control, to avoid having their course diverted by the intervention of obstacles upon the street, and that, if not held under control, a slight obstacle will so divert them, and imperil the safety of those rightfully upon the street; that, when diverted, they become a menace to those in the vicinity of their course,—a menace from which it is difficult sometimes to escape. Therefore it becomes the duty of one upon a public highway in a thickly populated part of a large city to exercise reasonable care to see that he has the instrumentality under control, and to so manage it that it will not unreasonably or unnecessarily imperil the safety of others upon the public highway. Whether the defendants did this in this particular case was clearly a question for the jury. The jury might well have found that, if the driver had his automobile under such perfect control as he should have had on a public street, and was giving reasonable attention to it, he might have avoided the collision with the flange at the switching point, or, having collided with it, might have stopped the same in

time to have avoided the injury complained of.

The general rule is that where a collision occurs between a vehicle on the wrong side of the road, or at a place where the vehicle has no right to be, with a person rightfully occupying the place, there is a presumption that the collision was caused by the negligence of the person who was in the wrong. This, however, of course, is open to explanation. The fact, however, remains, that if the truck left the public traveled highway, and came upon the sidewalk where people were congregated, and, in so doing, collided with one rightfully upon the walk, defendants are, prima facie, guilty of negligence, and are liable for the injury, unless their act in so doing is excused by reason of the intervention of some independent agency, over which they had no control, which, operating upon their movement, forced them, without fault on their part, into the position as hereinbefore explained. See Riepe v. Elting, 89 Iowa, 90, 26 L.R.A. 769, 48 Am. St. Rep. 356, 56 N. W. 285; Carpenter v. Campbell Automobile Co. 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1. When the substantive fact is shown that the defendants departed from the line of travel, which they had a right to pursue, and suddenly, without warning, came upon the sidewalk where plaintiff was standing, it then became their duty, in order to exculpate themselves, to explain and justify their conduct in so doing.

This brings us to a consideration of one of the errors assigned by the defendants, and the only one which, we think, justifies any consideration at our hands. The court, in its fourth instruction to the jury, said: "And if you find from the evidence that the motor truck in question was run upon the sidewalk upon which the plaintiff was standing, this would be prima facie evidence, and would raise the presumption that the defendants were negligent in running their motor truck upon the sidewalk."

This instruction is in accord with what we have already said, and announces a correct rule. If the defendants had desired the thought to be amplified, they should have asked an instruction upon that point.

We have read the record in this case with some care, and no reversible error appears. Many questions are argued which we do not feel called upon to discuss in this case, because, in so far as they are properly presented, they have been so frequently decided by this court that any further discussion of them would add nothing to what has already been said.

It is, however, urged that the plaintiff was guilty of contributory negligence. We dismiss this by saying that the question was one for the jury, and the jury found adverse to defendants' contention.

Trial—jury—negligence of one hit by auto truck.

From our reading of the record, we are satisfied that the plaintiff neglected no duty which she owed to herself for her own protection; that, when she retired to the sidewalk, she had every reason to suppose, as a reasonably prudent person, that she had secured a place free from any danger from contact with defendants' automobile. Under no theory of this case, could she be expected to do more for her safety than it is apparent, from this record, she did, unless it should be held that reasonable prudence and caution for her own safety required her to hide behind the lamppost, or flee for safety into the building.

In view of the manner in which this case has been presented to this court, we desire to say that § 53 of the rules of this court (Code Supp. 1913, p. 1947) has a legitimate purpose among the rules, and must be followed, if counsel would have this court review errors alleged to have been committed by the court below. In law actions, all cases are

triable upon error. Rule 53 provides that: "The brief (of counsel) shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them. . . . No alleged error or point not contained in this statement of *points* shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing."

In this case, the brief of counsel presents what are alleged to be sixteen errors committed by the court. Commencing with alleged error No. 5, the assignment is in substantially the following language: "The court erred in refusing to give instructions asked by the defendants, and so on, including alleged error No. 11."

No reason is given for reversing the ruling on error claimed, nor is our attention called to anything in the action of the court claimed to constitute error. Then, commencing with alleged error No. 12, the brief recites: "The court erred in overruling defendants' objection to questions at page 24 of abstract, lines 7 and 9, etc.," and substantially in the same language, including error No. 15.

Errors 1, 2, 3, and 4 are the only errors, with points, in which any reason is given for reversal, or any statement of what the claimed error consists. We cannot and do not consider errors in this way, without any statement of *points* made. This rule was not made for the purpose, alone, of enabling this court to easily and readily appreciate and understand the errors complained of, but for the larger reason of enabling counsel on the other side to know what *points* are relied upon, and what is urged as error in the action of the court; and it is for the protection of counsel, as well as this court, that this rule is promulgated and enforced.

Appeal—failure to comply with rule—effect.

We find no reversible error in the case, and the cause is affirmed.

Evans, Ch. J., and **Ladd** and **Salinger**, JJ., concur.

ANNOTATION.

Injury by road vehicle to person on sidewalk.

I. Introductory, 840.
II. Rule as to motor vehicles, 840.
III. Rule as to other vehicles, 843.
IV. Illustrations:
a. Motor vehicles, 844.
b. Other vehicles, 849.
V. Contributory negligence, 853.

I. Introductory.

As the title of the note indicates, its purpose is to discuss the liability arising from injury by a road vehicle to a person on the sidewalk. It excludes liability for injury received by a pedestrian while crossing a street or highway, although incurred on a regular street or highway crossing; and it also excludes injury to a pedestrian caused by the riding of a bicycle on the sidewalk.

II. Rule as to motor vehicles.

The decisions uphold the general rule that where the driver of a motor vehicle, because of excessive speed, careless driving, or other negligent conduct, injures a pedestrian on the sidewalk, there may be a recovery for the injuries resulting therefrom. Jacob v. Ivins (1918) — C. C. A. —, 250 Fed. 431, affirming (1917) 245 Fed. 892; Keiper v. Pacific Gas & E. Co. (1918) — Cal. —, 172 Pac. 180; Kuchler v. Stafford (1914) 185 Ill. App. 199; J. F. Darmondy Co. v. Reed (1916) 60 Ind. App. 662, 111 N. E. 317; Carpenter v. Campbell Automobile Co. (1913) 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1; Roach v. Hinchcliff (1913) 214 Mass. 267, 101 N. E. 383; Murray v.

Liebmann (1918) 231 **Mass.** 7, 120 N. E. 79; Tuttle v. Briscoe Mfg. Co. (1916) 190 **Mich.** 22, 155 N. W. 724, 12 N. C. C. A. 909; Hodges v. Chambers (1913) 171 **Mo.** App. 563, 154 S. W. 429; Maynard v. Barrett (1918) — **Pa.** —, 104 Atl. 613; Van Winckler v. Morris (1911) 46 **Pa.** Super. Ct. 142; McGettigan v. Quaker City Automobile Co. (1912) 48 **Pa.** Super. Ct. 602.

But, in the absence of a showing of negligence on the part of the driver of a motor vehicle, there can be no recovery by the person injured. Thus, in Philpot v. Fifth Ave. Coach Co. (1911) 142 App. Div. 811, 128 **N. Y.** Supp. 35, it appeared that while a pedestrian was standing on the sidewalk a large automobile stage approached, and the driver turned the front of the machine so that the rear wheel ran against the curb, causing the extension of the coach to injure the pedestrian. The appellate court, in reversing a judgment for the plaintiff, said: "The action being based on negligence, to entitle the plaintiff to recover, there must have been a finding, sustained by the evidence, either that the chauffeur was negligent in the operation of this machine at the time in question,—in other words, that he did some act which a prudent person would not have done, or omitted some act which a prudent person would have done, in the operation of this omnibus,—or that, in some other respect, the defendant or its agents were negligent. The court charged that the skidding of the omnibus was not, of itself, evidence of negligence, and, on the proof, it is difficult to see how the skidding of the omnibus would have been prevented by any act of the chauffeur. If he put on the brakes to reduce the speed of the machine, that certainly was not evidence of negligence. Yet the evidence is uncontradicted that, in a condition of this kind, with the slippery pavement which then existed, skidding was likely to result from an application of the brakes. If the chauffeur had not attempted to regulate the speed of the omnibus by the application of the brakes, there would be a question as to whether failure to reduce the speed was not evidence of negligence. There is no evidence that the omnibus was going at an excessive or unusual rate of speed, and there is no suggestion of anything that the chauffeur did not do that he could have done to avoid this accident. Accepting the evidence of the defendant's witnesses, and I cannot see that there is any evidence to contradict their testimony, and applying the law of the case as stated to the jury by the court, there is a serious question presented, whether there was any evidence to sustain a finding that the chauffeur was guilty of negligence in the operation of this machine, which was the proximate cause of the injury. If the jury should find that, in consequence of the size of the machine, the condition of the pavement, and the motive power used, the machine could not be controlled so as to prevent an accident of this kind, there was a question for the jury as to the defendant's negligence. If they should find that it was negligence for the defendant to use such a machine in the prosecution of its business, so that a person lawfully on the sidewalk is mowed down by it in consequence of its operation, which could not, by the exercise of due diligence, be so regulated that it could not be kept from the sidewalk, causing injury to people there, the defendant would be liable. Assuming that these questions are presented in the case, they are clearly questions for the jury." And where an electric coupé was struck by a heavy touring car with such force as to deprive the driver of its control, so that it ran against a pedestrian on the sidewalk, it was held that the owner of the coupé was not liable for the resultant death of the pedestrian. The court said: "There was no testimony tending to show negligence on the part of Wight. He had no control over the force which was the proximate cause of the injury. It was through no fault of his that the vehicle was turned towards and driven upon the sidewalk. The complaint tendered no issue on the question of due care on his part after his machine was struck. Even if it had, the undisputed testimony shows that he did all

he could to stop it. It was, therefore, the duty of the trial court to direct the jury to return a verdict in his favor." Bishop v. Wight (1915) 137 C. C. A. 200, 221 Fed. 392.

In Williams v. Holbrook (1913) 216 Mass. 239, 103 N. E. 633, it appeared that the decedent, a boy about five years of age, was standing on the sidewalk, when an automobile operated by the defendant suddenly skidded from the roadway and, running on the sidewalk, struck and forced him against a building, causing injuries from which he died. It further appeared that the car was being driven on a portion of the street in which street railway tracks were located, and at the time of the accident water was running in the track, and the surface of the street in the vicinity was wet and slippery. The court, in discussing the question of negligence involved in the skidding of the car, said: "The jury could find that as the defendant, without slackening but with increased speed, turned to get off the wet track, the car skidded on the rails, and passed upon the sidewalk. The type of car, and the testimony of the expert called by the plaintiff, warranted a further finding that, by reason of their diameter, the tires adhered tenaciously to the groove of the track and, if an attempt were made to turn out, the tendency of the car, even with a dry track, would be to twist around and run onto the sidewalk, while, with a wet rail, the tendency to move laterally, and of the rear wheels to cling to the track, would be greatly increased. A verdict could not have been ordered for the defendant, as he requested. The jury properly were permitted to pass upon the question whether, from his experience as shown by his testimony, the defendant's conduct in the operation of the car in running in the groove of the track, and in applying increased power when trying to turn therefrom, was that of the ordinarily prudent driver, acting under like conditions. Brown v. Thayer, 212 Mass. 392, and cases cited. The plaintiff's expert, having testified in cross-examination that, from his experience in the same street, after skidding began it could not be stopped, was asked if he had not seen 'other light machines skid at the place where this accident occurred.' It was discretionary with the presiding judge whether this evidence should be admitted, and its exclusion shows no reversible error. Jennings v. Rooney (1903) 183 Mass. 577, 67 N. E. 665; Yore v. Newton (1907) 194 Mass. 250, 80 N. E. 472; Williams v. Winthrop (1913) 213 Mass. 581, 100 N. E. 1101. Proof, moreover, that similar cars had skidded, did not show their conditions of management, which, of course, were material, if such evidence was to have any probative value. French v. Sabin (1909) 202 Mass. 240, 88 N. E. 845. . . . The defendant's negligence, as we have said, depended upon the view the jury took of his acts in operating the car within instead of outside of the groove, and then attempting to turn from the track by increasing rather than by lessening the rate of speed. The evidence for the plaintiff showed that, even with the brakes set and the steering gear under full control, the car would continue to move irregularly, solely because of the position in which it had been placed. It follows that the mere skidding of the car was not an occurrence of such uncommon or unusual character that, unexplained, the jury could say it furnished evidence of the defendant's negligence."

But since the sidewalk is a safety zone from vehicles, an injury from a vehicle there incurred has been held to be prima facie evidence of negligence on the part of the driver thereof. Ivins v. Jacob (1917) 245 Fed. 892, affirmed in (1918) — C. C. A. —, 250 Fed. 431, wherein it appeared that the presence of an automobile on the sidewalk was due to the fact that the movement of the car was beyond the driver's control, because the steering gear would not work. The court said: "The use of the res ipsa loquitur phrase as the technical designation of a legal doctrine was avoided in the charge, because the phrase, as voicing a legal doctrine or the law of the case as the law governing it, was deemed not to be applicable. The thought expressed to the jury was merely the

statement of the obvious truth that there are happenings attended by such circumstances as that the story of what happened cannot be told, without disclosing the responsibility for what happened. There is no more legal doctrine in the expression of such a thought than there is in the equivalent statement: From all the facts and circumstances surrounding this occurrence, anyone would be justified in concluding the negligence of the defendant was the cause of it. The argument of counsel, which concedes that the circumstances of the occurrence justify the inference of the negligence of someone, but not the negligence of the defendant, is a concession of everything, because one of the circumstances was that the defendant was driving the car. If this automobile had been, without warning, driven upon the sidewalk, there striking a pedestrian, no one could doubt that it would not only justify but compel a finding of negligence. This inference of fact is not stayed by the possibility that it might not have been intentionally driven upon the sidewalk. If such possibility were suggested, the answer would be: Show me that, and I am prepared to believe it; but, unless you do, I must hold you to be in fault. This attitude is sensible and just, and in accord with the accepted principle of the law of evidence, that he who has control of the proofs shall produce them. If the car was beyond control, the driver knows it, and can offer evidence of the fact. All the pedestrian could do would be to know the fact that the car was where it should not be driven, and that the circumstances indicated negligence. This constitutes prima facie proof. There is nothing in any of the cited cases to combat this view. Zahniser v. Pennsylvania Torpedo Co. (1899) 190 Pa. 350, 42 Atl. 707; Lucid v. E. I. Du Pont De Nemours Powder Co. (1912) L.R.A.1917E, 182, 118 C. C. A. 61, 199 Fed. 377; Allen v. Kingston Coal Co. (1905) 212 Pa. 54, 61 Atl. 572; Joyce v. Black (1910) 226 Pa. 408, 27 L.R.A.(N.S.) 863, 75 Atl. 602; Wolf v. American Tract Soc. (Wolf v. Downey) (1900) 164 N. Y. 30, 51 L.R.A. 241, 58 N. E. 31, 8 Am. Neg. Rep. 296. The inference of negligence is, of course, only prima facie, and may be rebutted. We are again in entire accord with counsel for defendants that the exculpating facts, so far as testified to by one of the defendants, were before the jury, and that they could not be disregarded. There is an old saying, however, to the effect that one hole may be filled by the digging of another. The hole which was filled was accounting for the automobile being run upon the sidewalk, by explaining that the steering gear would not work. The hole which was dug subjected the driver to the inference of negligence in attempting to operate a vehicle without the exercise of that degree of care which was called for by its defective condition. The latter became the real and only issue of negligence in the case. To present this feature of the case in its purely legal aspect, the testimony of the defendants is to be viewed as if it had been in chief, excusing defendants of negligence by showing a broken steering gear, and the witness, on cross-examination, had admitted negligence in the operation of a defective car."

See also the reported case (BROWN v. DES MOINES STEAM BOTTLING WORKS, ante, 835).

It has been held that, where the rate of speed is in dispute, it is a question for the jury. Jacob v. Ivins (1918) — C. C. A. —, 250 Fed. 431, affirming (1917) 245 Fed. 892; Hodge v. Chambers (1913) 171 Mo. App. 563, 154 S. W. 429; Van Winckler v. Morris (1911) 46 Pa. Super. Ct. 142.

III. Rule as to other vehicles.

The rule as to liability for injuries incurred by a pedestrian on the sidewalk from vehicles propelled in the street or roadway, other than motor vehicles, is substantially the same as those received from the careless or negligent operation of motor vehicles; and ordinary and reasonable care must be exercised by those superintending their operation, to avoid injury to a person using the sidewalk. If a driver or one having charge of a

road vehicle, by reason of careless driving, excessive speed, or negligent handling of the vehicle, injures a pedestrian on the sidewalk, a recovery may be had therefor. American Bolt Co. v. Fennell (1908) 158 Ala. 484, 48 So. 97; Corona Coal & I. Co. v. White (1908) 158 Ala. 627, 20 L.R.A.(N.S.) 958, 48 So. 362; Robita v. Crane Co. (1912) 176 Ill. App. 24; Murphy v. Brine Transp. Co. (1910) 206 Mass. 243, 92 N. E. 333; Fleischman v. Polar Wave Ice & Fuel Co. (1910) 148 Mo. App. 117, 127 S. W. 660; James v. Hayden Bros. (1915) 97 Neb. 619, 150 N. W. 1013; Goff v. Akers (1893) 1 Misc. 468, 21 N. Y. Supp. 454, affirmed in (1893) 139 N. Y. 653, 35 N. E. 207; Ehrlich v. New York (1912) 78 Misc. 373, 138 N. Y. Supp. 294; Ford v. Deigendesch (1918) — Pa. —, 104 Atl. 573; Prinz v. Lucas (1905) 210 Pa. 620, 160 Atl. 309, 18 Am. Neg. Rep. 245; McCaughey v. American Ice Co. (1911) 45 Pa. Super. Ct. 370; Wark v. Dunlap Co. (1912) 48 Pa. Super. Ct. 517; Amundsen v. Ward (1913) — Alberta, —, 24 West. L. R. 280, 11 D. L. R. 167; Crawford v. Upper (1889) 16 Ont. App. Rep. 440. Thus, in Goff v. Akers (1893) 1 Misc. 468, 21 N. Y. Supp. 454, affirmed in (1893) 139 N. Y. 653, 35 N. E. 207, the court said: "The plaintiff was lawfully upon the sidewalk at the time of the accident, and, seeing the thoroughfare clear, had the right to continue his journey without anticipating that a driver, without warning, would attempt to back a team across the sidewalk and imperil his life." And in McCaughey v. American Ice Co. (1911) 45 Pa. Super. Ct. 370, wherein it appeared that the cause of the injuries was the skidding of a heavy ice wagon, the court said: "The driver had a wide street before him, and his team was under his control. His haste was the sole cause of the trouble, and his employer must stand responsible for that."

In Crawford v. Upper (1889) 16 Ont. App. Rep. 440, wherein it appeared that a person on the sidewalk was knocked down by a horse and sleigh, the court said: "We have to say here whether the fact of a horse in the street of a city being seen running away, upsetting the cutter, throwing out the driver, and then running into the sidewalk and injuring a passenger thereon, does not show a prima facie case. I am inclined to think that it does. It would be hardly fair on persons injured in this way if the additional burden of proof of the cause or reason of the runaway should be cast upon them. It might, in many cases, be next to impossible to prove what took place in some other street, etc. I think the reasonable view of the law, and of the ordinary transactions of human life is, that if a man's horses, galloping through a street, run on and injure a passenger on the sidewalk, a case of prima facie wrong is shown. It may be fully explicable, but I think it calls for explanation."

See also Amundsen v. Ward (1913) — Alberta, —, 24 West. L. R. 280, 11 D. L. R. 167.

IV. Illustrations.

a. Motor vehicles.

In Jacob v. Ivins (1918) — C. C. A. —, 250 Fed. 431, affirming (1917) 245 Fed. 892, it appeared that a pedestrian on the sidewalk was struck and injured by an automobile, caused by the driver's loss of control, due to defective steering gear. It further appeared that the automobile was a new car, had only been in operation about one hour, and was defectively constructed. In holding the owner of the car liable for the pedestrian's injuries, the court said: "The machine had just crossed Berks street, and was running north on Eighteenth, when it swerved to the west, mounted the curb, pushed a stone carriage block some distance from its place, struck the plaintiff, and overturned. These facts were proved by the plaintiff herself, and by one or two other witnesses, and in themselves were sufficient to carry the case to the jury. We do not decide that they justified the application of the doctrine, 'Res ipsa loquitur.' It is fairly common knowledge that an automobile sometimes gets out of control, without the driver's fault; but, without more, the jury would have been at liberty to draw the inference of negligence. . . . It is clear

enough that the verdict is justified by the evidence; the driver's lack of due care might properly be inferred from the fact that, when he took the wheel, he knew that the car was not working satisfactorily, but took the risk of going on without examination, or effort to remedy what might be wrong, and, moreover, of running it on a narrow city street, at a rate of speed which some of the witnesses described as very fast."

In Keiper v. Pacific Gas & E. Co. (1918) — Cal. App. —, 172 Pac. 180, it appeared that the owner of an automobile left it standing unoccupied and unattended on a street railway track, while he went to a near-by store, and that during his absence it was struck by a street car and thrown against the curb and sidewalk, injuring the plaintiff, who was cleaning the sidewalk in front of his house. The court, in holding the owner of the automobile liable for the personal injuries sustained, said: "The appellant concedes that he was guilty of negligence in his act of placing his automobile upon the street-car tracks, and permitting it to remain standing thereon, but contends that such negligence on his part ceased the instant that the street car of his codefendant carelessly and negligently ran into and against his automobile; that his negligence was broken by the electric company's negligence, which was an independent, intervening, and the proximate cause of the damage, wholly unconnected with him. . . . The appellant was, confessedly, primarily at fault in placing and leaving his machine in a place where it would necessarily operate as an obstruction to the passage of the cars of the electric company over and along its track; and, as above declared, the negligence involved in that wrongful act necessarily continued so long as the obstruction remained, and until it had contributed to the damage which could not have occurred but for said obstruction. . . . The irresistible conclusion from the facts of this case, as they are alleged in the complaint, and as the appellant admits that the evidence shows them to be, is that the appellant's act was one of the procuring, active, proximate causes of the injury complained of; and that the said act involved a high degree of negligence, there can be no question, since the appellant himself testified that he was at all times aware of the fact that street cars passed over the tracks upon which he left his automobile standing, at frequent intervals during the day."

In Carpenter v. Campbell Automobile Co. (1913) 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1, it appeared that a person on the sidewalk was injured by an automobile which was driven thereon, in an attempt on the part of the driver to avoid a collision with a motor cycle, approaching at a high rate of speed on the wrong side of the street. The court held the owner of the car liable for the injuries sustained, and, in discussing the testimony, said: "The defendant's testimony is that he was on the right side of the street; that he saw a motor cycle coming towards him from the north; that he turned to the left to avoid collision with the motor cycle. He was at the time near the center of the street, at least 15 or 20 feet from the east curb. He could easily have turned to the right. There was no apparent obstacle to his so doing. Apparently the emergency did not arise until after he turned to the left. At least, the jury might have well so found. It was his duty to keep to the right. The jury might well have found that the emergency was due to and created by the negligent act of Black in turning his automobile to the left. The jury might, too, have found that if Black had his automobile under perfect control, as he should have had on a public street such as the one in question here, he might have stopped the same after the emergency had passed, and have prevented the injury. The testimony is that the automobile, running at the rate of speed authorized, might have been stopped within 15 or 20 feet. The record does not disclose any effort on the part of Black to stop the machine, even after the emergency passed. Means says he does not think he used the brakes at all, and the machine was not stopped

until it was stopped by the guy post; then only after passing over from the east side of the street to the west, up over the sidewalk, and across the same. This is so clearly a question for the jury that it needs no argument." The court, in passing on the instructions of the trial court, also said: "Complaint is made of instruction 6, given by the court on its own motion. This instruction was given and evidently intended as a guide to the jury, when they came to consider and determine whether, on the ground of an emergency existing at the time, producing confusion and excitement, the defendants had explained and justified their conduct in turning to the left and passing across the street to the west, and upon and across the sidewalk on which the plaintiff was traveling. The court said to the jury, in substance, in this instruction: 'If you find, from the evidence, the defendants did not exercise ordinary skill and care in managing the machine, or that the person driving the machine was at the time unable to control it, on account of his lack of knowledge or experience, even though you find there were defects in the same by reason of which he was unable to manage the car, nevertheless the driver would not be justified in turning it to the left and upon the sidewalk, where persons were traveling, unless you were satisfied there was a cause or an emergency requiring him to do so, in order to avoid injury. But even then, if you further find they did not have control of the car so that, by reasonable effort and care, they could have prevented the same from running upon the sidewalk, where people were passing and repassing, or if you find that by the exercise of reasonable care and diligence, and a proper knowledge of the operation of the car, they could have stopped the same by the use of the appliances on the car, placed there for that purpose, and they failed to do this, the existence of the alleged emergency will not shield them from the liability for resulting consequences.' That is, the court said: 'If you find, from the evidence, that the person operating this car has explained to your satisfaction that such an emergency existed as to justify him in turning to the left, to allow a certain motor cycle to pass him, nevertheless such person operating the machine must have it under control, after so turning to the left, that he may be able to avoid injury to others.' This instruction, though not happily worded, we think was not misleading or prejudicial, and, when properly analyzed and understood, correctly states the law as applicable to this branch of the case, and, though not worded with the technical niceness that appears in the instruction asked by defendant upon this point, yet we think it more correctly states the rule which should be observed by the jury on this branch of the case; and we find no reversible error in the giving of the same."

In Murray v. Liebmann (1918) 231 Mass. 7, 120 N. E. 79, the owner of an automobile was held liable for injuries sustained by a person standing on the sidewalk, who was struck by overhanging spare tires carried on the running board of the car.

In Roach v. Hinchcliff (1913) 214 Mass. 267, 101 N. E. 383, it appeared that the person killed was walking on the sidewalk, when an automobile driven by the defendant ran up behind him and struck him with such force that death resulted. The court held the driver of the car liable, and, in reviewing the evidence, said: "There was evidence that the street was wide, straight, level, and dry; no other vehicles were in the highway, and it was a clear morning. As to the speed of the automobile there was conflicting testimony, but one witness placed it at 18 miles and another as high as 25 miles an hour; and it could be found that, after going upon the sidewalk, the car ran a distance of 30 or 40 feet, with no diminution of speed, before it struck the deceased. There was some trouble with the engine that caused it to 'skip' when running at low speed, but this did not interfere with the operation of the brake or of the steering gear; and the jury could find that, if the car had been under proper control, it could have been stopped after

the tires exploded, and before the deceased was reached. In fact, they well might find that it was due in whole or in part to excessive speed that the automobile 'skidded' against the curbstone, and caused the tires to burst and the car to leave the roadway."

In Hodges v. Chambers (1913) 171 Mo. App. 563, 154 S. W. 429, it was held that the owner of a car was liable for injuries sustained by a pedestrian on a driveway which, although primarily constructed for vehicles, was frequently used by pedestrians to gain quick access to near-by streets. It appeared that the machine "whirled" into the driveway at a "lively" rate of speed, forcibly striking the pedestrian before he could get out of its way, and dragged him some 15 or 20 feet. The court said: "This evidence must be regarded in the light most favorable to plaintiff. It tended to show negligence on the part of defendant's driver, and the evidence in regard to plaintiff's own negligence was conflicting, and he cannot be said to have been guilty of negligence as a matter of law. It was for the jury to determine, under the evidence and guided by proper instructions of the court, whether defendant's driver was negligent, and whether plaintiff was guilty of negligence on his part, contributing to his injuries."

In Tuttle v. Briscoe Mfg. Co. (1916) 190 Mich. 22, 155 N. W. 724, 12 N. C. C. A. 909, it appeared that the person killed was struck by an auto truck which was being driven through a private passageway running across the sidewalk; and, in holding the owner of the truck liable for his death, the court said: "Eaton was run over in the street where he had a right to be, a pedestrian practically on the sidewalk, and on a part of the street which, but for a driveway into private property, was a safety zone from vehicles. Price was driving from private property through a covered passageway across the sidewalk, to get out upon the street. He had an equal right upon the street, but was riding upon and driving a heavy, powerful auto truck from which, so far as physical danger to himself was involved, he could contemplate with complacency the ordinary hazards of the street, even including the common automobile. Though comparatively safe himself, the serious responsibility and duty rested upon him, according to the size, character, power, and manner of movement of the vehicle he was driving, to operate it with commensurate vigilance, and use every reasonable precaution to avoid causing injury; not to simply take chances on what others might do to avoid him."

In J. F. Darmondy Co. v. Reed (1916) 60 Ind. App. 662, 111 N. E. 317, the owner of an automobile was held liable for injuries sustained by a boy about six years of age who, it appeared, was walking with his uncle on a public sidewalk, crossing a private driveway, when he was struck by the car as it entered the driveway. The evidence showed that no whistle or horn was sounded, and that the machine came on them at great speed from the rear.

In Kuchler v. Stafford (1914) 185 Ill. App. 199, where the owner of a car was held liable for injuring a pedestrian on the sidewalk, it appeared that the car was traveling at the rate of 10 or 12 miles per hour, while turning to enter an alley crossing the sidewalk.

In McGettigan v. Quaker City Automobile Co. (1912) 48 Pa. Super. Ct. 602, the owner of an automobile was held liable for the death of a boy, where it appeared that the driver turned from the line on which he had crossed the street, with such speed, near the curb, that the rear part of the car slued and projected over the sidewalk, striking the boy, who was standing thereon. The court said: "The jury evidently concluded from the testimony that the accident was caused by the swinging of the rear of the car out of its course when the driver turned from the southward to the westward direction, and the evidence would justify such a conclusion. It needs no expert to show that when a sleigh or wagon or automobile, moving rapidly, describes a short turn, there is a tendency of the rear of the vehicle to slue, and, by such side move-

ment, to go out of the course along which the vehicle is directed. All of the jurors had probably seen such a result, and, as there was no evidence that reasonably accounted in any other way for the action of the automobile or was a probable explanation of the movement it described, the verdict returned was the one to be expected."

In Van Winckler v. Morris (1911) 46 Pa. Super. Ct. 142, it appeared that, in turning an automobile from a street-car track, on a slippery asphalt pavement, the rear wheel caught on a rail, and the car skidded at right angles to the track with such violence that it mounted the curb and ran over a pedestrian on the sidewalk. In holding the driver of the car liable for the injuries sustained, the court said: "Every reasonable deduction to be drawn from the defendant's own testimony leads to but one conclusion, that the accident was entirely due to the speed of the car when it left the car rail to occupy the wet asphalt. His experience and the conditions he faced required him to exercise special care at that time. He did not slacken his speed, and his idea of what was perfectly safe, and very slow, was demonstrated to be an unsafe standard of his duty. State and city regulations as to speed apply to the general and average conditions. These vary, and the measure of duty, the degree of care, and correspondent liability are to be determined by the jury in the light of the surrounding circumstances. The rate of 8 to 10 miles per hour is generally a prudent one, but conditions may and frequently do arise where it is an imperative duty to come to a full stop. The jury was fully warranted in concluding that when the defendant left the car track with his heavy car, going at the admitted speed, to occupy a wet asphalt roadway, he was negligent to a degree bordering on recklessness. An inanimate body of the weight of a heavy automobile will not take a 'flying jump' over a curb onto a pavement, unless propelled by exceptional force. This was within the power of the defendant to regulate; and the verdict returned was the only one to be expected from men of common sense and common observation of such matters."

In Matlack v. Sea (1911) 144 Ky. 749, 139 S. W. 930, 2 N. C. C. A. 305, it appeared that one automobile was following another, and, as the car ahead turned at the intersection of a cross street, the rear car collided with it, causing the latter to skid over the pavement and against a telephone pole, killing a woman who was standing on the pavement. The court held that the question whether the driver of the leading car was exercising proper care was for the jury, where his witnesses testified that he was traveling about 5 or 6 miles an hour; that when he reached the intersection of the cross street he first bore a little to the north, and then turned and came south to avoid the street-car tracks, when the machines collided; that no signal was given by the approaching machine; and that he did not know that the other machine was behind him. The evidence, however, did not disclose whether the person killed was, at the time, on the sidewalk; the court, in describing the accident, merely stated that she was "standing on the pavement."

Where a pedestrian about to cross a street, and when in the act of stepping off the curb, "one foot on the pavement and one foot going towards the street," was struck by an electric truck running close to the curb, it was held that a verdict for the pedestrian would not be disturbed. Maynard v. Barrett (1918) — Pa. —, 104 Atl. 613. And see to the same effect, May v. Allison (1906) 30 Pa. Super. Ct. 50, wherein it appeared that, at the time of the accident, the pedestrian was standing on the edge of the pavement with one foot on the curb, in the act of stepping on the roadway, when he was struck by an automobile which was driven on the curb, either through reckless management or inexperience of the driver. But in Bohan v. Metropolitan Exp. Co. (1907) 122 App. Div. 590, 107 N. Y. Supp. 530, the defendant was held not to be liable for the death of an infant, who was struck by an automobile while on the sidewalk; but in this case the court

held that the chauffeur was not in the employment of the express company, which had merely hired the car from a transportation company, and it further appeared that the car was in a defective condition when so hired.

In the reported case (BROWN v. DES MOINES STEAM BOTTLING WORKS, ante, 835), it appeared that the defendant's auto truck struck a frog or curve in a street railway track, which suddenly diverted it from its course, so that the steering wheel was thrown out of the driver's hands, and the car ran on the sidewalk and struck a pedestrian thereon. It also appeared that the driver had frequently crossed the street railway tracks at this point, and with the same truck. The court held the owner of the machine liable for the injuries sustained by the pedestrian, on the ground that the driver permitted it to be diverted from its main course of travel on the street, to the sidewalk, without any warning of its approach to those rightfully congregated there; and further held that it becomes the duty of one operating a vehicle on a public highway, in a thickly populated part of a city, to exercise reasonable care to see that he has the vehicle under control, and to so manage it that it will not unreasonably or unnecessarily imperil the safety of others on the public highway.

b. Other vehicles.

In American Bolt Co. v. Fennell (1908) 158 Ala. 484, 48 So. 97, the defendant was held liable for injuries sustained by a pedestrian on the sidewalk, who was struck from behind and run over by a team of mules, drawing a truck owned and operated by the defendant, and carelessly and negligently driven by the driver thereof.

In Corona Coal & I. Co. v. White (1908) 158 Ala. 627, 20 L.R.A.(N.S.) 958, 48 So. 362, it was held that the owner of a team of horses and a wagon, left unhitched and unattended on a public street, was liable for injuries sustained by a pedestrian who was struck and knocked down by the horses running away. The court said: "It is negligence for the owner of a horse to leave a team of horses unhitched and unattended on a public street, and he thereby becomes liable for any damage caused by their running away."

In Crawford v. Upper (1889) 16 Ont. App. Rep. 440, it appeared that a pedestrian on the sidewalk was knocked down and injured by a horse and sleigh of the defendant, the horse having run away, and no person or driver being in the sleigh at the time. In holding that the facts constituted a prima facie case of negligence, the court said: "I think it most in accordance with authority and good sense to hold that the fact of a defendant's horse rushing at speed, apparently beyond control, along a street, and injuring a passenger on the sidewalk, in itself calls for explanation on the part of the defendant, who may or may not be able to prove that the cause of his so running was not from any fault or neglect of himself or his driver." But where a horse drawing a brougham suddenly, and for no apparent cause, bolted and knocked down a pedestrian on the footway, it was held that there was no evidence of negligence for the jury to consider. Manzoni v. Douglas (1880) L. R. 6 Q. B. Div. (Eng.) 145, 45 J. P. 391, 50 L. J. Q. B. N. S. 289, 29 Week. Rep. 425, wherein the court said: "We do not know what it was that caused the horse to bolt; and therefore we have no evidence that it was caused by the driver's negligence or want of care. It is said that negligence is to be inferred from the fact that the driver did not call out, or give warning. I cannot see that that, per se, affords any ground for inferring negligence. The coachman himself was in fear for his own life; and the probability is that, in such circumstances, even a cool man might abstain from calling out. Then it is said that the fact of the horse having cast one or two shoes was some evidence of negligence: but I cannot see that the fact of a horse having cast a shoe, after he has bolted, affords any evidence of negligent driving. To hold that the mere fact of a horse bolting is, per se, evidence of negligence, would be mere reckless

guesswork. To entitle him to recover in an action of this kind, the plaintiff must make out a clean prima facie case by evidence which will warrant an inference of negligence. This, I think, the plaintiff has failed to do here." See also Holmes v. Mather, (1875) L. R. 10 Exch. (Eng.) 261, 33 L. T. N. S. 361, 44 L. J. Exch. N. S. 176, 23 Week. Rep. 864.

A somewhat peculiar situation arose in Robita v. Crane Co. (1912) 176 Ill. App. 24, wherein it appeared that a boy, while walking near the street edge of a sidewalk, was struck on the left leg by the end of a whiffletree attached to a truck, causing him to fall on the sidewalk, with his left hand extending in the street, in which position a wheel of the truck passed over his extended hand. It also appeared that there was some conflict in the evidence, it being claimed that the boy had dropped a book in the street and, while reaching to recover it, his left hand was run over by the rear wheel of the truck; but this evidence was disregarded, and a judgment in favor of the boy was sustained. The court said: "Appellant also produced witnesses who testified minutely as to many measurements of and concerning the truck, and of the sidewalk, curb, and pavement, and most of the argument of appellant's counsel is devoted to a discussion of the alleged 'physical impossibility' of appellee's theory, in the light of the measurements. Starting with certain assumed facts as to the position of appellee when he fell, appellant's counsel have undertaken to demonstrate mathematically that the accident could not have happened in the way appellee claims it happened. In order to reach this conclusion, however, appellant's counsel are obliged to assume that the right wheels of the truck could not possibly be nearer the edge of the curbstone than 13 inches, when the truck was heavily loaded and being drawn by three horses, and to assume that the boy's body was wholly on the sidewalk and no part of it was above the curbstone. Without entering into any extended explanation of this alleged mathematical deduction, it will suffice to say that we have given careful consideration to the argument thus advanced, and do not find it convincing, for the reason that its assumptions are not manifest from the evidence. We see nothing inherently improbable in the story of appellee. The evidence of appellee and his witnesses is entirely consistent with the theory that the upper part of his body and left shoulder projected slightly beyond the edge of the curb into the street, while the trunk of his body and lower limbs were entirely on the sidewalk. After a careful study of the whole record and of the briefs and arguments filed, we do not think the verdict is so clearly and manifestly against the weight of the evidence that we would be justified in disturbing it. The same conclusion holds as to the alleged contributory negligence of appellee."

In Murphy v. R. S. Brine Transp. Co. (1910) 206 Mass. 243, 92 N. E. 333, the defendant was held to be liable for injuries sustained by a boy, wherein the facts appeared that he was hit by the end of a derrick lashed on a wagon, while sitting on the sidewalk in front of his home; it also appeared that the street was 32 feet in width between the curbs, and the sidewalk was 8 feet, 4 inches, wide; the derrick was 65 feet, and the caravan on which it was lashed was 16 feet long. It further appeared that, as the caravan was being driven on the right-hand side of the street, a street car came up from behind, and the driver, not having room to turn to the right, pulled over to the left, and the wheels, sliding on the car tracks, swung the rear part of the wagon towards the sidewalk, and the extreme end of the derrick protruded over the sidewalk and struck the boy.

In Prinz v. Lucas (1905) 210 Pa. 620, 60 Atl. 309, 18 Am. Neg. Rep. 245, it appeared that a boy on the sidewalk was caught between the tailboard of a wagon and a post because the driver made a sharp turn, causing the tailboard to project over the edge of the sidewalk and to come in contact with the boy. In holding the employer of the driver liable for the death of the boy, the court said: "Obviously, it

was the duty of the driver to so turn his wagon as to avoid a collision with persons or property on the pavement. This could readily have been done by an ordinarily careful man in the usual management of his team. It was certainly not necessary for him to have made so short a turn. He could have driven further out into the street, or even across to the other side, and thus have avoided all possibility of collision with the tailboard."

In James v. Hayden Bros. (1915) 97 Neb. 619, 150 N. W. 1013, it appeared that the plaintiff was walking on the sidewalk in front of a driveway, when he was struck by a horse and wagon approaching him on the driveway from behind. In affirming a judgment for the plaintiff (although reducing the damages), the appellate court said: "It is defendant's first contention that the evidence was insufficient to justify a verdict for the plaintiff and against the defendant. We think this contention should not be sustained. The plaintiff, when struck by the defendant's horse, was lawfully passing along the sidewalk on the public street of the city, attending to his own affairs. He had no notice that anyone was approaching him or intended to enter upon the driveway across the sidewalk. The driver of defendant's horse was approaching the driveway from the west and behind the plaintiff. One of defendant's witnesses testified that the horse was trotting as it came down the street and turned into the driveway. The view of the driver was unobstructed, and he must have been aware of the fact that plaintiff was crossing the driveway, and did not see him. The driver was in a hurry to get his horse put up, for it was about noon, and it is apparent that he negligently and carelessly drove the horse against the plaintiff without giving him timely warning of his approach. The evidence was therefore sufficient on this point to sustain the verdict."

In Goff v. Akers (1893) 1 Misc. 468, 21 N. Y. Supp. 454, affirmed in (1893) 139 N. Y. 653, 35 N. E. 207, it was held that the defendant was liable for injuries to a pedestrian, caused by backing a wagon across a sidewalk. The court said: "The defendant had the undoubted right to back his truck upon the sidewalk in front of his place of business for the purpose of loading or unloading merchandise. People v. Cunningham (1845) 1 Denio (N. Y.) 524, 43 Am. Dec. 709; People v. Horton (1876) 64 N. Y. 610; Welsh v. Wilson (1886) 101 N. Y. 254, 54 Am. Rep. 698, 4 N. E. 633. But the right must be exercised with care commensurate with the danger. Like the duty imposed upon drivers of vehicles upon the highway to notice foot passengers at street crossings, and take reasonable care not to injure them (Murphy v. Orr (1884) 96 N. Y. 14; Moebus v. Hermann (1888) 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415), so with drivers who back their trucks upon the sidewalk; they must in like manner notice foot passengers on the sidewalks, and exercise like care not to injure them. The owner of the truck had no right to the use of the sidewalk by his truck superior to that possessed by the plaintiff as a pedestrian or traveler."

In Ehrlich v. New York (1912) 78 Misc. 373, 138 N. Y. Supp. 294, it appeared that a boy twelve years of age, while playing on the sidewalk, was struck by the hub of an ash cart, which threw him over, the wheel running over his left foot. The evidence appeared to be conflicting as to the distance of the cart from the sidewalk curb when the boy was struck, but his testimony was corroborated by three witnesses, while the only evidence for the defendant was that of the driver, who denied all knowledge of the accident. The court held that the evidence justified the jury in finding that the accident was caused by the negligence of the driver, and that the boy was guilty of no negligence which contributed thereto.

In Ford v. Deigendesch (1918) — Pa. —, 104 Atl. 573, it appeared that while the defendant's horse and wagon were being driven at a trot through a narrow roadway about 6½ feet in width, bordered by a sidewalk 2 feet in width, the horse suddenly shied, causing a wheel of the wagon to strike

a small boy on the sidewalk. The court, in affirming a verdict for the boy, said: "Whether or not the driver exercised due care, under the circumstances, in permitting the horse to travel at such a rate of speed, or whether it was careless in him to drive with a slack rein at that time and place, were questions for the jury to determine."

In Amundsen v. Ward (1913) — Alberta, —, 24 West. L. R. 280, 11 D. L. R. 167, the owner of a horse and dray was held to be liable for injuries sustained by a pedestrian on the sidewalk, who was struck and knocked down by the dray.

In Wark v. Dunlap Co. (1912) 48 Pa. Super. Ct. 517, it appeared that a boy was run over by a pushcart, or barrow, while on a public sidewalk, it being contended that the operation of the cart on the sidewalk was in violation of a municipal ordinance. The court, in affirming a judgment for injuries sustained by the boy, said: "Even if such a use of a pavement had been permitted by the ordinance, the manner of exercising that right would determine the defendant's liability. Was it due care, under the circumstances mentioned? Permission to use the sidewalk would not justify its use in a reckless manner, and the provisions of the ordinance, so far as the facts in this case are concerned, are not material, for the reason that the evidence shows that the boy was not only struck by the barrow, but such violence was applied to him that he was knocked down, run over, and rendered unconscious."

In McCaughey v. American Ice Co. (1911) 45 Pa. Super. Ct. 370, it appeared that the driver of a heavy ice wagon, while making a turn on a sloping roadway at excessive speed, collided with a milk wagon, forcing the latter against a pedestrian on the sidewalk. The court, in holding the driver's employer liable for the injuries sustained by the pedestrian, said: "The only possible cause of this collision was the speed with which the driver of the ice wagon was making his turn on a sloping roadway. Had he been driving with less haste, his wagon would not have slipped or skidded, and the accident would not have happened. From his testimony, he was not unaccustomed to such incidents. When asked: 'Why didn't you come around easy and smooth, if you knew the incline was there?' replied: 'I had been driving that way before, and I never had an accident before.' He admitted striking the milk wagon while he was going around the corner at a trot. . . . The plaintiff was standing in a proper place on the pavement; the chain of events between the driver's negligent act and the final result was a very short one,—in fact, but a moment of time intervened,—and the occurrence was properly considered by the court and jury as a single incident, not complicated in any way with contributory negligence on her part, or with any intervention of any other agency."

In Fleischman v. Polar Wave Ice & Fuel Co. (1910) 148 Mo. App. 117, 127 S. W. 660, it appeared that a pedestrian on the sidewalk was passing a wagon standing near the curb, from which the horses had been unhitched, when a team and wagon collided with it, causing its tongue to swing across the sidewalk, violently striking the pedestrian. A judgment for the plaintiff, however, was reversed, on appeal, on the ground that it did not appear that the men in charge of the team and wagon which caused the collision were engaged at the time in the course of their employment.

In Firor v. Taylor (1911) 116 Md. 69, 81 Atl. 389, 2 N. C. C. A. 551, it was held that the mere fact that beams and timbers carried on a wagon protruded over a sidewalk, causing injury to a pedestrian thereon, was not evidence of negligence; but this case turned on the question of joint responsibility of the driver and those who loaded the wagon. The court said: "Surely the mere fact that the platform protruded over the wagon is not evidence of negligence. If that be so, it might be impossible to haul a platform or other article which was wider than a wagon on which it is carried, without being guilty of negligence, while it is a fact known to everyone

that many articles are hauled through the streets of cities and towns which project over and beyond the edge of the wagons on which they are hauled. The testimony shows that this platform projected a foot, or at most a foot and a half, beyond the wagon, and that it was loaded not only in the usual, but the only, way it could have been. It may be true that if it had not projected beyond the wagon at all the accident would not have happened, but that fact does not make it negligence on the part of Saxton's servants in loading the wagon. The evidence offered on the part of the plaintiffs is to the effect that it was the carelessness of the driver which caused the injuries. He could see that the platform projected, and some of the evidence shows that, before he started the wagon, he examined it to see how the platform was placed on it; and if there was occasion to drive up to the curb, he ought to have at least warned anyone standing, as the plaintiff was, with his back to the wagon, of the approach of the wagon, and have stopped his team, if the warning was not heeded."

V. Contributory negligence.

While the sidewalk is considered a safety zone for pedestrians thereon, it has been held that if the failure of a pedestrian to use ordinary, and reasonable care contributed to cause his injury by a road vehicle while he was on the sidewalk, he cannot recover. Mastin v. New York (1911) 201 N. Y. 81, 33 L.R.A.(N.S.) 784, 94 N. E. 611, 2 N. C. C. A. 652, reversing (1910) 136 App. Div. 925, 120 N. Y. Supp. 434; Maynard v. Barrett (1918) — Pa. —, 104 Atl. 613.

Thus, in the case first cited, it appeared that a photographer, in taking a picture, placed his camera on a sidewalk near the curb, and covered his face with a dark cloth to focus the instrument, and while in that position was struck by an ash cart, and knocked into the gutter. The court held that he could not recover, as he was guilty of contributory negligence as a matter of law.

But where a boy fifteen years of age, while playing ball on the street, was standing with one foot on the sidewalk and one foot in the gutter when he was struck by a wagon which he had seen approaching at a distance of 50 feet, and traveling 5 or 6 feet from the curb, it was held that the question of his contributory negligence was for the jury. Ferguson v. Rapid Transit Subway Constr. Co. (1918) 171 N. Y. Supp. 315.

In Ehrlich v. New York (1912) 78 Misc. 373, 139 N. Y. Supp. 294, it was held that a boy who was struck by the hub of a wheel of an ash cart while at play near the edge of the sidewalk was not guilty of contributory negligence, although he saw the cart approaching, but assumed that the driver would direct his course so as to avoid striking him. And see the reported case (BROWN V. DES MOINES STEAM BOTTLING WORKS, ante, 835).

A pedestrian on the sidewalk is not guilty of contributory negligence because he fails to look and listen for the approach of a vehicle. Corona Coal & I. Co. v. White (1908) 158 Ala. 627, 20 L.R.A.(N.S.) 958, 48 So. 362; J. F. Darmondy Co. v. Reed (1916) 60 Ind. App. 662, 111 N. E. 317; Tuttle v. Briscoe Mfg. Co. (1916) 190 Mich. 22, 155 N. W. 724, 12 N. C. C. A. 909; James v. Hayden Bros. (1915) 97 Neb. 619, 150 N. W. 1013; Goff v. Akers (1893) 1 Misc. 468, 21 N. Y. Supp. 454, affirmed in (1893) 139 N. Y. 653, 35 N. E. 207; McCaughey v. American Ice Co. (1911) 45 Pa. Super. Ct. 370; See also Robita v. Crane Co. (1912) 176 Ill. App. 24.

In J. F. Darmondy Co. v. Reed (1916) 60 Ind. App. 662, 111 N. E. 317, it appeared that a boy about six years of age was walking with his uncle on a public highway crossing a private driveway, when he was struck by an automobile passing at great speed through the driveway. The appellate court, in sustaining a verdict for the injuries sustained, said: "The movement of the automobile was much more rapid than the movements of the parties; that the fact that they did not see the automobile until it struck them is undisputed. There is a dispute as to wheth-

er appellant's servants sounded the horn, or made any effort to notify appellee of the approach of the auto, although the driver of the car saw appellee and his foster father approaching the driveway, and very near it. The question of appellant's negligence, as well as the negligence of appellee, was submitted to the jury. This court will not weigh the evidence for the purpose of determining upon which side the greater weight lies in any case. Under the circumstances of this case, we need not consider the question as to whether appellee was guilty of negligence which contributed to his injury. He was an infant less than six years of age, and the jury, by its verdict, finds that he had not reached the age of accountability. In the eyes of the law he was not sui juris. The evidence shows he was walking along the street in the direction of his home, at a place where he had a perfect right to be, and if he was gazing in at a shop window, as the driver of the machine states, then it was the driver's duty to use the precautions which the circumstances required to inform appellee of his approach. It was at least his duty to sound the horn, which the general verdict of the jury finds he did not do. He was required to use this care, regardless of the age of appellee. It must be taken into account that the use of this crossing was confined to persons who had business with the occupants of adjoining premises, most of the witnesses calling it a private driveway, which fact must be considered in determining the degree of care required of appellant. We cannot say, under these circumstances, that the verdict is contrary to law."

In Tuttle v. Briscoe Mfg. Co. (1916) 190 Mich. 22, 155 N. W. 724, 12 N. C. C. A. 909, it appeared that the person killed was struck from behind by an auto truck, which was being driven through a private passageway crossing the sidewalk. In discussing the question of contributory negligence, the court said: "Touching the question of Eaton's contributory negligence, it appears he was not crossing a public street, but was upon one inside its curb line, crossing a private driveway which led into the street, and was on or near the sidewalk, a portion of the street especially set aside for pedestrians. It was, of course, his duty to exercise such care and caution as ordinarily prudent persons would, under like circumstances. He was going diagonally away from the building through which this driveway ran in a straight line for about 40 feet, and certainly not obliged as a matter of law, when out on the street, to look back to see whether he was in danger of being run over by a conveyance from behind. 2 Elliott, Roads & Streets, 3d ed. § 1088; Hennessey v. Taylor (1905) 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; Gerhard v. Ford Motor Co. (1909) 155 Mich. 618, 20 L.R.A.(N.S.) 232, 119 N. W. 904. Under the circumstances of this case his contributory negligence is narrowed down to the question of whether, while on his way across the driveway, he immediately turned back and suddenly stepped in front of the oncoming truck when it was so near him that the driver, exercising ordinary vigilance on his part, was unable to stop or turn aside in time to avoid injuring him. If this was shown without dispute it would preclude recovery, but the testimony is in conflict upon that issue. The three witnesses agree that when the watchman spoke to Eaton he checked his progress and turned, but they do not agree that he stepped back in front of the approaching truck. Price testified that Eaton was over to one side, and if he had stood there the truck would have passed him all right, but says: 'He kind of hollered, and then turned round, backed into me;' he also says that Eaton started to walk back in the direction of the office from which he had come, and 'when he turned round, he turned right round in front of the wheel. He had both legs between the two wheels;' while Danforth and Findlay testify that, just, as he turned, the truck was right upon him, and the left front wheel instantly struck him before he had time to avoid it. Of his stepping backward, as asserted by Price, Danforth testified that, as he turned around, the front wheel caught his

leg, and, while facing the radiator as the truck came upon him, he went three or four steps backward 'with the machine running him down,' trying to grab something, and 'sliding down' until the truck ran over him, after which it stopped with its front wheels at the curb. The trial court, in sustaining an objection by defendant, refused to permit plaintiff to go into the question of discovered or subsequent negligences, which the circumstances of this case seem to suggest. (Richter v. Harper (1893) 95 Mich. 225, 54 N. W. 768), and squarely charged the jury: 'In order to hold the defendant liable, you must not only find that the defendant was guilty of negligence, but you must also find the affirmative fact that plaintiff's intestate was free from contributory negligence.' We think the question of deceased's conduct in the emergency which then unexpectedly confronted him was for the jury."

In James v. Hayden Bros. (1915) 97 Neb. 619, 150 N. W. 1013, the court stated the circumstances of the accident as follows: "The plaintiff, while lawfully passing along the sidewalk in the prosecution of his own business, had occasion to pass defendant's premises, where there was a driveway from the street across the sidewalk into defendant's yard and barn. It was a cold day, and plaintiff had on an overcoat, with his hands in his pockets. He was walking along the sidewalk, looking neither to the right nor to the left. Just at that instant, the defendant's servant, with a horse and wagon, on his way to the barn, came up behind the plaintiff from the west and turned in onto the driveway. As the horse was about to collide with plaintiff, the driver called: 'Look out!' and at the same time the horse's head struck the plaintiff, and knocked him down. The horse veered slightly to the east; the wagon ran against the plaintiff and dragged him into the yard." The court, in further considering the question of contributory negligence, said: "It is defendant's first contention that the evidence was insufficient to justify a verdict for the plaintiff, and against the defendant. We think this contention should not be sustained. The plaintiff, when struck by the defendant's horse, was lawfully passing along the sidewalk on the public street of the city, attending to his own affairs. He had no notice that anyone was approaching him or intended to enter upon the driveway across the sidewalk. The driver of defendant's horse was approaching the driveway from the west, and behind the plaintiff. One of defendant's witnesses testified that the horse was trotting as it came down the street and turned into the driveway. The view of the driver was unobstructed, and he must have been aware of the fact that plaintiff was crossing the driveway and did not see him. The driver was in a hurry to get his horse put up, for it was about noon, and it is apparent that he negligently and carelessly drove the horse against the plaintiff without giving him timely warning of his approach. The evidence was therefore sufficient on this point to sustain the verdict."

In Goff v. Akers (1893) 1 Misc. 468, 21 N. Y. Supp. 454, affirmed in (1893) 139 N. Y. 653, 35 N. E. 207, it appeared that a pedestrian on the sidewalk was injured by the sudden backing of a wagon across the walk. The court, in holding him to be free from contributory negligence, said: "The plaintiff was lawfully upon the sidewalk at the time of the accident, and, seeing the thoroughfare clear, had the right to continue his journey without anticipating that a driver, without warning, would attempt to back a team across the sidewalk and imperil his life. The jury having found in favor of the plaintiff upon evidence which satisfactorily sustains their verdict, we must assume for the purpose of this appeal that the facts are as stated by the plaintiff and his witnesses, and not as claimed by the defendant and his witnesses, whose version of the affair was rejected. According to the plaintiff's evidence it was not the case of a foot traveler attempting to cross a public thoroughfare ahead of vehicles, upon nice calculations of the chances of injury, and the authorities

relating to such controversies have, therefore, no application whatever. Nor was it a case where the plaintiff saw the impending danger in time to avoid it; so that it would have been error for the trial judge to have decided, as matter of law, that the plaintiff brought the mischief upon himself by his own neglect."

A pedestrian on the sidewalk, who is placed in a position of sudden peril by the negligence of the driver of a vehicle, cannot be held to the exercise of the same degree of care that a person would use ordinarily. Kuchler v. Stafford (1914) 185 **Ill.** App. 199; Roach v. Hinchcliff (1913) 214 **Mass.** 267, 101 N. E. 383; Tuttle v. Briscoe Mfg. Co. (1916) 190 **Mich.** 22, 155 N. W. 724, 12 N. C. C. A. 909; Hodges v. Chambers (1913) 171 **Mo.** App. 563, 154 S. W. 429. Thus, in Kuchler v. Stafford (Ill.) supra, it was held that a pedestrian, confronted by sudden danger from a rapidly moving automobile, was not guilty of contributory negligence because, in an effort to get out of the way, he acted contrary to what was expected of him by the driver.

See, to the same effect, Carpenter v. Campbell Automobile Co. (1913) 159 **Iowa**, 52, 140 N. W. 225, 4 N. C. C. A. 1.

The fact that a pedestrian is injured by a vehicle while on a driveway or passageway which, although primarily intended for vehicles, is frequently used by pedestrians, has been held not to render him guilty of contributory negligence. Hodges v. Chambers (1913) 171 **Mo.** App. 563, 154 S. W. 429, wherein it was held that the owner of an automobile was liable for injuries sustained by a pedestrian, who was walking on a driveway which was frequently used by pedestrians. The court said: "Neither is the case before us analogous to the numerous cases cited by appellant, in which it is held that one cannot recover where he knowingly chooses a dangerous road or passageway when a safe one was at hand. This for the reason that the driveway in question was a public highway, and could only be said to have been dangerous when made so by the failure of the drivers of vehicles to exercise the care required of them by law. Plaintiff was entitled to rely upon the presumption that such drivers would not be negligent, and hence it cannot be said that plaintiff had any reason to suppose that it would be dangerous for him to walk upon the driveway."

See, to the same effect, J. F. Darmondy Co. v. Reed (1916) 60 **Ind.** App. 662, 111 N. E. 317. H. B.

JOHN HORSTMANN COMPANY, Respt.,

v.

S. K. WATERMAN, Appt.

Washington Supreme Court, Dept. No. 1—June 27, 1918.

(— Wash. —, 173 Pac. 733.)

Guaranty — to pay debts — who may enforce.

A guaranty to one purchasing the stock of a corporation, and the corporation, that the seller of the stock will pay all debts of the corporation, cannot be enforced by creditors not parties to the contract.

[See note on this question beginning on page 861.]

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover, under defendant's guaranty contract, balances alleged to be due upon the purchase

price of goods sold and delivered by plaintiff and its assignor to a certain corporation. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Reed & Hardman**, for appellant:

Plaintiff cannot maintain this action against defendant, in view of the entire want of privity of contract between them.

3 Page, Contr. 1905 ed. p. 2033, § 1316; German State Bank v. Northwestern Water & Light Co. 104 Iowa, 717, 74 N. W. 685; Armour & Co. v. Western Constr. Co. 36 Wash. 529, 78 Pac. 1106; Spokane Merchants' Asso. v. Pacific Surety Co. 86 Wash. 489, 150 Pac. 1054; Rust v. United States Fidelity & G. Co. 87 Wash. 93, 151 Pac. 248; Du Pont de Nemours Powder Co. v. National Surety Co. 90 Wash. 227, 155 Pac. 1050; Ford v. Aetna L. Ins. Co. 70 Wash. 29, 126 Pac. 69; Davies v. Maryland Casualty Co. 89 Wash. 571, L.R.A. 1916D, 395, 154 Pac. 1116, 155 Pac. 1035; 20 Cyc. 1399, 1429; 12 R. C. L. pp. 1061, 1066, §§ 10, 16.

Messrs. **E. L. Skeel** and **Roberts, Wilson, & Skeel**, for respondent:

The promise of H. S. Waterman made to the Lithocrete Company to pay its debt owing to plaintiff can be sued upon by the latter.

Kelley v. Greenough, 9 Wash. 659, 38 Pac. 158; Solicitors' Loan & T. Co. v. Robins, 14 Wash. 507, 45 Pac. 39; Don Yook v. Washington Mill Co. 16 Wash. 459, 47 Pac. 964; Gilmore v. Skookum Box Factory, 20 Wash. 703, 56 Pac. 934; Dimmick v. Collins, 24 Wash. 78, 63 Pac. 1101; Nordby v. Winsor, 24 Wash. 535, 64 Pac. 726; Johnson v. Shuey, 40 Wash. 22, 82 Pac. 123; Lyth v. Hingston, 14 App. Div. 11, 43 N. Y. Supp. 653; Buchanan v. Tilden, 70 Am. St. Rep. 454, and note, 158 N. Y. 109, 44 L.R.A. 170, 52 N. E. 724; Carrier v. United Paper Co. 73 Hun, 287, 26 N. Y. Supp. 414; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731; State ex rel. Bartelt v. Liebes, 19 Wash. 589, 54 Pac. 26; McDonald v. Davey, 22 Wash. 366, 60 Pac. 1116.

Plaintiff may sue defendant, the guarantor of H. S. Waterman's obligations, without proceeding against him or joining him in the action.

20 Cyc. 327; Jenkins v. Wilkinson, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630; Garland v. Gaines, 73 Conn. 662, 84 Am. St. Rep. 183, 49 Atl. 19; Huff v. Slife, 25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289; Hanna v. Savage, 7 Wash. 414, 35 Pac. 127, 36 Pac. 269.

Parker, J., delivered the opinion of the court:

The plaintiff John Horstmann Company, a corporation, seeks recovery from the defendant S. K. Waterman, of balances due upon the purchase price of goods sold and delivered by it and its assignor to the Lithocrete Company, a corporation; recovery being sought upon the theory that the defendant has become liable to the plaintiff for the payment of such balances under her guaranty contract. Trial in the superior court for King county, without a jury, resulted in findings and judgment awarding to the plaintiff recovery as prayed for, from which the defendant has appealed to this court.

Prior to and on November 27, 1913, H. S. Waterman was the owner of all of the capital stock of the Lithocrete Company, except sufficient shares thereof to enable others to hold office in the company. On that day he sold all of his stock in the company to A. J. Weiffenbach, the then president of the company, at the same time entering into a written contract with Weiffenbach and the company as follows:

This contract, made this November 27, 1913, by and between H. S. Waterman, first party, A. J. Weiffenbach, second party, and the Lithocrete Company, a corporation of the state of Washington, third party, witnesseth: That whereas, Waterman has this day sold and transferred to Weiffenbach all of the capital stock of the Lithocrete Company, for the sum of $3,500, retaining however certain assets of the company below mentioned: Now, therefore, in consideration of the premises and of the mutual promises hereinafter contained, the parties hereto agree as follows:

I. It is agreed by all the parties hereto that Waterman shall retain

as his own individual property the following property heretofore owned by the company: All office furniture and office equipment, all the bills and accounts receivable, claims, and choses in action of the company, and ten tons of Styrian magnesite; and the company agrees to execute and deliver to Waterman, upon demand, a proper written assignment of any or all of said bills and accounts receivable, claims, and choses in action.

II. Said Waterman agrees that he will, within one year from the date hereof, pay or settle all of the bills and accounts payable of said company and all obligations and debts of said company now outstanding, except any commissions owing by the company on account of unexecuted contracts for laying lithocrete, which have been entered into by said company, which commissions the company is to pay; and said Waterman agrees to indemnify said company against the payment of any and all debts of the company contracted prior to this date, with the exception above noted, and to reimburse the company for all costs, attorneys' fees, and damages which it may incur or suffer by reason of any claim or action taken against it based on any existing debt or obligation of the company. . . .

V. Said Waterman agrees not to engage directly or indirectly in the business of manufacturing, selling, or laying any composition flooring or similar substance in the state of Washington for a period of five (5) years from the date hereof.

[Signed] H. S. Waterman.
A. J. Weiffenbach.
Lithocrete Company,
By A. J. Weiffenbach, Pres.,
Howard Waterman, Secy.

At the same time, to secure the performance of this contract by H. S. Waterman, appellant entered into a written contract with Weiffenbach and the company as follows:

This contract, made this November 27, 1913, by and between the Lithocrete Company, a corporation of the state of Washington, and A. J. Weiffenbach, first parties, and S. K. Waterman, second party, witnesseth: That whereas, at the time of making this contract, A. J. Weiffenbach is about to purchase from H. S. Waterman the capital stock of the Lithocrete Company: Now, therefore, in consideration of the first parties hereto entering into a certain contract with H. S. Waterman, a copy of which is hereto attached, the second party guarantees the performance by H. S. Waterman of all of the conditions of said contract to be performed by him, and in particular guarantees the payment or settlement by H. S. Waterman, within one year from this date, of all the debts and obligations of said Lithocrete Company now existing, except the commissions on unexecuted contracts of said company. The second party further agrees to indemnify and save harmless the first parties hereto against all claims based on existing debts or obligations of said company, and against all damages, costs, and attorneys' fees which first parties may suffer or incur on account of such claims.

[Signed] A. J. Weiffenbach.
S. K. Waterman.
Lithocrete Company,
By A. J. Weiffenbach, President,
Howard Waterman, Secretary.

At the time of entering into these contracts the Lithocrete Company was indebted to respondent and its assignor for goods sold and delivered by them to it some time prior thereto, for which indebtedness the judgment here appealed from was rendered against appellant. It is contended in behalf of appellant that her guaranty contract was not made for the benefit of respondent, but for the sole benefit of the Lithocrete Company and Weiffenbach, that no privity of contract was thereby created between her and respondent, and that therefore respondent has no right of recovery against her. There is thus present-

ed the much-discussed question, concerning which the authorities are seemingly quite out of harmony, as to the right of a third person to recover upon a contract, the performance of which by the obligor will result in benefit to such third person. It is conceded by counsel for appellant that the exceptions to the general rule that only parties to a contract can sue thereon would enable respondent to recover against H. S. Waterman, under his contract with the Lithocrete Company and Weiffenbach, because of the express promise of H. S. Waterman to pay the existing debts of the company, and the taking over by him of a considerable portion of the property of the company. We are to remember, however, that appellant S. K. Waterman is one step further removed from respondent than H. S. Waterman; that she has only guaranteed to the Lithocrete Company and Weiffenbach the performance by H. S. Waterman of his promise to pay the indebtedness of the Lithocrete Company; that she has not promised unconditionally to pay such debts, but her promise, in effect, goes no further than that she will pay those debts if H. S. Waterman does not pay them; and that she has not received, under her guaranty contract, any property or funds which respondent had a right to look to for the satisfaction of its claims against the Lithocrete Company.

In Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 123, 25 L. ed. 75, Justice Strong, speaking for the Supreme Court of the United States, said: "The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is a case where, under a contract between two persons, assets have come to the promisor's hands or under his control which, in equity, belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue."

In Washburn v. Interstate Invest. Co. 26 Or. 436, 36 Pac. 533, 38 Pac. 620, there was under consideration the claimed right of the plaintiff to recover upon a contract to which he was not a party, wherein the defendant stipulated with the Boston Shoe & Leather Company, which was indebted to the plaintiff and others, that it, the defendant, should, within thirty days, pay and discharge such indebtedness, and also make advances necessary to enable the leather company to carry on its business for a period of four months; the amount to be so paid and advanced not to exceed a named sum, and the defendant thereafter to receive therefor certain shares of the capital stock of the leather company. It was held that the creditors of the leather company could not recover from the defendant upon the contract, for want of privity, and because it was not made for their benefit. In so holding, Chief Justice Bean, speaking for the court, said: "The prevailing doctrine in this country undoubtedly is that, where one person, as a consideration or part consideration for an executed contract, promises another, for a consideration moving from him, to

pay or discharge some legal obligation or debt due from such other to a third person, the latter, although a stranger to the consideration and not an immediate party to the contract, may maintain an action thereon, if it was made directly and primarily for his benefit. . . . After a somewhat exhaustive examination of the question, we have found no case which has gone so far as to hold that such action can be maintained on an executory contract, by which one person promises to advance his own money to pay the debts of another, but, on the contrary, the authorities deny the application of the rule to such a contract. . . . Where one person receives a fund or property from another, and instead of paying him therefor is allowed to retain the consideration under an agreement to pay it to the creditors of the other party, or when it is agreed between the parties to the contract, there being a valuable consideration therefor, that the promisor may discharge his debt or liability to the promisee by paying it to some third person, to whom the promisee owes some legal duty or obligation, it would be just and proper that such third party should have the right to maintain an action on the contract in his own name. But this is on the theory that, the contract being for his direct benefit, the law invests him with a privity in respect thereto by reason of his interest, and the promisor, in performing the contract, is doing nothing more than to discharge his own debt or obligation in accordance with his agreement. In such case the amount which the promisor agrees to pay is his own debt or obligation, which, by an arrangement with the promisee, he is to pay or discharge in a particular manner; and the parties having, by their contract, thus treated the third party as primarily interested in its performance, they have recognized him as privy in fact to the consideration and contract, and therefore there can be no hardship in allowing him to enforce it by action in his own name, as the parties to the contract contemplated. But where there is no such funds, debt, or obligation in the hands of or owing from the promisor, but only an executory contract by one person to advance his own money to pay the debts of another, who is a party to neither the contract nor consideration, it is difficult to see upon what principle the doctrine can be applied. In such case the contract is not made for the direct benefit of the creditor, but of the promisee, to enable him to obtain money with which to discharge his liability, and, if enforceable at all, it is enforceable by him. The creditors are, of course, indirectly interested in its performance, for, if the contract is complied with, their claims will be paid, and this may be said of any executory contract whereby a debtor expects to receive money with which to pay his debts; but it has never been held, to our knowledge, that such an interest is sufficient to entitle a stranger to maintain an action to enforce the stipulations of the contract."

Our own early decisions may not be wholly harmonious upon the question of the right of a party to recover upon a contract to which he is not a party; but the following later decisions, we think, call for the conclusion, in harmony with the decisions above quoted from, that the guaranty contract of S. K. Waterman, entered into by her with Weiffenbach and the Lithocrete Company, was not intended for the benefit of respondent or other creditors of that company, but was for the exclusive benefit of Weiffenbach and the Lithocrete Company, and that therefore respondent cannot recover thereon, though it would be benefited by the performance of the obligations of S. K. Waterman thereunder: Spokane Merchants' Asso. v. Pacific Surety Co. 86 Wash. 489, 150 Pac. 1054; Rust v. United States Fidelity & G. Co. 87 Wash. 93, 151

Guaranty—to pay debts—who may enforce.

Pac. 248; Du Pont de Nemours Powder Co. v. National Surety Co. 90 Wash. 227, 155 Pac. 1050. Among other decisions supporting our conclusion, we note American Exch. Nat. Bank v. Northern P. R. Co. (C. C.) 76 Fed. 130; German State Bank v. Northwestern Water & Light Co. 104 Iowa, 717, 74 N. W. 685; Sweeney v. Houston, 243 Pa. 542, L.R.A.1915A, 779, 90 Atl. 347; Montgomery v. Rief, 15 Utah, 495, 50 Pac. 623; Wilson v. Shea, 29 Cal. App. 788, 157 Pac. 543. The two last-cited cases show the disposition of the courts not to extend the doctrine here contended for by counsel for respondent to new and doubtful cases, and also to resolve doubts as to the intent of the parties executing a contract against third parties claiming under it.

Contention is made in appellant's behalf that, in any event, respondent's cause of action, if any it has, is barred by the Statute of Limitations. In view of our conclusion upon the question above discussed, it becomes unnecessary to decide as to whether or not the bar of the statute would be effective as against respondent, should it be held to have a good cause of action as claimed.

The judgment is reversed, and the action dismissed.

Main, Ch. J., and **Mitchell** and **Tolman**, JJ., concur.

ANNOTATION.

Who may enforce guaranty.

I. Introductory, 861.
II. General guaranty:
a. In general, 861.
b. Necessity of knowledge of guaranty, 865.
III. Special guaranty:
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c. Change in status of partnership to which guaranty is given, 871.
d. Change in status of corporation to which guaranty is given, 874.
e. Guaranty addressed to agent, 875.

I. Introductory.

This note is limited strictly to a discussion of those cases dealing with contracts of guaranty; cases involving contracts of suretyship, indemnity, or indorsement are not discussed. The treatment is limited to the right to enforce the guaranty, excluding the manner of enforcement, and therefore, as negotiability affects only the form of the remedy, or the exclusion of defenses, and not the substance of the right, cases treating of the negotiability of a guaranty are excluded.

II. General guaranty.

a. In general.

While there is a seeming conflict among the decisions as to who may enforce a contract of guaranty, it appears from an examination of the cases that this conflict arises more from the application of well-accepted principles to the facts of given cases than from any disagreement as to the rules of law governing such contracts. Thus, it is generally agreed that those for whose benefit the guaranty was intended may enforce it, and that a person who is only incidentally benefited by the guaranty has no right of action thereon. The difficulty arises over the determination of the fact as to whom it was intended to benefit by a particular guaranty. Where the guaranty is general in its terms, and addressed to no particular person, it is uniformly held that anyone acting on it may enforce it.

United States.—Lawrason v. Mason (1806) 3 Cranch, 492, 2 L. ed. 509; Manufacturer's Automatic Sprinkler Co. v. Galbraith (1911) 116 C. C. A. 246, 196 Fed. 472.

Arkansas.—McCollum v. Cushing (1860) 22 Ark. 540.

Connecticut.—Hopson v. Ætna Axle & Spring Co. (1883) 50 Conn. 597.

Florida.—Wright v. Terry (1887) 23 Fla. 160, 2 So. 6; Punta Gorda Bank v. State Bank (1906) 52 Fla. 399, 42 So. 846.

Massachusetts.—Baldwin v. Dow (1881) 130 Mass. 416.

Michigan.—Nevius v. Bank of Lansingburgh (1862) 10 Mich. 547; Bleeker v. Hyde (1843) 3 McLean, 279, Fed. Cas. No. 1,537.

Minnesota.—Wood v. Bragg (1899) 75 Minn. 527, 78 N. W. 93.

Mississippi. — Pollock v. Helm (1876) 54 Miss. 1, 28 Am. Rep. 342.

New York.—Union Bank v. Coster (1849) 3 N. Y. 203, 53 Am. Dec. 280, affirming (1848) 1 Sandf. 563; Birckhead v. Brown (1843) 5 Hill, 634, affirmed in (1845) 2 Denio, 375; Tucker v. Blaudin (1888) 48 Hun, 439, 1 N. Y. Supp. 842, affirmed in (1890) 125 N. Y. 699, 26 N. E. 751; McLaren v. Watson (1841) 26 Wend. 425; Westchester Mortg. Co. v. McIntire (1915) 168 App. Div. 139, 153 N. Y. Supp. 437.

Ohio.—Bank of Ashland v. Jones (1864) 16 Ohio St. 145; Lonsdale v. Lafayette Bank (1849) 18 Ohio, 126; Bank of Batavia v. Sewell (1880) 6 Ohio L. J. 288.

Pennsylvania. — Northumberland County Bank v. Eyer (1868) 58 Pa. 97; Douglass v. Second Nat. Bank (1876) 4 W. N. C. 163.

South Carolina.—Griffin v. Rembert (1871) 2 S. C. 410.

Tennessee.—Vanleer v. Crawford (1852) 2 Swan. 117.

Vermont.—Lowry v. Adams (1849) 22 Vt. 160.

Wisconsin.—McNaughton v. Conkling (1859) 9 Wis. 316; Tidioute Sav. Bank v. Libbey (1898) 101 Wis. 193, 70 Am. St. Rep. 907, 77 N. W. 182.

Canada.—Manning v. Mills (1854) 12 U. C. Q. B. 515.

In Pollock v. Helm (1876) 54 Miss. 1, 28 Am. Rep. 342, the rule was stated as follows: "A general letter of credit is, on the part of the writer, a proposal to come under certain obligations with any person who will deal with the party for whose use it is given. It is intended to be shown and offered to one and another; and whenever it is accepted, and advances are made on its faith, there springs up at once a direct privity between the writer and him who advances, so that the former is bound to the latter to comply with its terms, or answer in damages. . . . When the letter is addressed to all persons, it is an open proposal to everybody to accept and act on the proposal; and when an individual does accept the offer, and parts with money or property in accordance with its tenor, there is a consensio mentium, and a direct contract between these parties. . . . The advances are made on the credit of the writer of the letter, and not of him for whose use it was given. Anyone to whom such letter might be shown in the course of business, as the predicate of a transaction, would infer, and would be justified in the belief, that the writer had agreed to be bound for the use of it, either for his accommodation, or because he was indemnified by effects in hand, or upon some good consideration, and would not entertain the thought that it was incumbent on him to inquire into the state of dealings between the writer and the usee of the letter, for the purpose of learning whether there was any contingency about it, or whether any change of circumstances between the date of the letter and the advances under it would affect the liability of the writer."

And in Birckhead v. Brown (1843) 5 Hill (N. Y.) 634, affirmed in (1845) 2 Denio, 375, it was said: "When the letter is addressed to all persons, it is, in effect, a request made to each and every one of them, and any individual may accept and act upon the proposition contained in it; and, on his doing so, that which was before indefinite and at large becomes definite and fixed; a contract immediately springs up between the person making the advance and the writer of the letter; and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter at the beginning. I can see no difficulty in this,

for there is plainly a privity of contract between the parties."

In Lawrason v. Mason (1806) 3 Cranch (U. S.) 492, 2 L. ed. 509, it was held that a general letter addressed to an intending purchaser of goods, stating that the writer would stand for the payment of the price of the goods, was enforceable by any person who furnished the goods.

In Manning v. Mills (1854) 12 U. C. Q. B. 515, it was held that a letter addressed to the debtor, guaranteeing the payment of the cost of an omnibus to the person from whom he might purchase it, was enforceable by any person who might furnish the omnibus.

In Manufacturers' Automatic Sprinkler Co. v. Galbraith (1912) 116 C. C. A. 246, 196 Fed. 472, wherein it appeared that the manufacturers of an automatic sprinkler agreed that it should be constructed according to the plans of a certain firm of engineers, and guaranteed against all damage that might arise because of faulty construction, it was held that the claims of tenants of the owner of the building, for damages because of the collapse of the tank, were covered by the terms of the guaranty.

In Punta Gorda Bank v. State Bank (1906) 52 Fla. 399, 42 So. 846, wherein it appeared that, in order to induce the investment of additional capital in a branch bank, the parent bank guaranteed all the securities held by the branch bank, whereupon the additional capital was subscribed and the branch bank was reorganized as a separate and distinct organization, it was held that the evident intent of all the parties was that the guaranty should strengthen the financial position of the new bank so as to induce the new subscriptions to its stock; and therefore it was executed for the benefit of the new bank, which was a proper party to enforce it.

In Vanleer v. Crawford, 2 Swan (Tenn.) 117, it was held that a contract guaranteeing the payment of any contract for the hire of slaves, made by a particular person during a specified year, could be enforced by any person who hired slaves to the person named, pursuant to its terms, and on its faith.

In Lonsdale v. Lafayette Bank (1849) 18 Ohio, 126, it was held that a letter stating that the writer would accept and pay drafts for a limited amount within a specified time, when accompanied by bills of lading, might be enforced by a bank discounting the drafts.

In Union Bank v. Coster (1849) 3 N. Y. 203, 53 Am. Dec. 280, affirming (1848) 1 Sandf. 563, the letter of credit sued on was as follows: "New York, 29 May, 1841. Sir:—We hereby agree to accept and pay at maturity any draft or drafts on us at sixty days' sight, issued by Messrs. Kohn, Daron, & Co. of your city, to the extent of $25,000, and negotiated through your bank. We are respectfully, sir, Your obd't serv'ts." Holding that any bank purchasing the drafts might enforce the guaranty, the court said: "The letter of credit in this case was evidently intended to be general; it did not contemplate a single transaction, or draft for the whole amount, but several drafts, limited in the aggregate to $25,000. Although the address, 'sir,' and 'your bank,' are in the singular number, yet I think it was intended to be used in a distributive sense, and apply to any bank or banks who should purchase the drafts." This case was distinguished in Evansville Nat. Bank v. Kaufmann (1883) 93 N. Y. 273, 45 Am. Rep. 204, reversing (1881) 24 Hun, 612, on the ground that the letter involved in Union Bank v. Coster was open and unaddressed, and expressly contemplated the negotiation of the drafts referred to therein, by some bank, for the benefit of the persons having possession of the letter.

In Tucker v. Blaudin (1888) 48 Hun, 439, 1 N. Y. Supp. 842, affirmed in (1870) 125 N. Y. 699, 25 N. E. 751, the guaranty sued on was as follows: "For value received we hereby guarantee the payment of the within bond, according to the conditions thereof. J. B. Pickit. E. W. Abbott. Watertown, May 12, 1874." In an action brought by a purchaser of the bond and mortgage a year after the date

of the guaranty, it was insisted by the guarantor that the guaranty was special, having been given with a view to the purchase of the bond by one Strickland, and therefore that a third person who purchased could not recover on it. Answering this contention, the court said: "Plaintiff claims as the original party, to whom, in good faith on his part, this open guaranty was transferred by the person intrusted with it. He claims as one to whom this guaranty was promised as an inducement to purchase, and who thereupon purchased and paid for the bond and mortgage. Had the defendant Abbott made a special guaranty, limited to Strickland, the case would have been different. But this guaranty is general. Anyone who, on the strength of it, purchased the bond and mortgage, might justly consider the guaranty as addressed to him. And the money with which he parted formed the consideration for the guaranty. The guaranty went into effect when he, in good faith, purchased the bond and mortgage thus guaranteed. Nor was the fact that the date of the guaranty was a year previous, anything to suggest suspicion or to put the purchaser on inquiry. Nor did the fact that he took from Pickit another guaranty, contained in the assignment, show that he did not rely on the former. Pickit's guaranty in the assignment was under seal, and, therefore, was better than the other as to him. The parol evidence changed the effect of the written paper. It made it a special, limited guaranty, instead of one general and unlimited. . . . The plaintiff, on the faith of the security apparently offered by the guaranty, has parted with his money. No parol evidence should be permitted to change the written instrument on which he trusted. . . . The parol evidence did change the effect of the written guaranty. The writing was a promise, unqualified, to guarantee the bond and mortgage, open to the acceptance of anyone. The parol evidence changed it to a guaranty to Strickland only, as if it were written: 'We hereby guarantee to Moses Strickland.'"

In Griffin v. Rembert (1871) 2 S. C. 410, the following guaranty was held to be a general guaranty, and enforceable by any person who sold goods on the strength of it. "Mr. Francis E. Joye, Dear sir:—As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guarantee the payment of any bills which you may make, under this letter of credit, in Baltimore, not exceeding in the whole amount $1,500."

In McNaughton v. Conkling (1859) 9 Wis. 316, it was held that a letter of credit, though addressed to a particular firm, could be enforced by anyone selling goods on the faith of it, provided it appeared from the terms of the letter that it was intended to be general. In that case, the letter in question requested the advice and assistance of the addressee, and guaranteed the payment, up to a certain amount, of any goods that might be purchased by the debtor in New York.

In Bleeker v. Hyde (1843) 3 McLean, 279, Fed. Cas. No. 1,537, the letter of credit on which it was sought to hold the guarantor read as follows: "Messrs. Erastus Corney & Co., New York, Gentlemen:—I hereby authorize Messrs. A. & D. Wallingsford to purchase goods, such as they may wish to, in my name and on my account, to the amount of $2,500. (Signed) O. M. Hyde, 20th Sept., 1841." Holding that the language of the letter was sufficiently general to give others than the firm to whom it was addressed a right of action against the guarantor, the court said: "Although the letter of defendant is directed to Corney & Co., yet it does not appear from its language to have been alone intended for them. The language is general: 'That he had authorized A. & D. Wallingsford to purchase goods on his account to the amount of $2,500.' He does not say he had authorized the purchase of goods from them. Had such been the language of the letter, it would be clear, from the cases above cited, that by virtue of the letter the defendant would not have been bound by a purchase from any other person or firm."

In Lowry v. Adams (1849) 22 Vt.

160, wherein it appeared that goods were sold by various merchants on a general letter of credit addressed to no particular person, it was insisted that the sale by the first merchant fixed the parties, and that a second merchant, making a subsequent sale, could not enforce the guaranty. Answering this contention, the court said: "The defendant had been a merchant himself, and had formerly carried on the mercantile business in the same store then occupied by Drury, and must have known that it would be impossible for Drury to have supplied himself with all the various kinds of goods usually kept for sale in a country store, at any single house in New York, and that he must, necessarily, make purchases of goods at several different houses. The defendant, having been in business and known to be responsible, under this state of things, gives to Drury a general letter of credit to carry to New York, addressed to no one, in which he agrees to be responsible for the goods Drury may purchase, more than he pays for. It would seem, from the writing itself and from the situation of the parties, impossible for anyone to doubt what the defendant really intended, when he executed the paper and delivered it to Drury. We are fully satisfied that his object must have been and that he intended to give to Drury the necessary credit to enable him to purchase his fall stock of goods, of the various descriptions and varieties kept in a country store, at as many different houses and of as many different dealers as might become necessary for that purpose. . . . We are not able to discover any principle, or authority, by which we are precluded from giving to the defendant's letter of credit the effect we are satisfied he intended, that is, to make himself responsible to each and every person who should sell goods to Drury, relying upon the faith and credit of it, and that he became liable to each in the same manner, and to the same legal effect and extent, as if he had given a separate letter to each."

But in Postlethwaite v. Minor (1914) 164 Cal. 227, 142 Pac. 55, it was held that the holder of the bonds of a corporation, who was in no way a party to an agreement among the incorporators, whereby some of them bound themselves to guarantee the bonds by indorsement, could not maintain an action to enforce the guaranty.

A general guaranty of the payment of a note, without naming any person as the party to be guaranteed, may be enforced by any person advancing money on it. Hopson v. Ætna Axle & Spring Co. (1883) 50 **Conn.** 597; Nevius v. Bank of Lansingburgh (1862) 10 **Mich.** 547; Wood v. Bragg (1899) 75 **Minn.** 527, 78 N. W. 93; McLaren v. Watson (1841) 26 Wend. (**N. Y.**) 425; Westchester Mortg. Co. v. McIntire (1915) 168 App. Div. 141, 153 **N. Y.** Supp. 439; Bank of Batavia v. Sewell (1880) 6 **Ohio** L. J. 288; Northumberland County Bank v. Eyer (1867) 58 **Pa.** 97; Douglass v. Second Nat. Bank (1876) 4 W. N. C. (**Pa.**) 163; Tidioute Sav. Bank v. Libbey (1898) 101 **Wis.** 193, 70 Am. St. Rep. 907, 77 N. W. 182.

In Baldwin v. Dow (1881) 130 **Mass.** 416, it was held that a guaranty written on the back of a negotiable promissory note, which had been indorsed by the payee for the accommodation of the maker, could not be enforced by the payee; but, being intended for the person who accepted it as a valid contract and advanced the money on it, could only be enforced by him.

b. Necessity of knowledge of guaranty.

While a general guaranty may be enforced by anyone who acts on the faith of it, it cannot be taken advantage of by a person selling goods or advancing money to the person for whose accommodation the guaranty is given, unless he had definite knowledge of its existence and acted on it. Thus, in McClung v. Means (1829) 4 **Ohio,** 196, the guaranty sued on was as follows: "Steubenville, December 26, 1825. Mr. James Boggs, Sir:—All the goods C. O. Page may purchase in Philadelphia during the month of January, 1826, I hold myself accountable for the payment of the same. Respectfully yours, James Means." Holding that a firm selling goods to the person for whose

accommodation the letter was given, but who had never seen it, and knew of its existence only through rumor, could not enforce it, the court said: "It appears one of the partners [plaintiff] had indirectly got information of the contents of the letter; besides, rumor had probably spread them over the city, and had brought them to both partners. There would, however, be something assuming the appearance of a departure from strict fairness and propriety to permit a man, perhaps a young and inexperienced one, too, to be sought out and made enter into extensive engagements to charge a friend, without an introduction or exhibition of the letter upon which the writer was to be charged, to an unlimited amount. Such is not the ordinary course of fair-dealing merchants. In the absence of authority, the court would pause before they would give countenance to a transaction attended with such circumstances of unfairness. . . . The very fact that the plaintiffs did not call upon Boggs to see the letter or obtain a copy, although one of the partners had understood such a letter had been written, shows that they either intended to give credit to Page, or that some apprehensions were entertained that Boggs would decline recommending their house to him. It would be fairer to presume the credit was given to Page himself, than to Means upon vague rumor."

In Hart v. Wynne (1897) — Tex. —, 40 S. W. 848, wherein it appeared that a guarantor wrote a letter to a bank, assuming all the liabilities of a debtor, it was held that the guaranty was general, and that the cashier of the bank, who was one of the creditors, or anyone else who obtained knowledge of the letter and acted on the faith of it, could enforce it.

III. Special guaranty.

a. In general.

The rule is well setled that a special guaranty can be enforced only by the person intended by the parties to be protected thereby, who, in most cases, is the one to whom it is addressed. Thus, in Birckhead v. Brown (1843) 5 Hill (N. Y.) 634, affirmed in (1845) 2 Denio, 375, the court, denying the right of a person other than the addressee to enforce a special guaranty, stated the rule as follows: "When the letter is special, or, in other words, addressed to a particular individual, he alone has the right to act upon and acquire rights under it. If anyone else attempts to accept and act upon the proposition contained in the letter, he comes in as a mere volunteer, and he cannot, by thus thrusting himself forward, create any legal obligation on the part of the writer. There has been no communication, and is no privity of contract between them."

In King v. Batterson (1880) 13 R. I. 117, 43 Am. Rep. 13, the court, holding that a person furnishing goods on the strength of a guaranty addressed to another, could not enforce the guaranty, said: "There may be good reasons why the guarantor should be willing to deal with one person, and not with another; and there may be equities, or other dealings, between the guarantor and the guarantee, which the former may desire to provide for, and has a right to provide for."

In Taylor v. Wetmore (1841) 10 Ohio, 490, the guaranty sued on read as follows: "Messrs. A. D. McBride & Co., Gentlemen:— Mr. C. D. Farrar has concluded to purchase a few goods; we have that confidence in Mr. Farrar that we will say that we will be responsible, to the amount of $2,000, for goods delivered him. We are truly, C. W. & S. D. Wetmore." Holding that this was a special guaranty, and could be enforced only by the person to whom it was addressed, the court said: "It is directed to the house of McBride & Co., in the city of Pittsburgh, and nothing upon its face evincing an intention to give Farrar credit, or to incur responsibility with any other house. The counsel for the plaintiff here admit that a surety cannot be held beyond the terms of his engagement; but they insist that, although it is addressed only to McBride & Co., as it does not say, 'We will be responsible to you,'

it is a letter of credit to any other who will advance the goods. It seems to us this reasoning is more ingenious than sound. The guaranty being addressed to A. D. McBride & Co., it is to them the defendants speak when they say, 'We will be responsible to the amount of $2,000,' and it contains no general terms by which either Farrar or the house of McBride had the authority to transfer it to the plaintiffs, and they to make the defendants their guarantors, without their assent, express or implied."

In Taylor v. McClung (1858) 2 Houst. (Del.) 24, it appeared that, when the guaranty sued on was written, there were two firms engaged in the wholesale grocery business in different parts of the same city, one under the firm name and style of Taylor, Gillesfie, & Co., and the other under the name and style of David B. Taylor & Co., and that, though apparently distinct and separate concerns, they were, in reality, composed of the same individual members and owners. The guaranty was addressed to Messrs. Taylor & Gillesfie, which, though not the formal designation of either firm, was intended by the guarantor for Taylor, Gillesfie, & Co., the only firm known to him, and with whom he had previously had business relations. The guaranty was delivered by the debtor to David B. Taylor & Co., and the goods sued for purchaser from there on its credit. Holding that they were not entitled to enforce the guaranty, although their firm was composed of the same members as that to which the guaranty was actually addressed, the court said: "The fact that the two houses were composed of the same identical members, with the same relative interests, or shares, as partners in each, established as they were at different times, and doing business at different points in the city and under different names, or styles, as commercial houses, and, so far as the public was concerned, apparently on separate and distinct grounds, each for itself, could not entitle them to consider and treat a guaranty, or proposition of guaranty, addressed to one house, as alike addressed to both, or indifferently to either; or that either one of the firms, or any but the firm to which it was addressed, or for which it was, in point of fact, designed, could act upon it as a valid and binding guaranty. For the identity of members will not constitute an identity of firms, under such circumstances, if it can, indeed, under any circumstances, where they are doing business as separate and distinct houses in different places, even under the same name; because a commercial house consists of something more than its individual members, or proprietors, merely. Its stock in trade, stand or place of business, books, bills, notes, accounts, and papers, as well as many other appliances peculiar to every such house, and in which no other firm, as a firm, can have any property, or interest as a proprietor, are all essential matters, which enter into the constitution and composition of a mercantile firm, or copartnership, as well as members or owners; and it would be productive of the greatest confusion, injustice, and embarrassment in all legal and judicial proceedings, if they were to be considered and treated as, in effect and substantially, one and the same house, because the respective members of them happen to be the same. It is for this reason, therefore, that every firm must sue and be sued by and in its own name, as a firm, for a partnership debt, or a debt contracted with it as a firm; and that one firm cannot, in its own name as a firm, sue for and recover a debt contracted with another firm, in the name of that firm, even though composed of the same members. In all these respects, two different houses doing business under two different commercial names as firms, though constituted of the same members, having the same interest in each, are, in contemplation of law, as separate and distinct from each other as two persons; and one cannot act or sue upon a guaranty intended for or given to another, any more than it can sue for a debt or an account contracted with the other; for if the guaranty be accepted by the party to whom it is

offered, or for whom it is intended by the guarantor, it is as much a matter of contract between the parties to it in the one case, as in the other."

In Scott v. Alton Bkg. & T. Co. (1915) — Mo. —, 175 S. W. 920, wherein it appeared that a letter of guaranty from a bank was addressed to Scott & Sons, railroad contractors, guaranteeing the payment of work done in grading a roadbed, the court, holding that there could be no recovery on the guaranty in an action brought by Scott & Sons and Grommet Brothers, subcontractors, said: "The letter is addressed to Scott & Sons, and not to Scott & Sons and Grommet Brothers. The action having been commenced by both firms, based on the letter aforesaid, the defendant cannot be held liable as guarantor in this case. Every guarantor has a right to stand upon the strict terms of its obligation, and hence the two firms could not be permitted to recover on alleged guaranty, based upon the letter set out in petition. Having been addressed to Scott & Sons, they alone could have maintained an action thereon, if anyone, and hence the plaintiffs are not entitled to a recovery in this action, based upon the letter aforesaid."

In Stevenson v. McLean (1861) 11 U. C. C. P. 208, it was held that under a guaranty addressed to one person, guaranteeing advances to be made to a third, the addressee could not recover against the guarantor for advances made by himself and another jointly.

In Robbins v. Bingham (1809) 4 Johns. (N. Y.) 476, it was held that where a letter of credit was addressed to a particular person, guaranteeing the payment for goods to be furnished the debtor, and the goods were furnished jointly by the addressee and another, the addressee could not recover, in an action brought by himself alone, for the goods furnished by the third person, as the latter was in no way entitled to enforce the guaranty.

In Fletcher Guano Co. v. Burnside (1914) 142 Ga. 803, 83 S. E. 935, it appeared that the letter of credit was addressed to a particular person in the following language: "Let William Copeland and Will Passmore have what fertilizers they need this year, and I will be responsible for the payment of it." Holding that the guaranty could not be enforced by another dealer, whom the addressee induced to furnish the fertilizer to the persons named, it was said: "A letter of credit addressed to a certain person will not be binding on the drawer of the letter in favor of a third person, who is induced by the drawee to let the party named in the letter have certain goods."

In Walsh v. Bailie (1813) 10 Johns. (N. Y.) 180, it appeared that the addressees of a letter of credit, instead of furnishing the goods themselves, gave the debtor a letter to a third person, requesting him to furnish them, and stating that, as they held a guaranty for the amount, they would stand accountable for any goods furnished. In an action by the addressee to recover on the guaranty for the goods furnished by the third person, it was held that the guaranty could be enforced by the addressee, only for goods furnished by themselves.

In Birckhead v. Brown (1843) 5 Hill (N. Y.) 634, affirmed in (1845) 2 Denio, 375, wherein it appeared that a special letter of credit was sought to be enforced by a person other than the addressee, the court, denying the right of enforcement, said: "In this case the letters were special. They were addressed to Messrs. W. and J. Brown & Co., Liverpool, and to no one else. With that house, and that one only, the defendants proposed to make a contract; and I see no principle upon which anyone else can come in and make himself a party to the agreement. The defendants requested Messrs. Brown & Co. to give a certain credit to Smith & Town, by way of paying the drafts of their agent Demarest, to be negotiated in Rio de Janeiro; and promised Brown & Co. that Smith & Town would attend to placing them in funds. If Brown & Co. had made the advance, and the principal debtors had failed to put them in funds, they might have had an action against the defendants on the

letters of credit. But how can the plaintiffs sue? They were not requested to give a credit to Smith & Town, either by paying the bills, or in any other form. They have stepped in and advanced money as mere volunteers, and they can only sue upon the contracts to which they are parties, to wit, the bills of exchange."

In Grant v. Naylor (1808) 4 Cranch (U. S.) 224, 2 L. ed. 603, the court, holding that a letter of credit, addressed by mistake to John and Joseph Naylor and delivered to John and Jeremiah Naylor, could not support an action by John and Jeremiah for goods furnished by them to the bearer on faith of the letter of credit, said: "This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John and Joseph Naylor & Co., to either of which this letter might have been delivered. It is not a case of fraud. And if it was, a court of chancery would probably be the tribunal which would, if any could, afford redress. If it be a case of mistake, it is a mistake of the writer only, not of him by whom the goods were advanced, and who claims the benefit of the promise. Without reviewing all the cases which have been urged from the bar, it may be said with confidence that no one of them is a precedent for this. A letter addressed, by mistake it is admitted, to one house, is delivered to another. It contains no application or promise to the company to which it is delivered, but contains an application and a promise to a different company, not existing at that place. The company to which it is delivered are not imposed upon with respect to the address, but, knowing that the letter was not directed to them, they trust the bearer who came to make contracts, on his own account. In such a case the letter itself is not a written contract between Daniel Grant the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract is going further than courts have ever gone, where the writing is itself the contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it."

In Evansville Nat. Bank v. Kaufmann (1883) 93 N. Y. 273, 45 Am. Rep. 204, reversing (1881) 24 Hun, 612, the letter expressing the guaranty was as follows: "Messrs. Bingham Bros., Evansville, Ind., Dear Sirs:—Any drafts that you may draw on Mr. A. Feigelstock, of our city, we guarantee to be paid at maturity. Yours truly, Kaufmann & Blun." Holding the letter to constitute a special guaranty, and to be unenforceable by a bank which had purchased the drafts, the court said: "We are, therefore, of the opinion, from the fact that the letter was addressed to Bingham Brothers, alone, the absence of any allusion to its consideration or the negotiability of the drafts therein referred to, and a consideration of the situation and relation of the parties, that the intention could not fairly be imputed to the defendants of making the guaranty contained in the letter, general and open for acceptance by anyone who might choose to comply with its terms. We have been unable to find any case which either requires or authorizes the classification of this letter as a general guaranty. In each of the numerous cases cited, in which the instrument considered was held to be a general guaranty, it was either addressed generally, or the guaranty contained inherent evidence that it was intended to be used in obtaining credit wherever it was needed."

In Second Nat. Bank v. Diefendorf (1876) 90 Ill. 396, wherein it appeared that a grain broker drew a draft on an out-of-town customer in favor of his local bank, which, however, refused to advance the money on it unless its payment were guaranteed, whereupon the customer (drawee) procured his bank to wire its guaranty to the payee bank, it was held that the drawer, who was forced to pay the draft on its nonacceptance and protest, could not recover on the guaranty, as there was no privity of contract between the guarantor and the drawer, the guar-

anty being intended solely for the protection of the payee.

In Campbell v. Lacock (1861) 40 Pa. 448, it was held that a guaranty given to a partner who sold his interest to the other member of the firm, that the purchasing partner would pay all debts and obligations of the firm, could not be enforced by a creditor of the firm, there being no privity of contract between such creditor and the guarantor.

In Holloway v. Blum (1884) 60 Tex. 625, it was held that a guaranty to a retiring member of a firm, guaranteeing him immunity against all creditors of his firm if he would release and convey his interest in the firm to his copartners, could not be enforced by creditors of the firm. And see the reported case (JOHN HORSTMANN CO. v. WATERMAN, ante, 856), wherein it is held that a guaranty given to particularly named persons, to the effect that the writer would see that all the debts of a corporation were paid, cannot be enforced by creditors of the corporation not named in the guaranty.

But in Fain v. Manos (1911) 89 S. C. 54, 71 S. E. 464, it was held that a guaranty given to a purchaser of a business, to the effect that the guarantor would stand between the purchaser and the creditors of the seller, and see that he was not sued by any creditor of the seller, was made for the benefit of the creditors of the seller, and could be enforced by them.

In Johnson v. Brown (1874) 51 Ga. 498, it was held that a letter of credit, guaranteeing the payment of any bill of goods sold to the person in whose favor it was drawn, by any person living in a particularly specified city, could not be enforced by a merchant who lived and conducted business in a city other than that named, although he relied on the letter in making his sale. The court, in stating the reason for its holding, said: "The writers of the letter may have had many reasons to prefer the credit being given in Macon. It may have been the headquarters of their own moneyed transactions. Their own consignments or deposits may have been there. It might have been easier for them to have made payments in Macon than elsewhere, to have procured accommodations so as to meet whatever liabilities might fall upon them on account of the letter, and generally to have run less risk of affecting their own credit, by giving a guaranty which was to be met at Macon. And, further, they had a right to limit the market where their own character for responsibility, etc., was to be tested, for instance, to a place where they might have been known, rather than where inquiry would be provoked by comparative nonacquaintance. Be the cause what it may have been, they had a right to indulge their own preference in fixing a very reasonable condition to their guaranty, whether outsiders could appreciate it or not." And, reasoning by analogy from the rule that a letter of credit addressed to a particular person cannot be enforced by a third person, it was further said: "If this be so, as to who may be parties plaintiff, or who may become creditors on such letters addressed to particular persons, why is it not equally applicable to letters drawn on particular places? The principle is the same."

b. Change in status of individual to whom guaranty is given.

A guaranty given to an individual cannot be enforced by a partnership, afterward formed by that person and another. Holmes v. Small (1892) 157 Mass. 221, 32 N. E. 3; Bussier v. Chew (1862) 5 Phila. (Pa.) 70; Sollee v. Meugy (1830) 1 Bail. L. (S. C.) 620.

Thus, in Holmes v. Small (Mass.) supra, the court, holding that a guaranty made with a person acting in his individual capacity could not be enforced by a partnership which he later formed to conduct the same business, said: "Without regard to precedents, there are sound reasons why the defendant's undertaking should not be held to inure to a copartnership, subsequently formed. The defendant may be presumed to have known the situation of Wright, the extent of his business, and his methods of conducting it, and to have been willing to

become his debtor, and to incur such risks as were involved in becoming primarily responsible for sales from him to Mitchell. But he did not agree that, if Wright should become associated as a partner with others, he would be liable to them also for sales of the new firm. The defendant made no contract with the firm, either in fact or in intendment of law, because Wright was not an agent of that firm, nor was it in existence when the contract to be responsible was made. . . . Wright, by becoming a member of the firm, could not transfer to his firm the contract of the defendant with himself. . . . The defendant did not elect to contract with them, nor did he contract with Wright when Wright was in such a position with reference to the other plaintiffs as to enable the firm to rely on his agreement. He had the right of every person to elect with what parties he would deal; . . . and he, in fact and in law, dealt with Wright alone, and is justified in saying to the plaintiffs that he has not contracted with them."

In Sollee v. Meugy (S. C.) supra, it was held that a letter of credit, guaranteeing advances of money to be made to the debtor, which was addressed to an individual, could not be enforced by a partnership subsequently formed by him with another, without proof that the guarantor had consented to extend his guaranty to advances made by the firm.

In Bussier v. Chew (Pa.) supra, wherein it appeared that the guarantor had given to an individual his written contract, guaranteeing the payment by the debtor of bills for goods purchased up to a certain amount, the court, holding that the guaranty could not be enforced by a partnership afterwards formed by the guarantee, although the goods were furnished by the partnership on the faith of the guaranty, said: "It may be one thing to be answerable for such goods as may be sold by a particular person whose business tact may be known, and whose discretion confided in, and another to be answerable for the possible recklessness or imprudence of any partner whom he may subsequently associate with himself in business."

It has been held that the incorporation of a person to whom a guaranty was addressed, after the contract of guaranty has been made, defeats the right to enforce the guaranty with respect to transactions thereafter occurring. W. B. Saunders Co. v. Ducker (1911) 116 Md. 474, 82 Atl. 154, Ann. Cas. 1913C, 817.

But where the person to whom the guaranty is given brings an action to enforce it individually, and in his own name, it has been held that the fact that he has formed a partnership with others, subsequently to the giving of the guaranty, and that they will share in the proceeds derived therefrom, does not preclude him from enforcing it. Roberts v. Griswold (1862) 35 Vt. 496, 84 Am. Dec. 641, wherein it was held that an attorney to whom a guaranty of payment for services to be rendered had been given did not lose his right to enforce it, although he had formed a partnership with others, where it appeared that he had performed the services, and the suit was brought in his name. In that case it was conceded that the guaranty could not be enforced by the firm.

In Barker v. Parker (1786) 1 T. R. 287, 99 Eng. Reprint, 1098, 1 Revised Rep. 201, it was held that a guaranty, given for the faithful performance of his duties by a clerk in the employ of the obligee, could not be enforced by his executors, who continued the business and retained the clerk in their employ.

c. Change in status of partnership to which guaranty is given.

It may be stated, as a general rule, that transactions occurring after any material change in the status, or composition, of a partnership to which a guaranty was made, will not be covered by the guaranty. Thus, where a guaranty is given to a firm composed of certain known members, it cannot be enforced by a new firm, formed by the addition of another member to the old firm, though the business is the same and is conducted in the same

place. John H. Lyon & Co. v. Plum (1908) 75 N. J. L. 884, 14 L.R.A.(N.S.) 1231, 127 Am. St. Rep. 858, 69 Atl. 209, 15 Ann. Cas. 1019, wherein it appeared that a partnership, consisting of three members, attempted to enforce a guaranty given to the firm when it consisted of only two members. Holding that the firm had lost its right to enforce the guaranty by the increase in its membership, the court said: "Plum, the defendant, presumably knew both Lyon and Knight of the original firm, and had a right to rely on their care in extending credit and promptness in collection. He could not be expected to know what part a new partner might play in the business of the firm. Such new partner might be intrusted with the entire management of credits and collections, and might negligently extend undue credit and delay collection. Plum guaranteed the original firm, and that alone. His liability is measured by the terms of his contract, which is strictissimi juris, and not to be extended by implication. . . . And the addition of a partner to the firm of Lyon & Company was an additional risk, which Plum did not assume. Plum's liability, therefore, did not extend to credits given by the new firm of Lyon & Company, after Tully's admission into it."

And in Spiers v. Houston (1829) 4 Bligh, N. R. 515, 5 **Eng.** Reprint, 183, it was held that a guaranty of money, advanced by a firm consisting of two members, did not extend to a new firm in which a third person had been introduced as a partner.

The rule as to changes in the firm secured is not confined to an increase in a partnership by the admission of a new partner, but extends to a decrease by voluntary act, or death. Thus, in Starrs v. Cosgrave Brewing & Malting Co. (1885) 12 **Can.** S. C. 571, reversing (1885) 11 **Ont.** App. Rep. 156, and affirming (1884) 5 Ont. Rep. 189, it was held that the surviving partners of a firm could not enforce a guaranty given to the original firm, for any goods it might sell to the person for whose accommodation the guaranty was given.

And in Strange v. Lee (1803) 3 East, 484, 102 **Eng.** Reprint, 682, wherein it appeared that, after a guaranty had been given to a firm of bankers to secure any advances it might make to a named person, one of the members of the firm died, the court, holding that neither the firm as composed of the remaining members, nor the firm after a new member had been taken in, could enforce the guaranty with respect to advances made after the death of the member, said: "The defendant's obligation is to pay all sums due to them, on account of their advances to Blyth. Now who are 'them' but the persons before named, amongst whom is James Walwyn, who then constituted the banking house, and with whom the defendant contracted? The words will admit of no other meaning. And indeed, with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is surety. For a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently. The characters, therefore, of the several partners, may form a material ingredient in the judgment of the obligor upon entering into such an engagement."

In Dry v. Davy (1839) 10 Ad. & El. 30, 113 **Eng.** Reprint, 12, the guaranty sued on read as follows: "Messrs. Mirfin and Dry, Gentlemen:— My son, Mr. G. C. Davy of . . . is desirous of commencing business in your line, and wants the usual credit for four or six months. If you think well to supply him, I will be answerable for the amount of £100. I am, etc., 28th June, 1836, Mary Davy." At the time it was given the firm consisted of the two named and a third person, who afterwards left the firm, and the business was continued by the two named in the guaranty under the same firm name. The goods, in respect to which

it was sought to enforce the guaranty, were supplied after the third member had left the firm. Holding that the two remaining members could not enforce the guaranty, the court said: "The circumstance of a particular person being in the firm may be the inducement for giving and continuing the guaranty; and there is nothing in the instrument in question to show that that was not the case here."

Nor can a guaranty given to a firm be enforced by an individual member, succeeding to the business. Thus, in Schoonover v. Osborne Bros. (1899) 108 Iowa, 453, 79 N. W. 263, it was held that a partner who, succeeding to the business of a firm, advanced money under a guaranty directed to the firm, could not enforce such guaranty. And in Smith v. Montgomery (1848) 3 Tex. 199, it appeared that the guarantor wrote and forwarded a letter of credit as follows: "Colonel Smith & Pilgrim, Gentlemen:— Mr. A. W. Tennard wishes to get some dry goods on time; if you will furnish, I will see you paid as far as to the amount of $3,000, and much oblige yours with respect, James S. Montgomery." The letter was addressed on the back to Smith alone. It appeared that Smith and Pilgrim had been partners in business but, a short time prior to the date of the letter, had dissolved the partnership. The letter was delivered to Smith, and he supplied the goods to Tennard, who failed to pay for them. Whereupon Smith instituted an action to recover from Montgomery, as guarantor, the price of the goods to the amount of the guaranty. Holding that he could not enforce the guaranty, the court said: "Upon consideration, we are all of opinion that we must look to the address upon the face of the letter, and not to the direction upon the back of it, to ascertain the party to whom its application and promise were intended, by the writer, to have been made; that, bearing upon its face a direction and address full and complete, and free from ambiguity, we must take that as the certain criterion to determine its application, without regard to the discrepancy in the superscription. If the letter did not bear upon its face the proper address, resort might be had to the superscription, or perhaps to other extrinsic evidence, if necessary, to determine its direction and application. . . . But when the contract, upon its face, is complete and perfect, and certain to every intent, as well in respect to the parties as the subject-matter, we do not think it admissible to resort to anything extrinsic to control the express terms and clear import of the face of the instrument. . . . It is a well-settled rule, applicable to this class of cases, that the liability of a guarantor, or surety, cannot be extended by implication, or otherwise, beyond the actual terms of his engagement. It does not matter that a proposed alteration would even be for his benefit, for he has a right to stand upon the very terms of his agreement. The case must be brought strictly within the terms of the guaranty, when reasonably interpreted, or the guarantor will not be liable."

In Penoyer v. Watson (1819) 16 Johns. (N. Y.) 100, it was held that a draft accepted and paid by one partner, after a dissolution of the firm to which the letter of guaranty had been addressed, could not be used as a basis for an action to enforce the guaranty by the remaining partner.

Similarly in Friedlander v. New York Plate Glass Ins. Co. (1899) 38 App. Div. 146, 56 N. Y. Supp. 583, wherein it appeared that the guaranty sued on had been given to a firm for goods sold to the debtor, and it was sought to be enforced by one of the partners, who succeeded to the business and made sales after the dissolution, the court, holding that the remaining partner could not enforce the guaranty, and that subsequent correspondence between the partner and guarantor, conducted in the firm name, did not alter the rule, said: "It is said that after the dissolution of the firm, and while Edelman was purchasing goods of Friedlander, there was a correspondence between the latter and the defendant, concerning the extent and obligation of this guaranty; but it will be observed that all

that correspondence emanating from the plaintiff is signed 'Friedlander & Greene,' and the defendant's answers are directed to 'Friedlander & Greene,' down to as late a date as July 30, 1896. There is nothing in the correspondence making the guaranty individual as to Friedlander."

Similarly, a change in the partnership by incorporation will preclude the corporation from enforcing a guaranty given to the partnership. Jordan Marsh Co. v. Beals (1909) 201 Mass. 163, 87 N. E. 471, wherein it appeared that a guaranty, addressed to Messrs. Jordan Marsh Co., bound the maker to pay all bills contracted "at your house." It was held that the use of the term, "at your house," did not alter the rule, and that the concern, by incorporating itself, lost its right to enforce the guaranty, although the corporation was composed of the same persons, and carried on the same business at the same place and in the same manner as the copartnership.

But in Knit Goods Exch. v. Halpern (1913) 81 Misc. 218, 142 N. Y. Supp. 566, wherein it appeared that the guaranty was addressed to a merchandise company in its former partnership name of "Knit Goods Exchange," although the company had previously been incorporated under the name and style of "Knit Goods Exchange, Ins.," it was held that the intention of the parties was clearly to make the corporation the guarantee, and that it could enforce the guaranty.

In Wadsworth v. Allen (1851) 8 Gratt. (Va.) 174, 56 Am. Dec. 137, it was held that a letter of guaranty, addressed to the firm of "Wadsworth & Williams," might be enforced by a firm doing business under the style of "Wadsworth, Williams, & Co.," and that parol evidence was admissible to show that, although the firm had formerly been Wadsworth & Williams, it had been changed before the letter of guaranty was written, and that the guarantor really intended the letter for the firm of Wadsworth, Williams, & Co.

d. Change in status of corporation to which guaranty is given.

In First Commercial Bank v. Talbert (1895) 103 Mich. 625, 50 Am. St. Rep. 385, 61 N. W. 888, it was held that a state bank, which was a reorganization of a national bank, and which assumed all the disabilities of the national bank and had the same board of directors and stockholders, could enforce a guaranty given to the national bank. Similarly, in City Nat. Bank v. Phelps (1884) 97 N. Y. 44, 49 Am. Rep. 513, the court, holding that a national bank, which was a reorganization of a former state bank, retained its identity so that a guaranty of payment made to the state bank could be enforced by the reorganized national bank, said: "All the property and rights which they held before organizing as national banks are continued to be vested in them under their status. Great inconveniences might result, if this saving of their existing assets did not include pending executory contracts and pending guaranties, as well as vested rights of property. Although, in form, their property and rights as state banks purport to be transferred to them in their new status of national banks, yet, in substance, there is no actual transfer from one body to another, but a continuation of the same body, under a changed jurisdiction. As between it and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing under the National Banking Act." But in Mechanics' American Bank v. Rowell (1916) — Mo. —, 182 S. W. 989, it was held that a bank formed by the merger of three other banks could not enforce a guaranty given to one of the original banks.

And in Crane Co. v. Specht (1894) 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015, the rule that a guarantor is to be bound only according to the strict terms of his undertaking was carried to an extreme limit, the court holding that a guaranty addressed to the "Crane Bros. Manufacturing Company" could not be enforced by the "Crane Co.," which, while it had

changed its name, was in reality the same corporation, had the same officers and stockholders, and conducted the same business at the same location.

It has been held that a guaranty given to a corporation might be enforced by a receiver for the corporation. Philadelphia & R. Coal & I. Co. v. Daube (1896) 71 Fed. 583, wherein the reason for the holding was stated as follows: "The appointment of a receiver by a court of chancery does not operate to transfer title to the property, or to dissolve the corporation. . . . Its whole effect is clearly stated in Union Nat. Bank v. Bank of Kansas City (1890) 136 U. S. 223, 236, 34 L. ed. 341, 346, 10 Sup. Ct. Rep. 1013, in which it is said, in the opinion of the court, by Mr. Justice Gray: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody, as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property.' Under this definition, which is supported by abundant authority, I can find no ground for holding a substitution of new parties, or change of relationship, which can relieve the guarantor from liability on the subsequent sales. It is true that the court has interposed its agency, through the receiver, in the control of the business; but the corporation retains its title, 'and even the right of possession in the property.' Its corporate existence and interests are unaffected, and it has the same corporate benefit in all the subsequent transactions as were its right before the appointment; for it is the established rule respecting corporations that their managing officers and directors are, at all times, charged with the duty and liability of trustees, for the creditors and all parties in interest. This change of management may well be likened to that which takes place when the stockholders, in honest effort for reform, elect a new board of directors, and new agencies are substituted in conducting the affairs; in which case, I presume, there would be no contention that existing contracts of the character in question would be released."

e. Guaranty addressed to agent.

A principal cannot enforce a guaranty addressed to an agent, where there is nothing in the guaranty to indicate that the agent was acting for an undisclosed principal, and the guarantor had no knowledge that the credit was to be extended by the principal. Drummond v. Prestman (1827) 12 Wheat. (U. S.) 515, 6 L. ed. 712; Mitchell v. Railton (1891) 45 Mo. App. 273; Barns v. Barrow (1874) 61 N. Y. 39, 19 Am. Rep. 247; King v. Batterson (1880) 13 R. I. 117, 43 Am. Rep. 13; Allison v. Rutledge (1833) 5 Yerg. (Tenn.) 193; Anderson v. May (1872) 10 Heisk. (Tenn.) 84; Wilson v. Childress (1884) 2 Tex. App. Civ. Cas. (Willson) 374.

In Barns v. Barrow (1874) 61 N. Y. 39, 19 Am. Rep. 247, it appeared affirmatively that the guarantor had no knowledge that the nominal guarantee was acting for a firm, as its agent. In that case E. F. Barrow engaged to sell flour and feed for John W. Barns, and the guaranty sued on was made to Barns, agreeing to stand good for the performance of the contract entered into by Barrow. It appeared that the flour was furnished by a firm of which John W. Barns was a member, and, on the default by Barrow to account for the proceeds of flour sold on commission, the firm of Barns & Co. sued on the guaranty. It was insisted that, although the contract of guaranty, on its face, was made in the name of John W. Barns alone, yet as the goods were furnished by the firm of Barns & Co., an undisclosed principal, the firm had the right to enforce the guaranty. Holding that the firm could not maintain the action, the court said: "On the face of this contract, it is plain that no one could act upon it, except the persons named in it. The plaintiffs maintain that they can go behind the apparent transaction, and show that they supplied the

goods instead of John W. Barns. This claim is not one between the person who received the consideration and the plaintiffs. Were they seeking to collect of Edward F. Barrow the purchaser, it might be claimed that the case was simply one of an undisclosed principal in the law of agency; and that parol evidence might be offered to show that John W. Barns was acting for the firm. . . . The present case . . . is a case of pure guaranty; a contract which is said to be strictissimi juris; and one in which the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. The consideration of the contract does not inure to him, but to another. He assumes the burden of a contract, without sharing in its benefits. He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection. This is not my contract, non in hæc fœdera veni. Accordingly, in the present case, he may say: 'I contracted with John W. Barns, and will not be liable for supplies furnished by a firm, though he may be a member of it.' . . . The sole question is: To what did he agree? And if he contracted with one person, as he had reason to suppose, no other person can be substituted in the place of the apparent contractee. On like grounds, no person can be added to or subtracted from the apparent number. The words of the written instrument point out the person with whom he contracted, and measure his liability, unless it be made to appear affirmatively, by legitimate evidence, that the guarantor intended to embrace others."

In Wilson v. Childress (1884) 2 **Tex.** App. Civ. Cas. (Willson) 374, it was held that a letter of guaranty, addressed to a person in his individual capacity, could not be enforced by a firm for which the addressee was acting as agent, it not appearing on the face of the letter that it was, in any manner, made with the addressee as agent.

In Allison v. Rutledge (1833) 5 Yerg. (**Tenn.**) 193, it was held that a guaranty addressed to John Allison could not be enforced by John and Joseph Allison, who furnished the goods, the price of which was guaranteed.

But, in Drummond v. Prestman (1827) 12 Wheat. (U. S.) 515, 6 L. ed. 712, it was held that a guaranty given to a person in his individual name, and to his brother, for the faithful discharge of all engagements that the son of the guarantor might have with them, was enforceable by the firm composed of the two brothers, it appearing that it was known and understood by all parties that the two brothers were dealing as a firm, and the brother being mentioned in the body of the guaranty.

Where the guarantor has knowledge that the addressee of the guaranty is acting as agent for another, it is permissible to show by extrinsic evidence that such third person was intended to be benefited by the guaranty. Thus, in Mitchell v. Railton (1891) 45 **Mo.** App. 273, it was held that a guaranty addressed to a traveling salesman might be shown to have really been intended for his principal, where the guarantor knew that the addressee was making the sales as an agent. And in Michigan State Bank v. Peck (1855) 28 **Vt.** 200, 65 Am. Dec. 234, it was held to be proper to show that, in a letter of guaranty directed to C. C. Trawbridge, Esq., President, the bank of which Trawbridge was president was the real party intended. Similarly, in Woodstock Bank v. Downer (1855) 27 **Vt.** 482, 65 Am. Dec. 210, it was held that a guaranty addressed to the cashier of a bank, where it imported official action on the part of the cashier, and the consideration moved from the bank, might be enforced by the bank. Likewise, in Martin v. Blair & H. Co. (1916) — **Tex.** Civ. App. —, 187 S. W. 506, wherein it appeared that a letter was addressed to an individual as the president of a corporation, guaranteeing the account of a debtor, and

that the guarantor knew that the account was with the corporation, and not with its president individually, it was held that the corporation could enforce the guaranty.

In Van Wart v. Carpenter (1861) 21 U. C. Q. B. 320, the guaranty sued on read as follows: "Messrs. Irving, Van Wart, & Co., New York, Gentlemen:—In consideration of your filling the orders for goods from your Birmingham house of Joel Carpenter & Co., say the spring importations, I hereby hold myself responsible for and guarantee the payment of the same to you. Yours, etc., (Signed) Brian Carpenter." Holding that the guaranty could be enforced by the Birmingham firm, the court said: "A guaranty of this description may be sued upon by those for whose benefit it was in fact given, though their names may not appear in it, and . . . the intention of the guaranty, in that respect, may be made out by oral evidence."

In Beakes v. Da Cunha (1891) 126 N. Y. 293, 27 N. E. 251, an action by a partnership on a guaranty addressed to one member of the firm, individually, the court, in holding that if it appeared that the guarantor intended to guarantee the firm, they could enforce the guaranty, said: "The written guaranty, upon its face, appears to be for the benefit of George E. Beakes, individually, and not for the benefit of any firm, and hence the defendant claims that the plaintiffs, as copartners cannot have the benefit of the guaranty; and his counsel relies upon the case of Barns v. Barrow (1874) 61 N. Y. 39, 19 Am. Rep. 247. But this case is clearly distinguishable from that. There was evidence sufficient, although quite slight, to show that the defendant's testator, at the time he executed the guaranty, knew that the plaintiffs were copartners, doing business under the firm name of George E. Beakes, and that he intended that the guaranty should be for their benefit. He knew that the milk which Ketcham had been receiving came from Sidney Centre, Delaware county, and that that which he intended to receive after the execution of the guaranty was to come from the same place, and the guaranty was intended to cover that milk, by whomsoever shipped. The business was carried on in the name of George E. Beakes, and the guaranty was intended for that business, and to secure the payment of the milk shipped in that business to Ketcham. We cannot disturb the finding of fact upon this point in favor of the plaintiffs, and must, therefore, hold that the guaranty is available to them."

In Meyer v. Kahnweiler (1917) 98 Misc. 184, 162 N. Y. Supp. 1038, the court, holding that a guaranty addressed to one member of a firm could be enforced by the firm, provided it appeared that the firm was the real party intended to be guaranteed, set out the facts and its ruling as follows: "The guaranty in question reads as follows: 'New York, March 18th, 1916. David Meyer, 6th First Avenue, New York City, Dear Sir:—In reference to the merchandise ordered by our Di Gioia of Liberty Doll Company, Mr. Louis Kahnweiler of David Kahnweiler Sons of 260 Front street will guarantee the account to $200. Trusting that this will be satisfactory, I am, yours very truly. (Signed) Louis Kahnweiler.' . . . There is testimony, although 'slight,' from which the jury could have legitimately inferred and found that the defendant knew, when he told the bookkeeper of the doll company to send the guaranty to David Meyer, that it was for the benefit of the firm of David Meyer & Brothers. The defendant was the president of the doll company. That company had, for some time previous to March 17, 1916, been obtaining merchandise from the plaintiffs, of the same kind purchased under the order of March 18, 1916, and *subsequently* the defendant presumably knew of this fact. It is undisputed that, when David Meyer called upon defendant in reference to obtaining the guaranty, he told defendant that 'we' would not sell the doll company more merchandise, unless defendant would personally guarantee the payment. The expression 'we' clearly referred to the plaintiffs, and that evening, when the defendant went to the office of the doll company, he was told that the company wanted some more merchan-

dise, and that the bookkeeper had sent a guaranty to 'David Meyer Company,' thus showing that the defendant knew for whose benefit the guaranty was given."

In Garrett v. Handley (1825) 4 Barn. & C. 664, 107 Eng. Reprint, 1208, 7 Dowl. & R. 144, 1 Car. & P. 483, 27 Revised Rep. 405, it was held that a guaranty made in terms to one partner might be enforced by the firm, where it appeared, from the correspondence of which the guaranty was a part, that it was intended for the benefit of the firm, and not for the individual partner alone.

In Walton v. Dodson (1827) 3 Carr. & P. (Eng.) 162, it was held that a guaranty given to one of two partners might be enforced by the firm, if it appeared that the other partner did not carry on any separate business.

In Anderson v. May (1872) 10 Heisk. (Tenn.) 84, wherein it appeared that the guaranty was given to an individual for the payment of rent for a farm, if rented to a certain person and the lease was made by a firm of which the addressee of the guaranty was a member, but the action to enforce the guaranty was brought by the individual member, it was held that it was immaterial whether the contract of lease was made by the individual partner, or the firm, and that the individual partner could maintain the action to enforce the guaranty.

M. B.

A. BURGESS COLLINS, Appt.,
v.
JOHN N. REIMERS.

Iowa Supreme Court—December 11, 1917.

(— Iowa, —, 165 N. W. 373.)

Easement — reservation — loss by adverse possession.

Possession in good faith under an absolute warranty deed for the statutory period bars a right of way reserved across the property by a prior grantor.

[See note on this question beginning on page 884.]

APPEAL by plaintiff from a decree of the District Court for Scott County in favor of defendant in a suit to quiet title to certain lands. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Helmick & Boudinot**, for appellant:

An action to recover an interest in real property is barred in ten years.

Wenger v. Thompson, 128 Iowa, 750, 105 N. W. 333; Murray v. Quigley, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869.

The statute begins to run against a right from the date on which an action might have been commenced for its enforcement.

Prescott v. Gonser, 34 Iowa, 175; Lower v. Miller, 66 Iowa, 408, 23 N. W. 897.

A party cannot, by his own act or neglect, delay the running of the statute against him.

Hintrager v. Hennessy, 46 Iowa, 600; Squier v. Parks, 56 Iowa, 407, 9 N. W. 324; First Nat. Bank v. Greene, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754; Ball v. Keokuk & N. W. R. Co. 62 Iowa, 751, 16 N. W. 592; Great Western Teleg. Co. v. Purdy, 83 Iowa, 430, 50 N. W. 45; Collman v. Equitable L. Assur. Soc. 133 Iowa, 177, 8 L.R.A. (N.S.) 1019, 110 N. W. 444.

Messrs. **Thuenen & Shorey**, for appellee:

A purchaser is bound to take notice of the condition of the record title and of all the conditions contained in the deed upon which his title depends.

Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740.

Whoever acquires real estate with notice of an easement reserved in the same takes it burdened with the easement.

Fisher v. Beard, 32 Iowa, 346; Karmuller v. Krotz, 18 Iowa, 353; Presbyterian Church v. Harken, 177 Iowa, 195, 158 N. W. 692.

If an easement has been acquired by deed, no length of time nor mere nonuser will operate to impair or defeat the right.

Barlow v. Chicago, R. I. & P. R. Co. 29 Iowa, 276; Slocumb v. Chicago, B. & Q. R. Co. 57 Iowa, 675, 11 N. W. 641.

The Statute of Limitations does not commence to run against an easement until the property is used in a manner inconsistent with the reservation.

Fisher v. Beard, 32 Iowa, 346; Barlow v. Chicago, R. I. & P. R. Co. 29 Iowa, 276; Slocumb v. Chicago, B. & Q. R. Co. supra.

Stevens, J., delivered the opinion of the court:

Prior to August 13, 1872, J. Goldsbury was the owner of a tract of land situated in southeast quarter section 24, township 78 north, range 3 east of the 5th P. M. Scott county, Iowa, which was within the corporate limits of the city of Davenport. On the above date the said Goldsbury and wife conveyed to Henry W. Lee a portion of said tract described as follows: "Commencing at the southeast corner of a tract of land conveyed by J. Goldsbury and wife to H. R. Wood on July 10, 1872, and running thence east along the north line of said High street 257½ feet more or less to land belonging to E. B. Collins; thence north on said Collins west line 320 feet; thence west 257½ feet more or less to the northwest corner of said H. R. Wood's land; and thence south along the east line of said H. R. Wood's land 320 feet to the first named corner containing 1⅘ acres more or less, subject only to the intention of and opening of Grove street 40 feet wide on the east side, and to opening or giving half the width necessary for a street on the north side of said lot whenever said Wood and Goldsbury or their assigns shall be willing to give half on their side of the said north line."

The tract owned by Wood adjoined the land of grantor on the east. Subsequently Grove street, now known as Bridge avenue, was opened between the Goldsbury tract and the Wood land; the land of plaintiff and defendant abutting on High street on the south and the original Goldsbury tract upon Carey avenue, formerly Chestnut street, on the west. There is an alley extending east and west across the north end of the original Goldsbury tract, and north of that, a distance of approximately 150 feet, is Henry street, extending east and west. Through several mesne conveyances the plaintiff became the owner of a small tract off the north end of the land above conveyed to Lee, described as follows: "Beginning at a point in the west line of Bridge avenue, in the city of Davenport, Iowa, 270 feet north of the north line of High street; thence north on the west line of Bridge avenue 50 feet; thence west 160 feet; thence south 50 feet; and thence east 160 feet to the place of beginning,"—being therefore a tract 50 feet wide and 160 feet long.

The defendant owns that portion of the original Goldsbury tract adjoining the land of plaintiff on the north and west. Plaintiff alleged his ownership of said above tract; that he and his grantors have been in the adverse possession thereof for a period of forty-four years, and that whatever interest the defendant has or claims to have in and to said real estate by reason of the latter clause in the description above quoted from the deed of Goldsbury and wife to Lee is barred by this Statute of Limitations; that prior to the commencement of the suit plaintiff demanded of defendant a quitclaim deed to said premises and tendered to him $1.25; and that defendant refused said tender and to execute said deed. The defendant in answer, after a general denial, states that he is the owner of the land above referred to; that he acquired

the same by warranty deed from one of the mesne grantees of Goldsbury; that in the deed by which Goldsbury conveyed the land to plaintiff with the remaining tract described therein to Lee, he reserved to himself and his assigns the right to lay out a street between the land of plaintiff and that now owned by defendant, one half thereof to be taken off the north end of plaintiff's real estate, which said reservation became appurtenant to the land of plaintiff and his grantors in the real estate now owned by him.

It is also averred that at the time of the transfer the real estate in question was located on the outskirts of the city of Davenport, and that the public exigencies did not require the opening of a street through said tract at the point in controversy, but that the city is developing in that vicinity, and a street will soon be required. He also offers to dedicate to the public enough of his tract to make one half of said street, and prays that his alleged right to have one half thereof taken from the real estate of plaintiff be sustained and established.

It was stipulated by the parties that all deeds conveying the tracts of plaintiff and defendant, executed subsequent to that of Goldsbury and wife on August 13, 1872, to Lee, omitted therefrom the reservation or exception contained in that deed. The plaintiff testified that his tract is fenced, and has been for thirty-five or forty years; that very shortly after the purchase thereof defendant informed him of the provisions of the Goldsbury deed: that he caused a couple of hundred loads of dirt to be put on said lot during the summer of 1915 and a cement sidewalk to be constructed across the front thereof. The defendant testified that two buildings were built immediately north of his tract on Henry street about 1914; that Bridge avenue from Henry to High street was opened up its full width six or seven years previous; that the alley above referred to and located north of defendant's tract was dedicated to public use three years before; and that two houses have recently been erected on the west side of Carey avenue.

Appellant relied in the court below upon his plea of the Statute of Limitations and upon an estoppel, but nothing further is pleaded as constituting an estoppel than the facts relied upon to show the alleged adverse possession. The trial court held that nothing had been done to start the running of the Statute of Limitations, and that plaintiff's possession of the premises was rightful until a demand was made upon him for the use of the necessary portion of the north side of his lot for a street as contemplated by the reservation contained in the deed from Goldsbury and wife to Lee, and that his possession was not adverse.

The deed under which defendant claims title to the tract lying north and west of that in controversy is not in the record, nor does it show whether the reservation in question is referred to or contained therein.

Counsel for appellant in argument, however, treats appellee as sustaining the same relation, and possessing all the rights reserved by Goldsbury in his deed to Lee, and what is said herein is on the assumption that this is so. The clause in the Goldsbury deed should, perhaps, be construed as the reservation of a right to an easement of indefinite width off of the north side of plaintiff's tract for one half of a public street. No street was, however, ever opened in accordance with the intention declared by Goldsbury in said deed. The trial court held that the reservation in question was of a right which became appurtenant to the tract now owned by defendant; that it was not shown by plaintiff that he had ever denied the right of defendant to said easement, or that he held possession of the premises above described adverse to defendant's right under said reservation. But it is unnecessary to discuss the

question whether the right to an easement, as above stated, became an appurtenance to defendant's land, as that question is not presented, and counsel for appellant has argued this case upon the theory that defendant had some right under said reservation that could be destroyed by plaintiff's adverse possession of the entire tract.

Thus simplified, the only question presented for our decision is whether whatever right defendant acquired under and by virtue of said reservation has been lost to him by the alleged adverse possession of plaintiff of the whole tract, which was conveyed to him by warranty deed without exception or reservation. Counsel for appellee cites numerous decisions of this court to sustain his contention that the Statute of Limitations has not run against him. We therefore deem it necessary to refer specially thereto, and, if possible, to distinguish same from the case at bar.

The Statute of Limitations was not involved in Karmuller v. Krotz, 18 Iowa, 352, and we need not refer specially thereto.

In Barlow v. Chicago, R. I. & P. R. Co. 29 Iowa, 276, which was an action for the recovery of a railroad right of way across plaintiff's premises, the defendant claimed title to the disputed strip under a deed from plaintiff's grantor which contained the following provision: Provided, " 'that in case said railroad company do not construct their road through said tract, or shall, after construction, permanently abandon the road through said tract of land, the same shall revert to and become the property of the grantors, their heirs or assigns.' "

Defendant acquired title thereto as purchaser at a mortgage foreclosure sale. Plaintiff demurred to defendant's answer setting up title under the above deed and sheriff's deed, upon the ground that the original grantee of said right of way abandoned the same, and the defendant's right thereto was barred by the Statute of Limitations. The court held that plaintiff's use of said premises had not been adverse to the defendant's right, and that a mere nonuser for any length of time would not operate to impair or defeat the right to an easement acquired by deed.

Fisher v. Beard, 32 Iowa, 346, was an injunction suit brought to restrain the defendant from laying off into lots, selling same for building purposes, and erecting buildings on a certain block or square in the city of Pella, known and platted on the recorded plat of said city as "Public Square," and later changed to "Garden Square," and from diverting said block from its original purpose and use as a public square. Plaintiff and others purchased lots abutting thereon in reliance upon the statements and representations of the original proprietor that said square would always remain open for public use, and exhibited to purchasers a plat upon which same was designated as a public square. The defendant is the grantee through several mesne conveyances of the original proprietor of said tract. The court held that, as defendant had never asserted any right to said public square inconsistent with the original purpose and use thereof until same was laid off into lots and offered for sale, plaintiff's right to maintain an action to enjoin the platting and sale thereof was not barred by the Statute of Limitations. The court said: "The law is well settled that, when the owner of lands lays out a town thereon and sells lots to purchasers with reference to the plat thereof, the purchasers of such lots acquire, as appurtenant thereto, a vested right in and to the use of adjacent grounds, designated as public grounds on such plat, to the full extent such designation imports, which right cannot be devested by the owner making the dedication nor by the town in its corporate capacity."

Slocumb v. Chicago, B. & Q. R. Co. 57 Iowa, 675, 11 N. W. 641, was a suit to enjoin the defendant

from moving its right-of-way fence back 21 feet from where it had stood for more than ten years, and thereby appropriating a strip of which plaintiff claimed to have had possession for more than ten years, adverse to defendant. The deed by which plaintiff acquired title to her tract excepted the railroad right of way, which, in fact, included the 21 feet in controversy, but for some reason the railroad fence was set much nearer to the tracks, so as to leave the controverted strip outside. Plaintiff had planted shrubbery and cherry trees upon the strip in controversy and used same for more than ten years. The court held that plaintiff's possession was not adverse to, nor inconsistent with, the right of defendant to occupy its whole right of way whenever it became necessary or desirable for it to do so, resting its conclusion upon the holding in Barlow v. Chicago, R. I. & P. R. Co. supra.

The land in controversy in Garstang v. Davenport, 90 Iowa, 359, 57 N. W. 876, was an alley 20 feet wide which had never been opened and of which plaintiff had held possession for more than ten years. This action was brought to restrain the city from opening said alley, and Pauline Krumbholz, who owned a lot abutting on the north side thereof, intervened, alleging that the said alley was an appurtenance to her lot. The alley was a part of a tract of land formerly owned by one Houghton, grantor of both intervener and plaintiff. The description in the deed to plaintiff was by metes and bounds, and extended "to a 20-foot alley, hereafter to be laid out," but did not include same. No time was fixed in any of the conveyances within which said alley should be opened. The court held plaintiff's plea of the Statute of Limitations was not good, as no time was fixed when the alley was to be opened, and neither plaintiff nor any of his grantors had done anything to set the statute in operation. The court said: "From the time of the conveyance to Crowell [one of the mesne grantees] there has not been a fact on which to base a color of title or claim of right for the operation of the Statute of Limitations."

The court further quoted with approval the following from Tufts v. Charlestown, 2 Gray, 271: "When a grantor conveys land, bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way. This is not descriptive merely, but an implied covenant of the existence of the way."

Each of the above cases may be distinguished from the case at bar.

In Barlow v. Chicago, R. I. & P. R. Co. supra, the court based its decision upon the fact that the railway company acquired title to its right of way or easement by deed, holding as above stated. It was not shown that plaintiff in that case had color of title or had been in possession under a claim of right. In the case at bar plaintiff was in possession of the whole tract under a deed which conveyed same to him by metes and bounds, without reservation or exception of any kind.

In Fisher v. Beard, supra, the public square was dedicated to public use by the original proprietor, and lots, including those of plaintiff, which abutted thereon, were sold with particular reference thereto, and with the understanding that said public square would always remain open for public use. In the case at bar no easement or right of way has ever been opened, enjoyed, or used by defendant or any of his grantors, and plaintiff and his grantors have been in possession thereof under a deed, as above stated, for forty-four years.

It does not appear from the record in Slocumb v. Chicago, R. I. & P. Co. or in Garstang v. Davenport, supra, that possession of the plaintiff in either of said cases was under claim of right, and neither had color of title to the controverted strip.

We will now refer to some of our more recent decisions in which the

facts are more nearly analogous to those in the case at bar than in any of the cited cases. It is the settled doctrine of this court that, when one in good faith enters into possession of a tract of land under a deed conveying the same to him absolutely, without exception or reservation, and continues in possession thereof for ten years, all outstanding claims or interests in or to said tract are completely barred by the Statute of Limitations. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862; Hughes v. Wyatt, 146 Iowa, 392, 125 N. W. 334; McCarthy v. Colton, 134 Iowa, 658, 108 N. W. 217; Erickson v. Johnson, 172 Iowa, 12, 152 N. W. 575. And this is true notwithstanding the party in possession had actual notice of the defect in his title. Severson v. Gremm, supra; Hughes v. Wyatt, 146 Iowa, 392, 125 N. W. 334. Possession under a deed to the whole tract, as above stated, is presumptively in good faith. We held in Hughes v. Wyatt, supra, referring to the question of good faith as an incident to title by adverse possession, that "the presumption in such a case is with the claimant in possession. Where the claimant puts a deed upon record and enters into possession, his possession is presumptively referable to his deed. In such a case, in so far as good faith is essential to his claim of right, it is presumed in his favor."

The evidence shows that plaintiff in the case at bar entered into possession of the premises in question more than forty years prior to the commencement of this suit, under a deed conveying the same to him absolutely, without reservation or exception, and has been in the continuous, open, notorious possession thereof under claim of ownership under a deed conveying same to him without reservation or exception during all of said time. Defendant has never attempted to exercise the right which he now claims to possess under the Goldsbury deed, nor has anything been done to open a street at the point in controversy. If defendant acquires some right as a grantee of Goldsbury by virtue of said reservation, he has failed and neglected to exercise the same or make any affirmative claim thereunder until plaintiff demanded a quitclaim deed from him, shortly before the commencement of this suit.

Defendant in Presbyterian Church v. Harken, 177 Iowa, 195, 158 N. W. 692, had not been in possession of an easement previously opened and used for ten years, and the court held that plaintiff's right thereto was not barred by the Statute of Limitations.

Whatever right defendant and his grantors may have had by virtue of the reservation in the Goldsbury deed, it was in the nature of a right to an easement inconsistent with the title conveyed by plaintiff's deed, and was, at the time of the commencement of this suit, barred by the Statute of Limitations.

Easement—reservation—loss by adverse possession.

We therefore reach the conclusion that a decree should have been entered in the lower court in favor of plaintiff, as prayed.

The judgment of the lower court is therefore reversed, and cause remanded for a decree in harmony herewith.

Gaynor, Ch. J., and **Weaver** and **Preston**, JJ., concur.

ANNOTATION.

Loss of easement by adverse possession, or nonuser.

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I. Nonuser without adverse possession.

a. In general.

It is not intended to include herein cases involving a railroad right of way, since while such cases present many features involving the general principles applied in the cases herein included, in other respects they involve questions peculiar to railroad rights of way.

The cases are agreed that at least where a right of way or other easement is created by grant, deed, or reservation, no duty is thereby cast upon the owner of the dominant estate thus created, to make use thereof or enjoy the same as a condition to the right to retain his interest therein; for the mere nonuser of an easement will not extinguish the same.

California.—Petitpierre v. Maguire (1909) 155 Cal. 242, 100 Pac. 690; Gardner v. San Gabriel Valley Bank (1907) 7 Cal. App. 106, 93 Pac. 900; Davidson v. Ellis (1908) 9 Cal. App. 145, 98 Pac. 254; Pitcairn v. Harkness (1909) 10 Cal. App. 295, 101 Pac. 809.

District of Columbia.—Brunthaver v. Talty (1908) 31 App. D. C. 134.

Illinois.—Hofherr v. Mede (1907) 226 Ill. 320, 80 N. E. 893.

Indiana.—Cleveland, C. C. & St. L. R. Co. v. Griswold (1912) 51 Ind. App. 497, 97 N. E. 1030.

Iowa.—Noll v. Dubuque, B. & M. R. Co. (1871) 32 Iowa, 66; Teachout v. Capital Lodge, I. O. O. F. (1905) 128 Iowa, 380, 104 N. W. 440; Reed v. Gasser (1906) 130 Iowa, 87, 106 N. W. 383; Kane v. Templin (1912) 158 Iowa, 24, 138 N. W. 901; Presbyterian Church v. Harken (1916) 177 Iowa, 195, 158 N. W. 692.

Kansas.—Edgerton v. McMullan (1895) 55 Kan. 90, 39 Pac. 1021.

Kentucky.—Crigler v. Newman (1906) 29 Ky. L. Rep. 27, 91 S. W. 706.

Maine.—Tabbutt v. Grant (1900) 94 Me. 371, 47 Atl. 899.

Maryland.—Cox v. Forrest (1882) 60 Md. 74; Baugh v. Arnold (1914) 123 Md. 6, 91 Atl. 151.

Massachusetts.—Emerson v. Wiley (1831) 10 Pick. 310; Williams v. Nelson (1839) 23 Pick. 141, 34 Am. Dec. 45; Barnes v. Lloyd (1873) 112 Mass. 224; Kesseler v. Bowditch (1916) 223 Mass. 265, 111 N. E. 887; Lagorio v. Lewenberg (1917) 226 Mass. 464, 115 N. E. 979.

Michigan.—Murphy Chair Co. v. American Radiator Co. (1912) 172 Mich. 14, 137 N. W. 791.

Missouri.—Dulce Realty Co. v. Staed Realty Co. (1912) 245 Mo. 417, 151 S. W. 415.

New Jersey.—Manning v. Port Reading R. Co. (1896) 54 N. J. Eq. 46, 33 Atl 802.

New York.—Norris v. Hoffman (1910) 197 N. Y. 578, 91 N. E. 1118, affirming (1909) 133 App. Div. 596, 118 N. Y. Supp. 156; Pope v. O'Hara (1872) 48 N. Y. 446; Corning v. Gould (1837) 16 Wend. 531; Miller v. Garlock (1850) 8 Barb. 153; Tyler v. Cooper (1888) 47 Hun, 94; Valentine v. Schreiber (1896) 3 App. Div. 235, 38 N. Y. Supp. 417; Brady v. Smith (1906) 88 App. Div. 427, 99 N. Y. Supp. 1119, affirmed in 181 N. Y. 178; Hederson Estate Co. v.

Carroll Electric Co. (1906) 113 App. Div. 775, 99 N. Y. Supp. 365, affirmed in (1907) 189 N. Y. 531, 82 N. E. 1127; Spencer v. Lighthouse (1906) 114 App. Div. 591, 99 N. Y. Supp. 1015; Harris v. Curtis (1910) 139 App. Div. 393, 124 N. Y. Supp. 263, affirmed in (1914) 211 N. Y. 573, 105 N. E. 1085; Heughes v. Galusha Stove Co. (1909) 133 App. Div. 814, 118 N. Y. Supp. 109; Stillman v. Olean (1911) 72 Misc. 196, 129 N. Y. Supp. 515, affirmed in (1912) 148 App. Div. 936, 133 N. Y. Supp. 1145; Blenis v. Utica Knitting Co. (1911) 73 Misc. 61, 130 N. Y. Supp. 740.

Pennsylvania.—Bombaugh v. Miller (1876) 82 Pa. 203; Weaver v. Getz (1901) 16 Pa. Super. Ct. 418.

South Carolina.—Cuthbert v. Lawton (1825) 3 M'Cord, L. 194; Elliott v. Rhett (1852) 5 Rich. L. 405, 57 Am. Dec. 750; Polson v. Ingram (1884) 22 S. C. 541.

Virginia.—Watts v. C. J. Johnson & B. Real Estate Corp. (1906) 105 Va. 519, 54 S. E. 317.

South Dakota.—Miller v. Southard (1917) 38 S. D. 477, 162 N. W. 146.

Tennessee.—Clayton v. Wise (1910) 1 Tenn. C. C. A. 620.

Vermont.—Percival v. Williams (1909) 82 Vt. 531, 74 Atl. 321.

Washington.—McAdam v. Benson Logging & Lumbering Co. (1910) 57 Wash. 407, 107 Pac. 187.

England.—James v. Stevenson [1893] A. C. 162, 62 L. J. P. C. N. S. 51, 1 Reports, 324, 68 L. T. N. S. 539.

And see Curran v. Louisville (1886) 83 Ky. 628, holding that mere nonuser of land acquired for a canal basin and wharf does not destroy the easement therein, but there must be adverse possession of the land by the owner of the servient estate for the statutory period.

b. Where easement rests on grant, etc.

Where the easement is created by grant, deed, or reservation, even though the nonuser extends for or beyond the statutory prescriptive period, it does not affect the dominant estate, since the interest in the land represented by the easement can be extinguished only by the usual means for the loss or transfer of estates in land, and mere nonuser is not effective in that regard.

California.—Smith v. Worn (1892) 93 Cal. 206, 28 Pac. 944; Gardner v. San Gabriel Valley Bank (1907) 7 Cal. App. 106, 93 Pac. 900; Davidson v. Ellis (1908) 9 Cal. App. 145, 98 Pac. 254; Pitcairn v. Harkness (1909) 10 Cal. App. 295, 101 Pac. 809.

Illinois.—Kuecken v. Voltz (1884) 110 Ill. 264; Hofherr v. Mede (1907) 226 Ill. 320, 80 N. E. 893.

Iowa.—Reed v. Gasser (1906) 130 Iowa, 87, 106 N. W. 383.

Kansas.—Edgerton v. McMullan (1895) 55 Kan. 90, 39 Pac. 1021.

Maine.—Tabbutt v. Grant (1900) 94 Me. 371, 47 Atl. 899.

Massachusetts.—Arnold v. Stevens (1839) 24 Pick. 106, 34 Am. Dec. 305; Bannon v. Angier (1861) 2 Allen, 128; White v. Crawford (1813) 10 Mass. 183; Hayford v. Spokesfield (1868) 100 Mass. 491; Barnes v. Lloyd (1873) 112 Mass. 224; Kind v. Murphy (1885) 140 Mass. 254, 4 N. E. 566; New England Structural Co. v. Everett Distilling Co. (1905) 189 Mass. 145, 75 N. E. 85; Willets v. Langhaar (1912) 212 Mass. 573, 99 N. E. 466.

Michigan.—Lathrop v. Elsner (1892) 93 Mich. 599, 53 N. W. 791.

New Jersey.—Perth Amboy Terra Cotta Co. v. Ryan (1902) 68 N. J. L. 474, 53 Atl. 699; Reihle v. Heulings (1884) 38 N. J. Eq. 20.

New York.—Smyles v. Hastings (1860) 22 N. Y. 217, affirming (1857) 24 Barb. 44; Pope v. O'Hara (1872) 48 N. Y. 446; Welsh v. Taylor (1892) 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896; Brady v. Smith (1905) 181 N. Y. 178, 106 Am. St. Rep. 531, 73 N. E. 963, 2 Ann. Cas. 636, reversing (1903) 88 App. Div. 427, 84 N. Y. Supp. 1119; McCullough v. Broad Exch. Co. (1906) 184 N. Y. 592, 77 N. E. 1191, affirming (1905) 101 App. Div. 566, 92 N. Y. Supp. 533; Longendyck v. Anderson (1878) 59 How. Pr. 1; Tyler v. Cooper (1888) 47 Hun, 94, affirmed without opinion in (1891) 124 N. Y. 626, 26 N. E. 338; Valentine v. Schreiber (1896) 3 App. Div. 235, 38 N. Y. Supp. 417; Marshall v. Wenninger (1897) 20 Misc. 527, 46 N. Y. Supp. 670, reversed on other grounds in (1897) 23 App.

Div. 275, 48 N. Y. Supp. 229, which is affirmed in (1900) 163 N. Y. 579, 57 N. E. 1117; Andrus v. National Sugar Ref. Co. (1904) 93 App. Div. 377, 87 N. Y. Supp. 671, affirmed without opinion in (1906) 183 N. Y. 580, 76 N. E. 1088; Heughes v. Galusha Stove Co. (1909) 133 App. Div. 814, 118 N. Y. Supp. 109, affirming (1909) 62 Misc. 385, 115 N. Y. Supp. 890; Norris v. Hoffman (1909) 133 App. Div. 596, 118 N. Y. Supp. 156.

Ohio.—O'Ferrall v. Chase (1877) 7 Ohio Dec. Reprint, 242.

Pennsylvania.—Yeakle v. Nace (1837) 2 Whart. 123; Hall v. McCaughey (1865) 51 Pa. 43; Bombaugh v. Miller (1876) 82 Pa. 203; Richmond v. Bennett (1903) 205 Pa. 470, 55 Atl. 17; Weaver v. Getz (1901) 16 Pa. Super. Ct. 418; Citizens' Electric Co. v. Davis (1910) 44 Pa. Super. Ct. 138.

Rhode Island.—Johnson v. Stitt (1899) 21 R. I. 429, 44 Atl. 513.

Tennessee.—Boyd v. Hunt (1899) 102 Tenn. 495, 52 S. W. 131.

Utah.—Brown v. Oregon Short Line R. Co. (1909) 36 Utah, 257, 24 L.R.A. (N.S.) 86, 102 Pac. 740.

Virginia.—Watts v. C. I. Johnson & B. Real Estate Corp. (1906) 105 Va. 519, 54 S. E. 317.

West Virginia.—Wooldridge v. Coughlin (1899) 46 W. Va. 345, 33 S. E. 233.

Nonuser for the statutory period is subject to explanation. Presbyterian Church v. Harken (1916) 177 **Iowa**, 195, 158 N. W. 692.

Where there is no evidence of any occupation of the land charged with the right to overflow hostile to such easement, and no evidence of any distinct denial thereof, adverse possession is not shown although the right has not been exercised for the statutory period. Day v. Walden (1881) 46 **Mich.** 575, 10 N. W. 26.

Compare with Hunter v. West (1916) 172 **N. C.** 160, 90 S. E. 130, holding that where there had been twenty years' nonuser of a right of way and exclusive possession during that time by the owner of the servient estate, such possession was necessarily hostile and adverse.

Where there is evidence of possession by the owner of the servient estate of a right of way, and its obstruction by him, and the nonuse thereof by the owner of the dominant estate, it has been held that the question whether or not such possession is adverse to the dominant estate is for the jury. Street v. Griffiths (1888) 50 **N. J. L.** 656, 14 Atl. 898.

c. As showing abandonment.

It is not intended to cover the question of the loss of an easement by abandonment. In so far as affected by the question of adverse possession, however, it may be said that, assuming that an easement may be lost by abandonment, then the element of time or adverse user would be material only as it might tend to establish abandonment. But abandonment is a question of intention, and it is subject to proof by any competent evidence, the same as any other issue.

In this regard it has been pointed out that abandonment is a question of intention, and nonuser is a fact, aiding in determining it. But nonuser, even for the statutory period, is not conclusive evidence in itself of the abandonment. Its weight must depend upon the intention to be drawn from its duration, character, and accompanying circumstances. Raritan Water Power Co. v. Veghte (1869) 21 **N. J. Eq.** 463.

Nonuser of a right of way for less than the statutory period is not sufficient, and even nonuser for the statutory period is subject to explanation, and the inference of abandonment arising therefrom may be explained away. Presbyterian Church v. Harken (1916) 177 **Iowa**, 195, 158 N. W. 692; Pratt v. Sweetser (1878) 68 **Me.** 346.

Nonuser even for the statutory period is not conclusive evidence of abandonment of a right to overflow lands. Armstrong v. Lehigh & N. E. R. Co. (1912) 82 **N. J. L.** 704, 82 Atl. 899.

It has been held that under the Code of Georgia a right of way may be lost if there is an abandonment or nonuser by the owner for a length of time sufficient to raise the presumption of a

release or abandonment. McElwaney v. McDiarmid (1908) 131 Ga. 97, 62 S. E. 20.

d. When easement is based upon prescription.

A distinction has been made between easements created by grant or implication and those created by prescription. As to easements of the latter character it has been held that possession by the owner of the servient estate for the statutory prescriptive period will operate to extinguish the easement without showing that such possession was hostile or adverse. Potts v. Clark (1901) 23 Ky. L. Rep. 332, 62 S. W. 884; Clay v. Kennedy (1903) 24 Ky. L. Rep. 2034, 72 S. W. 815; Wooster v. Fiske (1916) 115 Me. 161, 98 Atl. 378; Cox v. Forrest (1882) 60 Md. 74; Arnold v. Stevens (1833) 24 Pick. (Mass.) 106, 35 Am. Dec. 305; Emerson v. Wiley (1831) 10 Pick. (Mass.) 310; Mason v. Ross (1908) 75 N. J. Eq. 136, 71 Atl. 141; Smyles v. Hastings (1860) 22 N. Y. 217, affirming (1857) 24 Barb. 44; Pope v. O'Hara (1872) 48 N. Y. 446; Miller v. Garlock (1850) 8 Barb. (N. Y.) 153; Willey v. Norfolk Southern R. Co. (1887) 96 N. C. 408, 1 S. E. 446; Cuthbert v. Lawton (1825) 3 M'Cord, L. (S. C.) 194.

In Corning v. Gould (1837) 16 Wend. (N. Y.) 531, it is said that the nonuser of a right of way for the statutory period affords the presumption either that the right was extinguished in favor of some other adverse right, or that it had been surrendered, or had never existed.

In making the distinction between ways or easements acquired by prescription and those acquired by deed, grant, or implication, it has been held that while a right of way acquired by prescription can be lost by nonuser, a right of way cannot be lost or extinguished by mere nonuser when it has been acquired by deed or grant, for nothing short of a holding for the statutory period, strictly adverse, can extinguish an easement thus acquired. Smyles v. Hastings (1860) 22 N. Y. 217; Snell v. Levitt (1888) 110 N. Y. 595, 1 L.R.A. 414, 18 N. E. 370.

In Jewett v. Jewett (1858) 16 Barb. (N. Y.) 150, referring to a water right, the court points out the distinction between an easement acquired by use and one acquired by grant, and it is said that while the former may be lost by disuse the latter cannot be thus lost unless there is also an adverse possession for the statutory period.

And see Pope v. O'Hara (1872) 48 N. Y. 446, holding that a right of way acquired by prescription may be lost by nonuser, but not when acquired by deed.

II. Nonuser and adverse possession.

This rule that mere failure to enjoy an easement, even for the statutory prescriptive period, does not, in and of itself, extinguish the easement, is based upon the principle that, at least where the easement is created by grant, no duty is imposed upon the owner of the dominant estate to make use thereof as a condition to his right to retain his title thereto; but an easement is an interest in the land, and the only failure to enjoy the same which will operate to extinguish the easement is that which is due to the adverse occupancy by the owner of the servient estate or by some other person. Adverse possession and use, however, by another for the prescriptive period, will terminate the easement.

Alabama.—Roden v. Capehart (1915) 195 Ala. 29, 70 So. 756.

California.—San Francisco v. Calderwood (1867) 31 Cal. 585, 91 Am. Dec. 542; Smith v. Worn (1892) 93 Cal. 206, 28 Pac. 944; San Francisco v. Main (1913) 23 Cal. App. 86, 137 Pac. 281.

Illinois.—Kuecken v. Voltz (1884) 110 Ill. 264; Illinois C. R. Co. v. Houghton (1888) 126 Ill. 233, 1 L.R.A. 213, 9 Am. St. Rep. 581, 18 N. E. 301; Swedish Evangelist Lutheran Church v. Jackson (1907) 229 Ill. 506, 82 N. E. 348.

Indiana.—Vanalia R. Co. v. Wheeler (1914) 181 Ind. 424, 103 N. E. 1069.

Iowa.—Reed v. Gasser (1905) 130 Iowa, 87, 106 N. W. 383; Presbyterian Church v. Harken (1916) 177 Iowa, 195, 158 N. W. 692.

Kansas.—Edgerton v. McMullan

(1895) 55 Kan. 90, 39 Pac. 102; Raedell v. Anderson (1916) 98 Kan. 216, 158 Pac. 45.

Kentucky.—Skaggs v. Carr (1918) 178 Ky. 849, 200 S. W. 27; Johnson v. Clark (1900) 22 Ky. L. Rep. 418, 57 S. W. 474; Clay v. Kennedy (1903) 24 Ky. L. Rep. 2034, 72 S. W. 815; Crigler v. Newman (1906) 29 Ky. L. Rep. 27, 91 S. W. 706.

Louisiana.—Marigny v. Pontchartrain R. Co. (1860) 15 La. Ann. 427.

Maine.—Adams v. Hodgkins (1912) 109 Me. 361, 42 L.R.A.(N.S.) 741, 84 Atl. 530; Wooster v. Fiske (1916) 115 Me. 161, 98 Atl. 378.

Maryland.—Canton Co. v. Baltimore (1907) 106 Md. 95, 11 L.R.A.(N.S.) 129, 66 Atl. 679, 67 Atl. 274; Baltimore v. Canton Co. (1915) 124 Md. 620, 93 Atl. 144; Philadelphia, B. & W. R. Co. v. Baltimore (1917) 131 Md. 368, 102 Atl. 471.

Massachusetts.—White v. Crawford (1813) 10 Mass. 183; Emerson v. Wiley (1831) 10 Pick. 310; Hurd v. Curtis (1843) 7 Met. 94; Putnam v. Bowker (1853) 11 Cush. 542; Bannon v. Angier (1861) 2 Allen, 128; Warshauer v. Randall (1872) 109 Mass. 586; Chandler v. Jamaica Pond Aqueduct Corp. (1878) 125 Mass. 544; Smith v. Langewald (1885) 140 Mass. 205, 4 N. E. 571; King v. Murphy (1885) 140 Mass. 254, 4 N. E. 566; Willets v. Langhaar (1912) 212 Mass. 573, 99 N. E. 466; Hartt v. Rueter (1916) 223 Mass. 207, 111 N. E. 1045.

Michigan.—Day v. Walden (1881) 46 Mich. 575, 10 N. W. 26; Lathrop v. Elsner (1892) 93 Mich. 599, 53 N. W. 791.

Minnesota.—Wilder v. St. Paul (1867) 12 Minn. 192, Gil. 116.

Missouri.—Hatton v. Kansas City, C. & S. R. Co. (1913) 253 Mo. 660, 162 S. W. 227.

Nebraska.—Ballinger v. Kinney (1910) 87 Neb. 342, 127 N. W. 239.

New Jersey.—Perth Amboy Terra Cotta Co. v. Ryan (1902) 68 N. J. L. 474, 53 Atl. 699; Johnston v. Hyde (1881) 33 N. J. Eq. 632; Dill v. Board of Education (1890) 47 N. J. Eq. 421, 10 L.R.A. 276, 20 Atl. 739; Mason v. Ross (1908) 75 N. J. Eq. 136, 71 Atl. 141; Supplee v. Cohen (1913) 81 N. J. Eq. 500, 86 Atl. 366, affirming (1912) 80 N. J. Eq. 83, 83 Atl. 373; Street v. Griffiths (1888) 50 N. J. L. 656, 14 Atl. 898.

New York.—Smyles v. Hastings (1860) 22 N. Y. 217; Woodruff v. Paddock (1892) 130 N. Y. 618, 29 N. E. 1021; Welsh v. Taylor (1892) 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896; Rupprecht v. St. Mary's Roman Catholic Church Soc. (1910) 198 N. Y. 576, 92 N. E. 1101, affirming (1909) 131 App. Div. 564, 115 N. Y. Supp. 926; Corning v. Gould (1837) 16 Wend. 531; McCullough v. Broad Exch. Co. (1905) 101 App. Div. 566, 92 N. Y. Supp. 533, affirmed without opinion in (1906) 184 N. Y. 592, 77 N. E. 1191; Andrus v. National Sugar Ref. Co. (1904) 93 App. Div. 377, 87 N. Y. Supp. 671, affirmed without opinion in (1906) 183 N. Y. 580, 76 N. E. 1088; People ex rel. Washburn v. Gloversville (1908) 128 App. Div. 44, 112 N. Y. Supp. 387; Heughes v. Galusha Stove Co. (1909) 133 App. Div. 814, 118 N. Y. Supp. 109; Tyler v. Cooper (1888) 47 Hun, 94, affirmed in (1891) 124 N. Y. 626, 26 N. E. 338; Lewisohn v. Lansing Co. (1907) 119 App. Div. 393, 104 N. Y. Supp. 543, reversing (1906) 51 Misc. 274, 100 N. Y. Supp. 1073; Re West 214th Street (1905) 109 App. Div. 575, 96 N. Y. Supp. 557; Re New York (1902) 73 App. Div. 394, 77 N. Y. Supp. 31; Brady v. Brady (1900) 31 Misc. 411, 65 N. Y. Supp. 621; Lambert v. Huber (1898) 22 Misc. 462, 50 N. Y. Supp. 793; Marshall v. Wenninger (1897) 20 Misc. 462, 46 N. Y. Supp. 670.

Oregon.—Hoffman v. Doris (1917) 83 Or. 625, 163 Pac. 972.

Ohio.—Tudor Boiler Mfg. Co. v. I. & E. Greenwald Co. (1904) 26 Ohio C. C. 356.

Pennsylvania.—Yeakle v. Nace (1836) 2 Whart. 123; Lindeman v. Lindsey (1871) 69 Pa. 93, 8 Am. Rep. 219; Erb v. Brown (1871) 69 Pa. 216; Bombaugh v. Miller (1876) 82 Pa. 203; Richmond v. Bennett (1903) 205 Pa. 470, 55 Atl. 17; Greenmount Cemetery Co's Appeal (1887) 1 Sadler, 371, 4 Atl. 528; Citizens' Electric Co. v. Davis (1910) 44 Pa. Super. Ct. 138; Whitney v. Welshans (1912) 50 Pa. Super. Ct.

422; Nickels v. Hand in Hand Cornet Band (1912) 52 Pa. Super. Ct. 145; Com. v. Zimmerman (1914) 56 Pa. Super. Ct. 11; Weaver v. Getz (1901) 16 Pa. Super. Ct. 418; Stuart v. Rosengarten (1912) 23 Pa. Dist. R. 548.

Rhode Island.—Faulkner v. Rocket (1911) 33 R. I. 152, 80 Atl. 380; Bentley v. Root (1895) 19 R. I. 205, 32 Atl. 918.

South Carolina.—Bowen v. Team (1852) 6 Rich. L. 298, 60 Am. Dec. 127; Dupont v. Charleston Bridge Co. (1902) 65 S. C. 524, 44 S. E. 86.

Tennessee.—Boyd v. Hunt (1899) 102 Tenn. 495, 52 S. W. 131.

Texas.—Walton v. Harigel (1916) — Tex. Civ. App. —, 183 S. W. 785.

Virginia.—Watts v. C. I. Johnson & B. Real Estate Corp. (1906) 105 Va. 519, 54 S. E. 317.

Washington.—McAdam v. Benson Logging & Lumbering Co. (1910) 57 Wash. 407, 107 Pac. 187.

West Virginia. — Woolridge v. Coughlin (1899) 46 W. Va. 345, 33 S. E. 233.

III. What constitutes adverse possession.

a. In general.

The question as to what amounts to an adverse hostile user which will operate to extinguish an easement depends very largely upon the character of the easement; especially where the question arises between the owners of the dominant and servient estates. The owner of the servient estate is entitled to the use and possession of the land, subject only to the rights of the owner of the dominant estate; hence, in order that the possession by the former be adverse and hostile, it must be wholly inconsistent with the right to enjoy the easement, and amount in effect to a disseisin or ouster. Stuart v. Rosengarten (1912) 23 **Pa.** Dist. R. (Pa.) 548; Yeakle v. Nace (1836) 2 Whart. (**Pa.**) 123; Baugh v. Arnold (1914) 123 **Md.** 6, 91 Atl. 151; Noll v. Dubuque, B. & M. R. Co. (1871) 32 **Iowa,** 66; Reed v. Gasser (1905) 130 **Iowa,** 87, 106 N. W. 383; Swedish Evangelist Luthern Church v. Jackson (1907) 229 **Ill.** 506, 82 N. E. 348.

The adverse use to extinguish a right of way must be of the same character as would defeat the right of entry on real estate. Clay v. Kennedy (1903) 24 **Ky.** L. Rep. 2034, 72 S. W. 815. For possession of the right of way to be adverse, it must be put to a use inconsistent with the recognition of the existence or exercise of the easement. San Francisco v. Main (1913) 23 **Cal.** App. 86, 137 Pac. 281.

The possession must be open, exclusive, and hostile for the full statutory period. Presbyterian Church v. Harken (1916) 177 **Iowa,** 195, 158 N. W. 692. And it must be inconsistent with any right in the dominant estate. Marshall v. Wenninger (1897) 20 Misc. 527, 46 **N. Y.** Supp. 670. And the use of the right of way must constitute a denial of the right of the owner of the dominant estate to use the same. Burnham v. Mahoney (1916) 222 **Mass.** 524, 111 N. E. 396.

As to a water right, in order that possession by the servient estate be hostile or adverse, there must be an absolute denial of the easement, followed by enjoyment for the statutory period inconsistent with its existence. Lindeman v. Lindsey (1871) 69 **Pa.** 93, 8 Am. Rep. 219.

In Snell v. Levitt (1888) 110 **N. Y.** 595, 1 L.R.A. 414, 18 N. E. 370, the rule is stated that an easement acquired by grant cannot be lost by mere nonuser for any length of time. It may, however, be lost by adverse user or possession by the owner of the servient estate, and an easement can be lost or extinguished by abandonment in some modes or by the means recognized by law for the loss of estates in land by prescription. Nonuser for twenty years under such circumstances as show an intention to abandon or give up the easement is sufficient to extinguish it. Even an abandonment for a shorter period of time under such circumstances as to indicate an intention to give up and release the easement, which is acted upon by the owner of the servient estate to the extent that it would work harm to him to have the easement thereafter asserted, will operate to extinguish it.

Nonuser and adverse possession

which may be construed to indicate a purpose to relinquish are usually intermixed; hence the question of adverse possession and abandonment should be submitted to the jury. Heughes v. Galusha Stove Co. (1909) 133 App. Div. 814, 118 N. Y. Supp. 109.

b. Use under license or permission.

Adverse possession of a right of way requires the use thereof without license or permission; for an adverse right to an easement cannot grow out of a mere permissive enjoyment, or tolerated user. Cox v. Forrest (1882) 60 Md. 74.

The inconsistent use of a right of way for twenty years will be presumed to be under a claim of right unless it appears to have been by permission. Ibid.

In Riehle v. Heulings (1884) 38 N. J. Eq. 20, the statement is made that if a passageway created by grant has not been used for more than the statutory period of time, except by express permission from the owner of the servient estate, these facts are not sufficient to extinguish the easement.

The uninterrupted and continuous enjoyment of a right of way, in order to constitute adverse possession, does not require the use thereof every day for the statutory period, but simply the exercise of the right more or less frequently, according to the nature of the use. It must be without objection on the part of the owner of the land, and under such circumstances as to exclude the presumption of voluntary abandonment on the part of the person claiming the easement. Cox v. Forrest (Md.) supra.

The right to use a stairway by the owner of a building adjoining that in which the stairway is located is lost where the stairway is closed without objections from the owner of the easement, and remains closed for the statutory period. Raedell v. Anderson (1916) 98 Kan. 216, 158 Pac. 45.

c. Use inconsistent with right of dominant owner.

The right to use land for a certain purpose created by covenant is lost by open, notorious use for a prohibited purpose for the statutory period. Stephens v. Hockemeyer (1892) 46 N. Y. S. R. 329, 19 N. Y. Supp. 666. But where in some respects an alleyway is put to a use exceeding the use which might rightfully be made of it, but such use is not so unusual as would appear to be hostile to the easement, it does not constitute such adverse possession as will extinguish the easement. Hofherr v. Mede (1907) 226 Ill. 320, 80 N. E. 893. So, where land was conveyed subject to an easement over a portion of it for a public street, the act of the grantees in fencing in a strip of land set off for the street, and planting and draining it or building upon it, does not constitute adverse possession in their favor, for, having entered into possession in subordination to the servitude imposed, they will be presumed to have occupied it in a like manner and only temporarily, until its use for a street should be required. Olean v. Steyner (1892) 135 N. Y. 341, 17 L.R.A. 640, 32 N. E. 9.

d. As between co-owners.

Adverse possession of a right of way as against a common owner of the dominant estate, to be effective must be open, unequivocal, constant, and equivalent to the ouster of the other owner, indicating a purpose to hold possession of the right of way to his exclusion. Heughes v. Galusha Stove Co. (1909) 133 App. Div. 814, 118 N. Y. Supp. 109.

For example, where two buildings separated by a stairway, owned by a partnership, were conveyed to different partners in a division of the assets of the firm, and the right to the use of the stairway was reserved to each of the grantees, possession of such stairway by either of them is not adverse to the other, and the latter's easement is not thereby extinguished. Gates v. Sebald (1914) 180 Mich. 578, 147 N. W. 481.

So, where the occupants of a store recognized a right in others to use a stairway, they could not claim their occupancy would amount to adverse possession which would bar the easement. Hensel v. Witt (1907) 134 Wis. 55, 113 N. W. 1093.

IV. Indicia of adverse use.

a. Obstructions; buildings.

Where a building is constructed and maintained in a right of way under a claim of right, it constitutes adverse possession of the occupied part of the right of way. Goodwin v. Bragaw (1913) 87 **Conn.** 31, 86 Atl. 668.

It has been held that by constructing and maintaining buildings obstructing an alleyway for the statutory period of time, the right to maintain the same is thereby gained. Jessop v. Kittanning (1909) 225 **Pa.** 589, 74 Atl. 554; Tudor Boiler Mfg. Co. v. I. & E. Greenwald Co. (1904) 26 **Ohio** C. C. 556.

And an encroachment upon an alleyway for the statutory period without objection by those having an easement therein extinguishes the easement as to the land encroached upon. Bentley v. Root (1895) 19 **R. I.** 205, 32 Atl. 918.

Where a right of way is effectually obstructed by buildings and fences for the full statutory period, and full possession thereof retained for such period by the owner of the servient estate, it is a question for the jury as to whether or not possession has been adverse. Street v. Griffiths (1888) 50 **N. J. L.** 656, 14 Atl. 898.

However, the mere obstruction of a right of way by building on it, but not to an extent which entirely prevents its use for a passageway, does not constitute such adverse user as will extinguish the right of way. Reed v. Gasser (1905) 130 **Iowa**, 87, 106 N. W. 383.

And while the erection and maintenance for the statutory period of a building obstructing a part of the right of way does not defeat the entire way, it does defeat the way to the extent of the obstruction. Wimpey v. Smart (1911) 137 **Ga.** 325, 73 S. E. 586; Reed v. Gasser (1905) 130 **Iowa**, 87, 106 N. W. 383; Putnam v. Bowker (1853) 11 Cush. (**Mass.**) 542; Welsh v. Taylor (1892) 134 **N. Y.** 450, 18 L.R.A. 538, 31 N. E. 896; Rupprecht v. St. Mary's Roman Catholic Church Soc. (1910) 198 **N. Y.** 576, 92 N. E. 1101, affirming (1909) 131 App. Div. 564, 115 N. Y. Supp. 926; Lambert v. Huber (1898) 22 Misc. 462, 50 **N. Y.** Supp. 793; Re New York (1902) 73 App. Div. 394, 77 N. Y. Supp. 31. And see Butterfield v. Reed, infra, IV. c, and Olean v. Steyner, supra, III. c.

It has been held that cultivating land, building upon and improving it, does not constitute a use adverse to the right to overflow the land. Butterfield v. Reed (1894) 160 **Mass.** 361, 35 N. E. 1128.

b. Gates and fences.

The rule that the mere obstruction of a right of way which does not preclude its use as such does not extinguish the way, even though maintained for the statutory period, applies to such obstructions as fences, gates, or bars erected and maintained across the right of way, the way being still subject to use as such. By the great weight of authority the right of way is not extinguished by an obstruction of this character. Edgerton v. McMullan (1895) 55 **Kan.** 90, 39 Pac. 1021; Skaggs v. Carr (1918) 178 **Ky.** 849, 200 S. W. 27; Mowe v. Stevens (1872) 61 **Me.** 592; Cotting v. Murray (1911) 209 **Mass.** 133, 95 N. E. 212 (maintenance of post by mutual consent of owner of dominant and servient estate); Litchfield v. Boogher (1911) 238 **Mo.** 472, 142 S. W. 302; Van Blarcom v. Frike (1861) 29 **N. J. L.** 516; Welsh v. Taylor (1892) 134 **N. Y.** 450, 18 L.R.A. 535, 31 N. E. 896 (gate maintained by co-user); Schmidt v. Liberium (1913) 54 **Pa.** Super. Ct. 500; Johnson v. Stitt (1899) 21 **R. I.** 429, 44 Atl. 513 (building fences and growing flowers on half of right of way by common owner); Barnwell v. Magrath (1841) 1 McMull. L. (**S. C.**) 174, 36 Am. Dec. 254; State v. Pettis (1854) 7 Rich. L. (**S. C.**) 390; Boyd v. Hunt (1899) 102 **Tenn.** 495, 52 S. W. 131 (gates built by common user); Pritchard v. Lewis (1905) 125 **Wis.** 604, 1 L.R.A.(N.S.) 565, 110 Am. St. Rep. 873, 104 N. W. 989; Young v. Star Omnibus Co. (1902) 86 L. T. N. S. (**Eng.**) 41 (gate maintained by mutual agreement of dominant and servient owners).

Maintaining gates across an alleyway, constructed by one person, who is

using the same in common with others, is not such adverse use as will extinguish the right of way as to the other common users. Nickels v. Hand in Hand Cornet Band (1912) 52 Pa. Super. Ct. 145.

It has, however, been held that maintenance of a fence or building across the right of way for the statutory period of time, by the servient owner, to the knowledge of the dominant owner, will extinguish the easement. Mason v. Ross (1908) 75 N. J. Eq. 136, 71 Atl. 141 (abutment wall); Yeakle v. Nace (1837) 2 Whart. (Pa.) 123; Bell v. Golding (1896) 23 Ont. App. Rep. 485.

Adverse possession is not shown by mere nonuser of an alleyway by the owner of the dominant estate, together with the act of the owner of the servient estate in excavating a portion of the way for an area way, and in placing a gate at the entrance. Boyd v. Hunt (1899) 102 Tenn. 495, 52 S. W. 131.

Nor is the erection and maintenance of a gate across the right of way evidence of adverse possession as against another, also entitled to use the way, there being no evidence that the purpose of the gate was to exclude the co-owner of the easement from the enjoyment thereof. Welsh v. Taylor (1892) 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896. But it has been held that while the erection of fences or gates across the right of way does not, as a matter of law, constitute an eviction of the dominant estate, it is evidence thereof. Stuart v. Rosengarten (1912) 23 Pa. Dist. R. 548.

Adverse possession is shown by inclosing a right of way with fences, and retaining exclusive possession thereof. Re West 214th Street (1905) 109 App. Div. 575, 96 N. Y. Supp. 557. And a right of way is lost where the owner of the servient estate fences the ends and retains exclusive possession of and cultivates the same for the statutory period of time. Bowen v. Team (1852) 6 Rich. L. (S. C.) 298, 60 Am. Dec. 127. Likewise, fencing a right of way and erecting buildings thereon has been held to show adverse possession. Tudor Boiler Mfg. Co. v. J. & E. Greenwald Co. (1904) 26 Ohio C. C. 556.

c. Cultivation.

Whether or not cultivation of land is an adverse use of a right of way depends upon its effect. If it is entirely inconsistent with the right to use the land as a right of way, it may be regarded as adverse. And a private way is extinguished by the act of the servient owner in fencing it and cultivating it as a field. Tuttle v. Sowadski (1912) 41 Utah, 501, 126 Pac. 959. And see Bowen v. Team, supra, IV. b. But cultivating land and building upon and improving it does not constitute a use adverse to the right to overflow the land. Butterfield v. Reed (1894) 160 Mass. 361, 35 N. E. 1128. Cultivation of the surface of the soil by the owner of the servient estate is not such adverse possession as to put in operation in his favor the Statute of Limitations against the right to mine the land, which was conveyed by express grant. Arnold v. Stevens (1839) 24 Pick. (Mass.) 106, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176.

It has been declared that if the servient owner for the statutory period of time continues to cultivate and obstruct a right of way under a claim of right so to do, it constitutes adverse possession. Peck v. Loyd (1871) 38 Conn. 566, and see Yeakle v. Nace (1837) 2 Whart. (Pa.) 123, supra, wherein it is said that the cultivation of a way by the servient owner is either a direct denial of the existence of the easement, or a possession adverse thereto, even though the dominant owner has had no occasion to use the way during that period.

A. G. S.

WILLIAM E. SNYDER

v.

PAUL H. KING et al., Receivers of Pere Marquette Railroad Company, Plffs. in Err.

Michigan Supreme Court—December 27, 1917.

(— Mich. —, 165 N. W. 840.)

Carrier — uniform live stock contract — notice of loss — sufficiency.

1. A report in writing by the local station agent to the general officers of a railroad company of the condition of a carload of live stock, made after personal investigation, is a substantial compliance with the requirements of the uniform live stock contract that claims for loss shall be made in writing, supported by affidavits, within five days after removal of the stock from the car.

[See note on this question beginning on page 900.]

Conflict of laws — state and Federal— uniform live stock contract.

2. The question of the validity, force, and effect of the uniform live stock contract under which animals are shipped in interstate commerce is for the Federal courts, and not within the field of state regulations.

Trial — question for court — negligence.

3. The court can properly pass upon the question of negligence only in cases where the facts are such that all reasonable men would be likely to draw the same inference.

Same — question for jury — escape of horses.

4. The jury must determine the question of negligence of a railroad company in replacing twenty-three young, active horses in one pen from which they have escaped, when they might have been divided, and leaving no one to watch them, which results in their escaping a second time, to their injury.

Same — question for court — absence of evidence.

5. The court cannot say as matter of law that horses escaped from a pen because of their own viciousness, when no one saw their escape.

Carrier — injury to animals out of car — liability.

6. A provision in the uniform live stock contract requiring the shipper to feed and water the animals en route does not relieve the carrier from liability for injury while they are out of the car for rest and care, if, under the Federal statute, the carrier undertakes their care at the expense of the shipper.

ERROR to the Circuit Court for Oceana County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to a shipment of horses under a uniform live stock contract. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Parker, Shields, & Brown** and **Norris, McPherson, Harrington, & Waer**, for plaintiffs in error:

The validity, force, and effect of the provisions of the uniform live stock contract are Federal questions, not within the field of state law or regulation.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N. S.) 257, 33 Sup. Ct. Rep. 148; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 327, 60 L. ed. 1022, 1026, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555.

The five-day provision is valid, and cannot be waived.

Chesapeake & O. R. Co. v. McLaughlin, 242 U. S. 142, 61 L. ed. 207, 37 Sup. Ct. Rep. 40; Northern P. R. Co.

v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; St. Louis, I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462; Kidwell v. Oregon Short Line R. Co. 125 C. C. A. 315, 208 Fed. 1.

If the provisions of published tariffs are unreasonable, it is for the commission to correct them, upon proper proceedings.

George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351.

The five-day clause is not an unreasonable provision.

Erie R. Co. v. Stone, 244 U. S. 332, 61 L. ed. 1173, 37 Sup. Ct. Rep. 633; St. Louis, I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462; Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Chesapeake & O. R. Co. v. McLaughlin, 242 U. S. 142, 61 L. ed. 207, 37 Sup. Ct. Rep. 40; Georgia F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541.

Messrs. **Hall & Greene** and **Hall, Gillard, & Temple,** for defendant in error:

Under the circumstances, it was an absolute impossibility for plaintiff to comply with the letter of the contract concerning the filing of this claim.

Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 941; Ryan v. United States, 136 U. S. 68, 83, 34 L. ed. 447, 453, 10 Sup. Ct. Rep. 913; Kleinhans v. Jones, 15 C. C. A. 644, 37 U. S. App. 185, 68 Fed. 745; Godwin v. Francis, L. R. 5 C. P. 295; Reg. v. Riley [1896] 1 Q. B. 314, 65 L. J. Mag. Cas. N. S. 74, 74 L. T. N. S. 254, 44 Week. Rep. 318, 18 Cox, C. C. 285, 65 J. P. 519, 10 Am. Crim. Rep. 402; Howley v. Whipple, 48 N. H. 488; State v. Holmes, 56 Iowa, 590, 41 Am. Rep. 121, 9 N. W. 894.

Stone, J., delivered the opinion of the court:

This is an action for damages for a carload shipment of horses belonging to the plaintiff, moving from Chicago, Illinois, to Hart, Michigan, under a uniform live stock contract issued February 10, 1915. Some of the horses were sick when the shipment arrived at Hart, and three died later, the plaintiff claiming that the sickness and death were due to exposure at Waverly (near Holland), Michigan, where the horses broke out of a stock pen; and the plaintiff also claimed an unreasonable delay on the part of the defendants in transporting the horses from Chicago to Hart. The car of horses arrived at Waverly, Michigan, at about 11 o'clock A. M. on February 11th, and, as there was no train which would take the car to Hart, or on intermediate point, within the thirty-six hours' limit fixed by the Federal law and the contract, the horses, twenty-three in number, were unloaded for water and feed, as required by that law.

The only question of negligence which the trial court submitted to the jury was the claimed negligence of the defendants in the handling of the stock at Waverly, the court ruling that no negligence was shown in the actual transportation of the horses. When the horses were unloaded at Waverly, as aforesaid, they were placed in an open stock pen, built 4 feet, 9 inches, high, out of 1 by 6 hemlock boards, and cedar posts set 4 feet apart. The pen was built in 1912, or 1913, and was about 74 feet long and 48 feet wide, divided into two parts with an open gate between. The boards were all nailed on the inside of the posts, except at each corner one set of boards had to be nailed and was nailed on the outside. There was testimony that fifteen or twenty other cars of horses had been before unloaded into this same pen; that it was constructed similarly to other horse pens used by railroad companies in unloading horses for feeding; that no horses had ever broken out of the pen before; and that the pen was in good condition, and was not rotten or decayed anywhere.

About an hour after the horses were first turned into the pen, a large sorrel kicked some of the other horses, crowded them against the fence, and broke it down in the northwest corner of the pen. The sorrel horse in question was vicious

to the other horses at the time it was in the stock pen, though he showed no signs of viciousness, either before he was shipped or after he was delivered to the consignee at Hart. The stock pen was immediately repaired, after the first break, and made as good as it was before. The horses were left untied in the pen, so that they might exercise. No one watched the horses while they were in the pen, but the yardmaster testified: "There wasn't any time for thirty minutes during the day, perhaps, but what I saw them. I had seen them not to exceed five minutes before they broke out the second time. I did not see them break out the second time."

The horses broke out again about 4 o'clock in the afternoon. They broke out at a different place, but at a place where the boards were nailed on the outside of the posts, in a corner. All but one of the horses escaped from the pen before the men arrived to stop them. The only horse which did not escape was the large sorrel which had been the cause of the trouble in the morning. Six of the horses were caught immediately, and two more about an hour afterwards. The remaining fourteen horses ran 5 or 6 miles, and were out all night. Twelve of them were caught about 8 o'clock, and two about 10 o'clock, the following morning. The eight horses that were caught immediately were put back into the car, but were taken out of the car again the next morning to exercise. They and the other horses, captured later, were not put into the car finally until about 4 o'clock P. M. on February 12th. As to the condition of the weather at Waverly the yardmaster testified: "The weather was warm; the sun was shining. I mean that it was a warm day for March or February; probably it was considerable above freezing. I wouldn't state just what the temperature was, but it was not freezing."

The plaintiff testified as to the condition at Hart as follows: "The weather at that time was a cold northwest wind, the next thing to freezing, and about half rain. The air was chock full of moisture, cold and disagreeable."

There was testimony that, when the horses were first unloaded at Waverly, one of them, a bay mare, had a bad, very odorous, and green discharge from her nose, indicating that she had an old case of distemper, or shipping fever; that this mare did not eat when taken out of the car at Waverly, and did not eat the following day. As soon as the horses were recaptured, the defendants called in a local veterinary surgeon to examine them. He examined them, and found all of them eating except the bay mare. He testified that she was discharging from the nose, and had a high temperature, and that her condition indicated that she had the distemper, or shipping fever, and had had it from four to seven days; and that the rest of the horses were all in good condition when recaptured. Some of the horses were sick when they arrived at Hart on the afternoon of February 13th, others became sick later, and three of them died. Plaintiff claimed that the horses suffered from sickness due to the exposure at Waverly, and that none of them had distemper when shipped. Plaintiff called as a witness a veterinary surgeon, who testified that the horses had pneumonia when he treated them after their arrival at Hart, and that it might have been caused by the exposure.

The uniform live stock contract which the plaintiff signed, and under which the shipment in this case moved, contained the following provisions: "No claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the traffic manager of the said carrier at his office in Detroit within

five days from the time said stock is removed from said car or cars." "Live stock will be taken at the reduced rates fixed in the tariff only when a uniform live stock contract is executed by the station agent and the consignor, and when the release on the back of said contract is executed by man or men who are to accompany said live stock. If consignor refuses to execute a uniform live stock contract, the live stock will be charged ten (10) per cent higher than the reduced rates specified herein, provided that in no case shall such increase be less than one (1) per cent per 100 pounds." "The railroad company does not assume any risks from the acts of the animals themselves, or to each other, such as biting or kicking; such risk must always be borne by the owner." "The said shipper is, at his own sole risk and expense, to load and take care of, and to feed and water, said stock whilst being transported, whether delayed in transit or otherwise, and to unload same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same." "The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to wit: Overloading, crowding one upon another, kicking, or goring," etc.

Plaintiff had shipped a number of cars of horses from Chicago to Hart, prior to the shipment in question, and had shipped them all under similar contracts, containing the clauses above set forth. The uniform live stock contract under which the shipment moved is part of defendants' published tariffs, on file with the Interstate Commerce Commission and the Michigan Railroad Commission, and in effect at the time. Such tariffs provide a rate of 36.8 cents per hundred pounds for live stock carried under and subject to the conditions of the uniform live stock contract, which was the rate paid by the shipper in this case. Under such tariffs, the shipper had the option of shipping his stock, either subject to the terms and conditions of the uniform live stock contract, or under the liability imposed upon common carriers by the common law and the Federal and state statutes applicable thereto. In case the shipper chose to have his stock transported under a common law liability bill of lading, the rate specified in the tariff was 10 per cent higher than the rate paid in this case.

Plaintiff did not file his claim within five days, as required by the contract, he not having filed it until March 8, 1915. The defendants gave notice of this defense under their plea of the general issue. The trial court held that the provision might be waived, and submitted the question of waiver to the jury. The facts upon this question were that, immediately after purchasing and seeing about the shipment of the horses, plaintiff left Chicago and went back to Hart. When the horses did not arrive at the usual time, plaintiff went to learn the cause of the delay. One of the men on the freight train told him the horses had gotten out of the yards at Waverly. Plaintiff then went to defendants' local agent at Hart, and he telegraphed to Waverly and found that the horses were running at large. The weather at Hart was a cold northwesterly wind, the next thing to freezing, and about half rain. The plaintiff testified that he feared such weather would give the horses pneumonia, so he told said local agent about the condition the horses were in; that they would take cold; and that when they arrived at Hart he would refuse to take them, and the defendants could keep them; that the agent told plaintiff that they could not do that; that plaintiff must take care of them, and do the best he could with them; that somebody had to take care of them. After the horses arrived, and before the

plaintiff unloaded them, he again had a talk with defendants' agent, which he detailed as follows: "He told me to take them, and to take care of them, and do the best I could with them. The horses were unloaded. I did as he told me; took them to the barn; took the best care I could of them. He (the agent) followed us into the barn, and I showed him the horses, and explained to him the condition they were in. He gave me instructions at that time to take care of them the best I could, and whatever the damage was the company would pay it. The condition of the horses was that some of them were seemingly all right—were all right. I had three horses that never ate a mouthful after they came to the barn, and finally died. There were five others which it took me from one to three months to get in shape to do anything with them, and I came very near losing them. I took all of the care anybody possibly could of the horses."

The defendants' local agent saw the horses two or three times a week after they were unloaded.

Defendants' local agent, called by the plaintiff for cross-examination under the statute, after testifying substantially the same as the plaintiff relating to said conversations, also testified as follows:

Q. Didn't Mr. Snyder tell you that there would be a claim filed, and didn't you tell him to file his claim when he knew what his loss was?

A. Yes, I did. . . . Mr. Snyder filed his claim with me some time later, and it was sent by me to the offices of the Pere Marquette at Detroit.

Q. Before that you had wired the Pere Marquette, in Mr. Snyder's behalf, of the loss that had been sustained?

A. Not that I remember of.

Q. Didn't you make a report?

A. Not by wire. I wrote them a report by letter.

Q. Either by wire or letter?

A. By letter I did.

Q. You made a report of this loss?

A. Yes, sir.

Q. When was that made?

A. That was made shortly after the arrival, as to the condition on arrival.

Q. Within a day or two?

A. Yes, I think so.

Q. Have you got that letter?

A. I have not.

(After inquiry for the letter, and defendants' inability to produce it, counsel proceeded:)

Q. And in that letter didn't you tell the officers of the company that you had persuaded Mr. Snyder to unload the car, and file his claim?

A. I don't remember as to how it was worded, but I gave them the condition of the car on arrival, and either stated or made it in such a way that a claim would be made.

Q. So, that you made it plain to them that you had made an arrangement for taking care of the loss, between yourself and Mr. Snyder?

A. I couldn't say as to that. I don't remember how the letter was worded, but I presume—

Q. Will you speak a little louder?

A. I don't remember as to how the wording of the letter was.

Q. But that was the substance of it?

A. That would be the substance of the report made. . . .

Q. Didn't you tell Mr. Snyder to go ahead and take care of these horses, and when he knew what his loss would be to file his claim, and that it would be paid?

A. I don't know whether I told him in those words; but I told him to take care of the shipment, and when he had the matter where he knew what the loss was to file his claim. As far as saying that it would be paid, I may have said it, but then he would know how it was intended. I couldn't pay the claim myself. I knew it would have to be investigated.

Q. You told him that the company would take care of it?

A. Would entertain the claim, certainly.

On examination by defandants' counsel, this witness testified:

Q. Do you remember, Mr. Story, when Mr. Snyder filed his claim with you, that was shown you by counsel for the other side, whether or not it is on the date—

A. I think it is on the date.

Q. March 8, 1915?

A. Yes, sir.

Q. Now, in this letter that counsel has spoken about, that you say you wrote to the officers of the railroad company, did you state in that letter any more than that the shipment had arrived, the condition that it had arrived in, and that a claim would be filed?

A. I think not; I don't remember positively, but I believe that would be all the information I would give them, as to condition on arrival, and that a claim would be filed. . . .

Q. Did you send that letter in your line of duty as an agent of the railroad company?

A. I did.

Q. You notified them of the damaged shipment, the same as you would notify them of any damaged shipment?

A. I did; yes, sir.

At the close of plaintiff's case defendants made a motion for a directed verdict upon three grounds, all of which were again raised by appropriate requests to charge, which were denied. The case was submitted to the jury, and the trial resulted in a verdict and judgment for the plaintiff, for $428.30 damages. Defendants have brought the case here for review, and error is assigned upon the refusal of the court to direct a verdict, and to charge the jury as requested. Defendants rely upon and urge the following propositions in this court: (1) That the court should have directed a verdict for the defendants on the ground that plaintiff did not file a verified claim within five days after the arrival of the shipment. (2) That the court should have directed a verdict for defendants on the ground that plaintiff did not show any negligence in the handling of the stock at Waverly. (3) That a like verdict should have been directed on the ground that plaintiff's loss was due to the nature of the animals themselves. (4) And a like verdict should have been directed on the ground that plaintiff's damage was incurred while the property was not being actually transported.

1. It is strenuously urged by defendants' counsel that the plaintiff cannot recover, because he did not file a verified claim within five days; that the shipment was an interstate shipment and governed by the Federal law, and the decisions pertaining thereto; and that the validity, force, and effect of the provisions of the uniform live stock contract involved in the case are, under the decisions of the Supreme Court of the United States, Federal questions, not within the field of state law regulations, and the following cases are cited:

Conflict of laws—state and Federal—uniform live stock contract.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 327, 60 L. ed. 1022, 1026, L.R.A. 1917A, 265, 36 Sup. Ct. Rep. 555. And that the United States Supreme Court has expressly held that the five-day provision is valid and cannot be waived, citing Chesapeake & O. R. Co. v. McLaughlin, 242 U. S. 142, 61 L. ed. 207, 37 Sup. Ct. Rep. 40; Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541. Counsel cite additional cases in their reply brief, but, as we fully agree with the

above contention, we do not cite them.

In our opinion the only serious question here involved is whether there was a substantial compliance with the five-day requirement. In the Blish Mill. Co. Case it was held that the parties could not waive conditions "fixed by the agreement made under the published tariffs and regulations." The court, however, reached the conclusion that a telegram sent by the plaintiff to the defendant, to the effect that the shipper "would make claim against the railroad for entire contents of car at invoice price," taken in connection with other telegrams identifying the shipment, was a substantial compliance with the bill of lading provision in question, and therefore affirmed the Georgia court. In that case, Justice Hughes, after referring to the telegrams, and stating that the object of the stipulation was to secure reasonable notice, said: "We think that it sufficiently apprised the carrier of the character of the claim, . . . and it is plain that no prejudice resulted. Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency, and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which, in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement"—citing cases.

The object of the stipulation was reasonable notice. If the telegram was a substantial compliance with the stipulation, in the Blish Mill. Co. Case, may not the report from the agent of the defendants at Hart to the office at Detroit, made after his own personal examination of the horses after they had been unloaded, and under the circumstances stated, be deemed a substantial compliance with the contract in the instant case? We think so. An investigation by a claim agent followed, and there was no claim of surprise, or that defendants had been misled. In the McLaughlin Case the stipulation was the same as in the instant case, and the court said: "Upon its face the agreement seems to be unobjectionable, and nothing in the record tends to establish circumstances rendering it invalid, or excuse failure to comply therewith."

Carrier—uniform live stock contract—notice of loss—sufficiency.

We think this reaffirms the doctrine of the Blish Case, which is therein cited. Plaintiff's counsel in this court do not claim that the five-day clause can be waived, but that there was a substantial compliance with it, "when the contract and the facts are given practical construction, in the light of the practical exigency which existed in the case." With this contention we agree.

2. It is defendants' claim that plaintiff showed no negligence on the part of defendants. Without discussing the question as to which party had the burden of proof, we think that the question could not be properly disposed of as one of law. We recognize the rule to be that the court cannot properly pass upon the question of negligence, except in cases where the facts are such that all reasonable men would be likely to draw from them the same inference. It appears that, without separating the horses, which might have been done by closing the gate and thus making two pens, the twenty-three young, active horses were placed together in one pen, from which some of them had before escaped. Nobody was in charge to watch them, and nobody saw how the horses finally got out, and no one knew what knocked the boards off. It has been held that care is required in preventing the escape of animals, which are unloaded for some reason incident to the transportation. 6 Cyc. 437, and cases cited. The question of negligence

Trial—question for court—negligence.

in handling the horses at Waverly was one of fact, and defendants cannot justly complain of the charge of the court upon that question.

Same—question for jury—escape of horses.

3. Should the court have directed a verdict for defendants on the ground that plaintiff's loss was due to the nature of the animals themselves? It seems to us that a good answer to this question is found in the uncontradicted testimony of the yardmaster: "I did not see them break out the second time." How can the court say, as matter of law, that the horses got out of the pen because of their viciousness? This affirmative defense was not claimed in the pleadings. The court did not err in refusing to direct a verdict on this ground.

Same—question for court—absence of evidence.

4. Should the court have directed a verdict for defendants on the ground that the damage to plaintiff's stock was incurred while the property was not being actually transported? We have already stated that a duty rests upon the carrier to prevent the escape of animals, while unloaded for some reason incident to the transportation. This interstate shipment was controlled by the Federal statute. See §§ 8651 to 8658, U. S. Comp. Stat. 1916. Section 8652 [34 Stat. at L. 608, chap. 3594, § 2] provides that: "Animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad . . . company . . . transporting the same, at the reasonable expense of the owner," etc.

In the instant case, charges for feed and water were made by defendants, and paid by plaintiff. Under the Federal statutes, the unloading, feeding, and watering are part of the transportation, incumbent upon the carrier. It is evident that a clause in a contract cannot override a Federal statute. The contention of the defendants in this regard was decided adversely to them in Chicago, R. I. & G. R. Co. v. Scott, — Tex. Civ. App. —, 156 S. W. 294.

Carrier—injury to animals out of car—liability.

Upon this record we are of the opinion that the result reached upon the trial was justified, and not erroneous, and that there was not a miscarriage of justice. The judgment below is therefore affirmed.

ANNOTATION.

Carriers: sufficiency of compliance with stipulation requiring notice of claim for damages to shipment.

I. General requisites and sufficiency of notice, 900.
II. Oral or written notice, and verification:
  a. In general, 904.
  b. Bringing of suit as notice, 905.
  c. Verification, 905.
III. Statement of amount of claim in notice, 906.
IV. By whom notice must be given, 906.
V. To whom notice must be given:
  a. In general, 907.
  b. Where there are several carriers, 908.
VI. Place where notice must be given, 909.
VII. Time of giving notice:
  a. In general, 910.
  b. Before removal, 911.

I. General requisites and sufficiency of notice.

The fundamental reason for or purpose of a stipulation requiring notice of a claim for damages to a shipment is not to relieve the carrier from just liability; but reasonably to inform it that the shipment has been damaged, and that it is charged with liability therefor, and to give it an

opportunity to examine the nature and extent of the injury. Georgia, F. & A. R. Co. v. Blish Mill. Co. (1916) 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; St. Louis, I. M. & S. R. Co. v. Starbird (1917) 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462; Pacific Coast Co. v. Yukon Independent Transp. Co. (1917) 83 C. C. A. 625, 155 Fed. 29; The Persiana (1911) 107 C. C. A. 416, 185 Fed. 396; St. Louis, I. M. & S. R. Co. v. Furlow (1909) 89 Ark. 404, 117 S. W. 517; Chicago, R. I. & P. R. Co. v. Williams (1912) 101 Ark. 436, 142 S. W. 826; Atchison, T. & S. F. R. Co. v. Wright (1908) 78 Kan. 94, 95 Pac. 1132; Wichita & W. R. Co. v. Koch (1899) 8 Kan. App. 642, 56 Pac. 538; SNYDER v. KING (reported herewith) ante, 893; Boyd v. King (1918) — Mich. —, 167 N. W. 901; Rice v. Kansas P. R. Co. (1876) 63 Mo. 314; Harned v. Missouri P. R. Co. (1892) 51 Mo. App. 482; Cudahy Packing Co. v. Atchison, T. & S. F. R. Co. (1918) 198 Mo. App. 520, 201 S. W. 623; Cudahy Packing Co. v. Bixby (1918) 199 Mo. App. 589, 205 S. W. 865; Hyatt Roller Bearing Co. v. Pennsylvania R. Co. (1918) — N. J. L. —, 104 Atl. 82; Osterhoudt v. Southern P. Co. (1900) 47 App. Div. 146, 62 N. Y. Supp. 134; D'Arsi v. Navigazione Alta Italia (1915) 91 Misc. 10, 154 N. Y. Supp. 158, affirmed without opinion in (1916) 173 App. Div. 963, 158 N. Y. Supp. 1112; Hinkle v. Southern R. Co. (1900) 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; Duvall v. Norfolk Southern R. Co. (1914) 167 N. C. 24, 83 S. E. 21; Shark v. Great Northern R. Co. (1917) 37 N. D. 342, 164 N. W. 39; Missouri, K. & T. R. Co. v. Davis (1909) 24 Okla. 677, 24 L.R.A.(N.S.) 866, 104 Pac. 34; St. Louis & S. F. R. Co. v. Young (1912) 30 Okla. 588, 120 Pac. 999; Chicago, R. I. & P. R. Co. v. Spears (1912) 31 Okla. 469, 122 Pac. 228; Atchison, T. & S. F. R. Co. v. Robinson (1912) 36 Okla. 435, 129 Pac. 20, reversed on other grounds in (1914) 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Atchison, T. & S. F. R. Co. v. Moore (1912) 36 Okla. 433, 129 Pac. 24, reversed on other grounds in (1914) 233 U. S. 182, 58 L. ed. 906, 34 Sup. Ct. Rep. 558; United Brokers Co. v. Southern P. Co. (1917) 86 Or. 607, 169 Pac. 114, Ann. Cas. 1918D, 814; Hoffman v. Delaware, L. & W. R. Co. (1909) 39 Pa. Super. Ct. 47; Deaver-Jeter Co. v. Southern R. Co. (1912) 91 S. C. 503, 74 S. E. 1071, Ann. Cas. 1914A, 230; Illinois C. R. Co. v. Wade (1911) 1 Tenn. C. C. A. 780; Chicago, R. I. & G. R. Co. v. Linger (1913) — Tex. Civ. App. —, 156 S. W. 298; Pecos & N. T. R. Co. v. Holmes (1915) — Tex. Civ. App. —, 177 S. W. 505; Castner v. Oregon-Washington R. & Nav. Co. (1916) 89 Wash. 694, 155 Pac. 167.

A stipulation requiring written notice of a claim for damages to a shipment is "addressed to a practical exigency," and is to be "construed in a practical way." Georgia, F. & A. R. Co. v. Blish Mill. Co. (1916) 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541. Or, as has been said, a stipulation for notice of a claim must be given a "reasonable" or practical, interpretation, rather than a technical or literal construction, or application. Jamison v. New York & P. R. S. S. Co. (1917) 241 Fed. 389; Louisville & N. R. Co. v. Landers (1903) 135 Ala. 504, 33 So. 482; Atchison, T. & S. F. R. Co. v. Temple (1891) 47 Kan. 7, 13 L.R.A. 362, 27 Pac. 98; Wichita & W. R. Co. v. Koch (1892) 47 Kan. 753, 28 Pac. 1013; Cudahy Packing Co. v. Bixby (1918) 199 Mo. App. 589, 205 S. W. 865; Hyatt Roller Bearing Co. v. Pennsylvania R. Co. (1918) — N. J. L. —, 104 Atl. 82; Missouri, K. & T. R. Co. v. Davis (1909) 24 Okla. 677, 24 L.R.A.(N.S.) 866, 104 Pac. 34; Chicago, R. I. & P. R. Co. v. Spears (1912) 31 Okla. 469, 122 Pac. 228; United Brokers Co. v. Southern P. Co. (1917) 86 Or. 607, 169 Pac. 114, Ann. Cas. 1918D, 814; Crawford v. Southern R. Co. (1915) 101 S. C. 522, 86 S. E. 19, 11 N. C. C. A. 541.

And although it has been held that a stipulation in a contract of carriage, requiring notice, must be strictly complied with (see Northern P. Exp. Co. v. Martin (1896) 26 Can. S. C. 135, reversing (1895) 10 Manitoba L. R. 595, as set out in the last paragraph of this subdivision), the

general rule is that a substantial compliance with such a stipulation is sufficient. It has been expressly, or in effect, so held in the following cases: Georgia, F. & A. R. Co. v. Blish Mill. Co. (1916) 241 **U. S.** 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Atchison, T. & S. F. R. Co. v. Temple (1891) 47 **Kan.** 7, 13 L.R.A. 362, 27 Pac. 98; Wichita & W. R. Co. v. Koch (1892) 47 **Kan.** 753, 28 Pac. 1013; Johnson v. New York, N. H. & H. R. Co. (1913) 111 **Me.** 263, 88 Atl. 988; SNYDER v. KING (reported herewith) ante, 893; Illinois C. R. Co. v. Wm. Atkinson & McD. Co. (1917) 113 **Miss.** 678, 74 So. 616; Illinois C. R. Co. v. Rogers (1917) 116 **Miss.** 99, 76 So. 686, Ann. Cas. 1918D, 1137; Rice v. Kansas P. R. Co. (1876) 63 **Mo.** 314; Hancock v. Chicago & A. R. Co. (1908) 131 **Mo.** App. 401, 111 S. W. 519; Cudahy Packing Co. v. Atchison, T. & S. F. R. Co. (1918) 198 **Mo.** App. 520, 201 S. W. 623; Cudahy Packing Co. v. Bixby (1918) 198 **Mo.** App. 589, 205 S. W. 865; Hyatt Roller Bearing Co. v. Pennsylvania R. Co. (1918) — **N. J. L.** —, 104 Atl. 82; Southerland v. Atlantic Coast Line R. Co. (1912) 158 **N. C.** 327, 74 S. E. 102; Shark v. Great Northern R. Co. (1917) 37 **N. D.** 342, 164 N. W. 39; Missouri, K. & T. R. Co. v. Davis (1909) 24 **Okla.** 677, 24 L.R.A.(N.S.) 866, 104 Pac. 34; St. Louis & S. F. R. Co. v. Young (1912) 30 **Okla.** 588, 120 Pac. 999; Chicago, R. I. & P. R. Co. v. Spears (1912) 31 **Okla.** 469, 122 Pac. 228; Atchison, T. & S. F. R. Co. v. Robinson (1912) 36 **Okla.** 435, 129 Pac. 20, reversed on other grounds in (1914) 233 **U. S.** 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Atchison, T. & S. F. R. Co. v. Moore (1912) 36 **Okla.** 433, 129 Pac. 24, reversed on other grounds in (1914) 233 **U. S.** 182, 58 L. ed. 906, 34 Sup. Ct. Rep. 558; Chicago, R. I. & P. R. Co. v. Gray (1917) — **Okla.** —, 165 Pac. 157; Chicago, R. I. & P. R. Co. v. Brockmeier (1917) — **Okla.** —, 168 Pac. 1011; Chicago, R. I. & P. R. Co. v. Pruitt (1918) — **Okla.** —, 171 Pac. 718; United Brokers Co. v. Southern P. Co. (1917) 86 **Or.** 607, 169 Pac. 114, Ann. Cas. 1918D, 814; Crawford v. Southern R. Co. (1915) 101 **S. C.** 522, 86 S. E. 19, 11 N. C. C. A. 541; Houston & T. C. R. Co. v. Davis (1908) 50 **Tex. Civ. App.** 74, 109 S. W. 422; Wichita Valley R. Co. v. Boger (1914) — **Tex. Civ. App.** —, 167 S. W. 767; Carstens Packing Co. v. Southern P. Co. (1910) 58 **Wash.** 239, 27 L.R.A. (N.S.) 975, 108 Pac. 613.

And it has been held that a substantial compliance with a stipulation requiring notice of claim for damages to a shipment is sufficient, although the contract of carriage also provided that a failure "to strictly comply" with the provisions as to notice would bar a recovery. See Chicago, R. I. & P. R. Co. v. McElreath (1917) — **Okla.** —, L.R.A. 1918C, 425, 169 Pac. 628.

But in any case, aside from the question of waiver, which is not treated herein, there must be at least a substantial compliance with the stipulation requiring notice.

For instance, in Kidwell v. Oregon Short Line R. Co. (1913) 125 C. C. A. 313, 208 **Fed.** 1, it was held that a stipulation that claims must be presented is not complied with by a notice that the shipper is going to put in a claim, or that there will be a claim against the carrier for damages, it having been argued that "to impart the information that a claim will be presented is not to present 'a claim.'" So, it has been held that a telegram by a shipper to the carrier, notifying it that damages "might" be sustained later, is not notice of loss or damage, subsequently sustained. Olson v. Chicago, B. & Q. R. Co. (1918) — C. C. A. —, 250 **Fed.** 372. And a mere statement to an office employee of the terminal carrier, informing him that a shipment of fruit was in bad condition, without any suggestion that the carrier was responsible for such condition, or that anyone was claiming that it was, has been held not such a notice as satisfied a stipulation in the bill of lading, requiring a written notice of claim for loss or damage. Waxelbaum v. Southern R. Co. (1912) 168 **Ill. App.** 66. And again, in Cudahy Packing Co. v. Bixby (1918) 199 **Mo. App.** 589, 205 S. W. 865; as well as in Cudahy Packing Co. v. Atchison,

T. & S. F. R. Co. (1918) 198 **Mo.** App. 520, 201 S. W. 623, written notices which made no reference to any loss, or claim therefor, and gave no intimation that a claim would be filed, or placed any blame upon the carrier, were held insufficient, under bills of lading requiring written notice of claims for damages. And in Texas & P. R. Co. v. Jackson (1885) 3 **Tex.** App. Civ. Cas. (Willson) 65, it was held that a letter merely complaining that the train carrying plaintiff's cattle had been delayed, and that he had been compelled to pay a higher freight rate than that contracted for, but making no claim for damages, did not constitute a sufficient written notice of loss or damage. And that a mere inquiry as to the whereabouts of a shipment, and a request that it be traced, do not constitute notice of a claim for damages, see Atlantic Coast Line R. Co. v. Bryan (1909) 109 **Va.** 523, 65 S. E. 30. And it has been held that an ordinary written delivery receipt, signed by the consignee, can in no way be construed as a written claim for damages. Johnson v. Missouri P. R. Co. (1916) — **Mo.** App. —, 187 S. W. 282. In fact, it seems that no writing can be regarded as sufficient, which does not indicate that a claim is or will be made. See Illinois C. R. Co. v. Wade (1911) 1 **Tenn.** C. C. A. 780.

However, in E. H. Emery & Co. v. Wabash R. Co. (1918) — **Iowa**, —, 166 N. W. 600, wherein the bill of lading required that claims must be made in writing, it was held that a notice that the consignee "will file a claim," though in the future tense, substantially complied with the stipulation. But this decision was made in the light of the fact that the carrier's agents had examined the shipment and made an inspection report, showing the damages, as well as made a note thereof upon the freight receipt. And, to the same effect, see Cudahy Packing Co. v. Bixby (1918) 199 **Mo.** App. 589, 205 S. W. 865.

And in Hyatt Roller Bearing Co. v. Pennsylvania R. Co. (1918) — **N. J. L.** —, 104 Atl. 82, where the contract required that "claims must be made in writing," it was held that, giving the stipulation a reasonable construction, and taking into consideration the purpose of the rule requiring same, and that a substantial compliance therewith is sufficient, a letter, "citing the facts and informing the defendant that the fifth bundle had not been delivered," was a substantial compliance with the stipulation; the defendant, after having been notified, having investigated the case, and notified plaintiff that the goods could not be found. The court said: "Manifestly, the delivery of a notice of the loss, from which no other inference is reasonably derivable than that the loss has occurred, and giving the substantial particulars, as in the case sub judice, and which resulted in an investigation by the carrier, is substantially a claim, or a notice of a claim, within the reasonable construction of the bill of lading."

Upon the question of the necessity for actual notice, it has been held that, in some instances, constructive notice is sufficient. Thus, in Johnson v. New York, N. H. & H. R. Co. (1913) 111 **Me.** 263, 88 Atl. 988, it was held that the seasonable mailing of a notice constituted a sufficient compliance with a contract, requiring that notice of a claim for damages to a shipment be given within a specified time. So, in Vencill v. Quincy, O. & K. C. R. Co. (1908) 132 **Mo.** App. 722, 112 S. W. 1030, it was held that a letter, properly addressed and deposited in a postoffice so that, in the usual course of transmission, it would have been delivered to the addressee within the time limit contained in a stipulation for claim of notice, was a sufficient compliance with such stipulation, although it did not appear that it was received until the period for notice had expired. However, it has been said that the notice must be actual. For instance, in St. Louis, I. M. & S. R. Co. v. Furlow (1909) 89 **Ark.** 404, 117 S. W. 517, it was held that the mailing of a notice of a claim was not sufficient, where it was not received within the time specified in the stipulation, the reason for the rul-

ing assigned being that the notice must be actual.

But formal language is not essential to the sufficiency of a notice of claim. The San Guglielmo (1917) 241 Fed. 969; Hinkle v. Southern R. Co. (1900) 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; Phillips v. Seaboard Air Line R. Co. (1916) 172 N. C. 86, 89 S. E. 1057 (holding that "a written claim need not be expressed in any special way, so that it is a plain and intelligible statement of the demand"); United Brokers Co. v. Southern P. Co. (1917) 86 Or. 607, 169 Pac. 114, Ann. Cas. 1918D, 814. In the Hinkle Case (N. C.) supra, the court, in holding that the signing of a receipt, "under protest," was a sufficient compliance with a stipulation requiring written notice of claim, said: "It is not denied that the plaintiff signed the receipt for the cattle under protest. These words written upon the receipt would be ample notice to the defendant that the plaintiff intended to enforce his rights. The meaning of these words is too well known in the business world to be capable of misconstruction. In the present case, they clearly meant that the plaintiff objected to receiving the cattle in their damaged condition, but did so under compulsion of circumstances, to prevent still further loss, but at the same time retaining all his rights of action against the defendant. If the defendant's agent had desired any more specific notice or information, he might have asked for it, after having been put upon notice; but this he did not see fit to do."

And the strictness of the rule requiring notice has been still more relaxed, where there is a total failure to deliver a shipment, as distinguished from partial loss or damage thereto, it having been held that the reason of the rule is not so forcible in the former case. This was the reasoning adopted in D'Arsi v. Navigazione Alta Italia (1915) 91 Misc. 10, 154 N. Y. Supp. 158, affirmed without opinion in (1916) 173 App. Div. 963, 158 N. Y. Supp. 1112, wherein it was held that a stipulation in a contract of carriage by water that notice of loss must be given within forty-eight hours to the steamer's agent, and a claim preferred at the owner's office within ninety days, was sufficiently complied with by the preferring of a claim within ninety days, although no forty-eight-hour notice was actually given. And see, to the same effect, Deaver-Jeter Co. v. Southern R. Co. (1912) 91 S. C. 503, 74 S. E. 1071, Ann. Cas. 1914A, 230.

In Northern P. R. Co. v. Martin (1896) 26 Can. S. C. 134, reversing (1895) 10 Manitoba, L. R. 595, after decreeing that a stipulation as to notice of claim in a shipping contract must be strictly complied with, it was held that a failure to attach a copy of the contract to a written notice of claim, as required by such contract, barred a recovery. And in Mason v. Grand Trunk R. Co. (1875) 37 U. C. Q. B. 163, where the bill of lading required that the notice give the particulars regarding the claim, it was held that the giving of a notice which did not go into the particulars, such as the amount of damages, etc., did not comply with the letter of the contract, and was insufficient.

II. Oral or written notice, and verification.

a. In general.

Where the stipulation does not require that the notice be written, a verbal notice is sufficient. The San Guglielmo (1917) 241 Fed. 969, modified on other grounds in (1918) — C. C. A. —, 249 Fed. 588; Blair Horse & Mule Co. v. St. Joseph & G. I. R. Co. (1915) — Mo. App. —, 180 S. W. 412.

Conversely, where the contract of carriage requires a written notice, oral notice in itself has been held insufficient. Thus, in Olson v. Chicago, B. & Q. R. Co. (1918) — C. C. A. —, 250 Fed. 372, it was held that oral notice of loss was not a sufficient compliance with a stipulation providing for a written notice, although followed by an investigation, since to hold otherwise would be to abrogate the express terms of the contract. And in Johnson v. Missouri P. R. Co. (1916) — Mo. App. —, 187 S. W. 282, it was expressly held that the giving

of oral information that a claim would be made did not satisfy a provision requiring written notice. And this was the holding in Missouri P. R. Co. v. Scott (1882) 2 **Tex.** App. Civ. Cas. (Willson) 279, and Mercer v. Canadian P. R. Co. (1908) 17 **Ont.** L. Rep. 585, per Riddell, J.

However, it has been held that a provision requiring written notice was sufficiently complied with, within the reason of the rule, where plaintiff made oral complaint, and the carrier acted upon the same, by sending out tracers and making an investigation. Shark v. Great Northern R. Co. (1917) 37 **N. D.** 342, 164 N. W. 39.

And a stipulation requiring written notice does not require a document in a particular form. Thus, a telegram, which in itself, or taken with other telegrams, contains an adequate statement of a claim, has been held to sufficiently satisfy a requirement that written notice be given. Georgia, F. & A. R. Co. v. Blish Mill. Co. (1916) 241 **U. S.** 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541 (holding that a claim for the value of a shipment of flour, undelivered by the carrier, is sufficiently made to satisfy a stipulation that written claims, based on failure to make delivery, must be made, where the shipper, after making an investigation in response to a telegram from the carrier, telegraphed the latter, five days after the arrival of the flour at destination: "We will make claim against the railroad for entire contents of car at invoice price. Must refuse shipment, as we cannot handle"); Boyd v. King (1918) — **Mich.** —, 167 N. W. 901.

And in St. Louis, I. M. & S. R. Co. v. Cumbie (1911) 101 **Ark.** 172, 141 S. W. 939, on subsequent appeal in (1912) 105 **Ark.** 406, 151 S. W. 237, it was held that a stipulation requiring written notice of a claim for damages was complied with, where the carrier's agent was present when the consignee's agent examined the shipment and refused to accept it, and was given a copy of a telegram advising consignor that the shipment was damaged in its total value, and that consignee refused to accept it on that account. So, it has been held that a letter may be a sufficient notice. Johnson v. New York, N. H. & H. R. Co. (1913) 111 **Me.** 263, 88 Atl. 988; Vencill v. Quincy, O. & K. C. R. Co. (1908) 132 **Mo.** App. 722, 112 S. W. 1030; Nelson v. Great Northern R. Co. (1903) 28 **Mont.** 297, 72 Pac. 642; Galveston, H. & S. A. R. Co. v. Itule (1915) — **Tex.** Civ. App. —, 172 S. W. 1123. And in Chicago, R. I. & P. R. Co. v. Pruitt (1918) — **Okla.** —, 171 Pac. 718, it was held that the negotiation of a settlement by letter within the required time constituted a substantial compliance with a stipulation requiring written notice.

b. Bringing of suit as notice.

The bringing of suit on a claim for damages within the time specified in a contract of affreightment for the giving of written notice of a claim has been held to constitute a sufficient notice and presentation of such claim. Southern Exp. Co. v. Ruth (1912) 5 **Ala.** App. 644, 59 So. 538, affirmed in (1912) 183 **Ala.** 493, 59 So. 538, Ann. Cas. 1915D, 871; J. Van Lindley Nursery Co. v. Southern R. Co. (1918) — **S. C.** —, 96 S. E. 221; Houston & T. C. R. Co. v. Davis (1908) 50 **Tex.** Civ. App. 74, 109 S. W. 422; Wichita Valley R. Co. v. Boger (1914) — **Tex.** Civ. App. —, 167 S. W. 767 (holding that, while the mere filing of suit might not be sufficient to give notice, the service of citation, together with a statement of the damages claimed would be sufficient); Missouri, K. & T. R. Co. v. Neale (1915) — **Tex.** Civ. App. —, 176 S. W. 85; Galveston, H. & S. A. R. Co. v. Gibbons (1918) — **Tex.** Civ. App. —, 202 S. W. 352.

And this, even though the contract of carriage expressly provided that "the filing of suit for such damages shall not be a compliance with this requirement." Wichita Valley R. Co. v. Boger (1914) — **Tex.** Civ. App. —, 167 S. W. 767.

c. Verification.

In Illinois C. R. Co. v. W. M. Atkinson & McD. Co. (1917) 113 **Miss.** 678, 74 So. 616, it was held that a stipula-

tion requiring written notice of loss, verified by affidavit, was substantially complied with by the sending and acknowledgment of an unverified letter, the court saying that the letter put the company upon notice of the claim so that it could ascertain all available facts, and that if it desired to insist upon the claim being verified by affidavit, it should have given notice of its insistence on such requirement. And see the reported case (SNYDER v. KING, ante, 893).

But that verification of a notice of claim is a condition precedent to recovery, where the stipulation requires a verified written claim, see Baltimore & O. R. Co. v. Hubbard (1905) 72 **Ohio** St. 302, 74 N. E. 214, 18 Am. Neg. Rep. 231.

III. Statement of amount of claim in notice.

In the absence of special provision, the written notice of intention to make a claim for damages, since its purpose is to give the carrier an opportunity to examine the nature and extent of the injury, need not contain a complete statement as to the injury and the resulting damages.

Thus, it has been held that such a notice, to constitute a sufficient compliance, need not specify the amount of the damages claimed. St. Louis, I. M. & S. R. Co. v. Starbird (1917) 243 **U. S.** 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462 (holding that a consignee should give the required written notice of intention to make a claim for damages within the stipulated time, even though such time was too short within which to determine the amount of his loss); Pacific Coast Co. v. Yukon Independent Transp. Co. (1917) 83 C. C. A. 625, 155 **Fed.** 29 (holding that the original notice need not satisfy the provision as to amount of damages claimed, where the same cannot be determined within the period during which notice must be given).

And where the contract of carriage does not confine the shipper or consignee to any special amount, but the notice is required in order that the carrier may make timely investigation, it has been held that the fact that the claim filed with the notice of damages is not as large as the amount sued for does not defeat a right to sue, on the ground that no notice was given. Pecos & N. T. R. Co. v. Holmes (1915) — **Tex.** Civ. App. —, 177 S. W. 505; Texas & P. R. Co. v. McMillen (1916) — **Tex.** Civ. App. —, 183 S. W. 773.

In Carstens Packing Co. v. Southern P. Co. (1910) 58 **Wash.** 239, 27 L.R.A. (N.S.) 975, 108 Pac. 613, it was held that a failure to mention shrinkage in weight as part of the loss or injury in transportation, in the notice of loss given the carrier, did not prevent a recovery of that element of damage from the carrier, where the notice given specified the injury so that the carrier could, by a prompt investigation, have become fully informed relative thereto.

Nor is a formal notice rendered insufficient, by reason of the fact that it contains an item as to which there can be no recovery. Jenkins v. Atlantic Coast Line R. Co. (1909) 83 S. C. 473, 65 S. E. 636.

But that the amount of the damages claimed must be stated, where the stipulation requires that the particulars of the claim be given, see Mason v. Grand Trunk R. Co. (1875) 37 **U. C. Q. B.** 163.

IV. By whom notice must be given.

It has been held that, where a bill of lading required the shipper to give notice of claim, the consignee need not give notice, although he was part owner of the shipment and joined in an action to recover damages, a proper notice having been served by the shipper. Texas & P. R. Co. v. McMillen (1916) — **Tex.** Civ. App. —, 183 S. W. 773.

And a stipulation in a bill of lading, requiring written notice of a claim for damages, was held sufficiently complied with in the D. Harvey (1905) 139 **Fed.** 755, by a letter written to the carrier by the proctor for the cargo owner, stating that the claim had been placed in his hands for collection; at least, when the carrier already had actual knowledge of the injury. So, in Missouri, K. & T. R. Co. v. Davis (1909) 24 **Okla.** 677,

24 L.R.A. (N.S.) 866, 104 Pac. 34, a notice given by the shipper's attorney was held sufficient.

In the reported case (SNYDER v. KING, ante, 893) it is held that a stipulation in a bill of lading for an interstate shipment, requiring a written claim for damages, verified by affidavit, and delivered to the traffic manager of the carrier, was sufficiently complied with by a written communication, made after investigation undertaken at the expense of the shipper by the carrier's local agent at the point of destination, stating that the shipment had been injured, and that a claim would be made, the court saying that such notice fulfilled the purpose of the stipulation regarding notice. And a similar ruling upon similar facts was made in St. Louis & S. F. R. Co. v. Young (1912) 30 **Okla.** 588, 120 Pac. 799. So, in McElvain v. St. Louis & S. F. R. Co. (1915) — **Mo.** App. —, 180 S. W. 1018, where the shipper notified the carrier's local agent orally, and the latter made a "written bad order," and sent it within the time stipulated in the contract of carriage, it was held that a sufficient written notice was given, the contract not requiring either that the notice be signed by the claimant, or that he personally give the notice. And in United Brokers Co. v. Southern P. Co. (1917) 86 **Or.** 607, 169 Pac. 114, Ann. Cas. 1918D, 814, it was held that an inspection report, made out and signed by the carrier's inspector, who had been called by the consignee, and in which the damage was fully stated, along with a statement that damages were claimed by the consignee, who was identified by name, was a sufficient compliance with a stipulation in the bill of lading, requiring written notice to the company, the court saying: "We do not consider it a matter of moment which one of the two men who examined the goods wrote the statement, or whether it was written by some third person," as long as it fulfilled its purpose. So, in Illinois C. R. Co. v. Rogers (1917) 116 **Miss.** 99, 76 So. 686, Ann. Cas. 1918D, 1137, it was held that where the shipper of stock, before accepting the shipment at point of destination, required the agent of the terminal carrier to note on the freight bill that the stock was received in bad condition, a stipulation requiring written notice of claim within one day was sufficiently complied with. And that the signing of the receipt, with the words "under protest" written thereon, has been held to be a sufficient written notice, see Hinkle v. Southern R. Co. (1900) 126 **N. C.** 932, 78 Am. St. Rep. 685, 36 S. E. 348, as set out supra, subdivision I. But in Johnson v. Missouri P. R. Co. (1916) — **Mo.** App. —, 187 S. W. 282, it was held that notations on the freight bill that the freight was in bad order did not constitute written notice of a claim, or take the place thereof. And again, in Taft v. Atlantic Coast Line R. Co. (1917) 174 **N. C.** 211, 93 S. E. 752, it was held that a notation by a railway agent on a freight bill, as to injury to a shipment of furniture, was not a written notice of loss to the carrier within the meaning of a stipulation in a bill of lading requiring such a notice. And in Illinois C. R. Co. v. Wade (1911) 1 **Tenn.** C. C. A. 780, where the consignee refused to accept a shipment until the agent indorsed on the bill of lading that the property was damaged, it was held that the same did not constitute a sufficient notice of claim, because the indorsement could not be construed into a claim.

V. To whom notice must be given.

a. In general.

Where the contract of carriage expressly stipulates to whom notice must be given, it has been held that the notice must be given to the designated agent. Thus, in Letts v. Wabash R. Co. (1908) 131 **Mo.** App. 270, 111 S. W. 138, where the contract provided for notice to the carrier's general freight agent, it was ruled that notice to the general claim agent was not sufficient. And in Missouri P. R. Co. v. Scott (1884) 2 **Tex.** App. Civ. Cas. (Willson) 279, where the contract provided that notice must be given to an officer of the road, or its nearest station agent, it was held that notice to a train

conductor, or a superintendent of stockyards, was not sufficient.

Where the stipulation requiring notice does not designate to what officer or agent such notice shall be given, but only provides that it shall be given to the delivering carrier, a notice given to an agent of such carrier, who was its depot manager at the place of destination, and to whom such complaints were customarily made, is sufficient. St. Louis & S. F. R. Co. v. Heyser (1910) 95 Ark. 412, 130 S. W. 562, Ann. Cas. 1912A, 610.

So, in Southerland v. Atlantic Coast Line R. Co. (1912) 158 N. C. 327, 74 S. E. 102, it was held that notice of an injury to a shipment of live stock, as required by a bill of lading providing that written notice must be given, was given by notifying the person in charge of defendant's stockyards, who always superintended the unloading of cattle, that the cattle were received under protest, the court saying, in answer to the contention of the carrier that no notice was given to any of its agents, that "it would be unreasonable to require the consignee to search for some other agent of the defendant than the one who was present, superintending the receipt and delivery of the cattle. Lambert [the person so in charge] was to all intents and purposes the agent of the railroad company, and notice to him was notice to it."

And it has been held that notice to the master of the vessel who issued the bill of lading was a sufficient notice to the charterers who were the duly authorized agents of the owner. The Persiana (1907) 156 Fed. 1019, reversed on other grounds in (1911) 107 C. C. A. 416, 185 Fed. 396. And in The San Guglielmo (1917) 241 Fed. 969, it was held that notice to the master of the carrying ship was sufficient.

In Walker v. Southern R. Co. (1906) 76 S. C. 308, 56 S. E. 592, it was held that filing a claim for damages to freight with the cashier at the station, who, in the absence of the general agent, was acting for him, was a sufficient compliance with the requirement that claims be filed with the agent of the defendant at the point of destination.

But a stipulation in a through bill of lading for an interstate shipment, requiring written notice to the terminal carrier, is not complied with by giving verbal notice to the terminal carrier's dock master at the place of delivery, where such carrier also has a freight agent at such place in charge of the docks. St. Louis, I. M. & S. R. Co. v. Starbird (1917) 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. Rep. 462, reversing on this point (1915) 118 Ark. 485, 177 S. W. 912.

And in Illinois C. R. Co. v. Davis (1916) 112 Miss. 119, 72 So. 874, it was held that oral mention of loss to a traveling freight agent, who was asked for an allowance, was not sufficient where the contract required written verified notice of loss to the general freight agent, the freight claim agent, or the station agent at the point either of shipment or destination, the carrier's traveling agent having no authority to receive such a notice.

And in Duvall v. Norfolk Southern R. Co. (1914) 167 N. C. 24, 83 S. E. 21, it was held that the calling of the attention of a negro laborer, who was working for the carrier, to the condition of an animal injured in transit, did not constitute a substantial compliance with a stipulation requiring notice of claims to be given an agent of the carrier.

b. Where there are several carriers.

Some question has also been made as to whether notice to one of several connecting carriers is notice to all.

Upon this point, it has been held that, where the shipment is over connecting lines, but under separate contracts with each carrier, as distinguished from a through contract, and each carrier's liability is confined to damages accruing on its own line, notice to one of the connecting carriers is not notice to the others. Houston & T. C. R. Co. v. Mayes (1906) 44 Tex. Civ. App. 31, 97 S. W. 318. And see Waxelbaum v. Southern R. Co. (1912) 168 Ill. App. 66, wherein it was, in effect, held that notice to one of sev-

eral connecting carriers is not notice to the others, where, under the bill of lading, "no carrier shall be liable for loss or damage not accruing on its portion of the route," or for any "act, omission, or negligence" of other connecting carriers; and this, even though the contract merely provided that notice should be given to the agent "at point of delivery."

But where the several connecting carriers are sued as partners, and the partnership is not denied, a written claim filed with one is binding upon the others, although the contracts of shipment limited the liability of each to damages accruing on its own line. Texas C. R. Co. v. Pool (1908) 52 **Tex.** Civ. App. 307, 114 S. W. 685.

And it has been held, under a contract of carriage which provided that written claim must be presented to the carrier as a condition precedent to liability, and that a connecting carrier would not be liable for damages accruing on its line unless a like claim should be presented to it, that where the shipper claims damages from the connecting carrier only, he need not give notice to the initial carrier. Needham v. Boston & M. R. Co. (1909) 82 Vt. 518, 74 Atl. 226.

And under the Carmack Amendment which, in effect, abolishes stipulations for separate liability of connecting carriers of interstate freight, the rule is that notice to one of several carriers of an interstate shipment, under a through bill of lading, is notice to all.

Thus, in the following cases, it was held that notice to a connecting carrier was a sufficient compliance with a stipulation requiring that notice be given to the initial carrier: Chicago, R. I. & G. R. Co. v. Linger (1913) — Tex. Civ. App. —, 156 S. W. 298; Overton v. Chicago, R. I. & G. R. Co. (1913) — Tex. Civ. App. —, 160 S. W. 111; Galveston, H. & S. A. R. Co. v. Itule (1915) — Tex. Civ. App. —, 172 S. W. 1123. And notice to the initial carrier is notice to the connecting carrier; Galveston, H. & S. A. R. Co. v. Gibbons (1918) — Tex. Civ. App. —, 202 S. W. 352; Norfolk & W. R. Co. v. Steele (1915) 117 Va. 788, 86 S. E. 124. And in Gulf, C. & S. F. R. Co. v. Bogy (1915) — Tex. Civ. App. —, 178 S. W. 577, it was held, generally, that notice to one of four connecting carriers was notice to all. So, in Northern P. R. Co. v. Wall (1916) 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493, reversing (1914) 50 **Mont.** 122, 145 Pac. 291, it was held that notice to an officer or station agent of the connecting carrier at final destination must be deemed to satisfy the requirement of a stipulation, in a through bill of lading for an interstate shipment of live stock, issued by the initial carrier, that the shipper shall give written notice of any claim for injury to the stock while in transit, to some officer or station agent "of said company," before the cattle are removed from the place of destination, or mingled with other stock, where, under statute, the connecting carrier is made the agent of the receiving carrier for the purpose of completing the transportation and delivering of property, and the bill of lading further stipulates that its terms and conditions shall inure to the benefit of any connecting carrier over whose lines the cattle shall pass.

And prior to the enactment of the Carmack Amendment, a notice to the agent at point of delivery of an interstate shipment was held to be notice to all of the connecting carriers, where the contract of carriage provided that notice should be given to the terminal carrier. Wichita & W. R. Co. v. Koch (1892) 47 **Kan.** 753, 28 Pac. 1013; Mulrooney, R. & C. Co. v. Western Transit Co. (1907) 102 **Minn.** 142, 112 N. W. 988. And this has been held to be the rule, even though the connecting carriers also had agents at the point of delivery. Mulrooney, R. & C. Co. v. Western Transit Co. (**Minn.**) supra.

VI. Place where notice must be given.

Where the contract of carriage requires that notice must be given at the point of shipment, or at the point of origin, it is not sufficient to mail it to another point. Equity Elevator Co. v. Union P. R. Co. (1915) — **Mo.** App —, 177 S. W. 773; Cudahy Packing Co. v. Bixby (1918) 199 **Mo.** App. 589, 205

S. W. 865. And this, although the notice went to the person to whom it eventually would have been referred. Cudahy Packing Co. v. Bixby (Mo.) supra.

But it seems that the fact that the notice was sent to the wrong place does not vitiate it, where it was received and answered by the proper person, and the one for whom it was originally intended. See Rissler v. Missouri P. R. Co. (1916) — Mo. App. —, 183 S. W. 676.

In Mason v. Grand Trunk R. Co. (1875) 37 U. C. Q. B. 163, where the stipulation required that notice be given at the "place of delivery," it was held that the quoted phrase meant the place where the shipment was to be turned over to the consignee, and not the place where it was to be delivered to an intermediate carrier.

VII. Time of giving notice.

a. In general.

Where the stipulation requires that a claim with full particulars be presented within a specified time, it has been held, applying the rule of reasonable construction, that the stipulation was sufficiently complied with, although the formal notice was not given until after the expiration of the specified period, it having been impossible to ascertain the amount of damages and other necessary facts within such period. Jamison v. New York & P. R. S. S. Co. (1917) 241 Fed. 389; Louisville & N. R. Co. v. Landers (1903) 135 Ala. 504, 33 So. 482; Harned v. Missouri P. R. Co. (1892) 51 Mo. App. 482; Baltimore & O. R. Co. v. Hubbard (1905) 72 Ohio St. 302, 74 N. E. 214, 18 Am. Neg. Rep. 231; Chicago, R. I. & P. R. Co. v. Spears (1912) 31 Okla. 469, 122 Pac. 228; Crawford v. Southern R. Co. (1915) 101 S. C. 522, 86 S. E. 19, 11 N. C. C. A. 541. And even where the stipulation provided that the "amount and particulars" of the claim must be given within a specified time, notice given subsequent to the expiration of such period has been held sufficient, provided the necessary facts could not be obtained sooner, and the carrier knew of the injury. See The San Guglielmo (1917) 241 Fed. 969. But notwithstanding the contract of carriage requires notice of claims to be given within an unreasonably short time, the shipper is not relieved from giving any notice whatever, but is still required to give notice within a reasonable time; that is, he must at least comply with the requirement to the extent that he reasonably can. Osterhoudt v. Southern P. Co. (1900) 47 App. Div. 146, 62 N. Y. Supp. 134; Crawford v. Southern R. Co. (1915) 101 S. C. 522, 86 S. E. 19, 11 N. C. C. A. 541.

In some cases, the fact that the delay in giving notice was due to the fault of the carrier has seemingly influenced the decisions. Thus, in Cleveland, C. C. & St. L. R. Co. v. Hayes (1913) 181 Ind. 87, 102 N. E. 34, 103 N. E. 839, 104 N. E. 581, it was held that a five-day period after the removal of stock from the cars, stipulated in a bill of lading, for filing claims for damages to such stock, did not begin to run when the stock was unloaded, if an opportunity to inspect it was refused by the carrier; so that notice given within five days after inspection was sufficient, although it was not within five days of the unloading. And in Reynolds v. Great Northern R. Co. (1905) 41 Wash. 163, 111 Am. St. Rep. 883, 82 Pac. 161, where the shipping contract required that a written claim for loss be made within ten days, a claim was held to have been presented in due time, it appearing that the day after the receipt of the shipment the consignee notified the carrier that he desired to make a claim for damages, but was put off by the carrier's agent, who referred him to other agents, who finally requested a written statement, which he made without delay, but not within the period stipulated in the contract. So, in Southern Exp. Co. v. Stevenson (1906) 89 Miss. 233, 42 So. 670, where a verbal notice of loss was given a carrier within the prescribed period, and the agent sent a tracer after the goods, and about ninety days later reported that he could not find them, it was held that a written demand made after such report was sufficient notice,

although the contract provided for exemption from liability for loss unless written notice thereof was given within thirty days. And see also the following cases, as set out infra, VII. b: Chicago, I. & L. R. Co. v. Priddy (1917) — **Ind.** App. —, 115 N. E. 266; Rice v. Kansas P. R. Co. (1876) 63 **Mo.** 314; Houston & T. C. R. Co. v. Hester (1880) 2 Posey Unrep. Cas. (**Tex.**) 296.

In St. Louis, I. M. & S. R. Co. v. Bliss-Cook Oak Co. (1915) 118 **Ark.** 323, 176 S. W. 325, it was held that where, under the contract, claims in case of delay must be made within four months after a reasonable time for delivery had elapsed, the shipper had the right to assume that the delivering carrier would not make an unauthorized delivery, so that he was not chargeable with notice of a misdelivery, and that the four-months' period did not begin to run until information of the misdelivery was received; wherefore, a proper notice given within the period so determined was sufficient.

And a notice within a reasonable time has been held sufficient, although it was not within the period specified in the contract, where the provision as to the same was not among the parts of the contract to which the shipper was presumed to have assented. Jolly v. Atchison, T. & S. F. R. Co. (1913) 21 **Cal.** App. 368, 131 Pac. 1057.

On the other hand, in Olson v. Chicago, B. & Q. R. Co. (1918) — C. C. A. —, 250 **Fed.** 372, where part of a shipment of cattle was injured by exposure and was unloaded at a way station and disposed of, it was held that the fact that the remainder of the cattle were then transported under the original bill of lading, to the original destination, did not extend the period subsequent to the unloading during which notice of claim for injury was required; and, therefore, that a notice not given within the prescribed period after the unloading at the way station was insufficient.

b. Before removal.

Applying the rule that the purpose of a provision requiring notice of claim for damages to a shipment of live stock is to afford the carrier an opportunity to examine the extent thereof, it has been held that a stipulation requiring a written notice of injury before the removal of the stock, or the slaughtering or commingling thereof with other stock, was substantially complied with, where the agent of the carrier at the destination of a shipment of race horses was notified that some of them had been injured, and such agent went to the stable where such stock was kept, and examined the same, he having had ample opportunity to make such an examination. Atchison, T. & S. F. R. Co. v. Robinson (1912) 36 **Okla.** 435, 120 Pac. 20, reversed on other grounds in (1914) 233 **U. S.** 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Atchison, T. & S. F. R. Co. v. Moore (1912) 36 **Okla.** 433, 129 Pac. 24, reversed on other grounds in (1914) 233 **U. S.** 182, 58 L. ed. 906, 34 Sup. Ct. Rep. 558.

And again applying the same rule, it was held in Missouri, K. & T. R. Co. v. Davis (1909) 24 **Okla.** 677, 24 L.R.A. (N.S.) 866, 104 Pac. 34, that a stipulation requiring notice of claim before removal of stock from pens at destination was sufficiently complied with, although the stock was removed from the pens to the shipper's barn before the notice was given, the barn adjoining the right of way and being nearer the depot than the stock pens, and the agent having inspected the stock both before and after its removal; the court expressly refusing to rule that a strict compliance with the terms of the stipulation was called for.

So, in Chicago, I. & L. R. Co. v. Priddy (1917) — **Ind.** App. —, 115 N. E. 266, where the stipulation in a bill of lading for a shipment of live stock called for a written notice of claim for damages before removal of the stock, it was held that, since the carrier's agent had been present and had noted the condition of the stock, which condition required that it be gotten away and cared for immediately, and in addition was such that the extent of the injury could not then be determined, a written notice containing an itemized statement of the claim, served seven

days after the removal of the stock, was, under the circumstances, a sufficient compliance with the stipulation.

And in Houston & T. C. R. Co. v. Hester (1880) 2 Posey Unrep. Cas. (Tex.) 296, where a shipment of cattle was put off at night at a point where there were no stock pens, and it was impossible to keep the animals from scattering, it was held that verbal notice at the time, together with a written notice, given as soon as the facts could be ascertained, constituted a sufficient compliance with a stipulation in the bill of lading, requiring written notice before removal of the cattle.

And in Atchison, T. & S. F. R. Co. v. Temple (1891) 47 **Kan.** 7, 13 L.R.A. 362, 27 Pac. 98, where the removal was made with the knowledge and consent of the agent, who had an opportunity to inspect the shipment, it was held that the giving of a proper notice within a short time after such removal was a substantial compliance with a stipulation in the bill of lading for stock that notice must be given before removal. And the same was held in Atchison, T. & S. F. R. Co. v. Collins (1891) 47 **Kan.** 11, 27 Pac. 99, where it was alleged that the removal was with the knowledge and at the request of the carrier's agents.

And in Rice v. Kansas P. R. Co. (1876) 63 **Mo.** 314, where the stipulation in a bill of lading for a shipment of stock required that written notice be given before removal of the stock, and wherein it appeared that the stock reached its destination in an injured condition, that the carrier's yards at such point were in bad condition, that the shipper verbally notified the carrier's yardmaster that he could not receive the stock except under protest, that the shipper was told by the agent that he need not make formal complaint at that time, and that the stock, by the consent of such agent, was removed to plaintiff's farm 16 miles distant, and a formal written notice thereafter given, it was said that the evidence showed a substantial compliance with the spirit and reason of the requirement as to notice, and that the delay was caused by the defendant.

So, in Atchison, T. & S. F. R. Co. v. Wright (1908) 78 **Kan.** 94, 95 Pac. 1132, where representatives of the carrier were present when injured cattle were received, observed their condition, and advised their immediate sale, it was held that the purpose of a stipulation in the bill of lading that written notice of a claim must be given before removal of the stock was fully accomplished, so that the giving of further notice was not a condition precedent to recovery. And see Wichita & W. R. Co. v. Koch (1899) 8 **Kan.** App. 642, 56 Pac. 538, wherein it was held that, where the carrier had actual knowledge that a shipment of hogs had been injured, and that the consignee refused to accept the same, the purpose of an agreement requiring written notice of injury was sufficiently complied with.

In Jamison v. New York & P. R. S. S. Co. (1917) 241 **Fed.** 389, it was held that a stipulation requiring notice before goods are removed from the dock at the point of destination was complied with, by giving notice after the cargo had been unloaded into lighters, which, at the time of notice, were shown not to have left the carrying ship's side.

In Missouri & N. A. R. Co. v. Pullen (1909) 90 **Ark.** 182, 118 S. W. 702, where the contract required a notice of any claim for loss before the stock was removed "from its place of destination," it was held that the shipper had sufficiently complied with the requirement when he gave notice, within the required time after the removal of the last of the stock to his farm, which was 1½ miles from the railroad; the contract not having specified any particular place as the place of delivery at the point of destination. And in Welch v. Northern P. R. Co. (1914) 14 **N. D.** 19, 103 N. W. 396, it was held that the phrase "place of destination," as used in a stipulation requiring notice of claim before removal of the shipment therefrom, cannot be limited to the premises of the defendant where the shipment was unloaded, but means the town to which the shipment was

sent, so that a proper notice given before the shipment was removed beyond the limits of the town was sufficient.

On the other hand, some courts have adopted a more strict rule of construction, and it has been held that, where a valid and reasonable stipulation required notice before removal of the shipment, a notice given subsequent to the removal was not sufficient. See The Persiana (1911) 107 C. C. A. 416, 185 Fed. 396, reversing (1907) 156 Fed. 1019 (holding this to be the rule, even though the carrier knew of the injury); and Hudson v. Chicago, St. P. M. & O. R. Co. (1915) 226 Fed. 38.

G. J. C.

GROOME WHITTELSEY et al., Appts.,

v.

JAMES CONNIFF et al., Respts.

Missouri Supreme Court (Division No. 2)—January 6, 1916.

(266 Mo. 567, 182 S. W. 161.)

Constitutional law — appointment of curator for infant without notice.

1. An infant is not deprived of his property without due process of law or the equal protection of the laws by a sale of it for his benefit by a curator appointed without notice to the minor.

[See note on this question beginning on page 919.]

Infant — nonresident — curator — right to choose.

2. A general provision of a statute providing for the appointment of guardians and curators for minors, that the minor may, upon reaching the age of fourteen years, choose another guardian or curator before the court in the county of his residence, does not apply to a nonresident minor, where, under another section of the statute, a guardian may be appointed for him without notice or a provision for choice on his part.

Same — sale without notice — validity.

3. An infant's property may be sold by his curator without notice to him.

Same — appointment of curator — failure to accept resignation of prior one.

4. The appointment of a curator for an infant without the entry of a formal order discharging a prior one, who resigned, is not void.

APPEAL by plaintiffs from a judgment of the Circuit Court for Jefferson County in favor of defendants in a suit brought to quiet title to certain land. *Affirmed.*

Statement by **Roy, C.:**

This is a suit under § 2535 of our Revised Statutes to quiet title to lot 8, containing 146 acres, and lot 9, containing 90 acres, all in subdivision 10 of United States survey 1897, except 95 acres described in the petition, all in Jefferson county.

Plaintiffs are the children of Charles G. Whittelsey, a lawyer of St. Louis, who died in March, 1875, the owner of all of said lots 8 and 9, and also the owner of lands in the city of St. Louis and in St. Louis county outside of said city. His will was duly admitted to probate, by which he devised all his property to his wife, Anna G., for life, with remainder to his heirs. He left surviving him six children, who were also the children of said Anna G., and were all minors.

In July, 1875, while the widow and children were residing in St. Louis, Richard H. Spencer was duly appointed curator of said minors. The only personal assets he ever received of said minors was $324.52

each on a policy of insurance on their father's life. About June 27, 1878, Spencer tendered to the court his resignation as such curator, having duly published a notice of his intention to do so, and his resignation was by entry of record accepted by the court. There was no formal order of his discharge as such. His statements and vouchers show that he paid all the money in his hands to the mother of the minors for their education and support, all of which payments were approved by the court. Immediately after the appointment of Spencer as such curator the mother and children removed their residence to Elkton, Maryland, where they resided until 1881, when they moved back to St. Louis. Lillian and Lucy died in 1386. The mother and Edith died in 1910.

On October 17, 1878, the widow executed a power of attorney to Phil V. Taylor, of St. Louis, to sell her interest in all of said lands; and on January 18, 1879, Alice G. Whittelsey, one of the children, who had then become of age, executed a similar power of attorney to Taylor. On June 18, 1879, said Taylor filed in the probate court of St. Louis an application for the appointment of John F. O'Rourke as curator for the five children of Whittelsey who were still minors. That application stated that said minors Lucy and Iva were over fourteen years of age, and that Edith, Lillian, and Groome were under fourteen years of age; that they resided out of this state, and owned real estate in the city of St. Louis and in the counties of St. Louis and Jefferson. O'Rourke was thereupon appointed such curator, and gave bond in $1,500 in the estate of each of said minors. On June 24, 1879, the curator filed a petition for an order to sell said lands for the education and support of said minors, stating therein that the personal estate of said minors had been exhausted in their education and support. The court ordered that the land be sold at private sale. On October 4, 1879, that order was renewed. There is no showing on the record of the probate court or otherwise there was ever published or served on said minors any notice either of the application for the appointment of such curator, or of the petition for the order of sale of the land. Lot 8 was appraised at 75 cents an acre, and lot 9 at 25 cents an acre,—in all, $132. That appraisement was of the full value, and not merely of the minors' interests therein. The minors' interests in those lots were sold under that order, and the sale was reported to and approved by the court on January 10, 1880. That report contained the following: "And Mrs. Ellen McNamee became the purchaser of so much of the land above described as being in the county of Jefferson, having made the highest offer that could be obtained for the same, at the price of $76.70, the same being over the appraised value of said minors' interest in said parcels of land, the tenant for life being forty-six years of age, and the appraised value of the whole estate in said lands being $132."

On October 20, 1879, Phil V. Taylor, under his powers of attorney, executed two deeds to said Ellen J. McNamee, by one of which he conveyed the interest of the widow, Anna G. Whittelsey, in the Jefferson county land in consideration of $97.80, and by the other he conveyed the interest of Alice G. Whittelsey for the consideration of $25.35. On August 19, 1880, Ellen J. McNamee conveyed the 236 acres to defendant McCourt for a consideration of $600. On June 17, 1886, McCourt sold to James E. Shorb 95 acres of the land for a consideration of $125; it being the part excepted in the petition. On November 1, 1888, McCourt conveyed to defendant Conniff 40 acres of the land in controversy for a consideration of $125. There is very little oral evidence as to the character of the land; but it does clearly appear that it lies on the Merrimac river and

overflows; that at the time of the curator's sale it was in woods and unfenced, and that very little of it was cleared at the time of the trial.

Messrs. **Harry J. Cantwell, Thomas B. Crews,** and **Warren D. Isenberg,** for appellants:

The power of courts to devest an infant of his lands, whether the court deems it to his advantage or not, does not exist, in the absence of a statute.

Heady v. Crouse, 203 Mo. 100, 120 Am. St. Rep. 643, 100 S. W. 1052; Young v. Downey, 150 Mo. 317, 51 S. W. 751; Capen v. Garrison, 193 Mo. 335, 5 L.R.A.(N.S.) 838, 92 S. W. 368.

The enumeration in the statute of certain purposes for and conditions under which such sales of lands of infants may be made excludes all other purposes and conditions, and means that the land cannot be sold except within the terms of the statute.

Capen v. Garrison, 193 Mo. 335, 5 L.R.A.(N.S.) 838, 92 S. W. 368; Blackburn v. Bolan, 88 Mo. 80.

Notice of some sort, at some time or stage of the proceedings by which the property of an infant may be devested, is absolutely essential.

Jones v. Yore, 142 Mo. 38, 43 S. W. 384; Roth v. Gilbert, 123 Mo. 21, 27 S. W. 528; Clark v. Mitchell, 64 Mo. 564; State ex rel. Lemon v. Board of Equalization, 108 Mo. 235, 18 S. W. 782.

There was no jurisdiction to appoint the curator; there was no jurisdiction to order the sale or to confirm it.

Carder v. Culbertson, 100 Mo. 269, 18 Am. St. Rep. 548, 13 S. W. 88.

Mr. **James Booth,** for respondent McCourt:

No notice was required of the application for the appointment of O'Rourke as curator.

Wallace v. Tinney, 145 Iowa, 478, 139 Am. St. Rep. 448, 122 N. W. 936; Clarke v. Cordis, 4 Allen, 466.

Statutes authorizing the appointment of a curator of the estate of a nonresident minor, who owns property within the jurisdiction of the court, are by no means unusual, and are universally upheld by the courts of the state where in force.

Wallace v. Tinney, supra; Woerner, Am. Law. Guardianship, § 28, pp. 87, 88; Tiffany, Persons & Dom. Rel. § 306, p. 158; West Duluth Land Co. v. Kurtz, 45 Minn. 380, 47 N. W. 1134; Davis v. Hudson, 29 Minn. 27, 11 N. W. 136.

The action of the probate court in appointing O'Rourke curator and making its order of sale, together with its order approving that sale, being fair and regular on the face of the record, is not the subject of collateral attack in this action.

Hope v. Blair, 105 Mo. 93, 24 Am. St. Rep. 366, 16 S. W. 595; Carr v. Spannagel, 4 Mo. App. 288; Frye v. Kimball, 16 Mo. 21; Overton v. Johnson, 17 Mo. 442; Rugle v. Webster, 55 Mo. 246; Cox v. Boyce, 152 Mo. 582, 75 Am. St. Rep. 483, 54 S. W. 467; Johnson v. Beazley, 65 Mo. 250, 27 Am. St. Rep. 276; Rowden v. Brown, 91 Mo. 429, 4 S. W. 129; Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572, 26 S. W. 692; Smith v. Black, 231 Mo. 681, 132 S. W. 1129; Robbins v. Boulware, 190 Mo. 33, 109 Am. St. Rep. 746, 88 S. W. 674; Wilkerson v. Allen, 67 Mo. 502.

No notice of the curator's application for an order of sale was required to give the court jurisdiction.

Ancell v. Southern Illinois & M. Bridge Co. 223 Mo. 209, 122 S. W. 709.

The proceeds of the sale were used for the education of the minors, and they are now estopped. They cannot in the same breath both accept and reject.

Fischer v. Seikmann, 125 Mo. 165, 28 S. W. 435.

The probate court was not required to expressly discharge Spencer before appointing O'Rourke. The facts that Spencer had paid over, according to the court's order, all the assets in his hands, and his resignation had been accepted, coupled with the fact that the court afterwards appointed O'Rourke, show by necessary implication that Spencer was discharged.

Pattee v. Thomas, 58 Mo. 163; Henry v. McKerlie, 78 Mo. 416.

The law views with disfavor titles of the antique character of the one claimed by plaintiffs.

Hubbard v. Slavens, 218 Mo. 615, 117 S. W. 1104.

Roy, C., filed the following opinion:

I. Appellants say that the sale of a minor's land by a curator who was appointed without any notice to the minor of the application for such appointment is a violation of constitutional law in two respects: First, that it violates the Federal Constitution by denying to him the

equal protection of the laws; second, that it violates the state Constitution by taking his property without due process of law. There is one answer to be made to both those propositions: When the legislature, as parens patriæ, takes from a minor the power to dispose of his property, and, through the instrumentality of the probate court and a curator, sells that property for the purposes of his education and support, it does not deny to him the equal protection of the laws, but gives him the benefit of laws especially designed for his protection; it does not take from him his property, but used it for his benefit.

Constitutional law—appointment of curator for infant without notice.

In 1820 Chief Justice Parker, in Rice v. Parkman, 16 Mass. 326, said: "No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort, and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially employed. If this be not true, then the general laws under which so many estates of minors, persons non compos mentis, and others have been sold and converted into money are unauthorized by the Constitution, and void; for the courts derive their authority from the legislature, and, it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress who had unproductive property and were disabled from conveying it themselves, it would seem that one of the most essential objects of government, that of providing for the welfare of the citizens, would be lost."

In Cochran v. Van Surlay, 20 Wend. 365, 32 Am. Dec. 570, the court said: "But, as I have frequently had occasion to observe, an act of the legislature which would have the effect to devest an individual of his property and transfer it to others for their own benefit, without compensation, or where there was no reason to suppose the person whose property was thus taken would be benefited thereby, and contrary to the settled principles of law, would be void, as being against the spirit of our state Constitution, and not within the powers delegated to the legislature by the people of this state. It is clearly, however, within the powers of the legislature, as parens patriæ, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs."

Cooley, Const. Lim. 7th ed. pp. 141, 144, refers with approval to both those cases.

In Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148, this court said: "The view which we have taken of the subject is expressly based upon the idea that the act in question directs only the management of the property of the infants, changing its form and directing its use for their own benefit. Had the act undertaken to appropriate their property to the use of any other person, it would have been void, because 'retrospective in its operation' by destroying rights previously vested by law."

Nothing was expressly said in any of those cases on the subject of notice to the minor of the applica-

tion for the appointment of the curator.

The following authorities hold that no such notice is necessary unless the statute requires it: 21 Cyc. p. 29; Kurtz v. St. Paul & D. R. Co. 48 Minn. 339, 31 Am. St. Rep. 657, 51 N. W. 221; Kurtz v. West Duluth Land Co. 52 Minn. 140, 53 N. W. 1132; Shroyer v. Richmond, 16 Ohio St. 455; Mahan v. Steele, 109 Ky. 31, 58 S. W. 446; Packard v. Ulrich, 106 Md. 246, 12 L.R.A. (N.S.) 895, 67 Atl. 246; Wallace v. Tinney, 145 Iowa, 478, 139 Am. St. Rep. 448, 122 N. W. 936. In the latter case it was said: "But we do not think that either the statute or any rule of constitutional law requires the giving of notice of an application for the appointment of a guardian of the property of a nonresident. Surely our statute does not require any notice, and, if it be required, it must be in virtue of some general rule of law or constitutional requirement. Doubtless no guardian may be appointed for the person of another without notice, and this is what the cases for appellant seem to hold. Some of them perhaps go so far as to hold that notice must be given if the appointment is to be of a guardian for the property. But we are constrained to take a different view."

We observe that it is said in that case that some of the cases *perhaps* go so far as to hold that notice is necessary. A diligent search has failed to discover any case so holding, except those cases where the statute so required.

Those proceedings in the St. Louis probate court were had before Judge Woerner, who, in his American Law of Administration (page 88), says that no notice to a minor is necessary unless called for by the statute.

Prior to our Constitution of 1865 the legislature at every session passed numerous special bills for the sale of minors' lands. Few of them required any notice of any kind to the ward. Many of them failed even to require a bond to secure the interests of the minor. In Gannett v. Leonard, 47 Mo. 205, it was held that such an act which did not require a bond was improvident legislation, but that it was not void. It further said: "The power must be executed according to the statute; but the statute furnishes the rule by which we must judge of the legality of the transaction; and the dishonesty or subsequent misfortunes of the trustee, from which his beneficiaries suffer, should not be visited upon innocent purchasers when the statute has been followed."

In Garth v. Arnold, 53 C. C. A. 200, 115 Fed. 468, Judge Thayer said: "Concerning this question it is only necessary to say that it may be conceded to be well settled in the state of Missouri that, prior to the adoption of its Constitution of 1865, it was competent for the general assembly, acting as parens patriæ, to authorize by special laws the sale of lands belonging to minors and persons non compos mentis. The power in question had been repeatedly exercised and upheld. Indeed, the doctrine was so well established by local decisions, and so many titles had been acquired on the faith thereof, as to constitute it a rule of property. Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148; Gannett v. Leonard, 47 Mo. 205; Shipp v. Klinger, 54 Mo. 238; Cargile v. Fernald, 63 Mo. 304; Clusky v. Burns, 120 Mo. 567, 25 S. W. 585. In one of these cases (Shipp v. Klinger) the supreme court of the state declined to go into the question of the right of the legislature to exercise such a power, or to consider it as open for further discussion."

The Constitution of 1865 (art. 4, § 27) provided that the legislature should not by special law authorize the sale of a minor's land, but did not limit its power to provide for such sale by general law. It is thus seen that, when the statute is complied with, the sale is valid.

The probate proceedings now

under examination took place under the General Statutes of 1865. Section 3 of chapter 116 thereof provides that the court "shall appoint guardians to such minors under the age of fourteen years, and admit those over that age to choose guardians for themselves, subject to the approval of the court." Section 11 makes a similar provision for the appointment of a curator different from the guardian. Section 12 provides for the *appointment* of a curator for nonresident minors, without any provision for a choice by the minor. Section 13 provides that a minor having a guardian or curator appointed by the court, may, upon attaining the age of fourteen years, choose another guardian or curator before the court *in the county of his residence*. We think it clear that there is no choice of a curator given by that chapter to a nonresident minor. It may be and probably is the case that the statute giving the right of choice to a resident minor, over fourteen years of age impliedly requires that he shall have notice in order that he may make such choice. We are not now deciding that point, but we do hold that in that chapter there is no provision that a nonresident minor, either under or over the age of fourteen years, shall have such choice, or that he shall have any notice of the application for the appointment of his curator.

Infant—nonresident—curator—right to choose.

Appellants in their brief characterize O'Rourke as an "interloper." In that connection we have noticed that he was appointed at the suggestion of Phil V. Taylor, who was then the attorney in fact of the mother and adult sister for the sale of their interest in the same land, and who sold those interests to the same person who purchased from the curator, and at prices in harmony with the consideration paid the curator. The interests of the minors were as well cared for as were those of the adults, acting in their own right.

II. Appellants say that the sale is void because no notice was given of the application for an order to sell the land. They cite § 29 of chapter 116 of the General Statutes of 1865. We will not quote that section. It says nothing about how the order of sale shall be procured, but provides only that the sale shall be advertised and conducted as in case of sales made by executors and administrators for the payment of debts. In Pattee v. Thomas, 58 Mo. 163, and in Ancell v. Southern Illinois & M. Bridge Co. 223 Mo. 209, 122 S. W. 709, it was held that no such notice was necessary because the curator represents the ward, and that the latter was in court through such curator.

Same—sale without notice—validity.

III. The fact that no express formal order of discharge of Spencer as curator was ever made does not render void the subsequent appointment of O'Rourke. It is not necessary for us to hold that the acceptance of his resignation was, for all purposes, equivalent to a discharge.

Same—appointment of curator—failure to accept resignation of prior one.

In Cox v. Boyce, 152 Mo. 576, 75 Am. St. Rep. 483, 54 S. W. 467, a curator was appointed in Lincoln county, the place of the minor's residence. Subsequently both curator and ward removed to Howell county, where the same curator was again appointed as such by the probate court of that county, no discharge or resignation of the curator having ever been made or entered in Lincoln county. There was a sale of land of the ward, situate in Lincoln county, under the proceedings in the probate court of Howell county. It was contended that those proceedings were coram non judice and void because of the pre-existing curatorship. It was held that such original curatorship might have been sufficient cause in a direct proceeding to rescind the appointment in Howell county, but that such fact could not be shown in a collateral proceeding to annul

the judgment of a court of competent jurisdiction. O'Rourke was a duly appointed curator, and the sale made by him, valid in all other respects, cannot be thus collaterally assailed.

The judgment is affirmed.

Williams, C., concurs.

Per Curiam:

The foregoing opinion of **Roy**, C., is adopted as the opinion of the court. **Faris**, P. J., and **Walker**, J., concur. **Revelle**, J., not sitting.

ANNOTATION.

Validity of appointment of guardian or curator for infant without service of process upon, or notice to, latter.

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Scope.

This note does not cover the necessity of notice to any person other than the infant except as such notice is a part of the required notice to the infant; as, for example, the necessity of notice to the infant's near relatives, to enable them to present their own right or claim to appointment; nor does it embrace the appointment of guardians for incompetent or insane persons; the effect of a failure to appoint a guardian ad litem; questions as to presumption that notice was given; or the powers of general guardians, guardians ad litem, or curators.

I. General guardians.

a. Generally.

There are few cases dealing with the necessity of notice to the infant of an application for the appointment of a general guardian, in the absence of a statute requiring notice, but such cases as have passed on the question apparently support the statement in the reported case (WHITTELSEY v. CONNIFF, ante, 913) that notice is not necessary in the absence of a statute requiring notice, either expressly or by clear implication.

It is said in State ex rel. Fisher v. Madden (1901) 12 **Ohio** S. & C. P. Dec. 83, that the parent should undoubtedly be notified of the application for the appointment of a guardian, but that it is not necessary to notify the minor.

And appointment without notice to the infant has been upheld in the absence of any statutory requirement for notice in Mahan v. Steele (1900) 109 **Ky.** 31, 58 S. W. 446 (where the court said that they knew of no law requiring any petition to be filed or summons issued to give the county court jurisdiction to

make the appointment); Gibson's Appeal (1891) 154 **Mass.** 378, 28 N. E. 296 (where it was said that the probate court might require notice if deemed advisable); and in State ex rel. Amy v. Bazille (1900) 81 **Minn.** 370, 84 N. W. 120 (where the court said that the appointment might be made without notice, or on such notice as the court deemed proper).

In Shroyer v. Richmond (1866) 16 **Ohio** St. 455, it was said as the reason why the ward need not be actually before the court unless required by statute, that proceedings for the appointment of a guardian are not adversary in character, but are properly proceedings in rem, and are instituted ordinarily by application on behalf of the ward, and for his benefit; that in such a proceeding plenary and exclusive jurisdiction has been conferred by statute on the probate court, and the jurisdiction attaches whenever application is duly made for its exercise in a given case.

Under statutes authorizing minors over fourteen years of age to choose their own guardian, it has been held that a guardian might be appointed for infants under that age without notice, in Palmer v. Oakley (1847) 2 Dougl. (**Mich.**) 433, 47 Am. Dec. 41, and in Peacock v. Peacock (1871) 61 **Me.** 211 (where the infant resided in the county, but the infant's mother was a resident of another state, and the court said that there was nobody within the jurisdiction to cite).

In Burrus v. Burrus (1878) 56 **Miss.** 92, it is said incidentally, in discussing the appointment of guardians ad litem, that a probate court has power to appoint general guardians for all infants in the county under fourteen, without notice, and that notice to those over fourteen is necessary only because the statute gives them the right to select their guardian, and requires notice to them before the appointment.

Under a statute applicable to minors having no living parent authorized to act, it was held in Farrar v. Olmstead (1852) 24 Vt. 123, where the mother of the minor was disqualified by reason of her remarriage, that the appointment might be made on the application of the minor or any relative or friend, without notice to anyone.

In Credle v. Baugham (1910) 152 N. C. 18, 136 Am. St. Rep. 787, 67 S. E. 46, it was held that it was not essential to the validity of the appointment of a guardian for a nonresident minor owning land in the state, that the minor should have knowledge of the appointment.

Where, in a proceeding by a board of children's guardians to obtain the custody of a minor child, thirteen years old, on the ground that the father had abandoned the mother, and that the mother was an unfit person to have the custody of the child, process was served on the father and the mother, but no notice of the application was given the child, it was held on habeas corpus that no notice to the child was required, and that the court had jurisdiction. Children's Guardians v. Shutter (1894) 139 **Ind.** 268, 31 L.R.A. 740, 34 N. E. 665.

In the reported case (WHITTELSEY v. CONNIFF), it was held that the statute did not require notice to a nonresident minor of an application for the appointment of a curator, and that a sale of the minor's property by a curator appointed without notice did not take the property without due process of law or the equal protection of the laws.

Some support for the view that no notice is required unless required by statute is found in Re Grimes (1899) 79 **Mo.** App. 274, where the court passed on a motion to revoke the appointment of a guardian and curator, made without notice, because the will appointed a different guardian, without making any comment on the lack of notice; also in certain cases involving the necessity for or sufficiency of notice to persons other than the infant, where the court makes no mention of the lack of notice to the infant, although it is probable that no such notice was given. See Redman v. Chance (1869) 32 **Md.** 42; Badenhoof v. Johnson (1876) 11 Nev. 87; Waldron v. Woodman (1876) 58 **N. H.**

15; Morehouse v. Cooke (1824) Hopk. Ch. (N. Y.) 226; White v. Pomeroy (1850) 7 Barb. (N. Y.) 640; and Re Crickard (1906) 52 Misc. 63, 102 N. Y. Supp. 440.

In New Hampshire the statute expressly authorizes the judge of the probate court, in his discretion, to act without notice in certain cases, including the appointment of guardians, and it is accordingly held in Hanley v. Russell (1883) 63 N. H. 614, that no notice is required.

b. Express statutory provisions as to notice.

Where the statute requires notice, or authorizes the court to make the appointment only after the minor has been cited to choose his own guardian, an appointment without notice is, of course, irregular and erroneous. Thus, in Arthur v. Reed (1901) 26 Tex. Civ. App. 574, 64 S. W. 831, it is held that it is a sufficient ground for setting aside an order appointing a guardian that citation on the application for appointment was not issued as required by law.

Under a statute authorizing probate judges to appoint guardians for nonresident minors after such notice to all persons interested as the judge should order, it was held in Davis v. Hudson (1881) 29 Minn. 27, 11 N. W. 136, that notice was jurisdictional, though the manner of notice was submitted to the discretion of the judge.

And under a similar statute the court, in Gronfier v. Puymirol (1862) 19 Cal. 629, held that the manner in which the notice should be given, including the period for which it should be given, was subject entirely to the direction of the probate judge, and that in a suit in which an infant residing in France appeared by his general guardian, a purchaser of land at a judicial sale could not question the validity of the guardian's appointment because made on notice by publication, pursuant to the direction of the judge, for a period of five days only.

In Kurtz v. St. Paul & D. R. Co. (1892) 48 Minn. 339, 31 Am. St. Rep. 657, 51 N. W. 221 (followed in Kurtz v. West Duluth Land Co. (1893) 52 Minn. 140, 53 N. W. 1132), it was held that a statute providing for the appointment of guardians for nonresident minors on such notice to all persons interested as the judge should order did not necessarily require notice to the infants themselves; that this was left to the sound discretion of the probate judge; and that where, by direction of the judge, notice was given to the mother, who applied for her appointment as guardian, and to the sister, the only other near relative of the infant, the appointment was valid though no notice was given to the infant personally.

But under a statute authorizing the county judge to make a temporary appointment of a guardian in vacation, and authorizing the court, at the next regular term after proper service of citation by posting, to make such appointment permanent, it was held in Threatt v. Johnson (1913) — Tex. Civ. App. —, 156 S. W. 1137, that compliance with the statute was a condition precedent to the valid exercise of the power of appointment and was jurisdictional, and that any attempt to exercise such power without such express requirement being complied with was a nullity.

In Angell v. Angell (1884) 14 R. I. 541, it was held that a statute providing for the appointment of guardians on notice personally or by advertisement in a newspaper was valid, and did not deny due process of law, and that an appointment on such notice was valid.

c. Statutes providing that infant may nominate guardian.

Under a statute providing that a minor above the age of fourteen might nominate his own guardian, and that, if the guardian so nominated should not be approved by the commissioner, or if the minor should reside without the district, or if, after having been cited by the commissioner, he should neglect to nominate a suitable person, the commissioner might nominate and appoint the guardian in the same manner as if the minor were under fourteen years of age, it was held in White v. White Co. (1911) 4 Alaska,

317, that the commissioner could not appoint a guardian for a resident minor over fourteen unless nominated by the minor or after citation to the minor, and that an appointment made without the minor's consent or citation was of no effect.

Under a somewhat similar statute, it was held in Palmer v. Oakley (1847) 2 Dougl. (Mich.) 433, 47 Am. Dec. 41, that the courts had no power to appoint a guardian for a minor over fourteen, and not residing outside the territory, without first citing him to appear and choose his own guardian.

d. Collateral attack.

There is little authority on the question of whether an appointment without notice, when such notice is required, is open to collateral attack. It was squarely decided in Palmer v. Oakley (1847) 2 Dougl. (Mich.) 433, 47 Am. Dec. 41, that such an appointment was void for want of jurisdiction, and that a sale of land by the guardian so appointed was open to collateral attack. But in Farrar v. Olmstead (1852) 24 Vt. 123, where a minor brought an action by his guardian, appointed without notice, and defendant filed a plea in abatement on this ground, the court said that third persons could not, in this collateral manner, nullify the decree of the probate court, but that the remedy was by direct application to that court.

II. Guardians ad litem.

a. Process or notice of suit in general.

See also, under II. b, "Particular jurisdictions," where the cases cited below are discussed further.

While at one time the rule was to the contrary in a number of the states, it is now the rule supported by the weight of authority that it is irregular and erroneous to appoint a guardian ad litem for an infant defendant in the absence of service of process on the infant, or (where such service is permitted, as is the case in some jurisdictions, especially with reference to infants under fourteen) on a parent, guardian, or near relative in behalf of the infant. It is so held with reference to chancery cases in general in Woolridge v. McKenna (1881) 8 Fed. 650; Walker v. Hallett (1840) 1 Ala. 379; Hodges v. Wise (1849) 16 Ala. 509; Clark v. Gilmer (1856) 28 Ala. 265; Irwin v. Irwin (1877) 57 Ala. 614; Rowland v. Jones (1878) 62 Ala. 322; McQueen v. Grigsby (1907) 152 Ala. 656, 44 So. 961; Pillow v. Sentelle (1882) 39 Ark. 61; Evans v. Davies (1882) 39 Ark. 235; Pinchback v. Graves (1883) 42 Ark. 222; Graham v. Sublett (1831) 6 J. J. Marsh. (Ky.) 44; Shropshire v. Reno (1837) 5 Dana (Ky.) 584; Jones v. McGinty (1835) 3 Dana (Ky.) 426; Caulder v. Chenault (1913) 154 Ky. 777, 159 S. W. 578; Price v. Crone (1870) 44 Miss. 571; Hendricks v. McLean (1853) 18 Mo. 32; Westmeyer v. Gallenkamp (1899) 154 Mo. 28, 77 Am. St. Rep. 747, 55 S. W. 231; Greenlaw v. Kernahan (1857) 4 Sneed (Tenn.) 379; Ivey v. Ingram (1867) 4 Coldw. (Tenn.) 129; Cowan v. Anderson (1869) 7 Coldw. (Tenn.) 284; Rucker v. Moore (1870) 1 Heisk. (Tenn.) 726; Martin v. Porter (1871) 4 Heisk. (Tenn.) 407.

In partition suits it has been so held in Brock v. Doyle (1881) 18 Fla. 172; Campbell v. Campbell (1872) 63 Ill. 462; Chambers v. Jones (1874) 72 Ill. 275; Roy v. Rowe (1883) 90 Ind. 54; Girty v. Logan (1869) 6 Bush (Ky.) 8; Fischer v. Siekmann (1894) 125 Mo. 165, 28 S. W. 435.

For cases so holding in suits to enforce or foreclose mortgages and liens on land, see Preston v. Dunn (1854) 25 Ala. 507; Hodges v. Frazier (1876) 31 Ark. 58; Johnson v. Trotter (1891) — Ark. —, 15 S. W. 1025; Johnson v. San Francisco Sav. Union (1883) 63 Cal. 554; Ontario Bank v. Strong (1830) 2 Paige (N. Y.) 301; Syracuse Sav. Bank v. Burton (1884) 6 N. Y. Civ. Proc. Rep. 216; Hope v. Seaman (1909) 119 N. Y. Supp. 713; Sleeper v. Killion (1914) 166 Iowa, 205, 147 N. W. 314.

Other cases so holding are Jackson v. Putman (1912) 180 Ala. 39, 60 So. 61 (suit to cancel a mortgage, in which the court apparently assumed under the state of the record that service was made, and affirmed a decree);

Crowder v. Doe (1915) 193 **Ala.** 470, 68 So. 1005 (proceeding in the probate court for the sale of land); Freeman v. Russell (1882) 40 **Ark.** 56 (suit to declare a resulting trust); Gannon v. Moore (1907) 83 **Ark.** 196, 104 S. W. 139 (action of ejectment); McCloskey v. Sweeney (1884) 66 **Cal.** 53, 4 Pac. 943; Carver v. Carver (1878) 64 **Ind.** 194 (action at law); Voyles v. Hinds (1917) — **Ind.** —, 114 N. E. 865 (proceeding on objections to the probate of a will); Womble v. Trice (1902) 112 **Ky.** 533, 66 S. W. 370 (action by guardian against infant ward over the age of fourteen for sale of land and reinvestment); Roy v. Allen (1909) — **Ky.** —, 118 S. W. 981 (administrator's suit for settlement of the estate); Phelps v. Heaton (1900) 79 **Minn.** 476, 82 N. W. 990; Prewett v. Land (1858) 36 **Miss.** 495; Wright v. Hink (1905) 193 **Mo.** 130, 91 S. W. 933 (suit to cancel satisfaction of deed of trust); Grant v. Van Schoonhoven (1841) 9 Paige (**N. Y.**) 255, 37 Am. Dec. 393 (suit to cancel conveyance in trust); Glover v. Haws (1862) 19 Abb. Pr. (**N. Y.**) 161, note; Ingersoll v. Mangam (1881) 84 **N. Y.** 622, 61 How. Pr. 149, affirming (1881) 24 Hun, 202; Davis v. Crandall (1886) 101 **N. Y.** 311, 4 N. E. 721 (executor's accounting); Potter v. Ogden (1893) 136 **N. Y.** 384, 33 N. E. 228 (accounting by administrator); Van Williams v. Elias (1905) 106 App. Div. 288, 94 **N. Y.** Supp. 611; Turner v. Douglass (1875) 72 **N. C.** 127 (action at law); Moore v. Gidney (1876) 75 **N. C.** 34 (proceeding to sell a decedent's real estate for the payment of debts); Young v. Young (1884) 91 **N. C.** 359 (suit to have trustee under deed of trust appointed in place of deceased trustee, and for sale of land by him); Paulin v. Sparrow (1915) 91 **Ohio St.** 279, 110 N. E. 528 (suit to quiet title); Bolling v. Campbell (1912) 36 **Okla.** 671, 128 Pac. 1091; Jefferson v. Gallagher (1915) — **Okla.** —, 150 Pac. 1071; Echols v. Reeburgh (1916) — **Okla.** —, 161 Pac. 1065; Graham's Estate (1883) 14 W. N. C. (**Pa.**) 31 (proceedings by an executor to sell real estate); Wheatley v. Harvey (1852) 1 Swan (**Tenn.**) 484 (proceeding to sell land of a decedent for the payment of debts); Taylor v. Walker (1870) 1 Heisk. (**Tenn.**) 734; Linnville v. Darby (1872) 1 Baxt. (**Tenn.**) 306 (administrator's proceeding to sell land for the payment of debts); Sprague v. Haines (1887) 68 **Tex.** 215, 4 S. W. 371 (suit for specific performance); Tutt v. Morgan (1897) 18 **Tex.** Civ. App. 627, 42 S. W. 578, 46 S. W. 122; Maury v. Keller (1898) — **Tex.** Civ. App. —, 53 S. W. 59 (trespass to try title).

And where service on an infant is defective, or is incomplete at the time the guardian is appointed, the appointment is irregular and erroneous. Walker v. Bank of Mobile (1844) 6 **Ala.** 452; Hodges v. Wise (1849) 16 **Ala.** 509; Clark v. Gilmer (1856) 28 **Ala.** 265; McIntosh v. Atkinson (1879) 63 **Ala.** 241; Cook v. Rogers (1879) 64 **Ala.** 406 (suit to reform contract); Hibbler v. Sprowl (1881) 71 **Ala.** 50 (suit to set aside fraudulent conveyance); Herring v. Ricketts (1892) 101 **Ala.** 340, 13 So. 502; Gray v. Palmer (1858) 9 **Cal.** 616 (suit to dissolve partnership and for partnership settlement); Laflin v. Gato (1906) 52 **Fla.** 529, 42 So. 387 (suit to enforce a mortgage lien); McDermaid v. Russell (1866) 41 **Ill.** 489; Trevor v. Colgate (1899) 181 **Ill.** 129, 54 N. E. 909 (partition suit); Allen v. Saylor (1862) 14 **Iowa,** 435 (suit for partition); Cummings v. Landes (1908) 140 **Iowa,** 80, 117 N. W. 22 (foreclosure suit); Claypool v. Houston (1873) 12 **Kan.** 324 (suit to reform deed); Martin v. Battey (1912) 37 **Kan.** 582, 125 Pac. 88, Ann. Cas. 1914A, 475 (suit to determine interests in land and other property); Ingersoll v. Ingersoll (1868) 42 **Miss.** 155 (suit to foreclose mortgage); Johnson v. McCabe (1868) 42 **Miss.** 255 (suit to enforce vendor's lien); Price v. Crone (1870) 44 **Miss.** 571 (suit to foreclose mortgage); Erwin v. Carson (1876) 54 **Miss.** 282 (foreclosure of mortgage); Frank v. Webb (1889) 67 **Miss.** 462, 6 So. 620 (suit for accounting); Wright v. Hink (1906) 193 **Mo.** 130, 91 S. W. 933 (suit to cancel satisfaction of deed of trust); McMurtry v. Fairley (1906) 194 **Mo.** 502, 91 S. W. 902 (partition suit); Ingersoll v. Mangam (1881) 84 **N. Y.** 622, 61 How. Pr. 149, affirming (1881) 24 Hun, 202; Walter v. De

Graaf (1887) 19 Abb. N. C. (N. Y.) 406; Crouter v. Crouter (1892) 133 N. Y. 56, 30 N. E. 726; Crouter v. Crouter (1892) 17 N. Y. Supp. 758; Darrow v. Calkins (1897) 154 N. Y. 503, 48 L.R.A. 299, 61 Am. St. Rep. 637, 49 N. E. 61 (suit to settle partnership affairs); Potter v. Ogden (1893) 136 N. Y. 384, 33 N. E. 228; Ford v. Clendennin (1911) 137 N. Y. Supp. 54, affirmed in (1913) 155 App. Div. 433, 140 N. Y. Supp. 1119 (suit for appointment of trustee); Keys v. McDonald (1854) 1 Handy (Ohio) 287; Kremer v. Haynie (1887) 67 Tex. 450, 3 S. W. 676 (partition suit); Foster v. Hammond (1875) 37 Wis. 185 (partition suit); Helms v. Chadbourne (1878) 45 Wis. 60.

And where an infant has not been served with process, a judgment or decree against him or affecting his interests is erroneous, and the appointment of a guardian ad litem, or an appearance or answer by such guardian, does not bring the infant before the court, so as to justify such judgment or decree.

It has been so held with reference to partition suits in Hickenbotham v. Blackledge (1870) 54 Ill. 316; Campbell v. Laclede Gaslight Co. (1884) 84 Mo. 352; Rogers v. McLean (1860) 10 Abb. Pr. (N. Y.) 306; Moulton v. Moulton (1888) 47 Hun, 60, 13 N. Y. Civ. Proc. Rep. 420; Riker v. Vaughan (1885) 23 S. C. 187; Whitesides v. Barber (1886) 24 S. C. 373.

With reference to suits and proceedings for the sale of land of a decedent for the payment of his debts, it has been so held in Clark v. Thompson (1868) 47 Ill. 25, 95 Am. Dec. 457; Hamilton v. Lockhart (1867) 41 Miss. 460; Pinckney v. Smith (1882) 26 Hun (N. Y.) 524; Gulley v. Macy (1879) 81 N. C. 356; Finley v. Robertson (1882) 17 S. C. 435; Frazier v. Pankey (1851) 1 Swan (Tenn.) 75; Crippen v. Crippen (1858) 1 Head (Tenn.) 128.

It has been so held with reference to other suits and proceedings in Sleeper v. Killion (1914) 166 Iowa, 205, 147 N. W. 314; Collard v. Groom (1829) 2 J. J. Marsh. (Ky.) 487 (suit to enjoin judgment at law); Dodge v. Foulks (1850) 11 B. Mon. (Ky.) 178 (suit to establish alleged trust); Wooldridge v. Harding (1899) 21 Ky. L. Rep. 205, 51 S. W. 162 (suit to enforce vendor's lien); Taylor v. Taylor (1912) 149 Ky. 707, 149 S. W. 1000, Ann. Cas. 1914B, 275 (suit by general guardian to sell lands of infants for their education and maintenance); Nagel v. Schilling (1883) 14 Mo. App. 576; Genobles v. West (1884) 23 S. C. 154 (suit to set aside deed); Tederall v. Bouknight (1886) 25 S. C. 275 (proceeding in probate court to partition land); Robertson v. Robertson (1852) 2 Swan (Tenn.) 197; Wheeler v. Ahrenbeak (1881) 54 Tex. *535 (suit to enforce lien on land); Moore v. Prince (1893) 5 Tex. Civ. App. 352, 23 S. W. 1113 (action involving title to land).

The reason for requiring service of process before the appointment of a guardian is, as stated in Greenlaw v. Kernahan (1857) 4 Sneed (Tenn.) 379, that until this is done the infant is not properly a party, nor is the attention of friends drawn to the suit, so that the interests of the minor will have the protection of the watchful care which is the principal object of requiring personal service of process upon infants.

In Bustard v. Gates (1836) 4 Dana (Ky.) 429, the court said that for many years the practice had prevailed of appointing a guardian ad litem without any actual notice to the infant of the pendency of the suit, but that this practice was abolished, for, though the infant could not defend a suit in proper person, and might be utterly incapable of receiving actual notice, or of knowing anything respecting the case or his rights, yet personal notice to the infant, or to the person in whose care and custody he might be placed, might and generally would increase the probability of a vigilant and proper vindication of his interests.

In Allen v. Shields (1875) 72 N. C. 504, the court criticized the practice formerly prevailing in some of the county courts by which personal service on infants was dispensed with in proceedings to sell their land, and the clerk of the court was appointed as guardian ad litem to bind the infant

by his answer, saying that the appointment was merely formal and part of a judicial ceremony by which the infant was deprived of his estate.

In Campbell v. Campbell (1872) 63 Ill. 462, the court, in holding it reversible error to appoint a guardian ad litem without service on the infant, though a statute seemed to authorize a decree without service, said that this practice had rarely been adopted, and that such proceeding was not due process of law, which had reference to judicial proceedings according to the course and usage of the common law, and must always be based upon notice. And in Shaw v. Gregoire (1867) 41 Mo. 407, the court said that it might be questionable whether a statute authorizing a court to proceed against a person who had in no manner become a party to the record, and bind his estate by a judgment rendered in his absence and without his knowledge, and especially that of a minor without notice to him, and without the knowledge of his adult friends or his general guardian, natural or appointed, would not be void, as an invasion of the obligation of contracts and vested rights of property. The court said that it would be nearly equivalent to taking the property of one person and giving it to another by the mere force of statutory enactment, and scarcely less than confiscation.

But in Burrus v. Burrus (1878) 56 Miss. 92, overruling M'Allister v. Moye (1855) 30 Miss. 258, in holding that the probate court might appoint a guardian ad litem without the service of process on the infant, the court said: "If cited and present, he could do nothing; could not appear; could not consent to anything; could not appoint an attorney. The court is his protector and the guardian of his interests, and the statute required the court to appoint a guardian ad litem as a further means of protecting the interests of the minor, in all which the minor must have been passive and could take no part. . . . The probate court had full and exclusive jurisdiction of minors' business, embracing the guardianship of their persons and estates, and infants are regarded as without discretion, and therefore without legal capacity except to a very limited extent, bounded by necessity. . . . It is entirely free from doubt that the state had the right to confer on the probate court power to deal with the estates of infants in such way as the state chose to determine. It could by statute require process to issue and be served on the infant or not. It could require a guardian ad litem for the infant, or dispense with it, as legislative discretion might conclude."

And in Matthews v. Joyce (1881) 85 N. C. 258, the court, in referring to the former practice in that state of appointing the guardian without service on the infant, said that this was for the reason that no practical benefit would result to the infant from service on him, and the court always assumed to protect the interests of the infant, and to this end committed them to the defense of this special guardian.

b. Particular jurisdictions.

See also under II. a, where the cases cited below are cited with some further details in some instances.

As stated above, it was formerly the practice in a number of the states, if not in all, to appoint guardians ad litem and thus make infant defendants parties to the action without service of process on the infants. In some of the states this practice was changed by the court because of the belief that it did not properly safeguard the rights of the infant. In others, the change was due to a statute requiring service on infant defendants without specific reference to the appointment of guardians ad litem, and possibly in others, to statutes expressly requiring service before such appointment; but the practice probably still prevails in a few of the states, and possibly to a limited extent in others.

1. Federal courts.

In original cases in the courts of the United States sitting in equity a guardian ad litem cannot be appointed nor the infant bound until service

of process upon him, and never is service of process upon the regular guardian alone, or upon the parent, or other substituted process of that character, sufficient to bind the infant where he is personally an essential party defendant. It must be served on him in person. Woolridge v. M'Kenna (1881) 8 Fed. 650. This was a suit to set aside alleged fraudulent conveyances, and the holding is probably limited to actions other than actions in rem. The infant was between five and six years old.

In Sloane v. Martin (1895) 145 N. Y. 524, 28 L.R.A. 347, 45 Am. St. Rep. 630, 40 N. E. 217, affirming (1893) 24 N. Y. Supp. 661, it was held that, under the Federal decisions, a Federal circuit court acquired jurisdiction in a suit in rem where a guardian ad litem was appointed, though there was no service of process on infant defendants, and that a good title was acquired at a sale under the decree in such suit.

In Bank of United States v. Ritchie (1834) 8 Pet. 128, 8 L. ed. 890, where, in a suit to sell a decedent's real estate for the payment of debts, a guardian was appointed for infant heirs not served with summons, on motion of plaintiff's counsel, without bringing the infants into court or issuing a commission to make the appointment, the court said that this was contrary to the most approved usage and was certainly a mark of inexcusable inattention, as the adversary counsel was not the person to name the guardian. For this and other irregularities the decree was reversed.

Where, in a suit to cancel an insurance policy, process against the nonresident infant beneficiary was served on his general guardian, pursuant to a state statute, it was held in New York L. Ins. Co. v. Bangs (1881) 103 U. S. 435, 26 L. ed. 580, that the court never acquired jurisdiction over the infant, and could appoint no guardian ad litem for him, and that the decree rendered against him was ineffectual for any purpose. The court pointed out that substituted service could only be resorted to in the Federal court where some claim or lien upon real or personal property was sought to be enforced, and said: "In none of the cases to which our attention has been called has a judgment been upheld where a guardian ad litem had been appointed for a nonresident infant against whom a purely personal demand was prosecuted."

2. Alabama.

The general rule requiring service on the infant or on a parent, guardian, or near relative in his behalf, is supported by the following Alabama cases: Walker v. Hallett (1840) 1 Ala. 379; Hodges v. Wise (1849) 16 Ala. 509; Preston v. Dunn (1854) 25 Ala. 507; Clark v. Gilmer (1856) 28 Ala. 265; Irwin v. Irwin (1877) 57 Ala. 614; Rowland v. Jones (1878) 62 Ala. 322; McQueen v. Grigsby (1907) 152 Ala. 656, 44 So. 961; Jackson v. Putman (1912) 180 Ala. 39, 60 So. 61 (suit to cancel a mortgage in which the court apparently assumed, under the state of the record, that service was made, and affirmed a decree); Crowder v. Doe (1915) 193 Ala. 470, 68 So. 1005, cited supra.

As to defective or incomplete service, see Walker v. Bank of Mobile (1844) 6 Ala. 452 (where a chancery rule required that nonresident infants be made defendant by publication and sending a copy of the order to their parents or guardians, and in a suit to foreclose a mortgage the appointment was made simultaneously with the order of publication); Hodges v. Wise (1849) 16 Ala. 509 (where a rule provided that service might be made on the parents of the infant defendants, and though service was made on the mother and her husband, they were apparently served as parties to the suit, and not on behalf of the infant); Clark v. Gilmer (1856) 28 Ala. 265 (where the copy of the order sent to the infant's mother in attempted compliance with a chancery rule was sent to E. L., while the mother's name was M. L.); McIntosh v. Atkinson (1879) 63 Ala. 241 (in which case, as also in the three following cases, the service should have been made on the father of the infants, but it was made on them personally); Cook v. Rogers

(1879) 64 Ala. 406; Hibbler v. Sprowl (1881) 71 Ala. 50; Herring v. Ricketts (1893) 101 Ala. 340, 13 So. 502 (in which the probate of a will was set aside, the court holding that this was a direct, and not a collateral, attack).

In Walker v. Hallett (1840) 1 Ala. 379, the court said that it was not necessary in all cases that the minor should be personally present when the guardian was appointed, nor that a commission be sent in the case of nonresident infants, and that in the case of infants of tender years the process might be served on the guardian or near relations or friends of the infants.

3. Arkansas.

In support of the general rule requiring service, see Hodges v. Frazier (1876) 31 Ark. 58; Pillow v. Sentelle (1882) 39 Ark. 61; Evans v. Davies (1882) 39 Ark. 235; Freeman v. Russell (1882) 40 Ark. 56 (involving the appointment of a guardian for nonresident infants); Pinchback v. Graves (1883) 42 Ark. 222; Johnson v. Trotter (1891) — Ark. —, 15 S. W. 1025; Gannan v. Moore (1907) 83 Ark. 196, 104 S. W. 139, cited supra.

4. California.

In Stuart v. Allen (1860) 16 Cal. 474, 76 Am. Dec. 551, the court, in holding that an order of the probate court for the sale of land for the payment of debts of a decedent was not open to collateral attack because the order to show cause was not served on an infant defendant before the appointment of a guardian, said that the statute did not prescribe that a copy should be so served, and that it was not perceived what useful purpose would be subserved by such service, as the infant could make no use of the information thus offered him, and the guardian would be as well advised by notice of his appointment as if a copy of the order served on the infant was given him. If this is inconsistent with the general rule, it is probably no longer an authority under later statutes relating to service on infants and the appointment of guardians ad litem.

See, as supporting the general rule, Johnson v. San Francisco Sav. Union (1883) 63 Cal. 554 (where a statute provided for the appointment on the application of a party other than the infant only in case he failed to apply for the appointment of a guardian within ten days after service); McCloskey v. Sweeney (1884) 66 Cal. 53, 4 Pac. 943, cited supra.

And as to defective or incomplete service, see Gray v. Palmer (1858) 9 Cal. 616 (where service was by publication, but no copy of the complaint and summons was deposited in the postoffice, addressed to an infant under fourteen, upon whom the statute required service by delivering a copy to her and also to her father, mother, or guardian; the infant being held not properly before the court, though her mother appeared in her own behalf).

Where the record of the probate court admitting a will to probate was relied on as evidence, but it was stipulated that there were minor heirs upon whom no citation was served, as required by statute, the court said in Randolph v. Bayue (1872) 44 Cal. 366, that the appointment of an attorney to represent them, and his appearance for them, were mere nullities. That although proceedings for the proof of wills are usually treated as proceedings in rem, yet if the statute required that certain persons should be notified, such provisions must be complied with to give the court jurisdiction.

5. Florida.

Under the statute applicable, providing for citation to all heirs or devisees of full age, and for the appointment of guardians for such as were infants, it was held in Price v. Winter (1875) 15 Fla. 66, that in a statutory proceeding by an executor to sell land for division among the devisees, the court acquired jurisdiction over infants by the appointment of a guardian ad litem without the service of citation on such infants.

The case just cited does not appear to have been overruled, but in Brock v. Doyle (1881) 18 Fla. 172, cited supra, it is held that in a partition suit the appointment of a guardian with-

out service was erroneous, the court saying that there being no provision in the statute, the case was controlled by the general rule in chancery requiring service on the infant and the appointment of a guardian.

And in Laflin v. Gato (1906) 52 Fla. 529, 42 So. 387, the appointment of a guardian before service on the infant by publication was complete was held premature, so that the guardian's acts did not bind the infant.

In Terrell v. Weymouth (1893) 32 Fla. 255, 37 Am. St. Rep. 94, 14 So. 429, it was held that partition proceedings brought against a person as guardian ad litem for certain minors interested in the property, and the sale in such proceedings, were void because the minors were not made parties by having process served upon them personally. It was, however, held that the particular minor seeking to attack the proceedings was estopped by his conduct to do so.

6. Georgia.

In Georgia, prior to the Act of 1876, requiring personal service on minors, the appointment of a guardian ad litem and notification to him before the cause proceeded was all that was required to have the interests of the minor properly represented in any case in court. Richards v. East Tennessee, V. & G. R. Co. (1899) 106 Ga. 614, 44 L.R.A. 712, 33 S. E. 193.

So, under a statute authorizing judges of superior courts to change trustees or order a sale of trust property, and providing that, if minors were interested and had no guardian, a guardian ad litem must be appointed and notified before the cause proceeded, the court in Harvey v. Cubbedge (1885) 75 Ga. 792, refused to overturn the practice followed for thirty years, of appointing a guardian ad litem without service on the infant, and upheld an order subjecting trust property to the payment of a debt, pointing out, however, that under the Act of 1876 a different rule applies.

7. Illinois.

In Illinois it is held that an appointment without service is erroneous, in Campbell v. Campbell (1872) 63 Ill. 462; Chambers v. Jones (1874) 72 Ill. 275.

And a decree against an infant not served is erroneous though a guardian is appointed. Hickenbotham v. Blackledge (1870) 54 Ill. 316 (where the infants were not made parties); Clark v. Thompson (1868) 47 Ill. 25, 95 Am. Dec. 457.

And where service is defective, the appointment is erroneous. McDermaid v. Russell (1866) 41 Ill. 489 (in which the affidavit for service by publication was defective, and the notice published misstated the time the infants were required to appear); Trevor v. Colgate (1899) 181 Ill. 129, 54 N. E. 909 (in which affidavit of service outside the state was not sworn to before an officer authorized to administer oaths).

8. Indiana.

Where, in a suit to foreclose a vendor's lien, a guardian was appointed for infant defendants, but they were not served with process, the court, in Hough v. Canby (1846) 8 Blackf. 301, said that according to the English practice it was irregular to appoint a guardian before the infants were served; that under the Indiana practice the record must show both to have been done, but that it might not be essential that the service should precede the appointment. So far as this case intimates that the appointment might precede the service, it is not distinctly overruled by any subsequent Indiana case, but is inconsistent with the statement of the rule found in Carver v. Carver (1878) 64 Ind. 194. In that case, however, there was no service either before or after the appointment.

The later cases in Indiana recognize the general rule stated above, that an appointment without service is erroneous. Carver v. Carver (1878) 64 Ind. 194; Roy v. Rowe (1883) 90 Ind. 54; Voyles v. Hinds (1917) — Ind. —, 114 N. E. 865.

9. Iowa.

In Sleeper v. Killion (1914) 166 Iowa, 205, 147 N. W. 314, it was held

that until the court obtains jurisdiction of minor defendants by proper notice, properly served, there is no power to appoint a guardian ad litem to represent them, and accordingly, that in a suit to foreclose a mortgage, where the court had no jurisdiction over the infant defendants because notice was not addressed to them, the appointment of a guardian ad litem did not cure the want of jurisdiction.

On the question of defective or incomplete service, see Allen v. Saylor (1862) 14 Iowa, 435 (in which service was made upon the person with whom infants resided with no showing that they had no parent living and within the state and no guardian, and with no showing that the person served had the legal care and control of the children); Cummings v. Landes (1908) 140 Iowa, 80, 117 N. W. 22 (in which the notice served on infant defendants fixed a date for their appearance long prior to the date of service, and in which it was held that an acknowledgment of service by the mother of the infants, made after the return day, did not confer jurisdiction).

10. Kansas.

In Kansas the rule that defective service renders the appointment of a guardian irregular and erroneous is recognized in Claypoole v. Houston (1873) 12 Kan. 324 (in which there was a defective affidavit for service by publication), and in Martin v. Battey (1912) 87 Kan. 582, 125 Pac. 88, Ann. Cas. 1914A, 440 (where a statute provided that the appointment could not be made until after service, but service was not made on the father, mother, guardian, or person in control or with whom the infant defendant lived, as the law required).

11. Kentucky.

In Banta v. Calhoon (1819) 2 A. K. Marsh. 166, it was held that where a guardian ad litem was appointed for an infant defendant and appeared for him, no service of process on the infant was required; and for many years the practice prevailed in Kentucky to appoint a guardian ad litem without any actual notice to the infant of the pendency of the suit; but this practice was finally abolished by the court, for the reason stated in Bustard v. Gates (1836) 4 Dana, 429, cited supra.

In a proceeding to alter a public road, where infant owners had been in court before a guardian who defended for them was appointed, it was held in Gashweller v. M'Ilvoy (1817) 1 A. K. Marsh. 84, that the failure to serve them with process, if otherwise necessary, did not affect the validity of the order changing the road, as the only object of such service would be to cause them to appear in court.

The later cases from this state are in accord with the general rule that the appointment is irregular and erroneous where the infant has not been served. See Graham v. Sublett (1831) 6 J. J. Marsh. 44 (where unknown heirs of a party were made defendants); Shropshire v. Reno (1837) 5 Dana, 584; Jones v. McGinty (1835) 3 Dana, 425; Girty v. Logan (1869) 6 Bush, 8; Womble v. Trice (1902) 112 Ky. 533, 66 S. W. 370 (where the court held that the authority to appoint a guardian ad litem upon whom summons might be served was limited by the statute to cases in which the minor was under fourteen); Roy v. Allen (1909) — Ky. —, 118 S. W. 981 (in which summons was not issued against an infant defendant though a statute provided that no appointment of a guardian should be made until the defendant was summoned, or until a person was summoned for him); Caulder v. Chenault (1913) 154 Ky. 777, 159 S. W. 578.

As supporting the rule stated above, that the appointment of a guardian for an infant not served, or an appearance or answer by him, does not bring the infant before the court, so as to justify a judgment or decree against him or affecting his interests, see Collard v. Groom (1829) 2 J. J. Marsh. 487 (in which nonresident infant defendants were not served); Dodge v. Foulks (1850) 11 B. Mon. 178; Wooldridge v. Harding (1899) 21 Ky. L. Rep. 205, 51 S. W. 162; Taylor v. Taylor (1912) 149 Ky. 707, 149 S. W. 1000, Ann. Cas. 1914B, 275 (where service was had on the father of infant,

though a statute required personal service).

In South v. Carr (1828) 7 T. B. Mon. 419, the court stated as one reason for reversing a decree that a special guardian was appointed for the infant children of a certain person, but it did not appear how many of the children he represented, or how many of them were infants, and no process was ever executed on any of them.

Where one of the defendants to a bill died leaving infant children for whom a guardian ad litem was appointed without the service of process on them, and the guardian answered the bill, it was held in Coleman v. Coleman (1835) 3 Dana, 398, 28 Am. Dec. 86, that no decree could be rendered in their favor on the cross bill, and that no relief should have been decreed as to a matter as to which they were necessary parties.

In Bustard v. Gates (1836) 4 Dana, 429, it was held that the appointment of a guardian ad litem for infant defendants prior to any actual service of notice of the proceedings did not affect the court's jurisdiction, in view of the subsequent ratification of the appointment by permitting the guardian to appear, and thus recognizing him as the appointed guardian, this being a virtual appointment de novo, or nunc pro tunc.

Where a supplemental bill reviving a suit to foreclose a mortgage charged new and distinct matters, making it necessary that process should be issued and served, it was held in Chambers v. Warren (1845) 6 B. Mon. 244, that it was error to appoint a guardian ad litem for infant defendants until they had been served with process or personal notice in some form.

In Caulder v. Chenault (1913) 154 Ky. 777, 159 S. W. 578, it was held that the appointment of a guardian ad litem before infant defendants had been properly summoned was irregular, but that the irregularity was fully corrected by an order made after service on the infant, approving and ratifying the former appointment, subsequent to which order the guardian filed his answer as required by law.

12. Louisiana.

While no Louisiana case discussing this question has been found, it is said to have been the practice in that state to appoint the guardian ad litem without any service of process on the infant.

13. Massachusetts.

In Welch v. Fox (1910) 205 Mass. 113, 91 N. E. 145, in which plaintiff sought a writ of prohibition to prevent the court in which an action by him was pending from appointing a guardian ad litem for him on the ground that he was of unsound mind, it was said that the court should appoint a guardian or a litigant whenever, by reason of minority or mental unsoundness, one was required; that the court had jurisdiction to decide whether a guardian was required; and that this jurisdiction was not founded upon a previous notice to the litigant, but was a part of and incidental to the general jurisdiction over the case and the parties properly before the court. No Massachusetts case inconsistent with the intimation that jurisdiction is not dependent on notice has been found.

14. Minnesota.

In Phelps v. Heaton (1900) 79 Minn. 476, 82 N. W. 990, it is held that service of summons upon infant defendants in the mode authorized by the statute must precede the appointment of a guardian ad litem, and that though such guardian be appointed and he appears and represents the interests of the minors, the appointment and all subsequent proceedings in the action, including the final judgment, are void as against an infant not served with process or summons. In this case the infants attempted to waive service, and petitioned for the appointment of a guardian, and notice of the application was given to the only infant who was under fourteen.

15. Mississippi.

In Burrus v. Burrus (1878) 56 Miss. 92, overruling M'Allister v. Moye (1855) 30 Miss. 258, it was held that a statute requiring the service of process on infants before the appointment

of a guardian ad litem by courts of chancery did not apply to the probate court, and that, as the statute applicable to such courts merely required service of process on the guardian, and made no mention of service on the infant, the court might appoint a guardian without the service of process on the infant.

In Johnson v. Cooper (1879) 56 Miss. 608, it was held that under the statute in force in 1856, when a proceeding in the probate court to sell land for the payment of debts was brought, it was not necessary to appoint a guardian ad litem for infant heirs, and that the unnecessary appointment of a guardian before service of process on the infant could not make the decree void. It was also held that if the probate court was bound by the law applicable to chancery courts, the decree was not void, though a rule of the chancery court provided that no appointment of a guardian ad litem would be made until after the return day of process executed, because a statute expressly authorized such appointment by the chancery court, whether the infant should have been served with process or not, thus overruling Stanton v. Pollard (1852) 24 Miss. 154, where the chancery rule was relied on and the statute was apparently overlooked. The court said that the rule was a mere announcement that the chancellor would not exercise the power of appointment before process executed, and did not make the statute void.

In Price v. Crone (1870) 44 Miss. 571, and Prewett v. Land (1858) 36 Miss. 495 (suit to subject trust fund to payment of debt to which infant cestuis que trustent were not made parties), it was held that a guardian ad litem could not be appointed until the infant had been served with process. The Prewett Case was decided on the authority of Stanton v. Pollard, overruled in Johnson v. Cooper, supra, but the statute referred to in Johnson v. Cooper was apparently no longer in force when the appointment involved in the Price Case was made, as the court refers to a statute allowing the appointment of a guardian on the application of the infant before the service of process, and says that the right to appoint before service can only be made on such application.

In Hamilton v. Lockhart (1867) 41 Miss. 460, it was held that an order for the sale of land of a decedent for the payment of debts was void as to an infant heir residing in the county who was not served with citation, though a guardian ad litem was appointed for him.

A number of Mississippi cases involve defective service and it is held that the appointment on such service is irregular and erroneous. See Ingersoll v. Ingersoll (1868) 42 Miss. 155 (where a statute prohibited the appointment of a guardian except on the infant's application until after process should have been returned executed or proof of publication made, and service was made on an infant without also delivering a copy to the parent or guardian, as required by statute, and there was also publication without mailing a copy of the order as so required, the court saying that the statute contemplated that the process would be executed or the proof of publication made in compliance with law); Johnson v. McCabe (1868) 42 Miss. 255 (in which, as well as in the two following cases, there was service on the infant without service on the parent or guardian); Price v. Crone, supra; Erwin v. Carson (1876) 54 Miss. 282; Frank v. Webb (1889) 67 Miss. 462, 6 So. 620 (in which process was served on infant defendant in another state without any showing that there was no parent or guardian in the state upon whom service could be made).

16. Missouri.

A Missouri partition statute provided that a copy of the petition, with notice that it would be presented to the court on a certain day, should be served on all parties interested and on the guardians of such as were minors; that if any of the parties should reside out of the state, notice should be given by publication, and that the court might appoint a guardian ad litem for any minor living in or out of the state,

either before or after the commencement of the proceeding. In Hite v. Thompson (1853) 18 Mo. 461, it was apparently held, because of this authority to make the appointment before or after the commencement of the proceeding, that a guardian might be appointed for nonresident minors without publication of the notice. This was followed in Shaw v. Gregoire (1864) 35 Mo. 342, in a case in which the minor was a resident. But on a subsequent appeal in the same case (1867) 41 Mo. 407, the court repudiated this apparent holding, pointed out that the petitioner in Hite v. Thompson, supra, was himself the general guardian of the infants with whom he was tenant in common, and declared that the point decided was that he could appear for them in his capacity of general guardian without the service of notice upon them or upon himself. It was held that until the infant was brought into court by a service of the petition and a notice upon him or his guardian, or an appearance by the infant or his guardian, there was no authority under the statute or otherwise for the court to appoint a guardian or do any judicial acts affecting the infant's rights and estate.

With the exception of the cases mentioned in the preceding paragraph, the Missouri cases uniformly hold that an appointment without service of process is irregular and erroneous. See Hendricks v. McLean (1853) 18 Mo. 32 (decree set aside on motion); Fischer v. Siekmann (1894) 125 Mo. 165, 28 S. W. 435 (declaring that service upon a minor must be made in the same manner as upon an adult); Westmeyer v. Gallenkamp (1899) 154 Mo. 28, 77 Am. St. Rep. 747, 55 S. W. 231; Wright v. Hink (1905) 193 Mo. 130, 91 S. W. 933.

In Campbell v. Laclede Gaslight Co. (1884) 84 Mo. 352, it was held in a partition suit brought under a statute which required a copy of the petition with notice of its intended presentation to the court to be served on all parties interested and on the guardians of such as were minors, that service on the guardian did not dispense with service on the minor, and that where there was no service on the minor a judgment was void as to the infant, and did not devest his title though a guardian was appointed for him.

And that, in the absence of service, the appointment of a guardian does not justify a judgment or decree, is also held in Nagel v. Schilling (1883) 14 Mo. App. 576.

And where service is defective, the appointment is erroneous. Wright v. Hink, supra (in which there was constructive service without any preliminary showing that the infant was a nonresident); McMurtry v. Fairley (1906) 194 Mo. 502, 91 S. W. 902 (in which a minor defendant was served by reading the summons in his presence and hearing).

17. New York.

In Taylor v. Emmet (1910) 137 App. Div. 202, 122 N. Y. Supp. 66, reversing (1910) 66 Misc. 74, 122 N. Y. Supp. 757, the court said: "Thus the policy of the state in regard to the manner of notifying nonresident infant defendants under the Code has undergone many changes. From 1862 to 1877 there was required no preliminary service of process upon the infant in partition and foreclosure suits in order to obtain the appointment of a guardian for the infant on the application of another party to the action; from 1877 to 1889 (save for a few months in the former year) guardians could be appointed without the prior service of the summons only as to infants, residents of the state, but temporarily absent therefrom, and in any action; from 1889 to and including the present time a guardian could be appointed in any action for either nonresident or absentee infant defendants in two ways: (1) Under § 471, where process had been served either personally or by publication; (2) under § 473, where process had not been served."

Section 471 of the Code referred to in Taylor v. Emmet, supra, provided for service of process on infant defendants and for the appointment of guardians ad litem after such service.

Section 473 provided that when the infant resided out of the state, or was temporarily absent therefrom, the court might make an order appointing a guardian ad litem unless the infant, or someone in his behalf, procured a guardian to be appointed within a specified time after service of a copy of the order; that the court must give special directions in the order respecting the service thereof which might be made upon the infant, and that the summons might be served on the guardian so appointed. The court held that this last-mentioned section provided an additional method of appointing a guardian, and that where the appointment was made thereunder and a copy of the order served on the infant, the service of process on the infant was not required; but see Gruner v. Ruffner (1909) 134 App. Div. 837, 119 N. Y. Supp. 942, reversing (1908) 59 Misc. 266, 110 N. Y. Supp. 873, holding that the appointment was erroneous where there was neither service of process nor service of the order on a nonresident infant.

In Varian v. Stevens (1853) 2 Duer, 635, the court held that, under the statute relative to partition suits, allowing guardians ad litem to be appointed for infant defendants on notice to them or their general guardian, whether they resided in or out of the state, the appointment might be made whether or not they had been served with process; and that where the infants were over fourteen, and therefore entitled to apply for the appointment of a guardian, an appointment on their application was valid though there was no service of the summons on them. In Althause v. Radde (1858) 3 Bosw. 410, it was held that under such statute a guardian ad litem could be appointed on notice to the general guardian of the infant defendant before the service of process.

In Wood v. Martin (1873) 66 Barb. 241, it was held that the judgment in a partition suit was binding upon infant defendants who were served with process and for whom a guardian ad litem had been appointed, though the appointment was made before process was served.

In Gotendorf v. Goldschmidt (1880) 83 N. Y. 110, it was held that in a partition suit a guardian ad litem was properly appointed for infant defendants after notice to the infants and their father that such appointment would be made unless they procured the appointment of a guardian, though process was not served on the infants.

That in suits to foreclose mortgages the appointment of a guardian without service was erroneous, was held in Ontario Bank v. Strong (1830) 2 Paige, 301; Syracuse Sav. Bank v. Burton (1884) 6 N. Y. Civ. Proc. Rep. 216; Hope v. Seaman (1909) 119 N. Y. Supp. 713.

And with reference to other suits it was so held in Grant v. Van Schoonhoven (1841) 9 Paige, 255, 37 Am. Dec. 393 (suit to cancel conveyance in trust, involving the authority to appoint a guardian ad litem on the certificate of a vice chancellor or special master, under the provisions of a rule in chancery); Glover v. Haws (1862) 19 Abb. Pr. 161, note (where a statute authorized the appointment of a guardian for nonresident infant defendants in foreclosure and partition cases on plaintiff's application without specifying any time for the application); Ingersoll v. Mangam (1881) 84 N. Y. 622, 61 How. Pr. 149, affirming (1881) 24 Hun, 202 (where a statute authorized the appointment to be made on the application of any party to the action or a relative or friend if the infant was under fourteen, or was over fourteen and neglected to apply within twenty days after service, and the court held that the application in either case must be made after service); Davis v. Crandall (1886) 101 N. Y. 311, 4 N. E. 721 (executor's accounting); Potter v. Ogden (1893) 136 N. Y. 384, 33 N. E. 228 (accounting by administrator); Van Williams v. Elias (1905) 106 App. Div. 288, 94 N. Y. Supp. 611 (involving the same statute involved in Ingersoll v. Mangam, supra).

And that the appointment does not bring an infant not served before the court so as to justify a judgment or

decree is held in Rogers v. McLean (1860) 10 Abb. Pr. 306 (where the infant was of unsound mind, and the guardian was appointed on the application of his committee, appointed in another state, who had no authority to appear voluntarily for the infant); Pinckney v. Smith (1882) 26 Hun, 524 (in which the guardian was appointed without the order to show cause having been served on the infant, but, after the proof had been taken and the proceedings adjourned, the return day of the order was changed, and the order then served on the infant); Moulton v. Moulton (1888) 47 Hun, 606, 13 N. Y. Civ. Proc. Rep. 420 (service on infant outside the state without any order of publication).

And where a statute authorized the minor to apply for the appointment of a guardian within twenty days after service, and personal service was made outside the state under an order of publication, an appointment of a guardian before the expiration of the time for publication was held erroneous. Crouter v. Crouter (1892) 133 N. Y. 56, 30 N. E. 726, affirming (1892) 43 N. Y. S. R. 438, 17 N. Y. Supp. 758; Darrow v. Calkins (1897) 154 N. Y. 503, 48 L.R.A. 299, 61 Am. St. Rep. 637, 49 N. E. 61.

And an appointment before service by publication was complete was held erroneous. Ford v. Clendenin (1911) 137 N. Y. Supp. 54, affirmed in (1913) 155 App. Div. 433, 140 N. Y. Supp. 1119.

So, where the service was otherwise incomplete or defective. Ingersoll v. Mangam (1881) 84 N. Y. 622, 61 How. Pr. 149, affirming (1881) 24 Hun, 202 (where service was made on the infant's mother without also making service on the infant, as required by statute); Walter v. De Graaf (1887) 19 Abb. N. C. 406 (where the order for publication in a partition suit did not designate the postoffice in which a copy of the summons, etc., was to be deposited); Potter v. Ogden, supra (in which the appointment was before service, and the service personally and by publication was defective).

In Syracuse Sav. Bank v. Burton (1884) 6 N. Y. Civ. Proc. Rep. 216, the court upholds the appointment of a guardian ad litem without discussing this question, though it was probably made on the infant's application while publication was being made and before it was complete.

18. North Carolina.

In North Carolina prior to the Code of Civil Procedure the practice had long prevailed of exercising the power of appointment without the issue of process, and such appointments during that period are upheld in Matthews v. Joyce (1881) 85 N. C. 258, and Richmond Cedar Works v. Stringfellow (1916) 236 Fed. 264. As stated in Matthews v. Joyce, supra, the practice now is, however, regulated by statute, and a previous service of process is required before the court can exercise the power of appointment.

See Turner v. Douglass (1875) 72 N. C. 127; Moore v. Gidney (1876) 75 N. C. 34 (proceeding to sell a decedent's real estate for the payment of debts, in which the summons and copy of the bill were not served until after the decree of sale); Young v. Young (1884) 91 N. C. 359.

And where a guardian selected by the petitioner in a proceeding to sell land of a decedent was appointed without service on infants, and before the petition was filed, and accepted service as soon as it was filed, and forthwith, without inquiry into the interests of the infants, filed an answer prepared by the petitioner or at his instance, it was held that the sale might be set aside. Gulley v. Macy (1879) 81 N. C. 356.

In Roseman v. Roseman (1900) 127 N. C. 494, 37 S. E. 518, it was held in a suit to appoint a substituted trustee under a will that where summons was served on infant parties under fourteen years of age by delivering a copy of the summons to each of them personally, and a guardian ad litem was appointed who filed an answer, the failure to leave a copy of the summons with the father, mother, or guardian of the infant did not invalidate the judgment.

In Hughes v. Pritchard (1910) 153

N. C. 135, 138 Am. St. Rep. 649, 69 S. E. 3, it was held that a statute providing that when any defendants were infants and had no general guardians, and "any" of the defendants had been summoned, the court might appoint a guardian ad litem, did not authorize the appointment of a guardian for infants service upon whom was defective, though there were other defendants properly summoned.

A number of North Carolina cases depend upon the effect of a curative act declaring valid and binding the decrees in all civil actions and proceedings wherein any or all of the defendants were infants upon whom there was no personal service of the summons. Thereunder, it was held in Howerton v. Sexton (1884) 90 N. C. 581, where a statute authorized the appointment of a guardian for infant defendants over the age of fourteen on the application of the infants, if made within twenty days after service, that where the appointment was made on the infants' application, without any issue of summons, the proceedings could not be pronounced null.

In Hare v. Hollomon (1886) 94 N. C. 14, where a guardian was appointed for infants upon whom process was not served, the court said that the general assembly seemed to have anticipated similar controversies and to have furnished relief in the curative act.

In Cates v. Pickett (1887) 97 N. C. 21, 1 S. E. 763, where an infant accepted service and a guardian was appointed, the irregularity was held cured, and there were similar rulings in White v. Morris (1890) 107 N. C. 92, 12 S. E. 80, and Carter v. Rountree (1891) 109 N. C. 33, 13 S. E. 716, where service was had only on the persons having the care and control of the infants without service on the infants, as required by statute, guardians ad litem having been appointed, and also in Smith v. Gray (1895) 116 N. C. 311, 21 S. E. 200, where lands in which infants had an interest were sold in two suits in which guardians were appointed, but in one of which there was no service on the infants, and in the other of which the service was defective.

But in Hughes v. Pritchard, supra, it was held that the statute applied only to cases in which there was a failure to make personal service on the infant, and not to cases where no service was made on the infant or any other person in his behalf.

19. Ohio.

In Paulin v. Sparrow (1915) 91 Ohio St. 279, 110 N. E. 528, it was held that in a suit to quiet title the appointment of a guardian ad litem for a minor defendant before she was duly and regularly summoned was irregular and did not effect the appearance of the minor or give the court jurisdiction of her person; but that where his answer was not filed until she had been served, and she made no objection to his premature appointment or to the filing of the answer, she could not complain in a collateral action.

In Keys v. McDonald (1855) 1 Handy (Ohio) 287, where a statute required service before the appointment, and service was made on the infant without also serving his parent or guardian or the person having his care or control, or with whom he lived, the appointment was held erroneous.

20. Oklahoma.

It is held error to appoint a guardian ad litem without service of process, in Bolling v. Campbell (1912) 36 Okla. 671, 128 Pac. 1091; Jefferson v. Gallagher (1915) — Okla. —, 150 Pac. 1071; Echols v. Reeburgh (1916) — Okla. —, 151 Pac. 1065. The first two cases refer to the express provisions of a statute, and the third case is probably governed by the same statute.

21. Pennsylvania.

In Graham's Estate (1883) 14 W. N. C. 31, it is held in a proceeding by an executor to sell real estate under a statute providing that if minors shall have no guardian the court shall appoint a guardian for them, that the appointment will not be made without notice to the minors, if over fourteen, or otherwise to their next of kin, of the filing of the petition, and that they are required to appear and apply for such appointment, and that a

guardian will be appointed unless they so appear and apply.

22. South Carolina.

In South Carolina, prior to the Code of procedure which requires the service of process on infants, infants were made parties and bound by the judgment in proceedings to sell land, where a guardian ad litem was appointed for them though they were not served with process. Rollins v. Brown (1891) 37 S. C. 345, 16 S. E. 44; Bulow v. Witte (1871) 3 S. C. 308. And it was so held in the last cited case though the guardian filed no answer. At the present time service of process is required.

See the following cases holding that the appointment of the guardian does not bring an infant not served before the court so as to authorize a judgment or decree against him. Finley v. Robertson (1882) 17 S. C. 435 (where the infants attempted to accept service, but the guardian, appointed without notice to them and without their knowledge, was by natural relations inclined to be antagonistic to them); Genobles v. West (1884) 23 S. C. 154; Riker v. Vaughan (1885) 23 S. C. 187 (where the guardian was appointed on the application of the infant, who was not properly served, but who attempted to acknowledge service); Whitesides v. Barber (1885) 24 S. C. 373 (where infant not summoned accepted service); Tederall v. Bouknight (1886) 25 S. C. 275 (where statute required service on infant defendant and the appointment of a guardian ad litem on notice to the general or testamentary guardian, or, if there was none, to the infant or the person with whom she resided, but the infant's grandfather was appointed guardian on his own application, without notice to the infant of the proceeding or the appointment).

23. Tennessee.

The Tennessee cases uniformly hold that the appointment of a guardian without service is erroneous and irregular. See Wheatley v. Harvey (1852) 1 Swan, 484; Greenlaw v. Kernahan (1857) 4 Sneed, 379; Ivey v. Ingram (1867) 4 Coldw. 129 (where process was served after the guardian was appointed and had filed his answer); Cowan v. Anderson (1869) 7 Coldw. 284; Rucker v. Moore (1870) 1 Heisk. 726; Taylor v. Walker (1870) 1 Heisk. 734 (in which it was held that a sale of land of a decedent for the payment of debts might be set aside in a suit brought for that purpose); Martin v. Porter (1871) 4 Heisk. 407; Linnville v. Darby (1872) 1 Baxt. 306.

And where an infant was not served with process, it was held that she was not before the court, and that the appointment of a guardian or an answer by him did not give jurisdiction. Frazier v. Pankey (1851) 1 Swan, 75 (where the statute required that the devisees or heirs be made parties to a suit to sell the land of a decedent, but the infants were not named in the bill as parties, and process was not brought against them); Robertson v. Robertson (1852) 2 Swan, 196 (proceeding to partition land of a decedent among his heirs under a statute requiring notice to or publication as to each person interested); Crippen v. Crippen (1858) 1 Head, 128.

24. Texas.

It is held, in harmony with the general rule, that an appointment of a guardian without service on the infant is erroneous, in Sprague v. Haines (1887) 68 Tex. 215, 4 S. W. 371; Tutt v. Morgan (1897) 18 Tex. Civ. App. 627, 42 S. W. 578, 46 S. W. 122; Maury v. Keller (1898) — Tex. Civ. App. —, 53 S. W. 59.

And that the appointment of a guardian or an answer by him does not justify a judgment or decree against an infant not served, in Wheeler v. Ahrenbeak (1881) 54 Tex. 535 (where the infant had attempted to accept service); Moore v. Prince (1893) 5 Tex. Civ. App. 352, 23 S. W. 1113.

And where, in a partition suit, minor defendants were served only with a copy of the writ, and not with a copy of the petition, as directed by the statute, the court had no authority to appoint a guardian ad litem for the minors over whom it had not ac-

quired jurisdiction by service of the process, and the decree against them was of no more validity than if no guardian had been appointed. Kremer v. Haynie (1887) 67 Tex. 450, 3 S. W. 676.

25. Virginia.

Under a statute providing for the sale of small inheritances where any of the heirs were infants, it was held in Parker v. McCoy (1854) 10 Gratt. 594, that only adult heirs were required to be summoned, and that where infant heirs were represented by a guardian ad litem appointed for that purpose, it was wholly immaterial whether a summons had been previously served on them or not.

In Strayer v. Long (1887) 83 Va. 715, 3 S. E. 372, it is stated incidentally, in discussing the necessity of notice to a guardian ad litem of a certain proceeding in the action in which he was appointed, that, by the provision of the law of that state, the courts of equity are empowered to appoint guardians ad litem whether the infant has been served with notice or not. It is apparently so provided by statute.

26. Wisconsin.

Where service on the infant is defective, the appointment of a guardian is held erroneous in Foster v. Hammond (1875) 37 Wis. 185 (where order requiring nonresident infant to appear and answer was defective); Helms v. Chadbourne (1878) 45 Wis. 60 (where statute required the delivery of a copy of the summons to the infant's parent as well as to the infant, and the only copy delivered to the parent was delivered to her as a party to the action).

27. English cases.

In Wood v. Logsden (1852) 9 Hare, XXVI. Appx. 68 Eng. Reprint, 770, 22 L. J. Ch. N. S. 257, 1 Week. Rep. 46, where an infant had appeared and notice of the motion to appoint a guardian ad litem had been served at the dwelling house of the person with whom he was residing, the guardian ad litem was appointed though the infant had not been served with summons; and where a solicitor entered an appearance for an infant defendant, it was held in Lloyd v. Rossmore (1875) Ir. Rep. 9 Eq. 488, that the court might appoint a guardian ad litem though the infant had not been served with the bill.

28. Canadian cases.

In Robinson v. Dobson (1864) 1 Ch. Chamb. Rep. (U. C.) 257, it was held that where an infant had not been served with the bill before the return of notice of an application for the appointment of a guardian, the notice should be re-served.

In Bowman v. Becktel (1871) 2 Grant, Ch. (U. C.) 556, it was held that service of the subpœna and notice of a motion by delivering a copy and exhibiting the original to persons with whom or in whose care the infant defendants resided was sufficient without personal service on the infants or leaving copies at their place of abode.

c. Notice of application.

Except in New York, and possibly in Pennsylvania and South Carolina, the American cases do not generally recognize the necessity of notice of the application for the appointment of a guardian ad litem as distinguished from the notice or process in the suit or proceeding in which the appointment is made.

In New York the statute provides that in the surrogate court, if an infant party does not appear by his general guardian, the surrogate must appoint a special guardian; and that where a person other than the infant applies for the appointment, at least eight days' notice of the application must be personally served upon the infant if he is within the state. Thereunder notice is only required when the application is made by some person other than the infant. Re Ludlow (1881) 5 Redf. (N. Y.) 391.

Where, in a proceeding to sell a decedent's real estate for the payment of his debts, a guardian ad litem was appointed for infant parties on whom citation had been served, on the application of their father, without notice of the application being given to

the infant, as required by statute, it was held in Price v. Fenn (1885) 3 Dem. (N. Y.) 341, that this was an irregularity, but did not relieve the purchaser from taking title, as the surrogate might have made the appointment on his own motion without application by anyone.

With respect to other courts the statute provides for service of process on infant defendants and for the appointment of a guardian after such service on the application of the infant, or upon the application of any other party on notice to the general or testamentary guardian of the infant or the person with whom he resides, and that when the infant resides out of the state or is temporarily absent therefrom the court may make an order appointing a guardian unless the infant or someone in his behalf procures a guardian to be appointed within a specified time after service of a copy of the order, and that the court must give special directions in the order respecting its service. Thereunder it is held in Van Williams v. Elias (1905) 106 App. Div. 288, 94 N. Y. Supp. 611, that where a guardian ad litem was appointed without notice to the infant's general guardian or the person with whom she resided there was sufficient doubt as to whether the infant would be held bound by the judgment to relieve a purchaser at a judicial sale from taking title.

Where a nonresident infant defendant had been served with process in a suit for partition it was held in Mace v. Scott (1885) 17 Abb. N. C. (N. Y.) 100, that as the statute did not prescribe the notice to be given the infant, the court should prescribe what notice should be given.

It was held in Gruner v. Ruffner (1909) 134 App. Div. 837, 119 N. Y. Supp. 942, reversing (1908) 59 Misc. 266, 110 N. Y. Supp. 873, that where neither process nor the order was served on a nonresident infant, the appointment of a guardian ad litem was erroneous.

Under a statute authorizing the court in partition suits to appoint the register or clerk guardian ad litem of infant defendants, it was held in Minor v. Betts (1839) 7 Paige (N. Y.) 596, that the register might be so appointed though the infant resided out of the state, so that notice of the application could not be given to him or to his general guardian, as required by the act, other than a general notice to appear and answer, which had been duly published as required by law.

In Concklin v. Hall (1847) 2 Barb. Ch. (N. Y.) 137, the court said that in the case of infants who were absentees it was a matter of course to make an absolute order for the appointment of a guardian ad litem for them without further notice where they or their friends did not secure a guardian to be appointed within twenty days after the expiration of the time limited in the order of the court for their appearance.

And even though the vice chancellor erred in making a peremptory order for the appointment of a guardian upon the failure of the infants or their friends to procure such appointment, instead of making an order nisi appointing a guardian unless the infants within a time specified procured the appointment of another person in accordance with the usual practice, it was held that this did not justify the purchaser at a judicial sale in refusing to complete the purchase, where the infants had no defense and the guardian appointed did not neglect their interests. Ibid.

In a proceeding by an executor to sell real estate under a statute providing that if minors should have no guardian the court should appoint a guardian for them, it was held in Graham's Estate (1883) 14 W. N. C. (Pa.) 31, that the appointment would not be made without notice to the minor if over fourteen, or otherwise to his next of kin, of the filing of the petition requiring them to appear and to apply for such appointment, and stating that a guardian would be appointed unless they appeared and so applied.

In Finley v. Robertson (1882) 17 S. C. 435, and Tederall v. Bouknight (1886) 25 S. C. 275, cited supra, the court lays some stress on the fact that the guardian was appointed without

notice to the infant of the application, as well as without service of process.

In Hitch v. Wells (1845) 8 Beav. 576, 50 Eng. Reprint, 226, it was held that notice of an application to appoint a guardian ad litem for infants whose father was dead and who resided with their mother and her second husband was sufficient when served at the house of the mother and the second husband.

Where an infant defendant had appeared voluntarily, it was held in Cookson v. Lee (1846) 15 Sim. 302, 60 Eng. Reprint, 634, that notice of a motion for the appointment of a guardian ad litem was sufficient when served on a solicitor who appeared for the infant, without leaving a copy at the dwelling house of the person with whom or under whose care the infant was at the time.

In Lambert v. Turner (1862) 31 L. J. Ch. N. S. (Eng.) 494, 10 Week. Rep. 335, it was held that where an infant defendant living abroad had no substantial interest in the suit and had been served with a copy of the bill, notice of the application for the appointment of a guardian might be dispensed with, and under similar circumstances, in Turner v. Snowdon (1864) 2 Drew. & S. 265, 62 Eng. Reprint, 622, a guardian was appointed without the notice required by a rule of court.

In Hamilton v. Hamilton (1866) 2 Ch. Chamb. Rep. (U. C.) 160, the appointment of a guardian ad litem was set aside as irregular because the notice of the motion for the appointment did not allow the infant sufficient time to appear and show cause; but in Harper v. Harper (1864) 1 Ch. Chamb. Rep. (U. C.) 217, it was held that where a guardian ad litem died, a new guardian might be appointed without notice.

And in Weldon v. Templeton (1865) 1 Ch. Chamb. Rep. (U. C.) 360, where the solicitor and guardian ad litem for an infant defendant had left the province, a new guardian was appointed on plaintiff's ex parte application.

Where an infant's father and mother had been living apart, and the infant, who had been living with his mother, had absconded, the court, in Bigger v. Beaty (1864) 1 Ch. Chamb. Rep. (U. C.) 236, ordered that notice of the application be served on the mother at her residence, and that service on the father be dispensed with; and under a rule requiring service of the notice on the person with whom or under whose care the infant resided, service on the principal of a college of which the infant was a resident pupil was held sufficient in Whitmarsh v. Ford (1865) 1 Ch. Chamb. Rep. (U. C.) 357. See also on this point, Galbraith v. Galbraith (1867) 5 Can. L. J. 41.

d. Collateral attack.

The authorities are in conflict as to whether proceedings in a suit or proceeding in which a guardian ad litem is appointed for an infant party without service of process or notice are void when attacked collaterally. Probably the weight of authority supports the view that the proceedings are not open to collateral attack, but there is substantial authority to the contrary.

The proceedings were held not void when attacked collaterally in Nelson v. Moon (1843) 3 McLean, 319, Fed. Cas. No. 10,111 (suit for conveyance of land and for partition); Preston v. Dunn (1854) 25 Ala. 507 (suit involving foreclosure of mortgage in which the court said that there was merely an improper exercise of the authority conferred on the chancery court, and not a total want of power to make the appointment without service); Crowder v. Doe (1915) 193 Ala. 470, 68 So. 1005 (proceeding in probate court for sale of land); Stuart v. Allen (1860) 16 Cal. 474, 76 Am. Dec. 551 (involving a proceeding in the probate court to sell a decedent's land for the payment of debts where the court laid stress on the fact that the statute did not prescribe that a copy of the order to show cause should be served on the infant before the appointment); Bustard v. Gates (1836) 4 Dana (Ky.) 429 (where it was said that if the court had jurisdiction over certain of the parties the proceedings were not void, though the infant lived outside

the state, so that the court had no power to give the required notice); Bank of United States v. Cockran (1840) 9 Dana (Ky.) 395; Benningfield v. Reed (1847) 8 B. Mon. (Ky.) 102; Day v. Kerr (1842) 7 **Mo.** 426 (where the appointment was made with the infant's assent); Hughes v. Pritchard (1910) 153 **N. C.** 135, 138 Am. St. Rep. 649, 69 S. E. 3 (where the court says that the judgment will not be vacated or set aside for irregularity when the rights of bona fide purchasers for value, without notice, have intervened); Robb v. Irwin (1846) 15 **Ohio,** 689 (involving, as did also the two following cases, a proceeding by an administrator to sell land for the payment of debts under a statute requiring that the heirs should be made parties, but not prescribing the manner in which they should be made parties); Sheldon v. Newton (1854) 3 **Ohio** St. 494; Snevely v. Lowe (1849) 18 **Ohio,** 368 (where one infant was not named in the petition, and the guardian was appointed for minor heirs without naming them); Benson v. Cilley (1858) 8 **Ohio** St. 604 (proceeding to sell land for the payment of debts under a statute specifying the manner of service, the court holding that the earlier cases treated the proceeding as quasi in rem, and that its nature had not been changed by the later statute); Paulin v. Sparrow (1915) 91 **Ohio** St. 279, 110 N. E. 528 (suit to quiet title, in which guardian's answer was not filed until the infant had been served, and the infant made no objection to the premature appointment or to the filing of the answer); Greenlaw v. Kernahan (1857) 4 Sneed (**Tenn.**) 379 (suit in which title to land was devested and in which guardian was appointed before service of process, but accepted the appointment and appeared after the infant was served and assumed the trust assigned to him); McAnear v. Epperson (1881) 54 **Tex.** 220, 38 Am. Rep. 625 (suit involving title to land); Alston v. Emmerson (1892) 83 **Tex.** 231, 29 Am. St. Rep. 639, 18 S. W. 566 (partition suit).

The proceedings have been held void when attacked in a collateral action in New York L. Ins. Co. v. Bangs (1881) 103 U. S. 435, 26 L. ed. 580 (involving suit to cancel an insurance policy, the court laying stress on the fact that it was to enforce a purely personal demand); Holliday v. Miller (1901) 28 **Ind.** App. 121, 62 N. E. 291 (the infant not having been named in the petition or brought into court); Shaw v. Gregoire (1867) 41 **Mo.** 407 (partition suit); Westmeyer v. Gallenkamp (1899) 154 **Mo.** 28, 77 Am. St. Rep. 747, 55 S. W. 231 (partition suit in which service was defective); McMurtry v. Fairley (1906) 194 **Mo.** 502, 91 S. W. 902 (defective service in partition suit); Moore v. Starks (1853) 1 **Ohio** St. 369 (suit to foreclose mortgage); Finley v. Robertson (1882) 17 **S. C.** 435 (suit to sell land of a decedent for the payment of debts in which the infants, though not served with summons, accepted service, but in which a guardian inclined to be antagonistic to their interests was appointed without notice); Whitesides v. Barber (1885) 24 **S. C.** 373 (partition suit in which infant not summoned attempted to accept service); Tederall v. Bouknight (1886) 25 **S. C.** 275 (proceeding in probate court to partition land, in which guardian was appointed without notice to the infant of the proceeding or the appointment, the court saying that when these facts appeared from the record, the record was not regular on its face, so as to be immune from collateral attack); Helms v. Chadbourne (1878) 45 **Wis.** 60 (defective service in suit to foreclose equity of redemption).

In Good v. Norley (1869) 28 **Iowa,** 188, a statute provided that on an application by an administrator for the sale of real estate for the payment of debts, such notice as the court might prescribe must be given to all persons interested. Two of the four judges held in a collateral action that there was no warrant for the appointment of a guardian ad litem for an infant until the infant was served with process or was in court in person, and therefore that an appearance and answer by a guardian ad litem did not give the court jurisdiction of the person of the infant. They accordingly

voted to reverse a decree upholding the sale, but the decree was affirmed by an equally divided court, one judge voting to affirm on the ground that the court had jurisdiction, and the other on the ground that the action was barred by limitation.

Under a statute under which the appointment might not be made until after the required service of the notice in the action, it was held in Rice v. Bolton (1905) 126 **Iowa**, 654, 100 N. W. 634, 102 N. W. 509, that while the appointment should not be made until jurisdiction had been acquired by completed service, the appointment in an administrator's proceeding to sell land after service on the infant, but before the day he was notified to appear, did not render the judgment void when attacked collaterally, as the appointment of the guardian was not jurisdictional and its entire omission would have been an irregularity which would not have rendered the judgment void.

Where the notice served on infant defendants in a foreclosure suit fixed a date for their appearance long prior to the date of the service, it was held in a suit to quiet title that the court was without jurisdiction and without authority to appoint a guardian ad litem; also that an acknowledgment of service by the mother of the infant, made after the return day, did not confer jurisdiction. Cummings v. Landes (1908) 140 **Iowa**, 80, 117 N. W. 22.

In Shaefer v. Gates (1842) 2 B. Mon. (**Ky.**) 453, 38 Am. Dec. 164, the court said that the rule that the appointment without service was a mere irregularity, not rendering the proceedings void when attacked collaterally, did not apply where the guardian never accepted the trust or acted as such, and that in such case the judgment rendered without service of process was void.

Allsmiller v. Freutchenicht (1887) 86 **Ky.** 198, 5 S. W. 746, involved the effect of a decree in a suit by an executor against the widow and infant children of the decedent to have his account settled. The infants were not served with process, but a guardian ad litem was appointed for them. The widow filed three answers, the last of which she made a cross petition against the infants, who were then summoned and a guardian appointed for them. It was held in a collateral action that as nothing was sought personally against the infants by the petition or the first two answers of the widow, and as they were not summoned, the appointment of the guardian was void and did not bring them before the court, and no judgment could have been rendered against them, and that they were therefore bound only with respect to the matters set up in the cross petition.

In Bondurant v. Sibley (1861) 37 **Ala.** 565, where service was made personally on an infant three or four years old, contrary to the rules of practice, it was held that while the appointment of the guardian ad litem without any previous valid service was irregular, it was voidable merely, and not void, and hence that a new appointment could not be made without setting aside the first appointment.

In Frierson v. Travis (1863) 39 **Ala.** 150, it was intimated that this rule that an appointment without notice to the infant is merely irregular, and not void, was applicable to the probate court, but a decree settling the account of a general guardian was held void because the guardian ad litem never accepted the appointment.

In Phelps v. Heaton (1900) 79 **Minn.** 476, 82 N. W. 990, it was held that where service did not precede the appointment of a guardian the judgment was not merely voidable but void, so as to be open to attack by motion to vacate, regardless of the delay in making such motion.

Where service in a partition suit was defective, it was held in Walter v. De Graaf (1887) 19 Abb. N. C. (**N. Y.**) 406, that the purchaser's title was defective though a guardian ad litem was appointed.

Where, in the proceeding for the sale of land as assets in the hands of an administrator, brought in 1856, a guardian ad litem was appointed for infant heirs upon whom process was not served, it was held in Hare v. Hollomon (1886) 94 **N. C.** 14, that the

judgment, if irregular, was not therefore a nullity, but remained in force until set aside or reversed.

Where lands in which infants had an interest were sold in two suits in which guardians ad litem were appointed, but in one of which there was no service on the infant, and in the other of which the service was defective, it was held in Smith v. Gray (1895) 116 N. C. 311, 21 S. E. 200, that the proceedings were irregular but not void, and might be ratified by the infants after coming of age.

In North Carolina a judicial sale will not be disturbed to the prejudice of an innocent purchaser because an infant party represented by a guardian ad litem was not served with summons (Rawls v. Henries (1916) 172 N. C. 216, 90 S. E. 140), and the failure to serve the infant prior to the appointment is cured so as to prevent a setting aside of the sale by the subsequent service on the infant and the guardian (Carraway v. Lassiter (1905) 139 N. C. 145, 51 S. E. 968; Dudley v. Tyson (1914) 167 N. C. 67, 82 S. E. 1025).

In Ivey v. Ingram (1867) 4 Coldw. (Tenn.) 129, it was held that where process was not served on an infant defendant until after the appointment of a guardian ad litem and the filing of an answer by him, a sale of the land of the infant was not merely irregular and voidable, but absolutely void; and that the sale was incapable of confirmation.

Where in a partition suit no service was made on an infant defendant, an appearance by a guardian ad litem appointed by the court to defend for her did not give the court jurisdiction, and the whole proceedings were coram non judice. Chambers v. Jones (1874) 72 Ill. 275.

In addition to the foregoing cases a great many of the cases cited above as holding process or notice necessary speak of the proceedings in the absence of such process or notice as null, void, without jurisdiction, or coram non judice. As the attack in those cases was direct, and not collateral, this probably means no more than that the proceedings were erroneous. A. McT.

ANNA E. WOOD
v.
NORTH CAROLINA PUBLIC SERVICE CORPORATION, Appt.

North Carolina Supreme Court—December 5, 1917.

(174 N. C. 697, 94 S. E. 459.)

Street railway — passenger hit by automobile — liability.

1. The negligence of the driver of an automobile in striking a passenger alighting from a street car does not relieve the street car company from liability for the injury if it was also negligent.

[See note on this question beginning on page 953.]

Appeal — nonsuit — evidence to be considered.

2. In passing upon the question of error in denying a nonsuit, the appellate court must accept plaintiff's evidence and construe it most favorably to him, and cannot base its judgment on defendant's evidence, or draw inferences favorable to him.

Negligence — contributory negligence — effect.

3. One guilty of contributory negligence cannot hold another liable for his injury, because his negligence is a proximate cause of the injury, and there can be no contribution among tort-feasors.

Carrier — passenger alighting from street car — duty.

4. A street car company owes to a passenger about to alight from its car a high degree of care to protect him from and warn him of danger from vehicles that may be passing in the

street, to see that he alights in safety.

Same — evidence of negligence.

5. A street car company may be found negligent in permitting a passenger to alight upon a roadway along which automobiles are passing at the rate of one or two a minute, immediately in front of such machine, so that he is immediately hit and injured by it, without any care on the part of the conductor to ascertain whether or not the passenger can alight in safety.

Appeal — presumption as to submission of issues.

6. The appellate court must assume that issues supported by evidence were submitted to the jury when the charge is not in the record.

Trial — negligence as matter of law.

7. One alighting from a street car in front of a moving automobile cannot be said to be negligent as matter of law if he testifies that, immediately before attempting to alight, he looked for an automobile and failed to see one.

(Walker and Brown, JJ., dissent.)

APPEAL by defendant from a judgment of the Superior Court for Guilford County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **Allen, J.**:

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant street railway company. On July 5, 1916, the plaintiff became a passenger on one of the defendant's street cars for the purpose of going to her home, west of the city of Greensboro, and when the car reached a point nearly opposite Field's store, about one-half mile west of the corporate limits of Greensboro, it stopped at a regular stopping place and at the destination of the plaintiff, for the purpose of allowing passengers to alight. The plaintiff, while in the act of alighting from the car, or immediately after she had reached the ground, was stricken by an automobile running at from 25 to 30 miles an hour, and was seriously injured. The automobile was running in an opposite direction from the car. The evidence of the defendant tended to show that the plaintiff was injured 10 or 12 feet from the street car, while she was attempting to pass to the sidewalk. There was also evidence on the part of the plaintiff that if she had been permitted to get out on the other side of the street car, she could have stepped from the car in safety to a cinder path. At the conclusion of the evidence there was a motion for a judgment of nonsuit, which was denied, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Messrs. **Jerome, Scales, & Jerome** for appellant.

Messrs. **G. S. Bradshaw** and **John A. Barringer** for appellee.

Allen, J., delivered the opinion of the court:

The only question presented by the appeal from the refusal to nonsuit the plaintiff is whether there is any evidence fit to be submitted to the jury of negligence on the part of the defendant, and in the consideration of this question we must accept the evidence of the plaintiff, and construe it in the light most favorable to her. We are not permitted to base our judgment on the evidence of the defendant, nor can we draw the inference, favorable to the defendant, that the automobile was running on the extreme right side of the road, and turned suddenly and struck the plaintiff, as no witness testified that the automobile changed its course, and one witness, Boyles, testified, "The automobile was coming along by the side of the

car." We cannot act upon the statement in the defendant's brief that the evidence shows that the automobile turned suddenly and struck the plaintiff, in the absence of evidence of the fact, and it can only be inferred upon the presumption that the driver of the automobile was obeying the law by being on the right-hand side of the road, when all the evidence shows she was violating the law by exceeding the speed limit.

The evidence is irreconcilable; the plaintiff testifying that "as soon as I struck the ground the automobile got me," "I had just cleared the car when it got me," "I just barely cleared the car to get down to the street," "I hadn't made any steps," and "I just stepped off the car and hadn't taken a single step," and the witnesses for the defendant that she was 10, 12, or 15 feet from the car when she was stricken. Giving, therefore, to the evidence a construction favorable to the plaintiff and accepting it as true, as it is our duty to do, it shows that the defendant permitted the plaintiff, a passenger, to alight on a roadway, along which one or two automobiles were passing each minute, immediately in front of an automobile moving rapidly, without warning, and when the conductor of the defendant, who knew of the dangers of the road, did not look to see if any danger was approaching. Is this evidence of negligence?

Appeal—nonsuit—evidence to be considered.

The negligence of the driver of the automobile is established by the evidence, but this does not relieve the defendant from liability, if it was also negligent, as there may be two proximate causes of an injury; and where this condition exists, and the party injured is not negligent, those responsible for the causes must answer in damages, each being liable for the whole damage, instead of permitting the negligence of one to exonerate the other. It is in the application of this principle, it is held, except where the doctrine of comparative negligence prevails, that the plaintiff cannot recover if his own contributory negligence concurs with the negligence of the defendant in causing the injury, because as his negligence is one of the proximate causes, he, as well as the defendant, is liable for the whole damage, and as there is no contribution among tort-feasors, he cannot recover anything from the defendant. "There may be more than one proximate cause of an injury, and it is well established that when a claimant is himself free from blame, and a defendant sued is responsible for one such cause of injury to plaintiff, the action will be sustained, though there may be other proximate causes concurring and contributing to the injury. In 21 Am. & Eng. Enc. Law, 2d ed. 495, it is said: 'To show that other causes concurred in producing or contributing to the result complained of is no defense to an action of negligence. There is indeed no rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of plaintiff's injuries.' Again, on page 496, it is said: 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.'" Harton v. First City Teleph. Co. 141 N. C. 461, 54 S. E. 299, approved in Harvell v. Weldon Lumber Co. 154 N. C. 262, 70 S. E. 389, where it was pointed out that the difference of opinion in the Harton Case was only as to the application of the principle to the facts in that record.

Same—contributory negligence—effect.

Street railway—passenger hit by automobile—liability.

We must then inquire as to the negligence of the defendant, and here the decision depends on whether the defendant owed a duty to the plaintiff, who was a passenger on its car, and who was injured while alighting, or immediately thereafter, according to her evidence and whether it failed in the performance of this duty. There is a con-

flict of authority as to the obligation of the street railway after a passenger has left the car, the courts of Alabama and Kentucky holding that it must provide a reasonably safe place and way (Montgomery Street R. Co. v. Mason, 133 Ala. 529, 32 So. 261; Louisville R. Co. v. Mitchell, 138 Ky. 190, 127 S. W. 770), and others that, as the company has no stations and no control over the streets, its obligation should be co-extensive with its control, and that the relation of carrier and passenger ceases when the passenger has safely alighted. Clark Acci. Law. 13; Creamer v. West End Street R. Co. 156 Mass. 321, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; Chattanooga Electric R. Co. v. Boddy, 105 Tenn. 669, 51 L.R.A. 885, 58 S. W. 646, 8 Am. Neg. Rep. 555; Schley v. Susquehanna & N. Y. R. Co. 19 Ann. Cas. 1020, and note (227 Pa. 494, 136 Am. St. Rep. 906, 76 Atl. 207); Stewart v. Omaha & C. B. Street R. Co. Ann. Cas. 1912B, 863, and note (88 Neb. 209, 129 N. W. 440).

The weight of authority seems to be with the latter view, and also that, in any event, the railway must exercise the highest degree of care, and must afford the passenger an opportunity to alight in safety. The court says in Anderson v. Citizens' Street R. Co. 12 Ind. App. 197, 38 N. E. 1109, 3 Am. Neg. Cas. 60. "There is a marked difference between the duties the law imposes upon those who operate street railways and those who operate ordinary steam railways. The latter usually run upon schedule time and have fixed places for receiving and discharging passengers. There is a higher degree of care imposed upon street railways than upon ordinary steam railways. When their cars stop for passengers to alight, it is the duty of their servants to stop long enough for the passengers to alight, and to see that the car does not start again while anyone is attempting to alight or exposed to danger."

In Smith v. St. Paul City R. Co. 32 Minn. 3, 50 Am. Rep. 550, 18 N. W. 827, 4 Am. Neg. Cas. 220: "The defendant was a carrier of passengers for hire, owning and controlling the tracks and cars operated thereon. It is therefore subject to the rule applicable to passenger carriers. . . . As respects hazards and dangers incident to the business or employment, the law enjoins upon such carrier the highest degree of care consistent with its undertaking, and it is responsible for the slightest negligence. . . . This rule extends to the management of the cars and track, and to all the subsidiary arrangements necessary for the safety of passengers."

In Richmond City R. Co. v. Scott, 86 Va. 907, 11 S. E. 405, 7 Am. Neg. Cas. 34: " 'Passenger carriers bind themselves,' says a learned author, 'to carry safely those whom they take into their coaches, as far as human care and foresight will go,—that is, to the utmost care and diligence of very cautious persons.' . . . And in Norfolk & W. R. Co. v. Prinnell, 1 Va. Dec. 626, 3 S. E. 95, 7 Am. Neg. Cas. 12, this court said: 'The implied contract to carry safely includes the duty of giving the passengers reasonable opportunity to alight in safety from the train, and a violation of this part of the company's duty is culpable negligence, for which an action will lie.' In Wharton on Negligence, § 649, it is laid down that 'When a danger approaches it is the duty of the officers of the road to notify passengers, so that they can take steps to avoid it; and failure to give such notice is negligence. So, also if there is a dangerous place at the landing, it is the duty of the conductor to warn those about stepping out,' 'and' . . . 'he must give notice to all if any danger in alighting is probable.' "

In Cartwright v. Chicago & G. T. R. Co. 52 Mich. 606, 50 Am. Rep. 274, 18 N. W. 380, 4 Am. Neg. Cas. 40, Cooley, Ch. J., says: "If a car in which there were passengers was

not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or to move the car to a more suitable place."

These authorities show the extent to which the liability of carriers of passengers goes in cases like the present, and by this liability street or horse railways, as well as other classes of carriers, are bound. In Citizens' Street R. Co. v. Twiname, 111 Ind. 591, 13 N. E. 56: "A railway company is a common carrier of passengers as well as of freight. A street railway company is also a common carrier of passengers, with duties and responsibilities entirely analogous to, and substantially the same as, those of a railway company in the carriage of passengers. Both are railway companies within the usual meaning of that term, and the same general rules and degree of care in the transportation of passengers must be observed by each. . . . Carriers of passengers are required to exercise the utmost skill and foresight in the performance of their duty as such carriers. . . . This is the equivalent of requiring that the highest degree of care and skill shall be used in the transportation of passengers, as the rule is stated by many of the decided cases."

In Topeka City R. Co. v. Higgs, 38 Kan. 383, 5 Am. St. Rep. 754, 16 Pac. 674: " 'All possible skill and care' implies that every reasonable precaution in the management and operation of street cars be used to prevent injuries to passengers; it means good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. All possible foresight means more than this; it means anticipation, if not knowledge, that the operation of street cars will result in danger to passengers, and that there must be some action with reference to the future,—a provident care to guard against such occurrences,—a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so."

In Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner), 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557, after speaking of the duty of a street railway to deliver its passengers in safety: "It was not a duty to a person solely because he was in danger of being hurt, but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger."

And the author in 4 R. C. L. p. 1047: "The general rule just considered, that, in the case of a carrier having exclusive control or occupation of its tracks and stations, one traveling may still retain the status of a passenger after alighting from the carrier's vehicle, is, from the nature of things, not applicable to carriers not so situated, as, for instance, in the case of persons traveling on street railway cars. While a person attempting to alight from a street car remains a passenger until he has accomplished the act of alighting in safety, and the carrier owes to the passenger attempting to alight that very high degree of care and attention which the law puts upon it generally to the end of promoting the safety of its passengers, and will be liable for negligent injury to the passenger while so alighting, it is the generally accepted view that one who has alighted from a street car and is in safety upon the highway is no longer a passenger."

Carrier—passenger alighting from street car—duty.

If, therefore, the defendant owed to the plaintiff a high degree of care, and if it was its duty to protect her from and warn her of danger, and to see that she alighted in safety, has there been a breach of that duty? The question presented to us by the motion for judgment of nonsuit is within even narrower limits, as the law commits to the

jury the duty of saying how the fact is, and leaves to this court no power or jurisdiction, except to decide whether there is any evidence of a breach of duty, fit to be considered by the jury, and enjoins upon us that we give to the evidence the construction most favorable to the plaintiff, and that she is entitled to the benefit of every reasonable inference arising upon the evidence.

The evidence is conflicting, and that of the plaintiff, standing alone, would raise serious doubts in our minds, if we were sitting as jurors, as to her right to recover; but we cannot give her the benefit of the legal principles we have declared, which apply as of right to all litigants, and say there is no evidence that the defendant failed to protect and warn her, and to give her the opportunity to alight from its car in safety. One witness testified that 60, and another 120, automobiles passed the place of injury in an hour, and all the evidence shows that the plaintiff alighted on a much-traveled roadway. The plaintiff testified she was struck by the automobile as soon as her feet were on the ground. Her language is: "As soon as I struck the ground the automobile got me." "I just had cleared the car when it got me." "I just barely cleared the car to get down to the street."

A witness for the defendant, who was a passenger, testified: "The first I saw of the automobile was when the car stopped. I was looking out the window. It had not quite got to the street car."

The conductor in charge of the car was on the platform with the plaintiff, according to her evidence, and he testified: "I did not look specially to see whether an automobile was coming when Mrs. Wood got off the car."

Is it not a reasonable inference from this evidence that the plaintiff was permitted to alight on a roadway along which automobiles were passing at the rate of one or two a minute, immediately in front of a rapidly moving automobile, and that if the conductor had looked, and had taken the slightest precaution, he could have seen the approaching automobile and the danger to the plaintiff, and could have averted the injury?

Same—evidence of negligence.

The plaintiff must have been in the act of getting off the car, if her evidence is true, at the time the passenger saw the automobile not quite to the street car, and if the conductor had looked, would he not have seen the same thing, and that the automobile was not on the side of the roadway away from the car, but was rushing down on the plaintiff, and can it be said, if these facts are true, that the defendant afforded the plaintiff the opportunity to alight in safety? If so, there was evidence of a breach of duty on the part of the defendant which was the cause of the plaintiff's injury, and the case was properly submitted to the jury.

There is evidence of contributory negligence upon the part of the plaintiff, and we must assume that this was submitted, as the charge is not sent up as a part of the record.

Appeal—presumption as to submission of issues.

It cannot be declared as matter of law that she was guilty of such negligence that her right of action would be barred because she testified that she was paying attention when she got off, and that immediately before attempting to alight she looked for an automobile, and did not see one. If the inquiry is made as to why the conductor should be held to the duty of seeing the automobile when the plaintiff testifies that she looked and did not see one, the answer is that the automobile was running about 800 yards a minute, and that she might well have looked and not see it, as she was preparing to alight, and the conductor could have seen it while she was alighting, as enough time must have elapsed for the automobile to have run 200 or

Trial—negligence as matter of law.

300 yards from the time she prepared to get off the car until she actually reached the ground. There is other evidence in the record which we have not referred to, because we have not thought it necessary that the motorman in front of the car could have seen the approaching automobile one-half mile distant.

We have carefully considered the record, and are of opinion that the judgment must be affirmed.

No error.

Clark, Ch. J., concurs in all that is so well said in the opinion of the court, and upon the additional ground that the defendant did not give the plaintiff opportunity to alight upon the sidewalk on the opposite side of the car, where she would have been perfectly safe. The evidence is that the track on the right-hand side of the street going west, in which direction the car was moving, ran close to the sidewalk, and that the plaintiff could have stepped off the step of the car upon this sidewalk. This would have been entirely safe. On the contrary, the conductor put her off on the left-hand side of the car, in the middle of the street, which she thus had to cross where two cars per minute, on an average, were running at a high rate of speed, and put her down immediately in front of a car which was approaching at the rate of 30 to 35 miles an hour, according to defendant's conductor. The defendant contends that it was unsafe to put her off on the right-hand side of the street where the track was close along the sidewalk, because the telegraph poles were on that side, as if telegraph poles 60 yards apart, and standing still, would be more of a menace to a passenger getting off from a standing car than putting her off on the left-hand side in the maelstrom of moving cars, shooting by two to the minute, or "at least 100 per hour," going at a rapid rate on an asphalt roadbed,—the smoothest and best road in the state (from Greensboro to High Point),—and immediately in front of the car which struck the plaintiff, and which, according to the defendant's evidence, was moving 35 miles per hour, which was nearly 800 yards a minute.

Walker, J., dissenting:

It will be necessary to a proper understanding of the case, as we view it, that we should make a brief rehearsal of the facts: The action was brought by plaintiff to recover damages on account of personal injuries received by her, after she had alighted from one of the defendant's street cars, by being run over and dragged by an automobile driven by Mrs. H. F. Coleman, of Baltimore, Maryland. The plaintiff, on the 5th day of July, 1916, became a passenger on one of the defendant's street cars for the purpose of going to her home west of the city of Greensboro, and when the said street car had reached a point upon its run nearly opposite Field's store, and being about one-half mile west of the corporate limits of the city of Greensboro, it stopped for the purpose of allowing passengers to alight therefrom, at a regular stopping place for defendant's cars; it being the destination of plaintiff upon this occasion. The plaintiff alighted from the street car, when she was immediately stricken by an automobile driven by Mrs. H. F. Coleman at a very high rate of speed, receiving injuries for which this action was brought. The automobile, at the time it ran over the plaintiff, was going east and in an opposite direction to that of defendant's car, and was running at the rate of 25 to 35 miles an hour. Mrs. Coleman, who was driving the automobile, not only was violating the law as to the excessive speed at which she was running, but was driving the same upon the left-hand side of the road, in violation of the law. If the plaintiff did not see the automobile when she looked straight ahead, the line of vision being free from any

obstruction for a long distance, it must necessarily have been on the other side of the road, and it could not have appeared 6 feet from the side of the car when first seen by plaintiff's witnesses without having been suddenly veered from its course. The evidence shows that the defendant's track beyond the corporate limits of the city of Greensboro is located on the right-hand side of the public highway going west, and to the left of the street car track going west is a well-constructed way, about 30 feet wide, paved with asphalt, for the use of pedestrians and various kinds of vehicles, including automobiles. It had been the custom and rule of defendant for twelve years to discharge its passengers from its car going west at this point, on the left-hand side of said car, and this custom or rule was known to plaintiff prior to the time of her injury upon this occasion. The place where plaintiff alighted was paved with asphalt, and was smooth, while upon the right-hand side of the track there was a ditch and poles, except at one point directly in front of Field's store, where there was a sidewalk running a short distance, paved with cinders, and in wet weather a passenger getting off on that side would have to step in the mud. The accident happened about 4 o'clock P. M., and at this point a person could see both east and west along the highway a distance of one-half mile. Plaintiff was familiar with the conditions there existing at the time of her injury, having on numerous occasions prior to her injury gotten off defendant's cars at that stopping place. At the close of plaintiff's evidence, defendant moved to dismiss the action, and for judgment as in case of nonsuit, under the statute, and this motion was renewed at the close of all the testimony. The motion being refused, defendant appealed to this court.

It is a familiar principle that a defendant in an action of this kind can only be made liable in damages for a breach of duty to the plaintiff; that is, of a duty which was owing to her at the time she was injured by the automobile. If there was no duty owing to the plaintiff, or no breach of a duty, it follows that there is no liability. A street car company has no right of way, save that upon which its tracks are laid, and for this reason the courts have generally held that where a car stops in public streets or other highways, for the purpose of discharging a passenger, the relation of carrier and passenger is terminated as soon as the latter alights from the car, for he is then not upon the premises of the company, but upon the street, over which the company has no control. It may be true, as argued, that the carrier is not allowed to discharge passengers at a place where the street is out of repair and in such a dangerous condition that to alight from the car upon the highway would be perilous, but, however this may be, it is not the case, when the street is in good condition at the place of alighting, for then the passenger, as soon as he leaves the car, occupies the position of a traveler on the highway, with the same relative rights and responsibilities. It has been so decided in several cases by courts of the highest authority. Speaking of a passenger who had just alighted from a car on a public highway, the court, in Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391, said: "He was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the

car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or to leave a train have the relation and rights of passengers in leaving or approaching the cars at a station. Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700, 3 Am. Neg. Cas. 748; McKimble v. Boston & M. R. Co. 139 Mass. 542, 2 N. E. 97, 3 Am. Neg. Cas. 823; Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 214, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373, 3 Am. Neg. Cas. 843. But one who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger."

In that case, the passenger was killed immediately after leaving the car by another car of the same line, running in an opposite direction upon a parallel track, so that this case is stronger for this defendant than was the case cited for the one there sued. Other cases to the same effect are Bigelow v. West End Street R. Co. 161 Mass. 393, 37 N. E. 367; Oddy v. West End Street R. Co. 178 Mass. 341, 86 Am. St. Rep. 482, 59 N. E. 1026; Chattanooga Electric R. Co. v. Boddy, 105 Tenn. 666, 51 L.R.A. 885, 58 S. W. 646, 8 Am. Neg. Rep. 555. It appeared in Oddy v. West End Street R. Co. supra, that the plaintiff, upon leaving the car, was stricken by a hose cart immediately upon reaching the ground, and before he had an opportunity to take a step after doing so. The court said: "Street car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or of being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger, and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning."

And in the Tennessee case, the court said: "If the passenger relation did not determine when the defendant safely alighted from the car, when would it end? Would it continue only while he was crossing the parallel track, or until he had reached a point of comparative safety on the far side of the street? Or if, after reaching the ground, he had directed his steps to the other side of the street, would it have continued until he had reached the pavement? We think that the Massachusetts supreme court was wise in adopting the rule that this relation terminated the moment the passenger descended to the street. This is a fixed point, free from all speculation or uncertainty."

The same doctrine is stated in a note to Duchemin v. Boston Elev. R. Co. 104 Am. St. Rep. at page 589, where it is said: "The instant a passenger steps or frees himself from the car on which he has been riding, he, for most purposes, ceases to be a passenger. 'The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from a car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or his safe passage from the car to the sidewalk. . . . One who steps from a street railway car to the street is not upon premises of the railway company, but upon a public street, where he has the same rights as every other occupier, and over which the company has no control.' "

In this case there is no evidence of any inherent defect in the street, or in anything over which defend-

ant had any control. If we do not adopt the principle of the cases which have been cited, it would be next to impossible for a street railway to operate its cars for the convenience and accommodation of the public. The decision in this case will result in a peculiar hardship to the defendant. The proximate cause of the accident was not attributable to the defendant, but to the recklessness of another which could not well have been foreseen. If it was not the sole cause, it was at least an intervening one, and still the proximate cause. There are physical circumstances which tended to show, and from them the inference is clearly deducible, as we have stated, that the automobile was not on the side of the road where the street car was just before it struck the plaintiff, and, therefore, that it must have been suddenly turned from its course and driven in the direction of the street car. The view to the west along the road was clear and unobstructed, and if it had been on the side where the street car was, the plaintiff was bound to see it when she looked, for plaintiff's witnesses showed that it would be in the line of vision, and she stated that it was not in sight. It was impracticable for the defendant to have prevented the collision with the plaintiff. It was not bound to anticipate that Mrs. Coleman would so suddenly, and in such a reckless manner, drive her automobile so near the street car and imperil the lives of passengers while they were alighting therefrom. It is also to be said that the law of this state provides: "In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and if it be necessary for the safety of the public, he shall bring said vehicle to a full stop. Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching any intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling." Gregory's Supplement, p. 446.

The defendant's servant in charge of the street car was not bound to anticipate a violation of the positive law by Mrs. Coleman, or anyone else. The laws of the road are well known, and if they had been obeyed, there would have been no injury to the plaintiff. There was a clear and wide space between the proper position of the automobile under the law and the place where the plaintiff alighted from the street car. If the automobile had stopped, or even had the speed been reduced, there would have been no accident. It was not a natural and probable consequence that the automobile would be driven so near the street car as to injure a passenger then in the act of alighting, and the conductor was not, in law, required to look out for such an unexpected event. 29 Cyc. 528. The law of the state regulating the speed and use of automobiles on highways was enacted for the very purpose of protecting persons when leaving street cars, without the necessity of their conductors to look in every direction before discharging passengers. The plaintiff had already looked in the direction of the approaching automobile when she had a clear and unobstructed view, and did not see it. She had a better chance to see it, if within the range of vision, than the conductor, because she was occupying the steps in the act of getting off the car, while he was behind her on the platform. It would seem that if the law required the conductor to look, which we deny, he was not required to do so in this instance, because he would not have seen as well as she could, and certainly not any better than she did. If she was where the automobile could have been seen, and did not see it, how

could he have seen it if he had looked in the same direction? There is no reason why the conductor should have helped the plaintiff off the car, for she was fully able to help herself. She said, "I just had cleared the car, when the automobile got me." If the rule we have laid down, and supported by well-considered precedents, is the correct one, we do not see how the street railway company can be liable, when she admits that she had cleared the car, and therefore was in the highway when she was struck by the automobile. But there is testimony from two disinterested witnesses, introduced by the plaintiff (and not by the defendant), who were in the car at the time, and looking out of the windows, that she was well in the street, one stating the distance from the car to be 6 feet, and the other that the street car was moving when the automobile first was seen, before it reached her, and that when she was struck by the automobile she fell "very near the middle of the street," and was lying there when the automobile passed her. One of these witnesses for the plaintiff testified that "passengers always get off on the left-hand side at this place," and the other that "it was the usual custom to do so." There was a width in the street of 25 feet. It will make the case appear more clearly for the defendant if we conclude by quoting the testimony of L. A. Jackson, a witness for the plaintiff: "The automobile was passing the window where I was sitting when I first saw it. It was running very fast. Mrs. Coleman was driving it, so I heard. I did not see the automobile strike Mrs. Wood. I think the automobile was 5 or 6 feet from the street car when it struck her. The street car track is off from the paved part of the road. When the automobile passed the street car, it was going straight ahead. After the automobile passed the window where I was seated, it would have to go about 25 feet before it struck Mrs. Wood. I heard Mrs. Wood scream, and looked out the window. She was about in the center of the paved part of the road, and was about the center when the automobile finally left her, about 30 feet from the car. I think the street car had just started when the automobile went by the window."

This proves that she was not by the side of the street car when she was stricken by the automobile, but from 20 to 30 feet, and, at the very nearest, at least 6 feet away from it. She was necessarily excited, and perhaps, rendered unconscious, and oblivious of the events by the sudden impact, whereas her witnesses were not under such disadvantages. If they give the true account of the matter, there is no negligence on the part of the defendant. But her own testimony places her on the ground when she was stricken, and that is sufficient to have severed the relation of carrier and passenger at the time of her injury.

The two persons who were on the car, and who testified most strongly against her, were her own witnesses, Mr. M. E. Boyles and Mr. L. A. Jackson, and they placed her near the middle of the street when the automobile left her. But in any view of the testimony, when construed most favorably for her, she was on the ground, and not on the premises of the company, when she was hurt, and one of her witnesses, Mr. L. A. Jackson, stated that the street car had started before she was stricken, and as the automobile passed the window where he was sitting. In this case, if the conductor had looked ahead, he would have seen no more than the plaintiff herself saw; and besides, after a conductor looks and fails to see, an automobile driven at a high rate of speed could reach the steps where passengers are being discharged before he could reach the platform again and assure them of

safety, and then let them off. And that was the reason for passing the law, and restraining the chauffeurs, as the legislature knew of the difficulty and danger in the other method.

Brown, J., concurs.

ANNOTATION.

Liability of street railway company to passenger struck by a vehicle not subject to its control.

This note is not concerned with cases where the injury to the passenger was caused by collision or contact between the street car and another vehicle.

It will be observed that the liability of the street railway company in the reported case (WOOD v. NORTH CAROLINA PUBLIC SERVICE CORP. ante, 942) is predicated upon its breach of duty to afford the passenger a safe place to alight. In this respect the case is quite like Norton v. Third Ave. R. Co. (1898) 26 App. Div. 60, 49 N. Y. Supp. 898, where a judgment was rendered against a street car company in favor of a passenger who, in alighting from a car, was struck and injured by a truck. The court said that if the plaintiff is to be believed,—and the jury have so concluded,—there was evidence from which they could infer that her injuries were the proximate result of the defendant's negligence, and were not entirely due to the negligence of the truck driver. Nor do we think that, upon the facts, it can be held as matter of law that plaintiff was guilty of contributory negligence. Upon reaching her destination she had the right to give the signal to stop the car; and if, as is now claimed, the place which she selected to get off was made dangerous by the proximity of a truck, it was all the more reason for the defendant's affording her reasonable time to alight, and enabling her to select a safe position in the street where she would not run the risk of being run down by a truck. It cannot be concluded because the place where she endeavored to alight happened to be dangerous from the fact that the truck was approaching in close proximity to the car, that therefore, she was bound to know the exact position of the truck, and to conclude that it was dangerous to alight, and that she was obliged to proceed on the car to some other point. As she testified, it was while she was in the act of alighting, and before an opportunity had been afforded her of stepping on the street, that the conductor gave the signal to start the car, and she was thrown off and into a position where she received her injuries from the truck.

In Oddy v. West End Street R. Co. (1901) 178 Mass. 341, 86 Am. St. Rep. 482, 59 N. E. 1026, however, where a street car, after the conductor had called the next street and a passenger had signaled her wish to get off, stopped between streets to admit of the passing of a hose cart on its way to a fire, and the passenger, thinking she had reached her stop, alighted unobserved by the conductor, as the car stopped, and was struck by the passing hose cart, it was held that the company could not be found negligent. The court said: "It was right for the motorman to stop the car where he did upon the approach of the fire apparatus. It is not customary or necessary to notify passengers of the cause of a stoppage occasioned by an obstruction in the street. The conductor, while bound to give the passenger an opportunity to leave at the stopping place which she had indicated to him as the point where she wished her journey to end, was not obliged to inform her that that place had not been reached, unless he knew that she was attempting to leave under a misapprehension, and it was his duty to attend to the very things to which he was attending, namely, to ascertain when the obstruction to the progress of the car should cease by the passing

of the approaching fire apparatus. Street car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car, of the danger of colliding with or of being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger, and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning."

Where a conductor failed to stop a car at a designated place, and the passenger, to alight, stepped out on the running board of the car while it was still moving, to attract his attention to give him a stop signal, and was struck by a wagon going in the same direction, it was held in Flynn v. Consolidated Traction Co. (1902) 67 N. J. L. 546, 52 Atl. 369, that the passenger was guilty of negligence; that the injury was not the natural result of the negligent act of the conductor in failing to stop the car at the place designated.

In several cases the injury has been caused by the passenger being thrown into the path of a vehicle by the sudden starting of the car while the passenger was attempting to board it or alight from it. The general question as to negligence of a street car company in starting a car while a passenger is boarding or alighting is, of course, beyond the scope of this note.

In McConnell v. Chicago R. Co. (1916) 199 Ill. App. 490, plaintiff testified that her injury was sustained by being thrown backward into the street under a wagon when the car she was attempting to board started with a jerk. It is stated in an abstract of the decision that it was a question for the jury whether the company was negligent in starting its car, whereby the plaintiff was thrown to the street and run over by a wagon; that the declaration sufficiently alleged causal connection between the negligence of the defendant street railroad company and the accident; that a street car conductor must exercise the highest degree of care and caution to see that an intended passenger in the act of boarding his car is not put in danger by the starting of the car.

So, the negligence of a railway company in suddenly starting a car was, in Parker v. St. Louis Transit Co. (1904) 108 Mo. App. 465, 83 S. W. 1016, held to be the proximate cause of injury to a passenger, sustained when alighting by being thrown to the street, under the feet of a mule which became unmanageable and drew the wagon wheels over her.

The negligence of servants of a railway company in starting a car was held in Fine v. Interurban Street R. Co. (1904) 45 Misc. 587, 91 N. Y. Supp. 43, the proximate cause of injury to a passenger when in the act of boarding the car by being thrown therefrom. "The gravamen of the complaint," observed the court, "was not . . . that the plaintiff sustained injury while in the act of boarding the defendant's car, because *it was suddenly started with a violent jerk*, but that he sustained his injury by a fall from the car, caused by its being started at all before he had been given reasonable opportunity to place himself in a position of security. This required no proof that the car was started with more than ordinary violence, since negligence of the defendant's employees was predicable of the fact alone that the car was started with unavoidable violence while the plaintiff was in the act of boarding it, if the defendant's employees could reasonably have apprehended that the starting of the car would render the plaintiff's position insecure. . . . Moreover, the negligence of the defendant's employees was an efficient and therefore a proximate cause of the plaintiff's injury. While upon the car, he was in a position of comparative security from injury by passing vehicles. Assuming, therefore, that the driver of the truck was also chargeable with negligence, it remains that but for the conduct of the defendant's employees in causing the car to start before the plaintiff had reached a position of safety, he would not have fallen, and so would have been immune

from injury by the truck. The concurrent negligence of the driver of the truck would not have the effect of absolving the defendant from liability for the negligence of its employees, if such negligence efficiently contributed to cause the plaintiff's injury, and for the predicament of negligence as an efficient or proximate cause of injury it is enough that, in the exercise of reasonable care, the person or persons charged with negligence might reasonably have foreseen that some injury would result from his or their conduct. It need not be shown that he or they could reasonably have anticipated the actual consequences."

Where a passenger about to enter a street car was thrown from the running board to the street, and injured by a runaway horse as the driver of the car whipped up suddenly to avoid collision with it, the court in South Side Pass. R. Co. v. Trich (1887) 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627, in reversing judgment for plaintiff, said that the direct and immediately producing cause of the passenger's injury was her being struck by a runaway horse and buggy over which the defendant company had no sort of control and for which it was not responsible. "The jolting from the car simply landed her on her feet and inflicted no injury. But another agency intervened which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question." J. D. C.

STATE OF WYOMING EX REL. C. W. SAMPSON, Plff. in Err.,
v.
CITY OF SHERIDAN et al.

Wyoming Supreme Court — January 21, 1918.

(25 Wyo. 347, 170 Pac. 1.)

Municipal corporation — licensing power — concrete contractor.

1. Statutory authority to raise revenue by a license tax on any business and regulate the same by ordinance does not confer power upon a municipality to license, for regulation, one engaged in the business of laying concrete sidewalks and pavements, and require from him a bond for the protection of his customers.

[See note on this question beginning on page 964.]

Constitutional law — police power — requiring bond of contractor.

2. The police power does not extend to requiring one contracting to lay concrete pavements to give bonds for the faithful performance of the work, and to protect customers against defects for a term of years.

Same — class legislation — discrimination.

3. Requiring a maintenance bond from one contracting to lay concrete sidewalks, while permitting other kinds of walks to be laid without bonds, is unconstitutional class legislation.

Same — freedom of contract.

4. The constitutional right to freedom of contract is infringed by an ordinance forbidding one, without license and giving of bond, to contract to lay concrete sidewalks.

Costs — against relator in mandamus.

5. A statute requiring costs in mandamus proceedings to be taxed against relator, if judgment is given for defendant, applies in case an application for mandamus to compel the issuance of a license to do business is denied because the ordinance requiring it is void.

ERROR to the District Court for Sheridan County to review a judgment dismissing a petition for a writ of mandamus to compel defendants to

issue a cement contractor's license to relator, and overruling a motion for new trial. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. **H. Glenn Kinsley** for plaintiff in error.

Mr. **H. N. Gottlieb,** for defendants in error:

Provisions of the act relating to cities of the first class confer the broadest powers to tax for revenue purposes and to regulate under the police power.

Dill. Mun. Corp. 5th ed. §§ 662, 665, 666, 1408 et seq.; 25 Cyc. 601 (II.) 602 (b); 22 Am. & Eng. Enc. Law, 2d ed. 929.

It is competent for a municipality, to which has been delegated the power to license, to annex any condition to the granting of a license which it deems proper.

25 Cyc. 622 E, title, Licenses; Rumford v. Boston Grocery Co. 111 Me. 116, 88 Atl. 394.

A municipal ordinance enacted under the police power is not invalid as unreasonable, unless it is clearly so, and every intendment will be indulged in favor of its validity.

Harter v. Barkley, 158 Cal. 742, 112 Pac. 556.

In licensing occupations a municipality is not required to tax or regulate all trades, but it may tax and regulate some, and refuse to tax or regulate others.

Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168; 25 Cyc. 606 et seq.

Blydenburgh, J., delivered the opinion of the court:

This was a suit in mandamus brought in the district court of Sheridan county in the name of the state, on the relation of one C. W. Sampson, to compel the city of Sheridan and its officers, mayor, and commissioners to issue to the relator a cement contractor's license.

The city of Sheridan is a city of the first class that has adopted a commission form of government, and acting, as is claimed, under the authority conferred by § 1681, Wyo. Comp. Stat. 1910, had passed and adopted the following ordinance: "Sec. 440. That no person, or persons, firm or corporation shall contract for or engage in the business of constructing any sidewalks, curb, crossing or other public improvement within the city of Sheridan, of concrete, cement, or artificial stone until he, they or it has obtained a 'cement contractor's' license therefor, and has given bond as provided herein. Such license shall be granted by the city council to those experienced in and competent to do such work, and upon written application showing such facts and that the applicant is twenty-one years of age, and upon payment of $15. The application should state the full name of the applicant, and if a firm, the names of all the members thereof, and if a corporation, the state where incorporated, together with the residence and chief office of such person, firm, or corporation. That any such person, firm or corporation obtaining such license shall give a bond in the amount of $1,000 to the city of Sheridan, with good and sufficient surety conditioned for the faithful performance of all such work in accordance with the plans and specifications therefor and the directions of the city engineer, and in accordance with the ordinances of the city, and guaranteeing all such work done by him under such license to remain in good condition for five years after the completion thereof, and protecting the city or any person or corporation who may be required by the city to have such work done, against any loss from defects in said work appearing during the said five years (injuries from fire or other unavoidable causes excepted)."

Section 1681, Comp. Stat. 1910, is included in chapter 121, which provides for cities of the first class, and reads as follows: "They shall have power to regulate, license and tax hotels, restaurants and eating houses; to define by ordinance who shall be considered transient merchants; to regulate, license and tax their sales, and those of auctioneers, bankrupt and dollar stores, and the

like; but the exercise of such power shall not interfere with sales made by any person required by law to sell real or personal property; to regulate, license and tax peddlers, plumbers, billposters, itinerant doctors, itinerant physicians and surgeons, junk and second-hand dealers, scavengers, pawnbrokers and persons receiving actual possession of personal property as security for loans; to prohibit pawnbrokers and junk or second-hand dealers purchasing or receiving from minors any property, and provide for the examination of premises of such persons for the purpose of discovering stolen property; to license and regulate employment offices and intelligence offices; to raise revenue by levying and collecting a license tax on any business, or calling, or any corporation, and regulate the same by ordinance; to regulate, license or prohibit circuses, menageries, theaters, theatrical exhibitions, shows and exhibitions of all kinds; but lectures on scientific, historical or literary subjects shall not come within the provisions of this section."

It is established by the evidence that the relator was engaged in the occupation of mixing and laying cement and concrete sidewalks, and had been engaged in such occupation for more than ten years, and is what is termed by the witnesses a "cement contractor;" that he was competent and skilled in this occupation, and that the work he had done was of a first-class character; that he made application for a license in due form, filing the same with the city clerk, and paid $15.50, the license fee prescribed by the ordinance, and 50 cents required to be paid for filing the application, which money was still retained by the city at the time of the hearing in the court below; that he did not give or tender any bond as provided in the ordinance; that he had applied for a bond to an agent of a surety company, but had been refused a bond because he could not make a sufficient showing as to his financial standing, he not being possessed of any real estate or bank account; that the minutes of the meeting of the city council of the city of Sheridan held March 29, A. D. 1915, contain the following: "The application of C. W. Sampson for cement contractor's license was read and action deferred until the filing of cement contractor's bond to cover same."

The trial court found that § 440, chapter 25, of the Compiled Ordinances of the City of Sheridan, requiring a license fee of $15 and $1,000 maintenance bond of persons engaged in the business of constructing sidewalks of concrete, cement, or other artificial stone, is void, and that the city of Sheridan had no authority to pass the same, and no authority to enforce the same, and that the relator has exhibited no clear right to the writ or the relief prayed for, or any relief, and rendered judgment dismissing the petition, and taxed costs in the amount of $8.45 against the relator, and $6 against the respondents. Both parties excepted to the findings and judgment in so far as they were adverse to the parties respectively, and a motion for a new trial, alleging that the judgment is not sustained by the evidence and is contrary to law, was filed on behalf of the relator, and was overruled, and the case is brought here on error by the relator.

The judgment of the lower court is not satisfactory to either party. The city, although it did not institute any proceedings in error, while not objecting to the judgment dismissing the petition, contends here that the ordinance declared void is a valid exercise of the powers conferred on the city by the statute, and should be declared to be valid and in full force and effect. While the relator is willing to have the ordinance sustained except as to the requirement of giving the bond, which he claims is an unreasonable regulation, and therefore void, and such provision being easily separated from the rest of the requirements

of the ordinance, it can be declared void and the rest of the ordinance can stand, and a cement contractor's license should be issued to him without his being required to furnish the bond as provided in the ordinance.

This is a case of first impression in this court, the particular questions involved never having before arisen in this state, and in fact the question of the right of a municipality, under the police power, to regulate the business and occupation of mixing and laying cement or concrete sidewalks has been before the courts, as found by an exhaustive search of the reported cases, in one case only, viz., Gray v. Omaha, 80 Neb. 526, 14 L.R.A.(N.S.) 1033, 114 N. W. 600. There is a sharp distinction between a license for revenue and one of regulation under the police power; the first named being a tax and construed under the principles and rules governing taxing powers, the latter under the police power looking toward the health, morals, safety, or general welfare of the community, and it is generally held that power to regulate occupations does not in itself give the power to license for revenue or tax the same occupations, or that a given power to license for revenue does not in itself give power to license for regulation under the police power.

The statute relied on in this case to give the power (Comp. Stat. § 1681, supra) specifically gives the double power to tax and regulate many businesses and occupations, but does not specifically mention the vocation or occupation, the subject of the ordinance under consideration; but it is claimed to be covered by the general clause contained in the section, viz.: "To raise revenue by levying and collecting a license tax on any business, or calling, or any corporation, and regulate the same by ordinance."

It is evident that the primary object of this clause is to give the power to tax for revenue occupations and callings, and the regulation is only incidental to the taxing power conferred; while it is equally evident that the object of the ordinance is the regulation of those following the occupation of laying concrete or cement sidewalks.

"The general rule deducible from the adjudications is that the power of the municipal corporation to impose a license tax, either as a police regulation or for revenue, is made to depend upon the reasonable construction of the charter provision, or the legislative act conferring the authority; and if it appears that such power has not been granted in unequivocal terms, invoking the rule of strict construction, the right to levy the tax will be denied." 3 McQuillin, Mun. Corp. § 987; also Dill. Mun. Corp. 5th ed. § 667; 17 R. C. L. p. 525.

The right to follow any of the common occupations of life, or to earn one's living in any innocent vocation without let or hindrance, is one of those inalienable rights covered by the statements in the Declaration of Independence, and secured to all those living under our form of government by the liberty, property, and happiness clauses of the national and state Constitutions. 6 R. C. L. p. 266, and cases cited; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Tolliver v. Blizzard, 143 Ky. 773, 34 L.R.A.(N.S.) 890, 137 S. W. 509; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; 12 C. J. 921, and cases cited in notes; Com. v. Beaulieu, 213 Mass. 138, 99 N. E. 555, Ann. Cas. 1913E, 1080. In the case of Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. supra, Justice Field, on page 757 of 111 U. S. said: "It has been well said that, 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this

strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith, Wealth of Nations, bk. I. chap. 10."

These rights, however, are, under the maxim, "Sic utere tuo ut alienum non lædas," subject to reasonable restraint and regulation as are required to protect the public health, safety, morals and general welfare, and this is the police power; but all such regulations, to be a valid exercise of the police power, must tend "in some degree towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose." Tolliver v. Blizzard, 143 Ky. 773, 34 L.R.A.(N.S.) 893, 894, 137 S. W. 509, supra; 17 R. C. L. p. 542. "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." Lawton v. Steele, 152 U. S. 136, 35 L. ed. 388, 14 Sup. Ct. Rep. 500. "It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it. Because many men engaged in the calling persist in so conducting the business that the public suffers, and their acts cannot otherwise be effectually controlled, is no justification for a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public." Tolliver v. Blizzard, supra. "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof." 12 C. J. 929; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

The police power has been termed the "law of overwhelming necessity." Dunne v. People, 94 Ill. 120, 34 Am. Rep. 213. And even where the matter under consideration has been held a proper subject for regulation, all regulations must be reasonable and only go so far as are reasonably necessary to effect the legitimate object of the public protection sought. 12 C. J. 934. "There must be reasonable ground for the police interference, and also the means adopted must be reasonably necessary for the accomplishment of the purpose in view. So, in all cases where the interference affects property and goes beyond what is reasonable by way of interfering with private rights, it offends against the general equality clause of the Constitution; it offends against the spirit of the whole instrument." Bonnett v. Vallier, 136 Wis. 193, 202, 17 L.R.A.(N.S.) 486, 491, 128 Am. St. Rep. 1061, 116 N. W. 885. "A municipality has power to enact reasonable ordinances only, and that the court will annul ordinances which are unreasonable, illegal, or repugnant to law is a doctrine uniformly sustained. Jones v. Sanford, 66 Me. 585; State v. Robb, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275." State v. Starkey, 112 Me. 8, 90 Atl. 431, Ann. Cas. 1917A, 196,

198. "A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals, or general welfare. A statute cannot, under the guise of the police power, but really to effect some purpose not within such power, arbitrarily interfere with a person or a property right. The statute under consideration unnecessarily interferes in several particulars with that liberty of person and property guaranteed by the Constitution." People v. Ringe, 197 N. Y. 143, 149, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474. And such regulations must not be such as to discriminate between persons engaged in the same or like vocations, or they will be void as "class legislation." People v. Weiner, 271 Ill. 74, L.R.A.1916C, 768, 779, 110 N. E. 870, Ann. Cas. 1917C, 1065; 28 Cyc. 370, 390.

Viewing the ordinance in question in the light of the above principles, we are constrained to hold that it is unconstitutional and void, because: First, that the vocation of cement contractor is not a proper subject of police regulation, not affecting either the health, morals, safety, or welfare of the public generally, so as to be a necessary subject of regulation; second, that no express power to regulate this vocation is conferred upon the city, and none can necessarily be implied from the powers granted; third, that were the power given the regulations required are unreasonable, especially in requiring a maintenance bond to run five years; fourth, that the ordinance is discriminatory and class legislation in that it requires a fee and bond from one laying concrete or cement sidewalks, and requires neither from those laying sidewalks composed of asphalt, granite, vitrified brick, or any other hard and incombustible material. As said in Gray v. Omaha, 80 Neb. 526, 14 L.R.A.(N.S.) 1033, 114 N. W. 600: "It should not be sustained, unless vitally necessary to the exercise by the city of the power to designate the material and manner of construction of its walks. No adequate reason why it is essential to the exercise of this power is pointed out in the argument of the defendant; and we have been unable to conceive one."

The other ordinances of the city of Sheridan introduced in evidence provide (§ 730) that no person shall construct, reconstruct or remove any sidewalk without first obtaining a permit from the city engineer, and prescribes that the permit shall be filed with a return thereon showing date of completion of the work; (§ 732) that the construction of all sidewalks and curb of artificial stone shall be constructed under the supervision of the city engineer or his inspector, and shall at all times be subject to the inspection of the city engineer or his inspector; (§ 720) that all sidewalks hereafter constructed, reconstructed, or placed within the city of Sheridan shall be of granite, cement, concrete, asphaltum, vitrified brick, or some other hard and incombustible material with stone or cement curb not less than 5 inches thick, and that all cement or concrete sidewalks shall be constructed in accordance with the specifications and rules in relation thereto, prepared by the city engineer, and approved by the city council, and making it unlawful to construct any such sidewalk in any other manner than in accordance with such specifications or rules, and also making it unlawful to construct any sidewalk of a different character than concrete or cement, except in accordance with specifications and rules applicable to such construction, prepared by the city engineer and approved by the city council.

It is seen that the power of the city to designate the materials, manner of construction, and inspection thereof has been exercised and provided for in ordinances that do not provide for a license fee and bond and cover sidewalks of all kinds of materials that are permitted to be used. The right of the relator to follow the business of lay-

ing concrete sidewalks and make his living that way cannot be disputed, and unless it can be shown that this work affects the public health, morals, safety, or welfare, the state would have no power to restrict or prohibit it, and no power to delegate such power to a municipality. But the legislature has not attempted to grant such power. We are not referred to any statute that gives the power to regulate the vocation of laying cement sidewalks, nor to any from which that power, by necessary implication, can be inferred. In the case of Gray v. Omaha, supra, it was decided that the ordinance was void because the right was not granted to regulate, and it is said (14 L.R.A.(N.S.) 1034): "The power to pass a city ordinance must be vested in the governing body by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purpose of the corporation; not simply convenient, but indispensable. Dill. Mun. Corp. 1st ed. § 55; Anderson v. Wellington, 40 Kan. 176, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719. Powers encroaching upon the rights of the public or of individuals must be plainly and literally conferred by the charter. State, Breninger, Prosecutor, v. Belvidere, 44 N. J. L. 350. The power to license must be plainly conferred, or it will not be held to exist. Dill. Mun. Corp. 1st ed. § 295; Dunham v. Rochester, 5 Cow. 462; Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; Mays v. Cincinnati, 1 Ohio St. 268; St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462."

Municipal corporation—licensing power—concrete contractor.

But it might as well have been held in addition that it was not within the police power of the state to grant such a power.

Counsel for the defendant city in his brief criticizes this Omaha case, and infers that the city of Omaha had no power to license occupations, either by way of raising revenue or police power regulations. The charter provisions governing the city of Omaha in this matter are found in Cobbey's Annotated Statutes of Nebraska 1907, vol. 2, § 7678, contained in chapter 37, under the heading "Municipal Corporations," "Omaha Charter," which is as follows: "The mayor and council shall have power to tax for revenue, license and regulate pawnbrokers, peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express companies and vendors of patents; such tax may include both a tax for revenue and license. The mayor and city council shall have power to raise revenue by levying and collecting a tax on any occupation or business within the limits of the city and regulate the same by ordinance. All such taxes shall be uniform in respect to the class upon which they are imposed; provided that all scientific and literary lectures and entertainments shall be exempt from taxation as well as concerts and all other musical entertainments given exclusively by the citizens of the city. It shall be the duty of the city clerk to deliver to the city treasurer the certified copy of the ordinance levying such tax and the city clerk shall append thereto a warrant requiring the city treasurer to collect said tax."

The power therein given is certainly as broad as the provisions of the Wyoming Statute, § 1681, supra.

The requirement of a maintenance bond of $1,000 to guarantee all work for a period of five years is certainly an unreasonable regulation and restriction upon those engaged in the vocation of mixing and laying cement sidewalks, and is not necessary for the safety or welfare of the public. Counsel for the city state that "the requirement of a bond in connection with a license is a usual, customary,

Constitutional law—police power—requiring bond of contractor.

and reasonable one." We cannot agree with this statement, and the cases referred to by counsel are few, and all or nearly all the cases cited under this statement in his brief were for a bond conditioned on the payment of a license tax or in licensing nonuseful businesses, running pool halls and the like, conditioned on obeying the city ordinances, regulations, hours, forbidding minors to frequent such places and the like, and in several of these cases referred to the bond was declared void beyond the term of the license. In fact the requirement of a bond guaranteeing work for five years is so unusual a regulation, accompanying a license of occupations under an alleged police power, that the only case that has come to our notice where it was attempted, beside the case at bar, was the case of Gray v. Omaha, 80 Neb. 526, 14 L.R.A. (N.S.) 1033, 114 N. W. 600, and in that case it is said: "The only question involved is the right of the city to compel the plaintiff to comply with the requirements of the ordinance as a condition of following his vocation. We think the restrictions imposed by the ordinance are not only unreasonably oppressive, but unnecessary to the exercise of the power to designate the material and manner of construction of such walks. Its provisions must prove onerous to the individual of slender means engaged in the vocation sought to be regulated. He is required to pay a fee of $10 for each year or fraction of a year, a not inconsiderable tax upon a small business. In addition to this, he is required to give annually a bond, upon which his sureties will be liable for a period of five years, so that, if he continues in business for that period of time, he will be compelled to furnish five distinct bonds, representing an aggregate liability of $10,000, which is obviously impracticable, unless the applicant be of substantial means and established credit."

In the Omaha ordinance the license fee was $10, and the bond was $2,000, instead of $15 and $1,000, respectively, in the Sheridan ordinance. This ordinance under consideration has the effect of preventing the following of his usual vocation by the relator, and others situated like him as regards the possession of property. It was shown by the evidence that the relator could not get a bond from a surety company, because he was not possessed of sufficient property, real and personal; and although the ordinance does not require a surety company bond, the evidence discloses that the officers of the city informed the relator that they preferred that kind of a bond to a personal one. And it can well be seen that the difficulty in securing a surety bond, because of the lack of property, to some considerable extent would operate against obtaining a proper personal bond to guarantee the good condition of a sidewalk for five years, perhaps after the principal had ceased to reside in the city.

Same—class legislation—discrimination.

It is clearly class legislation. The ordinance of the city permits sidewalks to be constructed of asphalt, granite, vitrified brick, and other hard and incombustible material, but requires no license or bond from those laying such sidewalks. While it is established from uniform authority that reasonable and necessary classification is permitted, without violation of constitutional provisions, "the classification must be reasonable in view of the object sought to be accomplished. The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation, and within the sphere of its operation, the statute must affect all persons similarly situated." State v. Sherman, 18 Wyo. 169, 176, 27 L.R.A.(N.S.) 898, 105 Pac. 299, Ann. Cas. 1912C, 819. And the uniform rule is stated by this court in the opinion by Justice Beard, in the case of State v. Le Barron, 24 Wyo. 519, on page 526, 162 Pac. 265, Ann.

Cas. 1918D, 998. "As to classifications which are permitted, and which do not violate constitutional provisions, it is the uniform rule that the reason for the classification must inhere in the subject-matter, and must be natural and substantial, and must be one suggested by necessity, by such difference in the situation and circumstances of the subjects as to suggest the necessity or propriety of different legislation with respect to them. 6 R. C. L. § 374. Or, as well stated in State ex rel. Richards v. Hammer, 42 N. J. L. 435: 'The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation.' That principle is fully sustained by the decision of the Supreme Court of the United States (Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431), where the decisions are cited and reviewed."

No reason why sidewalks constructed of asphalt, or other hard and incombustible material, are not as liable to deteriorate or crumble within five years as one laid of cement or concrete has been pointed out to us, and we do not conceive any, and imperfections in one kind would be as dangerous to the public as another. This ordinance is not an attempt to regulate a vocation as such, and therefore does not pretend that the vocation is one so connected with the health, safety, and general welfare of the public as requires restriction and regulation. A cement contractor is not prevented, under its provisions, without a license from mixing and laying cement and concrete, either on walks or for other purposes, on private property or any other place, except on sidewalks on the streets.

There is still another reason why this ordinance is void. It interferes with the free right to contract. The statutes and the other ordinances of the city of Sheridan require the property owner to either construct or pay the cost of the construction or repair of the sidewalks adjoining his property, and the evidence shows that the city authorities required him to do so. This ordinance, by express terms, forbids the contracting by or with anyone who has not procured the license provided by the ordinance, and no license could be issued except to those who could furnish the bond. Thus the property owner was required to stand the expense of construction and repair while he was prevented from hiring to do the work, the one who, in his judgment, was perhaps the most competent to do good and lasting work. 12 C. J. 949; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936, 937. In the last above cited case the court said: "The right to follow any lawful vocation and to make contracts is as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature, without violating the letter and spirit of the Constitution. Every citizen is protected in his right to work where and for whom he will."

Same—freedom of contract.

Counsel for plaintiff in error complains of that portion of the judg-

ment of the court below which taxes costs against the relator, and quotes § 4647 of Comp. Stat. (Wyo.) 1910, which provides that, in other actions than those specifically mentioned in the preceding section, the costs may be equitably taxed in the discretion of the court. Counsel must have overlooked § 5068, which is contained in chapter 324, under the title "Mandamus," and reads as follows: "If judgment be given for the defendant, all costs shall be adjudged against the relator."

This is a mandatory provision as to costs in mandamus cases, and the court having found the ordinance void, there could be no right to the writ or the relief prayed for, and the judgment had to be for the defendant. Under these conditions and this statute, the court had no discretion to tax the costs except against the relator.

Costs—against relator in mandamus.

For the foregoing reasons, the findings and judgment of the lower court must be affirmed.

Affirmed.

Potter, Ch. J., and **Beard**, J., concur.

ANNOTATION.

Validity and construction of ordinance or statute requiring building or construction contractor to procure license.

The reported case (STATE EX REL. SAMPSON v. SHERIDAN, ante, 955) holds that a city ordinance which requires that one engaged in laying cement sidewalks shall procure a license before he commences to exercise his occupation is unconstitutional and void. The ground for this decision is that the singling out, by the ordinance, of cement sidewalk contractors, without making any regulation as to asphalt, vitrified brick, granite, or other kind of sidewalk contractor, is discriminatory and class legislation. Moreover, it is held that the requirement that a cement contractor shall procure a license is an unjustifiable and unreasonable police regulation, since the vocation in question has no tendency to affect the safety, health, morals, or welfare of the general public.

A similar holding was made in Gray v. Omaha (1908) 80 Neb. 526, 14 L.R.A. (N. S.) 1033, 114 N. W. 600, which is on all fours with STATE EX REL. SAMPSON v. SHERIDAN. The court said: "We think the restrictions imposed by the ordinance are not only unreasonably oppressive, but unnecessary to the exercise of the powers to designate the material and manner of construction of such walks. Its provisions must prove onerous to the individual of slender means engaged in the vocation sought to be regulated. He is required to pay a fee of $10 for each year or fraction of a year, a not inconsiderable tax upon a small business. . . . No adequate reason why it is essential to the exercise of this power is pointed out in the argument of the defendant, and we have been unable to conceive one. The power of the city to prescribe the material and manner of construction of its walks may be enforced by its refusal to accept any walk not constructed according to its requirements. It was argued on the hearing that, if a walk were constructed by an unlicensed contractor, there might exist some latent defect which would cause its disintegration. Since the lot owner must rebuild and repair, this would be his loss, and not that of the city; and the power of the city cannot be sustained on the theory that it is necessary to protect the lot owner from the consequences of employing a dishonest or incompetent contractor. He has the stimulus of his own personal interest. He knows that he must rebuild or repair at his own cost if he allows inferior work to be done. This incentive always has been, and probably always will be, more effectual than the sense of duty as ordinarily developed in pub-

lic officials. There is no alchemy in license fees and bonds to make a workman honest. Reliable work can only be secured by unremitting vigilance, and this vigilance will only be practised by the individual whose financial interest is direct. . . . It is not suggested that the construction of walks of artificial stone, asphalt, or other composite material is attended by any danger to individuals that does not exist in the work of constructing walks of other material; and it is apparent that an ordinance to require indemnity against such risks should not be confined, as is the one under consideration, to persons engaged in the construction of artificial stone, asphalt, or other composite walks. The ordinance as it stands is without authority, unreasonable, and void."

In Wilson v. District of Columbia (1905) 26 App. D. C. 110, it appeared that the defendant was charged with violating a statute, Act of Congress of July 1, 1902, § 46, which required "building contractors" to procure a license. It further appeared that the defendant was a bricklayer, and that he carried on his vocation by making contracts with builders or general contractors to lay part or all of the bricks required in any work. The defendant did the work himself, sometimes having one or two helpers. It was held that he was not a "building contractor" within the meaning of the statute, and that, therefore, he did not violate the same by not procuring a license.

The Constitution of Louisiana, article 206, provides that persons pursuing mechanical trades shall be exempt from a license tax. In 1880, the city of New Orleans passed an ordinance, requiring "all mechanics who employ assistance" to obtain a license. In construing this ordinance, it was held in New Orleans v. Bayley (1883) 35 La. Ann. 545, that the city had no power to require a plasterer "who worked at his trade with his own hands," even if he employed one or two additional plasterers to help him, to procure a license. Likewise in New Orleans v. Lagman (1891) 43 La. Ann. 1180, 10 So. 244, it was held that carpenters engaged in erecting and repairing buildings did not have to procure licenses, although they sometimes employed helpers in their work.

But in the same jurisdiction, it has been held that an ordinance which requires general contractors or master masons, who employ various mechanics in the erection of a building, to procure a license, does not violate the constitutional provision referred to, and that a general contractor or master mason is bound to obtain a license, though he occasionally does some work "with his own hands." Theobalds v. Conner (1890) 42 La. Ann. 787, 7 So. 689; New Orleans v. O'Neil (1891) 43 La. Ann. 1182, 10 So. 245; New Orleans v. Pohlmann (1893) 45 La. Ann. 219, 12 So. 116; New Orleans v. Leibe (1893) 45 La. Ann. 346, 12 So. 625.

So, under a statute of Louisiana, one who erected buildings as a carpenter, by employing a large number of persons to do the work, and only did some work himself occasionally, has been held not to be exempt from procuring a contractor's license. State v. McNally (1893) 45 La. Ann. 44, 12 So. 117. In that case, it appeared that the defendant's yearly income from his building contracts amounted to $20,000 per year. It was held that he was not a "mechanical trader, working with his own hands." In State v. C. C. Hartwell Co. (1906) 117 La. Ann. 144, 41 So. 444, it was held that a corporation engaged in "manufacturing of lighting fixtures, contracting and dealing in sanitary plumbing, electric instalments and supplies, steam heating," etc., was bound to pay a "contractor's license."

In the case of Re Unger (1908) 1 Okla. Crim. Rep. 222, 98 Pac. 999, it was held that an ordinance which required a "house and sign painter doing contract work" to pay a yearly license fee was not within a statutory power to license "contractors." C. M.

SUPREME COUNCIL OF THE ROYAL ARCANUM
v.
SUE B. BEHREND.

United States Supreme Court—June 3, 1918.

(247 U. S. 394, 62 L. ed. 1182, 38 Sup. Ct. Rep. 522.)

Insurance — return of certificate.

1. The physical return of the original paper called a "benefit certificate," issued by a fraternal benefit association, expressing on its face a conditional promise to pay the beneficiary named, provided the "certificate shall not have been surrendered by said member and another certificate issued at his request in accordance with the laws of this order," is not essential to validate a change of beneficiary as against the beneficiary originally named, where the printed form for change of beneficiary indorsed on the certificate refers to both "surrender and return,"— especially where the association is satisfied, and issues a new certificate during the lifetime of the insured.

[See note on this question beginning on page 971.]

Same — benevolent society — change of beneficiary.

2. In the absence of a special provision of law or of a rule of the association to the contrary, the naming of a person as beneficiary in a benefit certificate issued by a fraternal benefit association does not confer a vested right, but an expectancy merely, which may be defeated at any time by act of the insured member, even though the original beneficiary may have paid some or all of the assessments prior to the change of beneficiary.

PETITION for a writ of certiorari to review a judgment of the Court of Appeals of the District of Columbia, which, on rehearing, affirmed a judgment of the Supreme Court in favor of plaintiff, in a suit to recover the amount alleged to be due on a benefit certificate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Howard C. Wiggins** and **Philip Walker** for petitioner:

A beneficiary has no vested interest in a fraternal benefit certificate during the lifetime of the member.

Bacon, Ben. Soc. 3d ed. § 289; Hamilton v. Royal Arcanum, 189 Pa. 273, 42 Atl. 186; Masonic Mut. Ben. Asso. v. Tolles, 70 Conn. 537, 40 Atl. 448; Middeke v. Blader, 198 Ill. 590, 59 L.R.A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002; Carter v. Carter, 35 Ind. App. 73, 72 N. E. 187; Wandell v. Mystic Toilers, 130 Iowa, 639, 105 N. W. 448; Proctor v. United Order, G. S. 203 Mass. 587, 25 L.R.A.(N.S.) 370, 89 N. E. 1042; Grand Lodge, A. O. U. W. v. Frank, 133 Mich. 232, 94 N. W. 731; Grand Lodge, A. O. U. W. v. McFadden, 213 Mo. 269, 111 S. W. 1172; Brown v. Ancient Order, U. W. 208 Pa. 101, 57 Atl. 176; Supreme Council, A. L. H. v. Gehrenback, 124 Cal. 43, 56 Pac. 640; Golden Star Fraternity v. Martin, 59 N. J. L. 207, 35 Atl. 908; Schiller-Bund v. Knack, 184 Mich. 95, 150 N. W. 337; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Grand Legion, S. K. A. v. Beatty, 224 Ill. 346, 8 L.R.A.(N.S.) 1124, 79 N. E. 565, 8 Ann. Cas. 160; Supreme Council, R. A. v. McKnight, 238 Ill. 349, 87 N. E. 299; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Schoenau v. Grand Lodge, A. O. U. W. 85 Minn. 349, 88 N. W. 999; Westerman v. Supreme Lodge, K. P. 196 Mo. 737, 5 L.R.A. (N.S.) 1114, 94 S. W. 470; Fisher v. Donovan, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778; Pollock v. Household of Ruth, 150 N. C. 211, 63 S. E. 940; 29 Cyc. 129; Supreme Conclave, R. A.

v. Cappella, 41 Fed. 3; Grand Lodge, A. O. U. W. v. McGrath, 133 Mich. 626, 95 N. W. 739.

Mr. W. Gwynn Gardiner, for respondent:

Respondent had a vested interest in this policy.

Supreme Lodge, K. L. H. v. Ulanowsky, 246 Pa. 591, 92 Atl. 711; Order of Columbian Knights v. Matzel, 184 Ill. App. 15; Smith v. National Ben. Soc. 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197; Women's Catholic Order of Foresters v. Hill, 191 Ill. App. 629; McKeon v. Ehringer, 48 Ind. App. 226, 95 N. E. 604; Re Reid, 170 Mich. 476, 136 N. W. 476; Callahan v. Knights of Maccabees, 121 N. Y. Supp. 354; King v. Supreme Council, C. M. B. A. 216 Pa. 553, 65 Atl. 1108; Strong v. Supreme Lodge, K. P. 189 N. Y. 346, 12 L.R.A. (N.S.) 1206, 121 Am. St. Rep. 902, 82 N. E. 433, 12 Ann. Cas. 941; Supreme Council, R. A. v. Tracey, 169 Ill. 123, 48 N. E. 401; Supreme Lodge, K. P. v. Ferrell, 83 Kan. 491, 33 L.R.A.(N.S.) 777, 112 Pac. 155; Knights of Modern Maccabees v. Sharp, 163 Mich. 449, 33 L.R.A.(N.S.) 780, 128 N. W. 786; Mackall v. Mackall, 135 U. S. 167, 34 L. ed. 84, 10 Sup. Ct. Rep. 705.

The by-law in question under which the change of beneficiary was sought is void and inoperative.

O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; Ayers v. Grand Lodge, A. O. U. W. 188 N. Y. 280, 80 N. E. 1020; Court of Honor v. Rausch, 50 Ind. App. 161, 95 N. E. 1018; Modern Woodmen v. Wieland, 109 Ill. App. 340; Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Wilcox v. Court of Honor, 134 Mo. App. 547, 114 S. W. 1155; Jarman v. Knights Templars' & M. Life Indemnity Co. 95 Fed. 70; Supreme Council, A. L. H. v. Getz, 50 C. C. A. 153, 112 Fed. 119.

Mr. Justice Brandeis delivered the opinion of the court:

The Supreme Council of the Royal Arcanum is incorporated under the laws of Massachusetts as a fraternal benefit society, and it is licensed as a fraternal beneficial association in the District of Columbia.[1] The character and purposes of the organization and the relation to its members are described in Supreme Council, R. A. v. Green, 237 U. S. 531, 59 L. ed. 1089, L.R.A.1916A, 771, 35 Sup. Ct. Rep. 724. Samuel K. Behrend became a member of a local lodge of the order in Washington, known as "Oriental Council, No. 312, Royal Arcanum." On March 1, 1899, a $3,000 "benefit certificate" was issued to him there, payable on his death to his wife, Sue, as beneficiary; and there the first premium or assessment was paid. He delivered the certificate to her, giving it as a wedding present. From that time on, the certificate remained in her possession; and until August, 1913, most of the premiums and assessments were paid by her. On August 8, 1913, Behrend, having ceased to live with his wife, requested the order to change the beneficiary from his wife to his son and his daughter. As the original certificate was still in the wife's possession and she refused to surrender it, Behrend made affidavit that the certificate was beyond his control, and in writing relinquished all interest therein. Thereupon a new certificate was issued by the order, payable to the children, as requested; and the wife was notified that the certificate held by her had been canceled. On October 20, 1914, Behrend died. On December 21, 1914, the order paid to his son and to his daughter each $1,500 upon surrender of the new certificate. Thereafter the widow brought, in the supreme court of the District of Columbia, this action to recover $3,000 under the original certificate.

The order set up, by plea and affidavit of defense, the facts showing the change of beneficiary and payment to the new beneficiaries, which it alleged was in accordance with

[1] District Code, § 749 (Act of Congress, March 3, 1897, § 1, chap. 382, 29 Stat. at L. 630).

the contract contained in the benefit certificate and the constitution and laws of the organization. The case was heard by the supreme court on motion for judgment against the defendant for failure to file a good and sufficient affidavit of defense; and judgment was entered for $3,000 with interest. The court of appeals of the District reversed this judgment, but later granted a rehearing, the order reciting: "The question to be argued is this: Had the beneficiary of the certificate a vested interest in the same that could not be devested by the issue of a substitute certificate without the surrender of the original and without the consent of the beneficiary named in the original certificate?" Upon the rehearing, the judgment of the lower court was affirmed. 45 App. D. C. 260. The case comes here on writ of certiorari under § 251 of the Judicial Code [36 Stat. at L. 1159, chap. 231, Comp. Stat. 1916, § 1228].

The benefit certificate provided among other things, that the corporation will pay "out of its widows' and orphans' benefit fund to Sue B. Behrend (wife) a sum not exceeding $3,000 in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate; provided that said member is in good standing in this order at the time of his death, and provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order." On the back of said certificate appears the following:

Form for Change of Beneficiary.

—— Council No. —— R. A.

To ..... Sup. Sec., S. C. R. A.: I herewith surrender and return to the Supreme Council of the Royal Arcanum, the within Benefit Certificate No. ....., and direct that a new one be issued to me, payable to ..... Residing at ..... Related to me as .....

.....

Member will write his name in full. Attest:

[Seal of Sub. Council.]

..... Secretary.

The general laws of the order, in force at latest when the new certificate was issued, provide that a member in good standing may at any time make "a written surrender of his benefit certificate, and direct that a new certificate be issued to him, payable to such beneficiary or beneficiaries as such member may designate," and that the issue of such new certificate shall cancel all previous certificates. They also provide that in case "a benefit certificate is lost or beyond a member's control," he may, upon making satisfactory proof of the fact by affidavit or otherwise and paying the required fee of 50 cents, "in writing, surrender all claim thereto, and direct that a new certificate be issued to him, payable to the same or a new beneficiary or beneficiaries." These conditions were complied with before the new certificate making the son and daughter beneficiaries was issued.

Act of Congress, January 26, 1887, chap. 46, § 6 (24 Stat. at L. 367), provided that each life insurance company doing business within the District should attach to each policy a copy of the application "so that the whole contract may appear in said application and policy." Section 657 of the District of Columbia Code as amended June 30, 1902, chap. 1329 (32 Stat. at L. 534), extended the provision to benefit orders and associations, and declared that, in case of failure to furnish a copy of the application, "no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application." The court of appeals decided that Mrs. Behrend acquired a vested interest in the benefit certificate which could not be devested

by the issue of a substitute certificate without the surrender of the original and without her consent as beneficiary; that the rights of the parties were governed by the laws of the District of Columbia; that the benefit certificate was an insurance policy within the meaning of both the above acts; that the order was an assessment insurance company and as such came within the scope of both acts, so that the fact that the benefit certificate was issued before the amendment of 1902 was immaterial; that it did not appear that there had been attached to the certificate a copy of the application therefor; that the failure to annex the application precluded allowing as a defense any matter not appearing on the face of the benefit certificate; that the change of beneficiary was such a defense; and that since matters found only in the application and laws of the association could not be availed of, the court must "look solely to the terms of the contract, that is, to the terms of this so-called benefit certificate, to determine the measure of the insured's rights to change the beneficiary;" and that by its terms there was no such right.

This court held in Central Nat. Bank v. Hume, 128 U. S. 195, 206, 32 L. ed. 370, 375, 9 Sup. Ct. Rep. 41, that, under the ordinary policy of life insurance, when no right is reserved to surrender the policy or to change beneficiaries, the beneficiary named therein acquires, at the moment it is issued, a vested right which cannot be affected by any act of the insured subsequent to the execution of the policy. The rule there declared was deemed by the court of appeals to control the case at bar. But it was not applicable; because the contract sued on was a benefit certificate of a fraternal benefit association, not an ordinary policy of life insurance; and also because the benefit certificate on its face reserves the right to change beneficiaries.

First: The difference between ordinary life insurance and that furnished by the fraternal benefit societies has been universally recognized in legislation and is a matter of common knowledge. The differences in the legal incidents of these different forms of protection had been illustrated by numerous decisions. The difference in respect to the insured's right to change the beneficiary has been frequently commented on and is firmly established. In the absence of a special provision of law or of a rule of the association to the contrary, the naming of a person as beneficiary in the benefit certificate of a fraternal benefit association confers not a vested right, but an expectancy merely, which may be defeated at any time by act of the insured member.[1] A different case is presented where the insured has contracted with the beneficiary that he shall remain such. A con-

Insurance—benevolent society—change of beneficiary.

[1] Slaughter v. Grand Lodge, 192 Ala. 301, 68 So. 367; Jory v. Supreme Council, A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; Masonic Mut. Ben. Asso. v. Tolles, 70 Conn. 537, 544, 40 Atl. 448; Smith v. Locomotive Engineers Mut. L. & Acci. Ins. Asso. 138 Ga. 717, 76 S. E. 44; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 194, 195, 10 N. E. 79, 11 N. E. 449; Carpenter v. Knapp, 101 Iowa, 712, 38 L.R.A. 128, 70 N. W. 764; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Marsh v. Supreme Council, A. L. H. 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070; Schoenau v. Grand Lodge, A. O. U. W. 85 Minn. 349, 88 N. W. 999; Carson v. Vicksburg Bank, 75 Miss. 167, 37 L.R.A. 559, 65 Am. St. Rep. 596, 22 So. 1; Masonic Benev. Asso. v. Bunch, 109 Mo. 560, 19 S. W. 25; Knights of Maccabees v. Sackett, 34 Mont. 357, 363, 115 Am. St. Rep. 532, 86 Pac. 423; Ogden v. Sovereign Camp, W. W. 78 Neb. 804, 111 N. W. 797, 113 N. W. 524; Barton v. Provident Mut. Relief Asso. 63 N. H. 535, 3 Atl. 627; Spengler v. Spengler, 65 N. J. Eq. 176, 55 Atl. 285; Lahey v. Lahey, 174 N. Y. 146, 61 L.R.A. 791, 95 Am. St. Rep. 554, 66 N. E. 670; Pollock v. Household of Ruth, 150 N. C. 211, 63 S. E. 940; Lentz v. Fritter, 92 Ohio St. 186, 110 N. E. 637; Noble v. Police Beneficiary Asso. 224 Pa. 298, 132 Am. St. Rep. 783, 73 Atl. 336;

tract of that nature may be enforced by appropriate proceeding if consistent with the general law and with the laws of the association.[1] But the remedy to enforce rights arising out of such a contract would obviously not be a suit, like that at bar, upon the certificate. Nor is it contended that Behrend made any such contract concerning the certificate with his wife. The mere fact that she paid some, and possibly all, of the assessments, prior to the change of beneficiary, even if paid out of her separate estate, raises no legal claim.[2] Perhaps there was not even a moral claim; since throughout the period during which she paid assessments, she enjoyed the full protection which the order agreed to furnish; and for this alone payments were made. Under the form of insurance furnished by fraternal beneficial associations no reserve is accumulated.

Second: The certificate, on its face, expressed not an unconditional promise to make payment to the wife therein named, but a conditional promise to pay, provided the "certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order." The plaintiff alleged that the certificate had not been surrendered and that she had not been requested to surrender or deliver up the same for change of beneficiary. The latter allegation is denied by the affidavit of defense, and the statements therein contained must be taken as true. But the fact is not material. As indicated by the printed "Form for Change of Beneficiary" indorsed on the certificate, which refers to both "surrender and return," the requirement of a surrender does not necessarily imply a return to the order of the original paper called the "benefit certificate. Furthermore, requirements of that character are made for the protection of the society, and, if complied with to its satisfaction, or if waived by it during the lifetime of the insured, cannot be availed of to support the claim of a former beneficiary.[3] It is unnecessary, therefore, to determine wheth-

Same—return of certificate.

Supreme Council, C. K. A. v. Morrison, 16 R. I. 468, 17 Atl. 57; Christenson v. El Riad Temple, 37 S. D. 68, 71, 156 N. W. 581; Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38; Cade v. Head Camp, P. J. W. W. 27 Wash. 218, 67 Pac. 603; Supreme Conclave, R. A. v. Cappella, 41 Fed. 1.

The right of a member of a fraternal benefit society to change the beneficiary has been denied in a few cases which have failed to distinguish between benefit certificates and ordinary life policies. See Pittinger v. Pittinger, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195.

[1] Grimbley v. Harrold, 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558; McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; Re Reid, 170 Mich. 476, 136 N. W. 476; Supreme Council, C. B. L. v. Murphy, 65 N. J. Eq. 60, 55 Atl. 497; Stronge v. Supreme Lodge, K. P. 189 N. Y. 346, 12 L.R.A. (N.S.) 1206, 121 Am. St. Rep. 902, 82 N. E. 433, 12 Ann. Cas. 941; Supreme Lodge, K. L. H. v. Ulanowsky, 246 Pa. 591, 92 Atl. 711. Section 758 of the Code of the District of Columbia (§ 10 of the Act of March 3, 1897 [29 Stat. at L. 634, chap. 382], supra), provides in regard to fraternal beneficiary associations that "no contract with any such association shall be valid when there is a contract, agreement, or understanding between the member and the beneficiary prior to or at the time of becoming a member of the association that the beneficiary, or any person for him, shall pay such member's assessments and dues, or either of them."

[2] Jory v. Supreme Council, A. L. H. 105 Cal. 20, 30, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 320, 73 Atl. 791; Schiller-Bund v. Knack, 184 Mich. 95, 150 N. W. 337; Spengler v. Spengler, 65 N. J. Eq. 176, 180, 55 Atl. 285; Fischer v. Fischer, 99 Tenn. 629, 636, 42 S. W. 448; Preusser v. Supreme Hive, L. O. T. M. 123 Wis. 164, 101 N. W. 358.

[3] Ladies of Modern Maccabees v. Daley, 166 Mich. 542, 545, 131 N. W. 1127; Fischer v. Malchow, 93 Minn. 396, 101 N. W. 602; Lentz v. Fritter, 92 Ohio St. 186, 194, 195, 110 N. E. 637; Noble v. Police Beneficiary Asso. 224 Pa. 298, 132 Am. St. Rep. 783, 73 Atl. 336; Schardt v. Schardt, 100 Tenn. 276, 279, 280, 45 S. W. 340.

er, under this form of certificate, the burden rested upon the plaintiff to prove, as she alleged, that she had remained the beneficiary. As the judgment of the Court of Appeals must be reversed for the reasons stated above, we express no opinion upon other questions argued by counsel, and, in part, passed upon below.

ANNOTATION.

Surrender and return of benefit certificate as condition of change of beneficiaries.

I. General rule requiring compliance with regulations for surrender or return, 971.
II. Exceptions to general rule:
  a. In general, 972.
  b. Waiver of strict compliance, 973.
  c. Where it is beyond insured's power to comply literally, and he does all he can, 975.

Scope.

This note deals only with the validity of an attempted change of beneficiaries where the original certificate was not returned to the insurer. The question whether a beneficiary designated in a benefit certificate acquires a vested interest is not, of course, here considered.

I. General rule requiring compliance with regulations for surrender or return.

It is a general rule that, where the certificate or by-laws of a mutual benefit society provide the manner in which a change of beneficiaries may be affected, the mode indicated must be followed; and, accordingly, when the laws provide as a condition of a change of beneficiaries that the certificate be surrendered, it is generally held that a failure to comply with this provision will prevent the attempted change from being effectual. Supreme Conclave, R. A. v. Cappella (1890) 41 **Fed.** 1; Jory v. Supreme Council, A. L. H. (1894) 105 **Cal.** 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; Modern Brotherhood v. Matkovitch (1913) 56 **Ind. App.** 8, 104 N. E. 795; Isgrigg v. Schooley (1890) 125 **Ind.** 94, 25 N. E. 151; Holden v. Modern Brotherhood (1911) 151 **Iowa,** 673, 132 N. W. 329; National Exch. Bank v. Bright (1896) 18 **Ky.** L. Rep. 588, 36 S. W. 10, 38 S. W. 135; Supreme Lodge, K. H. v. Nairn (1886) 60 **Mich.** 44, 26 N. W. 826; Ables v. Ackley (1908) 133 **Mo. App.** 594, 113 S. W. 698; Wilson v. Bryce (1899) 43 App. Div. 491, 60 N. Y. Supp. 132; Thomas v. Thomas (1892) 131 **N. Y.** 205, 27 Am. St. Rep. 582, 30 N. E. 61; Wooten v. Grand United Order, O. F. (1918) — **N. C.** —, 96 S. E. 654; Earley v. Earley (1902) 23 **Ohio** C. C. 68; Charch v. Charch (1898) 57 **Ohio St.** 561, 49 N. E. 408; Stemler v. Stemler (1913) 31 **S. D.** 595, 141 N. W. 780; Flowers v. Sovereign Camp, W. W. (1905) 40 **Tex. Civ. App.** 593, 90 S. W. 526.

And, applying the rule announced, in the following cases, where the laws provided for a surrender of the certificate as a condition of a change of beneficiaries, and no surrender of the certificate was made, there was held to be no change effected:

—where the member merely indorsed on the certificate a direction to pay to a new beneficiary. Jinks v. Banner Lodge (1891) 139 **Pa.** 414, 21 Atl. 4;

—where the insured inserted the name of an additional beneficiary in the certificate, and delivered it to the person whose name was added. Thomas v. Thomas (1892) 131 **N. Y.** 205, 27 Am. St. Rep. 582, 30 N. E. 61;

—where there was a delivery of the certificate to one whom the insured desired to be substituted as benefi-

ciary, with a statement that the benefit was for such person. Eagan v. Eagan (1901) 58 App. Div. 253, 68 N. Y. Supp. 777;

—where the insured delivered the certificate to the one he desired substituted as beneficiary, and she delivered it to a person whom the insured asked to have the change made, but the latter failed to comply with the request. McLaughlin v. McLaughlin (1894) 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865;

—where the insured delivered his certificate to the one whom he desired to have designated as a new beneficiary, and also asked the clerk of the order to substitute such person as beneficiary, but did not surrender the certificate. Ables v. Ackley (1908) 133 Mo. App. 594, 113 S. W. 698;

—where an instrument was executed directing a change of beneficiaries and a release of the insurer from liability, upon payment to the new beneficiaries, and making a direction, which was never carried out, that the instrument be attached to the existing certificate when the insured, or either of the beneficiaries named, should obtain possession of it, and it appeared that the insured was familiar with the rules respecting a change of beneficiaries, and it did not appear that he was unable to procure the outstanding certificate for surrender. Wilson v. Bryce (1899) 43 App. Div. 491, 60 N. Y. Supp. 132;

—where an attempt was made to change beneficiaries by will. Holland v. Taylor (1887) 111 Ind. 121, 12 N. E. 116; Stephenson v. Stephenson (1884) 64 Iowa, 534, 21 N. W. 19;

—where there was an attempted assignment of the policy. Dale v. Brumbly (1903) 96 Md. 674, 54 Atl. 655.

And the attempted change of beneficiary in Coleman v. Supreme Lodge, K. H. (1885) 18 Mo. App. 189, was held ineffectual, where the certificate was in the possession of the member's wife, and he made no demand upon her for it, and did not surrender it, as required by the by-laws in case a change of beneficiaries was desired.

In Stemler v. Stemler (1913) 31 S. D. 595, 141 N. W. 780, where the by-laws provided that no change in beneficiary should be effective unless the old certificate was delivered to the head clerk of the lodge and a new certificate delivered during the lifetime of the member, and that until such time the old certificate should remain in force, it was held that no change resulted from the delivery to the clerk of the local lodge, on the day of the insured's death, of the certificate, with a request for a change of beneficiary; it appearing that it was not received by the head clerk until after the insured's death, and that the head clerk, who had no knowledge of that fact, issued a new certificate which was never delivered. The court in this case recognized the exceptions to the general rule hereafter noted, but held that the case did not fall within any of such exceptions.

In Page v. Bell (1917) 146 Ga. 680, 92 S. E. 54, it was held that there was no such unqualified right of possession in one who sought to be substituted as beneficiary, and who had gained possession of the benefit certificate by bail trover proceedings, which were still pending, as would authorize her to surrender the certificate to the association, in pursuance of its by-laws governing the right to change the beneficiary; and, the officer of the local lodge having refused to do anything toward changing the beneficiary, and having returned the certificate, it was held that no change of beneficiary was made.

It has been held that, where the beneficiary has acquired a vested interest in the benefit, the provision for surrender of the certificate as a condition of a change of beneficiary does not apply. Stronge v. Supreme Lodge, K. P. (1907) 189 N. Y. 346, 12 L.R.A. (N.S.) 1206, 121 Am. St. Rep. 902, 82 N. E. 433, 12 Ann. Cas. 941.

II. Exceptions to general rule.

a. In general.

To the general rule requiring a compliance with the laws of the insurer, governing a change of beneficiary, including a surrender of the benefit certificate, the following exceptions are

recognized: First. If the society has waived a strict compliance with its rules, and, in the pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. Second. If it is beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. Third. If the insured has pursued the course pointed out by the by-laws, and has done all in his power to change the beneficiary, but before a new certificate is issued he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued. These exceptions were recognized in the following cases, involving a requirement that the benefit be surrendered in order to effect a change of beneficiary: Supreme Conclave, R. A. v. Cappella (1890) 41 **Fed.** 1; McLaughlin v. McLaughlin (1894) 104 **Cal.** 171, 43 Am. St. Rep. 83, 37 Pac. 865; Modern Brotherhood v. Matkovitch (1913) 56 **Ind.** App. 8; Holden v. Modern Brotherhood (1911) 151 **Iowa,** 673, 132 N. W. 329; Wooten v. Grand United Order, O. F. (1918) — N. C. —, 96 S. E. 654; Stemler v. Stemler (1913) 31 **S. D.** 595, 141 N. W. 780.

b. Waiver of strict compliance.

The exception of waiver just noted was applied in the following cases, in which the insurer issued a new certificate at the member's request, payable to a different beneficiary, and there was held to have been a waiver by the insurer of a requirement of the by-laws, or certificate, for a surrender of the certificate as a condition of a change of beneficiaries:

—Delaney v. Delaney (1898) 175 **Ill.** 187, 51 N. E. 961, where the insurer had been in the habit of granting a new certificate without a surrender of the old one, upon the member's making an affidavit that the certificate was lost, destroyed, or stolen, and the insured made such an affidavit and received a new certificate;

—where the insurer issued a new certificate, naming a new beneficiary, upon an affidavit by the insured that the original certificate was lost or destroyed, and that he was unable to obtain it, and it appeared that it was in the possession of the first beneficiary, who refused to surrender it. Heasley v. Heasley (1899) 191 **Pa.** 539, 43 Atl. 364;

—where a written request for a change of beneficiary was made by the insured, together with a statement that a disagreement had arisen between him and his wife, the beneficiary, who had possession of the certificate, and that he could not surrender it, and the insurer issued a new certificate, payable to another beneficiary, although the insured made no affidavit, as provided for in the by-laws, that the certificate was in the possession of another who refused to deliver it. Earley v. Earley (1902) 23 **Ohio** C. C. 618;

—where the certificate was in possession of the original beneficiary, who refused to deliver it to the insured, and the company, upon notice of the facts and at the insured's request, issued a new certificate, payable to a different beneficiary. Ptacek v. Pisa (1907) 134 **Ill.** App. 155, affirmed in (1907) 231 Ill. 522, 14 L.R.A.(N.S.) 537, 83 N. E. 221; Allgemeiner Arbeiter Bund v. Adamson (1902) 132 **Mich.** 86, 92 N. W. 786; Moan v. Normile (1899) 37 App. Div. 614, 56 **N. Y.** Supp. 339.

And it was recognized in Wilson v. Bryce (1899) 43 App. Div. 491, 60 N. Y. Supp. 132, that the officers of the insurer might waive the requirement for a surrender of the certificate, as the provision was for the benefit of the insurer; but the instrument for a change of beneficiary was not presented to the officers in that case.

And in Southern Tier Masonic Relief Asso. v. Laudenbach (1889) 5 N. Y. Supp. 901, a requirement for a "return" of the certificate to effect a change of beneficiary was held for the benefit of the insurer, and held waived by the issue of a new certificate, without the return of the original one,

upon the request of the insured for a change of beneficiary.

And where the certificate was lost and the insured applied in writing for the issue of a new one, payable to another beneficiary, and the insurer accepted the application as a full compliance with the rules, which provided for a change of beneficiary on a return of the certificate, there was a waiver of literal compliance with the by-laws. Wooten v. Grand United Lodge, O. F. (1918) — N. C. —, 96 S. E. 654.

The court in the preceding case relied upon the decision in the reported case (SUPREME COUNCIL, R. A. v. BEHREND, ante, 966), in which, it will be noted, it was decided that a physical return of the benefit certificate, which provided for a change of beneficiary upon written surrender of the old certificate, and for the payment of the benefit to the beneficiary named, if the certificate had not been surrendered and another issued at the insured's request in accordance with the laws of the order, was not necessary to validate a change of beneficiary, the court holding that a form for change of beneficiary, referring to "surrender and return" of the certificate, did not necessarily imply a physical return of the original certificate, and that the requirements were for the protection of the insurer, and were waived by the issuance of a new certificate during the insured's life.

In Fanning v. Supreme Council, C. M. B. A. (1903) 84 App. Div. 205, 82 N. Y. Supp. 733, affirmed in (1904) 178 N. Y. 629, 71 N. E. 1130, where the right to change beneficiaries was given upon surrender of the original certificate, and the insured made an application for the issuance of a new certificate in favor of the same beneficiary, stating that the original certificate had been lost, although it was in fact in the beneficiary's possession, and the laws in force made no provision relating to the substitution of a certificate for one lost, it was held that the provision for a surrender of the certificate was for the benefit of the insurer, and might be waived by it, and that it was waived by the issuance of a new certificate; and effect was given to a subsequent change of beneficiary, obtained by a surrender of the substituted certificate.

In Cade v. Head Camp, P. J. W. W. (1902) 27 Wash. 218, 67 Pac. 603, it was held that, where the insurer elected to pay to the substituted beneficiary, the original beneficiary could not defeat the former's right to recover on the ground that there was not a compliance with the by-laws, which provided for a change of beneficiary by a surrender of the original certificate, and for the making of an affidavit in case of loss, although it appeared that the member filed an affidavit with his request for a change of beneficiary, that the certificate was lost, whereas it was in the beneficiary's possession.

In Dell v. Varnedoe (1918) — Ga. —, 95 S. E. 977, where the member had executed a request to change the beneficiary on the back of his certificate, and apparently delivered it to the clerk of the local camp, but it was not forwarded to the sovereign camp as required by the by-laws to make a change of beneficiary, it was held that as against the association the attempt to change the beneficiary was ineffectual, but that, by paying the money into court, the association had waived the failure to comply with the requirements, and that in such a case the equities of the parties would be compared; and, applying this rule, it was held that the member's wife, who had paid the premiums on the certificate, was entitled to the benefit as against his sister, who had been repaid a loan to secure which the insurance was taken.

And in Tidd v. McIntyre (1906) 116 App. Div. 602, 101 N. Y. Supp. 867, although a surrender of the old certificate was provided for as a condition of a change of beneficiary, where the insurer had voluntarily paid the fund to a trustee an attempted change of beneficiary was given effect, it appearing that the insured, who was in ill health, had agreed with the plaintiff that she should receive the benefit if she would take care of him, which it appeared she did, and in pursuance of the agreement the insured wrote the recorder of the local lodge,

requesting that the beneficiary be changed to the plaintiff, and the recorder, by mistake, told him that a change was unnecessary, as the plaintiff would get the benefit anyway. The court stated that while, as a general rule, a change of beneficiaries must be made as provided by the rules of the association, yet where the association has paid the money into court and has no interest in the litigation, and where there is a consideration for the change of beneficiaries, and a party has acquired a vested interest in the fund, equity will aid the one having such interest, and will regard as done what ought to be done.

In Hirschl v. Clark (1890) 81 **Iowa**, 200, 9 L.R.A. 841, 47 N. W. 78, where the constitution and by-laws did not require a surrender of the certificate as a condition of a change of beneficiary, although the benefit certificate contained a form for changing beneficiaries by a surrender of the certificate, this was held a mere regulation for the benefit of the insurer, and effect was given to a direction for a change of beneficiary received by the insurer after the insured's death, which was not accompanied by a surrender of the certificate, it appearing that this was in the beneficiary's possession.

c. Where it is beyond insured's power to comply literally, and he does all he can.

Another exception to the general rule, requiring the insured to follow the provisions of the certificate or by-laws for making a change of beneficiaries, is, as before indicated, recognized, where it is beyond the power of the insured to comply literally with these provisions, and he has done all that he can to comply. This exception had been given effect in numerous cases, involving a failure to surrender benefit certificates as a condition of a change of beneficiary.

Thus, it has been held that where the original beneficiary withholds the certificate, and renders it impossible for the insured to comply literally with the requirement that the certificate be surrendered as a condition of a change of beneficiary, effect will be given to an attempted change, upon its appearing that the insured did all that he could to comply with the requirement for a surrender of the certificate. Isgrigg v. Schooley (1890) 125 **Ind.** 94, 25 N. E. 151; Modern Brotherhood v. Matkovitch (1913) 56 **Ind. App.** 8, 104 N. E. 795; Holden v. Modern Brotherhood (1911) 151 **Iowa**, 673, 132 N. W. 329; Modern Brotherhood v. Hudson (1916) 194 **Mich.** 124, 160 N. W. 406; Grand Lodge, A. O. U. W. v. Kohler (1895) 106 **Mich.** 121, 63 N. W. 897; Lahey v. Lahey (1903) 174 **N. Y.** 146, 61 L.R.A. 791, 95 Am. St. Rep. 554, 66 N. E. 670.

The court, in Isgrigg v. Schooley (**Ind.**) supra, said: "The beneficiary named took it subject to the member's right to change and designate some other person in her stead; but according to the facts alleged in the cross complaint, she took possession of the certificate and sought to prevent any change being made by withholding the certificate, and alleging that it was lost, and preventing her husband, the assured, from surrendering the certificate and designating another beneficiary; and, under these circumstances, the assured did all that he could do toward asserting his right to make a change; he did all that was required by the by-laws of the association, except to surrender the certificate, which he was prevented from doing by the beneficiary originally named, who now claims she is entitled to the fund because she withheld from the assured the certificate which the by-laws contemplated was to be held by him, and surrendered if he desired to change the beneficiary. She prevented a formal surrender of the policy, and now claims she is entitled to the fund, because she placed it beyond his power to comply with the technical terms of the by-laws in the surrender of the policy. The assured had the right to make the change; he did all that was within his power to do in compliance with the by-laws governing such change; the appellee, the beneficiary named in the original certificate, prevented him from a formal compliance in the delivery of the certificate, and

equity will regard that as done, since he had the right to its possession, and the right to have delivered it, but could not do so by reason of the acts of the appellee, and equity requires no impossibilities."

And in Hamilton v. Royal Arcanum (1890) 189 **Pa.** 273, 42 Atl. 186, where a member surrendered all claim under a certificate, but not the certificate itself, which was in the possession of his wife, the original beneficiary, with whom he had had a disagreement, and a new certificate was issued to him payable to another beneficiary, the change was held valid.

And in Grand Lodge, A. O. U. W. v. Child (1888) 70 **Mich.** 163, 38 N. W. 1, where the insured had done all in his power to effect a change of beneficiary, but was unable to comply with the requirement that the certificate be surrendered, by reason of the fact that it had been lost, effect was given to his attempted change, as it was held that the law does not require impossibilities, and that the requirement could only be construed as requiring a surrender when the certificate was in existence.

And in Supreme Conclave, R. A. v. Cappella (1890) 41 **Fed.** 1, where the insured had requested the original beneficiary to get the certificate and have the beneficiary changed, and she had procured possession of it, but failed to have the change made, it was held, the insurer having paid the money into court, that as against the beneficiary a change had been effected, it appearing that a few days before his death the insured signed and executed before a notary a request for a change of beneficiary, which contained a statement that the certificate was beyond his control, and that he could not surrender it, and his request for a change was forwarded by the local lodge to the supreme body; but no certificate was issued before the insured died.

And it is stated in the abstract of the decision in National Croation Soc. v. Pavlic (1915) 200 **Ill.** App. 601, that a change must be deemed to have been made where the insured had the right to change the beneficiary, and did all that he could to effect a change by writing to the lodge in another state, where his certificate was, that he wanted to make a change indicated, and to send the certificate to the lodge in the town where he lived, and wrote the secretary of the local lodge to make such change and find the certificate for him, but it was not obtained.

In some cases the laws of the society make an express provision that if the certificate is lost, or beyond the member's control, he may make an affidavit of the facts, surrender in writing all claim thereto, and direct that a new certificate be issued.

In the following cases, where there was such a provision for an affidavit, and one was made, a change of beneficiary was held to have been effected, although there was no surrender of the certificate pursuant to a regulation for a surrender, it appearing that the certificate was lost or beyond the insured's control. Kiolbassa v. Polish Roman Catholic Union (1908) 141 **Ill.** App. 297; Knights of Maccabees v. Altmann (1908) 134 **Mo.** App. 363, 114 S. W. 1107; Grand Lodge, A. O. U. W. v. O'Malley (1905) 114 **Mo.** App. 191, 89 S. W. 68, affirmed in (1908) 213 Mo. 269, 111 S. W. 1172; Raschke v. Haderer (1909) 138 **Wis.** 129, 119 S. W. 812.

And in Jory v. Supreme Council, (1894) 105 **Cal.** 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524, where the insured, for the purpose of changing his beneficiary, complied with all requirements of the by-laws except a surrender of the certificate, and filed an affidavit in accordance with a provision of the by-laws, stating that the certificate was in the original beneficiary's possession, who refused to surrender it, it was held, the insurer having paid the money into court, that as between the beneficiaries justice would be administered from the standpoint of equity, and that the new beneficiary was entitled to the benefit.

And in Polish National Alliance v. Nagrabski (1906) 71 **N. J. Eq.** 621, 64 Atl. 471, the change was held effective, where the by-laws gave a right to change beneficiaries upon a delivery of the certificate and a written sur-

render, and the member made an affidavit requesting a change, and stating that she had made a demand upon the original beneficiary, who had possession of the certificate, and that he had refused to deliver it to her.

And in Leaf v. Leaf (1890) 12 Ky. L. Rep. 47, where the certificate provided that the benefit should be paid to the member's wife on his death, provided the certificate should not have been surrendered or canceled at the insured's request, and a new one issued, although the insured had agreed with his wife not to change the beneficiary, and had delivered the certificate to her, and she had undertaken to pay the dues, it was held, it appearing that she had instituted a proceeding for divorce and that one had been granted, that the insured had the right to change the beneficiary, and that it was immaterial that the original certificate was not surrendered, the member having made affidavit that his wife refused to surrender it.

And the rule that, if an insured has done all he can to change beneficiaries, effect should be given to his attempted change, was adopted in Wintergerst v. Court of Honor (1914) 185 Mo. App. 373, 170 S. W. 346, where it was held that if a change of beneficiaries was indorsed on the certificate by the insured, and the certificate delivered to the recorder of the local lodge, and by him transmitted by mail to the supreme lodge, which never received it, effect should be given to his intention, although the laws of the order provide for a surrender of the certificate as a condition of a change of beneficiaries.

And in Marsh v. Supreme Council, A. L. H. (1899) 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070, where the insured had done all that he could to change his beneficiary, by presenting a proper petition and depositing his certificate with the officer of the local lodge, but such officer, acting in collusion with the original beneficiary, delivered the certificate to the latter instead of forwarding it to the supreme lodge, and failed to properly attest and seal the petition before forwarding it, it was held, it appearing that the change would have been made by the supreme lodge but for such fraud and collusion, and that the benefit had been paid into court, that effect would be given to the attempted change, the court holding that the original beneficiary could not profit by her fraud.

In Supreme Council, A. L. H. v. Smith (1889) 45 N. J. Eq. 466, 17 Atl. 770, where the by-laws provided for a surrender of the original certificate as a condition of a change of beneficiaries, and provided that no act of any member should entitle the new beneficiary to any benefit, "unless such act shall be in strict accordance with the laws of the corporation," there was held to be no change effected by a written application by the member for a change, there being no surrender of the certificate, which was rendered impossible on account of the beneficiary's refusal to give it up.

In Flowers v. Sovereign Camp, W. W. (1905) 40 Tex. Civ. App. 593, 90 S. W. 526, there was held to be no compliance with a provision of the constitution that in the event the certificate was lost, or possession thereof withheld from the member desiring a change of beneficiary, the member should furnish the supreme clerk with "satisfactory proof, under oath, of the facts of the loss of the certificate, or proof under oath of the facts and circumstances of the withholding of such certificate from its possession, as the case may be, and waiving for himself and beneficiary, or beneficiaries, all rights thereunder," it appearing that the insured delivered a request for a change of beneficiary, accompanied by an affidavit that the original certificate was lost, but not waiving the rights of the beneficiary, to the clerk of the local camp, and that it was not received by the sovereign clerk, to whom it had been mailed, until after the insured's death. J. T. W.

JOHN A. SENNEFF, Appt.,
v.
A. A. BRACKEY et al.

T. A. KINGLAND, Special Admr., etc., of Alf. T. Brackey, Deceased,
v.
ALBERT A. BRACKEY et al., Appts.

Iowa Supreme Court—March 24, 1914.

(165 Iowa, 525, 146 N. W. 24.)

Devise — subject to debt to estate.

1. A devise of real estate to an insolvent who refuses to turn over to the estate funds received in trust after the execution of the will is subject to such indebtedness.

[See note on this question beginning on page 991.]

Mortgage — priority of claim against mortgagor.

2. The claim of the estate against an insolvent devisee for money due to the estate, for which suit has been brought, is superior to that of one taking a mortgage upon the property from the devisee not in good faith.

Same — good faith — notice.

3. An attorney who takes from his client a mortgage on property devised to him, to cover his fees, knowing that litigation has been instituted to establish a claim upon the property in favor of the estate, and that if the claim is established the claimant will be insolvent, is not a good-faith purchaser without notice.

APPEAL by plaintiff Senneff from a judgment of the District Court for Winnebago County in favor of defendants in an action brought to foreclose certain mortgages executed by defendant Brackey. *Affirmed.*

APPEAL by defendants from decrees of the District Court for Winnebago County in favor of plaintiff Kingland in suits to enforce payment of a judgment and establish a lien thereof against defendant Brackey. *Affirmed.*

Statement by **Deemer, J.:**

Action to foreclose a mortgage given by Albert A. Brackey upon lands devised to him by one Alf. T. Brackey. A special administrator of the estate of Alf. T. Brackey claimed that a judgment held by him against Albert A. Brackey for money converted by him, although rendered after the execution of the mortgage to plaintiff, was a prior lien. The trial court found that the judgment was entitled to priority, and plaintiff appeals.

Messrs. **Senneff, Bliss, & Witwer** for appellants.

Messrs. **Oliver Gorden, Morgan, & Meighen,** and **T. A. Kingland,** for appellees:

The estate had an equitable right to set off Albert A. Brackey's debt in favor of the estate against his devise, and had such right at the time Senneff took his mortgage for $1,500.

Wick v. Hickey, — Iowa, —, 103 N. W. 469; Streety v. McCurdy, 104 Ala. 493, 16 So. 686; New v. New, 127 Ind. 576, 27 N. E. 154; Dickinson's Estate, 148 Pa. 142, 23 Atl. 1053; Brown v. Mattingly, 91 Ky. 275, 15 S. W. 353; Oxsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7.

Deemer, J., delivered the opinion of the court:

Alf. Tallackson Brackey, by his last will and testament, devised to his son Albert A. Brackey, a life estate in a certain quarter section of land, with remainder over equally to all the children of Albert A. The remainder of his estate, both real and personal, was devised equally to all his children. At the time of decedent's death, Albert A. had in his possession $3,260 which belonged to his father, or his estate. Albert was then and has ever since been insolvent. Decedent died April 12, 1909, and Albert A. offered the will for probate. All the other heirs joined in contesting the will, and a trial was had which finally reached this court, resulting in an order confirming the will and probating the same. T. A. Kingland was appointed special administrator of testator's estate, in October, 1909. He brought suit against Albert A. Brackey for the amount of money held by him belonging to his father's estate, and as a result thereof, in the same month, recovered judgment for the amount claimed. In June and November of the year 1911, Albert A. Brackey executed mortgages to various parties, which covered all his interest in the quarter section of land specifically devised. These mortgages were executed to Senneff, Senneff, & Bliss, the Farmers' State Bank of Lake Mills, the First National Bank of Lake Mills, and the Lake Mills Implement Company, respectively. Each of said mortgagees knew at the time that the mortgagor was insolvent, and on June 29, 1912, he filed a voluntary petition in bankruptcy and has been discharged, as we understand it. The controversy is with reference to the priorities of these several mortgages and judgment liens. The trial court found that the judgment in favor of the special administrator was prior and superior to the mortgage liens, and superior to the claims of the trustee in bankruptcy, and the mortgagees and trustee in bankruptcy appeal.

A few more facts should be stated in order that the exact legal propositions may be fully understood. The mortgages covered not only the life estate devised to Albert A. Brackey, but also his one-seventh interest in another 80-acre tract of land which was afterward sold at referee's sale, in a partition suit, by T. A. Kingland, referee, and one seventh of the proceeds from the sale was paid to plaintiff Senneff to be applied on one of the mortgages held by him. The interest of Albert A. Brackey in the personal estate of his father will not exceed $500. The original notice of the suit brought by the special administrator against Albert A. Brackey was served on March 16, 1910, and the petition was filed March 18, 1911. In June of the year 1911, Brackey made one of the mortgages heretofore referred to, to John A. Senneff to secure the sum of $1,500, and on November 4, 1911, the mortgages were made to one of the banks, and the implement company before referred to, and on the same date he executed a mortgage to Senneff & Bliss to secure the sum of $1,200. On November 11, 1911, a verdict was returned for the special administrator in the suit brought by him for the sum of $3,260.

On June 29, 1912, Brackey filed a petition in bankruptcy, and on October 5th of the same year judgment was rendered on the verdict. At the time the will was made, Albert did not owe his father any money, but at the time of the testator's death he (Albert) held $3,260 in his hands, belonging to the estate, which he refused to turn over. The mortgages referred to were, generally speaking, made to secure pre-existing debts; but the $1,200 mortgage was made to secure Senneff & Bliss, who are attorneys, in their fees, not only in the will contest case, but in defending against the suit brought by the special administrator. They appeared for Brackey in the suit brought by the special administrat-

or and knew of the claim made against him in that suit.

At the time of the making of the $1,200 mortgage, Senneff knew that if judgment was obtained by the special administrator Brackey would be insolvent, but he testified that at the time of the taking of the $1,500 mortgage he was not aware of the mortgagor's insolvency, although he was advised of the claim made by the special administrator. The $1,200 mortgage was given while the suit of the special administrator was being tried; Senneff & Bliss, the mortgagees, being attorneys for the mortgagor. Albert A. Brackey was in fact insolvent at the time of testator's death, and remained so until he went into bankruptcy. Neither Senneff nor Senneff & Bliss knew of this fact, however, at the time the first mortgage to Senneff was made, but they were advised before the taking of the Senneff & Bliss mortgage that, if the special administrator recovered in his suit against Brackey, Brackey would be unable to pay the amount to the estate.

After recovering the judgment, the special administrator brought the second action referred to in the title to this opinion, in which he asked that his judgment be declared to be a specific lien upon the real estate devised to him by the testator, prior and superior to the lien created by the several mortgages, and that Senneff be required to refund the amount received by him from the referee in the partition suit, representing Albert A. Brackey's interest in the lands sold in that suit.

The $1,500 mortgage was made to secure the money with which to pay Senneff & Bliss for their attorneys' fees in the will contest, and possibly some other matter.

The suits by the special administrator to secure the judgment and to establish the lien thereof against Brackey's interest were not unduly delayed, because the contest of the will was pending, and until that was finally decided no one knew whether Albert A. Brackey would take under the will or as an heir of his father. When the $1,200 mortgage was taken, the mortgagees felt and believed that the suit they were then trying was likely to go against their client, and it was made to secure their attorneys' fees in that case, and also some other services theretofore rendered. Upon these facts, and the issues joined, the trial court made the following findings and order in the case brought by Kingland, special administrator:

"It is conceded by the parties that, at the time of the death of Alf. T. Brackey, deceased, Albert A. Brackey was indebted to various and sundry parties in an amount sufficient so that, together with the amount of the above judgment, he was insolvent. The evidence shows that, if the claims of the defendants are allowed priority over said judgment, the effect will be a loss to said estate of a substantial part, or perhaps all, of said judgment. I am of the opinion that the 'diligent creditor' rule does not apply, and that the defendant Albert A. Brackey ought not to be permitted, either by direct or indirect means, to avail himself either personally, or by assignment to others, of property which comes from the estate of Alf. T. Brackey, deceased, and at the same time be permitted to defeat the recovery by said estate of a valid claim against him. It seems to me that to permit him to do so would be unjust to the estate. I have no hesitancy in concluding that so far as Albert A. Brackey would derive any benefit from the personal estate of Alf. T. Brackey, deceased, the estate would properly offset in its favor any claim against Albert A. Brackey, and in principle I can see no reason why the same rule should not apply to the realty. The evidence shows that a certain tract of real estate which belonged to Alf. T. Brackey at the time of his death was sold by regular partition proceedings in court, and the portion of the proceeds thereof which would have belonged to Albert A.

Brackey, but for the claim of said estate against him, was paid to the defendant John A. Senneff. This plaintiff, special administrator, personally acted as referee in making such partition sale and distributing the proceeds derived therefrom, and I am of the opinion that, in legal effect, the payment made by him to said Senneff was voluntary and that the amount thereof cannot now be recovered back.

"It follows that in my opinion the claim of plaintiff should be and the same is hereby, together with the costs of this proceeding, decreed to be prior and superior to the claims of said defendants and each of them by reason of any and all mortgages made by Albert A. Brackey upon the real estate in question, or any interest therein; that plaintiff has a prior lien upon any and all moneys or personal property of every kind and nature coming, directly or indirectly, to Albert A. Brackey or his assigns from the estate of Alf. T. Brackey, deceased, except that the amount heretofore paid to John A. Senneff by reason of said partition proceedings is hereby decreed to be the property of said Senneff. The claim of plaintiff is also hereby decreed to be prior and superior to the right of the defendant trustee in bankruptcy. The costs of this action are hereby taxed to defendant Albert A. Brackey, and judgment is entered accordingly."

And in the action brought by Senneff to foreclose his mortgages the court entered the following decree: "By this proceeding plaintiff asks the foreclosure of certain mortgages executed by Albert A. Brackey. T. A. Kingland, special administrator, asks that a certain judgment rendered in his favor be decreed to be superior to plaintiff's claims. The decree entered on this date in case No. 4772, T. A. Kingland, Special Administrator, v. Albert A. Brackey et al., determines the respective rights of the parties, and plaintiff's said mortgages are hereby decreed to be junior and inferior to said judgment and subject to the rights of said Kingland as special administrator of the estate of Alf. T. Brackey, deceased, as determined in the decree entered in said case No. 4772, judgment and decree of foreclosure as prayed is entered for plaintiff. Clerk assess. Judgment against Albert A. Brackey for costs, including a reasonable attorney's fee to be taxed by the clerk."

Plaintiff Senneff in the first case, and all the defendants in the second case, appealed; but the main contention is between the special administrator on his judgment, and Senneff and Senneff & Bliss on their mortgages to secure the sums of $1,500 and $1,200, respectively.

Although not controlling, it may be well at the outset to say that none of the mortgages were, in our opinion, under the facts disclosed, good-faith purchasers from Brackey. These mortgages were each and all to secure pre-existing debts, unless perhaps it may be the first $1,500 mortgage to Senneff; and, while supported by valuable considerations, there is no showing which would justify a holding that the mortgagees were what are ordinarily termed good-faith purchasers.

The only question, as we view it, is simply this: Is a devise of real estate, either general or specific, to one who at the time of testator's demise is largely indebted to the estate, and is insolvent, subject to the devisee's indebtedness to the estate, or does it pass to him free from this indebtedness, and may he or his assignee, grantee, or mortgagee take the estate devised free from all claim by reason of his indebtedness to the estate?

The general rule as to personal property is that, as against a bequest to one who is already indebted to the estate, the amount of this indebtedness may be set off or detained against the legacy. And this may be done, as we understand it, whether the legatee be solvent or insolvent. Finch v. Garrett, 102 Iowa, 381, 71 N. W. 429; West v.

Beck, 95 Iowa, 520, 64 N. W. 599; Bowen v. Evans, 70 Iowa, 368, 30 N. W. 638; Pinckney v. Pinckney, 114 Iowa, 441, 87 N. W. 406; Garrett v. Pierson, 29 Iowa, 304. On the other hand, it is the general rule that as against devises of real estate, either general or specific, there is no right to offset a mere debt of the devisee, although such amounts, if advancements, and doubtless if mere debts, should be brought into hotchpot and charged against the devisee or devisees receiving them. Russell v. Smith, 115 Iowa, 261, 88 N. W. 361; Rider v. Clark, 54 Iowa, 292, 6 N. W. 271; McCormick v. Hanks, 105 Iowa, 639, 75 N. W. 494.

In the Russell Case, supra, it was said, however: "There may be cases where, on account of the insolvency of the debtor, or for some other cause, equity will interfere for the protection of the estate." This was perhaps dictum, and yet it was announced for the purpose of saving an exception to the general rule, if any such exception exists. As a matter of fact, many courts, and doubtless a majority, numerically, recognize and enforce the exception. Streety v. McCurdy, 104 Ala. 493, 16 So. 686; Oxsheer v. Nave, 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7; Dickinson's Estate, 148 Pa. 142, 23 Atl. 1053; Towles v. Towles, 1 Head, 601; Fiscus v. Fiscus, 127 Ind. 283, 26 N. E. 831; Fiscus v. Moore, 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362; Nelson v. Murfee, 69 Ala. 598; Head v. Spier, 66 Kan. 386, 71 Pac. 833; Cowen v. Adams, 24 C. C. A. 198, 47 U. S. App. 439, 78 Fed. 536; Hopkins v. Thompson, 73 Mo. App. 401; Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Webb v. Fuller, 85 Me. 443, 22 L.R.A. 177, 27 Atl. 346; New v. New, 127 Ind. 576, 27 N. E. 154; Smith v. Smith, 13 N. J. Eq. 164; Brown v. Mattingly, 91 Ky. 275, 15 S. W. 353; Ex parte Wilson, 84 S. C. 444, 66 S. E. 675; Re Esmond, 154 Ill. App. 357; Koons v. Mellett, 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95; Keever v. Hunter, 62 Ohio St. 616, 57 N. E. 454; 2 Woerner's Am. Law of Administration, 2 ed. pp. 1071–1168, 1237, and § 564, where there is a full discussion of the subject. See also note to Marvin v. Bowlby, 4 L.R.A.(N.S.) 189. Cases from other states have not recognized any exception to the general rule, although in some of these the question of the insolvency of the devisee did not appear. Vide Marvin v. Bowlby, supra; La Foy v. La Foy, 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266. No attention was paid, however, to Smith v. Smith, 13 N. J. Eq. 164, from the same state, and it did not appear that the devisee was insolvent. Manning v. Brown, — N. J. Eq. —, 20 Atl. 381; Hancock v. Hubbard, 19 Pick. 167; Dearborn v. Preston, 7 Allen, 192; Jones v. Treadwell, 169 Mass. 430, 48 N. E. 339; Thompson v. Myers, 95 Ky. 597, 26 S. W. 1014. But see in same connection: Brown v. Mattingly, 91 Ky. 275, 15 S. W. 353; Scobee v. Bridges, 87 Ky. 427, 9 S. W. 299; Broas v. Broas, 153 Mich. 310, 116 N. W. 1077; Mann v. Mann, 12 Heisk. 245; Towles v. Towles, 1 Head, 601; Sartor v. Beaty, 25 S. C. 293; Proctor v. Newhall, 17 Mass. 81; Kendall v. Mondell, 67 Md. 444, 10 Atl. 240; Smith v. Kearney, 2 Barb. Ch. 533; Re Smith, 14 Misc. 169, 35 N. Y. Supp. 701. Mann v. Mann, 12 Heisk. 245, although apparently in point, recognizes the right of offset in some cases.

The opinion in Brown v. Mattingly, supra, is really not in point because the right of detention was recognized. The writer of the note in 4 L.R.A.(N.S.) 190, states the two doctrines as follows: "The authorities are not in harmony on the question of an heir's indebtedness to the estate as forming a counterclaim or set-off against the debtor heir's distributive share, arising from the sale of real property. Some of the leading cases on this subject are cited and discussed by the court in its opinion, and need not be commented on in this note. The authorities which do not accept the doctrine of retainer or set-off

are based on the theory that the real estate of the intestate descends directly to the heirs upon the death of the ancestor, and vests in them, subject only to the debts of the estate; and, if the real property comes to them by will, the general rule applied is that, if the testator intends to do so, he may charge the estate devised with the duty of paying any debt which may be due from the devisee to the testator, and his omission to impose such a condition evinces an intention to make the devise unconditional. The cases in which the opposite doctrine finds support are based on statutory provision, or proceed on the theory that an heir who is a debtor to the estate stands in the attitude of having received so much from the estate, and, if his distributive share in the personal property is not equal to the amount thus received, the real estate ought to be held charged to the payment of the remainder in the division, and he receive that much less."

The rationale of the latter rule will better appear from this quotation from Marvin v. Bowlby, 142 Mich. 251, 4 L.R.A.(N.S.) 194 and 195, 113 Am. St. Rep. 574, 105 N. W. 753, 7 Ann. Cas. 559: "The Texas court said: 'Under our statutes, the real and personal estate of an intestate descend alike to the heirs, charged with the payment of debts, and subject to administration for that purpose. Both the real and personal property, when administered, are subject to distribution among the heirs in one proceeding. The debt of one of the heirs to the estate is a part of the general mass of property subject to distribution, and, if such heir fail to pay it, if more than his share, so much of it as amounts to the value of his share should be set apart to him; if less than his share, it should be taken by him in satisfaction of that share so far as it will go. The principle was applied in Re Akerman [1891] 3 Ch. 212.' In this case the court, in answer to the argument that the rule would not apply to real estate of a debtor heir which had not been converted into money, said: 'We apprehend that this makes no difference in principle, for the reason that the equity of requiring the debtor distributee is the same whether the mass to be distributed consists of property or money; and it is within the power of courts of equity to enforce the equity as well in the one case as in the other. Under our statutes in relation to the estates of deceased persons, a conversion of the property, both real and personal, may become necessary upon either of two contingencies: (1) For the payment of debts; and (2) in order to bring about equality in the final distribution. In principle we perceive no sound distinction between the two cases.' Donaldson's Estate, 158 Pa. 292, 27 Atl. 959, was an appeal from a decree dismissing exceptions to an auditor's report in partition of an estate. The court held that the equity of payment of an heir's debt to an estate runs with the land, and the amount of the heir's indebtedness may be charged upon his share as against an execution creditor, with notice that the same would be charged against said share as for an advancement. In Gosnell v. Flack, 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411, where a trustee of an insolvent heir claims the distributive share by right of his deed of trust, it was held that 'the right to a distributive share is subordinate from the beginning to the distributee's indebtedness to the estate. If he is charged with the indebtedness, as he should be, he can only receive in the way of a distributive share what remains after deducting that indebtedness. In other words, his right to claim any portion of the estate is limited to that portion, if any, which is in excess of what he owes to the estate, . . . and that the trustee was entitled to no greater rights than his grantor.' In this case the proceeds of this estate were in the administrator's hands for distribution."

Aside from our cases, already cited there is none other save McCormick v. Hanks, 105 Iowa, 639,

75 N. W. 494. But the decision there was apparently made to turn first upon an abandonment of any claim against the devisee, and, second, upon the failure of the executor to assert it before the liens of other creditors attached.

In view of the provisions of the will of Brackey, whereby he devised but a life estate in certain lands to Albert A. Brackey, with remainder over to his (Albert A.'s) children, and the remainder of his entire estate, both real and personal, to all his lawful children, including Albert A. Brackey, share and share alike; of the fact that Albert A. was not indebted to his father at the time the will was made, and was not indebted at the time of his death, save that he had been intrusted with the sum of $3,260 which he (the son) refused to turn over after the death of his father; of the further fact that he (Albert A.) has been insolvent since the father's death, and was both unwilling and unable to turn over the property held by him, belonging to the estate —we think it would be most inequitable to allow him to take his full share of the real estate devised to him, and of the real estate and personal property passing by the will to his brothers and sisters, share and share alike, without any diminution because of the fact that he already holds nearly $3,400 belonging to the estate, and either he or his assignee has already received for his interest in the other real estate belonging to the deceased at the time of his death the sum of $631.34. Albert A. Brackey's share in the personal estate of the deceased, not taking into account the $3,260 owed by him to it, will not amount to exceed $500; and the estate has not been closed, and no part of the property has been distributed. Deceased left seven children surviving, each of whom, including Albert A., was entitled to an undivided one-seventh interest in his estate, both real and personal, save the quarter section of land devised to Albert A. Brackey and his children. To allow Albert A. Brackey to have his full one-seventh, and also the specific devise of the life estate, and yet not compel him to account for the money and property in his hands at the time of testator's death, belonging to his estate, would be in effect to give him practically the entire estate of the deceased, leaving the other devisees and legatees without anything. Such a result should not be reached, if there be any way in law or equity for avoiding it.

Devise—subject to debt to estate.

In this regard we think the case is ruled by the authorities already cited, from some of which we have quoted. In addition thereto, the following extract from Streety v. McCurdy, 104 Ala. 493, 16 So. 686, is quite in point: "And where an heir or distributee was indebted to the ancestor in his lifetime and continues indebted to his estate, this debt to, this chose in action held by, the estate, is assets in the hands of the administrator both for the payment of the debt of the decedent and for the purposes of distribution; and both personalty and realty, including in the case supposed—the debt of a distributee to the estate, being a common fund for equal distribution, either by allotment of a sale and division of proceeds among all the distributees, those not indebted to the estate are entitled to have the sum due from one who is so indebted collected from him, or, failing this, they have a right to share in the assets as if such collection had been made; and the debtor distributee shares in the estate only upon the like assumption of payment by him. So that if his debt is equal to or greater than the value of one share in the distributable estate, including the claim against him, and that claim is not paid by him, he is never entitled to anything from the estate. Of course, a purchaser of his interest, or one holding a judgment, the lien of which would attach to any interest he would have had in the property of the estate but for his indebtedness to it, is in no

better plight than he; such purchaser or lienor would acquire nothing because his vendor or judgment debtor had and was entitled to nothing."

In Brown v. Mattingly, 91 Ky. 275, 15 S. W. 353, the Kentucky court said: "It is clear that the distributee's interest in the real estate should be extinguished to the extent of the amount he has received from the ancestor, so far as it exceeds his interest in the personal estate. He stands in the attitude of having received so much from the estate, and, if his distributive share in the personal estate is not equal to the amount thus received, the real estate ought to be held to be charged with the payment of the remainder in the division, and he to receive that much less. This is the only equitable rule. Were it otherwise, the one heir might virtually get a double or a treble portion."

The Indiana court said, in Fiscus v. Moore, 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362: "If it were possible for an heir, immediately upon the death of his ancestor, to convey or encumber his interest in the real estate, so that, after paying the debts of the ancestor, his grantee or mortgagee might participate in the surplus equally with other heirs who had received or who owed the ancestor nothing, the most manifest injustice and inequality would result. The law always presumes that an ancestor meant that his heirs should share equally in his estate." And in addition to the cases already cited, see Boden v. Mier, 71 Neb. 191, 98 N. W. 701; Donaldson's Estate, 158 Pa. 292, 27 Atl. 959; Wallace v. Keyser, 51 Pa. 498.

Of the cases holding to a contrary doctrine, some of them proceed upon the theory that, if the testator had intended that a debt due him by one of the devisees should be deducted from a general or specific devise, he would have said so, and, as he did not do this, the indebtedness should not be deducted from the devisee's share, whether that devisee be solvent or insolvent. This rule, while good as a general proposition, is not applicable here because there was no indebtedness from Albert A. Brackey when the will was made, and in fact no real indebtedness at the time of testator's death. Brackey was simply holding testator's property which he refused to turn over. This was clearly a fund belonging to the estate which he was holding in trust, both for the testator and, after his death, for the representative of his estate. This clearly distinguishes the present from some of the cases relied upon by appellant.

Other cases holding to the contrary proceed upon the old ecclesiastical and common-law rule that the real estate of one deceased passes either by will or descends to his devisees or heirs free from any debts of the deceased. In other words, the real estate passes directly upon the death of the owner, either to his devisees, or heirs, and cannot, under any circumstances, be charged with his debts, nor has his executor or administrator any power or authority over the real estate for any purpose whatever. The Massachusetts and Michigan courts seem to base their conclusions largely upon this rule, although in Michigan the common-law rule was changed by statute, and is now similar to our own, with reference to the payment of debts due the deceased. So far as we have noticed, the majority of the courts holding with the Massachusetts doctrine permit an administrator to offset against the distributive share of an heir in personal property the amount of his indebtedness, particularly when the heir is insolvent. Or what is the same thing, in effect, they bring the debt into hotchpot and require the one distributee to account to all the others for their proportion of the amount he is owing the estate.

Our statute treats real estate and personal property as the same for many purposes. After exhausting the personal property, real estate may be sold for the payment of

debts. If needed for the purpose of paying debts, the executor or administrator may be authorized to take charge of it at once, and to apply the rents and profits to the payment of the debts, as well as the land itself. Until the estate is closed, one is never safe in purchasing real estate from the heirs or devisees, because of its liability to pay decedent's debts, and if one of the heirs or devisees withholds from the estate personal property which might be used for the payment of debts, or perhaps specific legacies, and has become insolvent, it is quite clear to us that he would be held, in equity, to an accounting before taking a specific devise of land to himself or transferring the same to another; and if transferred to such other as an innocent purchaser, before the administration was closed, we are clear that the purchaser would obtain no greater rights to the property than he would have had, had he remained the owner down to the time the estate was closed. So here, in view of the peculiar facts of this case, already set forth, the estate not being closed, we think it is clearly within the power of a court of equity to take from a specific devise, made to a distributee, the proper part of the funds of the estate in his hands at the time of testator's demise, and to decree the same to be a lien upon this specific devise. These cases are both in equity, and proper parties are before the court.

Mortgage—priority of claim against mortgagor.

None of the mortgagees, unless it be Senneff individually, is an innocent holder for value, for they took their mortgages for pre-existing debts of the mortgagor. Koon v. Tramel, 71 Iowa, 132, 32 N. W. 243; Chadwick v. Devore, 69 Iowa, 637, 29 N. W. 757; Phelps v. Fockler, 61 Iowa, 340, 14 N. W. 729, 16 N. W. 210.

As to the first Senneff mortgage, he (Senneff) who was a member of the firm of Senneff & Bliss, attorneys at law, took the mortgage to secure the fees of the said firm, and accounted to the firm for its fees, taking the mortgage to himself. At that time he was fully advised of the claim made by the special administrator that his mortgagor was holding $3,200 of money belonging to the estate. He did not then know of the mortgagor's insolvency, but he did know that, if this claim was established, Albert A. Brackey could not pay it in full. He was Brackey's attorney at that time, not only in the will contest, but also in the suit brought against him by the special administrator. Mr. Senneff testified as follows: "Our position simmers down to this, that that property was not charged with any lien of the estate in favor of the estate, and latest authorities on the question are with us in that position. So as well as on the question whether he was insolvent, the question of whether we knew it or not, either one or both questions, we took those mortgages as we had a right to do, as if we were taking them for actual obligations, obligations actually owing us, and it became a race amongst creditors, in which the administrator's interests are not paramount to ours. These notes were given to me by Albert Brackey on June 1, 1911, and the mortgage securing the same, and were given to me for the services which had been rendered and to be rendered in the submission of the case of the contest of the will of Alf. T. Brackey. At the time these notes were given, the case had been tried in the district court, and there was some money still owing us for our services. These two notes, Exhibit A and Exhibit B, which were given to me, were taken by me as fees, and I accounted to the firm of Senneff & Bliss for the amount of those notes, or $1,500, which was the amount that was owing by Mr. Brackey to the firm of Senneff & Bliss at that time. Of course, I was a member of the firm of Senneff & Bliss. Now, at the time that I took this $1,500 mortgage, I say that I was not aware that Albert Brackey was insolvent. There was a claim which had been made

against him by the administrator. Mr. Brackey always told me, and still does, that he did not owe his father any money, and he did not have any money belonging to his father; at the time that I took the mortgage he told me then; and I had no reason to disbelieve it and I did not disbelieve it. I knew at that time that if that judgment was lodged against Albert Brackey that he would be insolvent. I knew that if that claim would be established against him that he would not have property enough to pay it, and that was—with that thought in mind I took that mortgage, although I don't know that that would have governed my action, because I told him right in the start, when he first employed us in this litigation, that either our fees would have to be paid, and paid promptly, or we would want them secured, because I was not going to devote my time up here trying this litigation, and not know that my fees were going to be paid; and he promised that he would do that. At the time I took the first mortgage I knew exactly what Brackey was owing us."

In this connection, it should be stated that Senneff also has a chattel mortgage upon the property of Albert A. Brackey to pay his claims, and the amount and value of the property covered thereby does not clearly appear, although Senneff stated in a general way that it would not be sufficient, he thought, to pay his claim. What the rule would be against a good-faith purchaser from Brackey, knowing nothing of the claim made against him by the representative of his father's estate, we have no occasion to determine. It is enough to say that, under the record, Senneff was not a good-faith purchaser without notice.

Same—good faith—notice.

These cases are in equity, and they are both peculiar in their facts; so peculiar as to introduce exceptions to general rules, and this opinion is not to be taken as a precedent for more than is actually decided. The general rules are as appellant's counsel claim them; but, in view of the peculiar facts shown by this record, the equities are so strongly with the representative of the estate that we are constrained to follow the authorities above cited, which introduce exceptions to the general rules, thus meting out full justice to all of the parties.

The decree of the court below must be, and it is, affirmed.

Ladd, Ch. J., and Gaynor and Withrow, JJ., concur.

Petition for rehearing denied.

W. R. WILSON et al.,
v.
S. P. CHANNELL et al.

RUSH MANUFACTURING COMPANY, Appt.

Kansas Supreme Court—April 6, 1918.

(102 Kan. 793, 175 Pac. 95.)

Descent — lien for debt of heir.

1. An indebtedness owing by an heir to his ancestor, remaining unpaid on the final settlement of the estate, constitutes an equitable lien upon such heir's distributive share of the real property belonging to the estate, superior to the lien of a judgment existing and docketed against him at the time of the death of his ancestor; and, after such final settlement, the interests of the other heirs in the real property are paramount to the lien of the judgment creditor.

[See note on this question beginning on page 991.]

Headnotes by MARSHALL, J.

Limitations — when applicable.

2. Such a claim as that mentioned in paragraph 1 of this syllabus is not affected by the Statute of Limitations.

(Johnston, Ch. J., and Porter and West, JJ., dissent.)

APPEAL by the defendant manufacturing company from a judgment of the District Court for Cowley County in favor of plaintiffs in an action brought to quiet title to certain real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. C. T. Atkinson, for appellant:

The judgment of the defendant manufacturing company against H. O. Wilson was a prior lien on the real estate to the claims of plaintiffs, and a lien on H. O. Wilson's part of said land.

Marvin v. Bowlby, 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 7 Ann. Cas. 559, 105 N. W. 751; Black v. Elliott, 63 Kan. 215, 88 Am. St. Rep. 239, 65 Pac. 215; Bliss v. Brown, 78 Kan. 467, 96 Pac. 945.

Messrs. W. L. Cunningham and **H. S. Hines,** for appellees:

An heir cannot claim what is coming to him from the estate without first discharging his liability to the estate.

Holden v. Spier, 65 Kan. 412, 70 Pac. 348; Head v. Spier, 66 Kan. 386, 71 Pac. 833; Keever v. Hunter, 62 Ohio St. 616, 57 N. E. 454; Brown v. Mattingly, 91 Ky. 275, 15 S. W. 353.

Marshall, J., delivered the opinion of the court:

Defendant the Rush Manufacturing Company appeals from a judgment in favor of the plaintiffs, quieting title to real property in Arkansas City. Martha A. Wilson died intestate, owning the real property in controversy, and owning personal property of the value of about $60. She left surviving her, as her heirs, H. O. Wilson and the plaintiffs, W. R. Wilson and Clara I. Jordan. H. O. Wilson was indebted to Martha A. Wilson, at the time of her death, in a sum equal to more than one third of the value of the real property. That indebtedness had been due for more than three years prior to her death. Some time prior thereto, defendant the Rush Manufacturing Company recovered a judgment in the district court of Cowley county against H. O. Wilson for $192.15, and costs, $163.25. At the time of the commencement of the present action, the estate of Martha A. Wilson had been fully administered and closed as provided by law.

The final order of distribution made by the probate court contains the following:

"The court further finds that the said Martha A. Abshear (Martha A. Wilson) left surviving her as her only heirs the said W. R. Wilson (sometimes called W. Robert Wilson) of Arkansas City, Kansas, H. O. Wilson of Arkansas City, Kansas, and Clara I. Jordan of Sommers, Arkansas, and that the said H. O. Wilson, at the time of the death of the said Martha A. Abshear, his mother, and ever since, was and has been, indebted unto her and unto said estate in the sum in excess of any interest which he might have therein, and that by reason thereof he has no interest in said estate, and had no interest at the time of the death of his said mother, that said H. O. Wilson has quitclaimed all of his right and title in and unto all of said real estate and disclaimed any interest in and unto all personal property, in full settlement and liquidation of the claim which said estate had against him, and is fully released and discharged therefrom, and has no interest and had no interest at the time of the death of his mother in her estate.

"It is therefore considered, ordered, and adjudged by the court that the said W. R. Wilson and Clara I. Jordan are the sole heirs of the deceased, and the sole owners of said estate and property both real and personal, and that all other persons here and after claiming or pretending to claim an interest in said estate be forever barred."

The plaintiffs claimed to be the

owners of all the real property in controversy, and claimed to be in possession thereof. The Rush Manufacturing Company set up its judgment against H. O. Wilson and claimed that the judgment was a lien on the real property inherited by him.

1. Did the judgment in favor of the Rush Manufacturing Company become a lien on the real property inherited by H. O. Wilson, prior to any claim of the estate of Martha A. Wilson on account of the indebtedness to her from H. O. Wilson, and, for that reason, prior to any claim or interest in the property held by the plaintiffs?

Some observations concerning undisputed principles of law may assist in correctly answering this question. By § 7320 of the General Statutes of 1915, a judgment of the district court is a lien on the real estate of a judgment debtor within the county in which the judgment was rendered. This lien attaches to the interest of the judgment debtor, and to nothing more. An heir has no interest in his ancestors' real property; but, when the ancestor dies intestate, that property descends at once to the heir. Advancements are recognized by statute, and must be considered in the final distribution of the estate of the deceased person.

There are two lines of authorities concerning the right of a creditor to look to the real property inherited by his debtor, where that debtor owed his ancestor an amount in excess of the value of the property inherited. Each line of authorities is supported by good reasoning. The leading case supporting the right of the creditor as against the estate is Marvin v. Bowlby, 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559. After citing and analyzing numerous decisions on this question, the Michigan court said: "We therefore hold that the distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness, either as against the land or the proceeds of the sale thereof in the hands of the administrator; that such indebtedness is to be collected by proceedings brought the same as for collecting any other indebtedness due the estate." 142 Mich. 256.

Probably the best-considered case on the other side is Stenson v. H. S. Halvorson Co. 28 N. D. 151, L.R.A. 1915A, 1179, 147 N. W. 800, Ann. Cas. 1916D, 1289, where it was held that an indebtedness owing by an heir to the estate constitutes a prior equitable lien on the heir's distributive share of the real estate, as against the liens of judgments docketed against him. The court said: "With due deference to the opinion of the Michigan court, we think the great weight of authority, as well as the better reasoning, is opposed to its holding in Marvin v. Bowlby, supra."

The facts stated in Stenson v. H. S. Halvorson Co. are very similar to the facts in the present case. In the Stenson Case the contest was over real property, between creditors of a debtor heir and another heir of their common ancestor, to whom the judgment debtor was largely indebted. The county court, the court having jurisdiction in North Dakota, directed that the judgment debtor's distributive share of the estate be applied on his indebtedness to that estate; and the supreme court held that the county court had jurisdiction to make such an order, and cites Holden v. Spier, 65 Kan. 412, 70 Pac. 348, where this court said: "The probate court, having jurisdiction to make settlement and distribution of a decedent's estate, may determine the share of each distributee, and to that end can inquire into and determine the indebtedness of the distributee to the estate, and order a deduction of the same from his share." Syl. 1.

This principle was followed in Head v. Spier, 66 Kan. 386, 71 Pac. 833, where this court further said: "The heirs of a decedent, whether

lineal or collateral, take their distributive share of the estate subject to all existing equities in favor of the estate against them personally and against any of those through whom they inherit." Syl.

These Kansas cases follow the same reasoning as that found in Stenson v. H. S. Halvorson Co.; but both Kansas cases arose over the distribution of personal property. A number of cases make a distinction between personal and real property, so far as the application of the principle now being discussed is concerned. There is no substantial justification for a less equitable rule in favor of the estate, so far as real property is concerned, than there is for the rule, acknowledged by almost all the authorities, concerning personal property. If, in the distribution of personal property, a distributee who is a debtor of the estate gets an advantage over the other distributees, because his debt is not deducted from his distributive share, then the inheritor of real property likewise gets an advantage over the other inheritors, if his debt to the estate cannot be in some way deducted from the share of real property which he receives. The equities which compel the rule concerning personal property are just as strong in favor of the same rule concerning real property.

The statute under which the North Dakota case was decided reads: "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court and to the possession of any administrator appointed by that court for the purpose of administration." N. D. Rev. Codes, § 5186, Comp. Laws 1913, § 5742.

The language used in the North Dakota statute is different from that used in ours; but the result is the same. With us, personal property decends to the heir the same as real property, with this exception; that the administrator must take possession of the personal property and use that property first for the payment of the debts of the decedent. The administrator may sell the real property for the payment of those debts, if there is not sufficient personal property.

The court concludes that the indebtedness of H. O. Wilson should, in some way, be deducted from his distributive share of the real property, and concludes that the rights of the estate, and therefore the rights of the plaintiffs, are paramount to the lien of the Rush Manufacturing Company. This conclusion is supported by numerous decisions, and by a note found in 7 Ann. Cas. 564; also, by 11 R. C. L. 247.

Descent—lien for debt of heir.

2. It may be contended that the claim of the estate against H. O. Wilson was barred by the Statute of Limitations. In Holden v. Spier, supra, this court said: "The equitable right to retain the debt of a distributee from his distributive share is not affected by the lapse of time, and the deduction of the debt should be made, although an action to recover the same would be barred by the Statute of Limitations." Syl. 2.

See also Goodenough v. Webber, 75 Kan. 209, 88 Pac. 879.

The Statute of Limitations cannot be set up to defeat the rights of the plaintiffs.

Limitations—when applicable.

The judgment is affirmed.

Johnston, Ch. J., and Porter and West, JJ., dissent.

Petition for rehearing denied, May 21, 1918.

ANNOTATION.

Right of retainer in respect of indebtedness of heir, legatee, or distributee.

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I. Scope.

The purpose of this annotation is to discuss the questions that have arisen in connection with the right, variously described as the right of retainer, deduction, or equitable set-off, which an executor or administrator has in respect to debts owing to the estate by persons claiming, either under a will or by virtue of the Statute of Descent and Distribution, to participate therein, both as against the debtor himself and against persons claiming under or through him.

The nature and extent of this right is of practical importance not only in ascertaining the relative rights of the estate and other creditors, seeking to subject the debtor's interest therein to the payment of their claims, but also in determining the amount with which the executor or administrator is properly chargeable upon an accounting (as in Sanchez v. Forster (1901) 133 **Cal.** 614, 65 Pac. 1077; Re Thomas (1903) 140 **Cal.** 397, 73 Pac. 1059; Lester v. Toole (1917) 20 **Ga.** App. 381, 93 S. E. 55; Howland v. Heckscher (1846) 3 Sandf. Ch. (**N. Y.**) 519; Lambright v. Lambright (1906) 74 **Ohio** St. 198, 78 N. E. 265, 6 Ann. Cas. 807; —infra), and the amount upon which he is entitled to commissions (as in Posey's Estate (1880) 1 Chester Co. Rep. (**Pa.**) 351.)

If a debt due to the estate from an insolvent debtor heir may be deducted from his distributive share of the proceeds of realty which has been sold in process of administration, or if, in the exercise of due diligence, the administrator can collect the debt of such heir out of the proceeds of real estate in his hands for the purpose of administration, liability will attach to the administrator for his failure to retain in the first instance, or to collect in the second instance, the debt due by the heir to the estate. Lester v. Toole (1917) 20 **Ga.** App. 381, 93 S. E. 55.

The fact that a debtor who is a legatee or distributee is insolvent does not prevent the debt from being considered an asset, with which the executor or administrator is chargeable to the extent to which such debt is offset by the legacy or distributive share. Lambright v. Lambright (1906) 74 **Ohio** St. 198, 78 N. E. 265, 6 Ann. Cas. 807; Howland v. Heckscher (1846) 3 Sandf. Ch. (**N. Y.**) 519.

Where an administrator's commissions and distributive share are equivalent to the amount of his promissory note to decedent, he is properly chargeable with the full amount thereof upon a settlement of his account, notwithstanding such note was appraised at less than its face value. Re Thomas (1903) 140 **Cal.** 397, 73 Pac. 1059.

The right to retain the amount of a debt of a legatee, of course, presupposes that the debt has not been excused or released by the testator. The question whether the provisions of the will amount to a remission of the debt is one of testamentary construction, and not within the scope of this note. The reader may be interested to know, however, that it is uniformly held that "a legacy from a creditor to his debtor, unaccompanied by language in the will, or exterior to it, expressly showing the special intent, whether equal to, greater, or less than the debt, raises no presumption whatever, either of law or of fact, that the testator intended thereby to excuse, release, or discharge the debt, so that the legatee would be entitled to claim and receive the whole amount bequeathed, but would be freed from all liability to pay the debt." 2 Pom. Eq. Jur. § 541, citing Wilmot v. Woodhouse (1793) 4 Bro. Ch. 227, 29 **Eng.** Reprint, 865; Clark v. Bogardus (1834) 2 Edw. Ch. (**N. Y.**) 387; Hayes v. Hayes (1859) 2 **Del.** Ch. 191, 73 Am. Dec. 709; Huston v. Huston (1873) 37 **Iowa,** 668; Blackler v. Boott (1873) 114 **Mass.** 24; Brokaw v. Hudson (1876) 27 **N. J.** Eq. 135; Zeigler v. Eckert (1847) 6 **Pa.** 13, 47 Am. Dec. 428; Sharp v. Wightman (1903) 205 **Pa.** 285, 54 Atl. 888.

See also, to the same effect, Spath v. Ziegler (1896) 48 **La.** Ann. 1168, 20 So. 663; Green v. Nelson (1847) 12

Met. (Mass.) 567; Re Lietman (1899) 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307; Elwart's Estate (1913) 52 Pa. Super. Ct. 321.

II. Nature and rationale of right; conditions of its exercise.

a. In general.

Nature and rationale of right.

"The right of an executor or administrator to retain a legacy or distributive share from a debtor to the estate, and apply it to the indebtedness, has long been recognized by the law as existing without any statute. It is not the technical right of set-off in actions at law. It is rather called, in the old cases, the right of retainer. It is an equitable right of its own nature, and not at all dependent upon any statute. It is the plain moral as well as legal duty of the debtor to pay his debt to the estate. He has had the value from the estate. He ought, in morals and law, to restore it. It needs no statute to affirm this duty. It is self-evident." Webb v. Fuller (1893) 85 Me. 443, 22 L.R.A. 177, 27 Atl. 346.

The fact that the legislature has expressly made advancements a subject of equitable set-off, and has not done so as to indebtedness owing by heirs or distributees, is not conclusive of the legislative intent not to allow such set-off as to such indebtedness. Boyer v. Robinson (1901) 26 Wash. 117, 66 Pac. 119; Stenson v. H. S. Halvorson Co. (1913) 28 N. D. 151, L.R.A.1915A, 1179, 147 N. W. 800, Ann. Cas. 1916D, 1289. In the case last cited, the court said: "The legislation thus enacted was, no doubt, for the purpose of distinguishing advancements from gifts, and not for the purpose of affecting in the least the rights of heirs or distributees who might be indebted to the estate. Indebtedness due the estate is a part of its assets for distribution, after payment of the debts and expenses of administration; but neither gifts nor advancements can be thus considered. Legislation was thus necessary in the one case, but not in the other." But a different view of the inference to be drawn from a statute making advancements a charge upon the heir's interest in the intestate's real estate was taken in Wheeler & M. Mercantile Co. v. Knox (1918) — Ark. —, 206 S. W. 46, in which it was said: "If the legislature has intended to make an heir's ordinary debt to his intestate a charge upon the heir's interest in the real estate, it would have been easy to include such debts in the sections making advancements a charge. By the inclusion of one, the exclusion of the other is logically inferable."

Many of the difficulties attending the question under discussion are due to the failure of the courts to agree upon the nature of the right. This vagueness is hardly surprising when it is taken into consideration that the right has never been so definitely marked out as to receive a name. Although, for the sake of brevity, it has been spoken of, in this note and elsewhere, as a right of retainer, it is not properly such, but a right in the nature of a right of retainer. The right of retainer, strictly speaking, is the right of an executor or administrator, who is himself a creditor of the estate, to retain (inasmuch as he cannot sue himself) the amount of such debt out of funds of the estate in his hands; and is thus explained and defined by Blackstone: "If a person indebted to another makes his creditor . . . his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree." 3 Bl. Com. 18. Nor is the right one of set-off, inasmuch as the case is not one of mutual demands (La Foy v. La Foy (1887) 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266); but rather a right in the nature of set-off. Although the right is sometimes spoken of as giving rise to an equitable lien upon a legacy, or distributive share (compare New v. New (1890) 127 Ind. 576, 27 N. E. 154; Holmes v. McPheeters (1898) 149 Ind. 587, 49 N. E. 452; Hancock v. Hubbard (1837) 19 Pick. (Mass.) 167), its assertion is not the enforcement of a lien (Ford v. Talmage (1889) 36 Mo. App. 65); and the characterization of

the right as one to a lien is objectionable, as implying that the right is broader than it really is.

The right has been described as a right to pay out of the fund in hand (Cherry v. Boultbee (1839) 4 Myl. & C. 442, 41 **Eng.** Reprint, 171, 3 Jur. 1116, 9 L. J. Ch. N. S. 118; Tillie v. Springer (1891) 21 **Ont.** Rep. 585; Fiscus v. Moore (1890) 121 **Ind.** 547, 7 L.R.A. 235, 23 N. E. 362; Fiscus v. Fiscus (1890) 127 **Ind.** 283, 26 N. E. 831; Armour v. Kendall (1885) 15 **R. I.** 193, 2 Atl. 311); but it is rather a right to treat the distributive share, or legacy, as having been paid pro tanto out of the assets of the estate which the debtor has in hand. See cases set forth infra, especially Turner v. Turner [1911] 1 Ch. (**Eng.**) 716, 80 L. J. Ch. N. S. 473, 104 L. T. N. S. 901, 21 Ann. Cas. 810.

The right is based upon the equitable principle that no one should be admitted to share in the distribution of a fund until he has discharged his obligation to contribute to the fund.

For the various judicial discussions of the nature and rationale of the right, reference may be had to the following cases, the effect of which has been above summarized:

While the administrator, if he would avail himself of the right to set off a debt owing by a distributee against his share, may refuse to pay such distributive share, this right of set-off does not constitute a lien on the estate. Proctor v. Newhall (1820) 17 **Mass.** 81.

In Hancock v. Hubbard (1837) 19 Pick. (**Mass.**) 167, it was said that an administrator has no lien upon the personal estate coming to an heir by distribution, in security of a debt due from the heir, where there is nothing to show that such debt was an advancement; although it was suggested that there might be a qualified lien arising from the right to set off, which might arise when the heir should sue for his distributive share; or an equitable lien, to be enforced in equity as a trust arising in the settlement of estates.

In Ford v. Talmage (1889) 36 **Mo.** App. 65, it is said that the right to deduct from the distributive share of an heir any indebtedness due from the heir to the deceased at the time of his death "is not the enforcement of an equitable lien, because there can possibly be no lien on the interest of the distributee, as security for the debt in favor of the administrator. We think that the true ground on which this doctrine rests is the equitable right of the administrator, by appropriate proceedings, to impound the interest of the distributee and, by decree of court, have the debt, if larger than the distributive share, paid pro tanto, by applying the amount due on distribution as a credit thereon;" but in Re Lietman (1899) 149 **Mo.** 112, 73 Am. St. Rep. 374, 50 S. W. 307, it is said that the right rests upon the ground that the debt is already in the hands of the executor, as assets collected by being deducted from the legacy.

In Cherry v. Boultbee (**Eng.**) supra, it was said that the term "set-off" is incorrectly used in a case of this nature, for the proper use of the term applies only to cases of mutual debts and credits; but that the right of the executor is rather a right to pay the legacy out of the funds in the hands of the other party, than a cause of set-off.

In Smith v. Smith (1861) 3 Giff. 263, 66 **Eng.** Reprint, 408, Vice Chancellor Stuart said: "I do not think 'retainer,' or 'set-off,' is a proper expression, for it is not a question of retainer or set-off, but a question of right on the part of the legatee to receive payment of the legacy, having regard to the amount of the debt due to the testator's estate."

The right of the administrator to deduct the indebtedness due from a distributee is usually denominated a right of set-off; but the term "set-off" is very inaccurately used in cases of this kind, the right being rather one to pay out of a fund in hand than a right of set-off. Fiscus v. Moore (1890) 121 **Ind.** 547, 7 L.R.A. 235, 23 N. E. 362.

In Fiscus v. Fiscus (1890) 127 **Ind.** 283, 26 N. E. 831, it is said that "the term 'set-off,' as used in this class of cases, is used inaccurately. It is not in fact a set-off; but it is the mere

exercise of the right of the administrator to apply the funds in his hands to the payment of a debt due from the distributee to the estate."

In Holmes v. McPheeters (1898) 149 **Ind.** 587, 49 N. E. 452, it is said: "This right is not one of set-off, but is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee, or legatee, until the latter has discharged the obligation which he owes to the estate. The heir, or legatee, as the authorities affirm, is not, in accordance with justice or good conscience, entitled to be awarded and receive his share as long as he is a debtor to the estate, and thereby has in his own hands a part of the fund upon which the payment of his own share and the shares of others depends."

In Re Lietman (1899) 149 **Mo.** 112, 50 S. W. 307, it is said that "the American doctrine places it upon the ground that the debt is already in the hands of the executor, as assets collected by being deducted from the legacy, thereby practically enforcing the common-law doctrine of retainer."

The right of an executor to retain the amount to which the legatee is indebted to the estate has been said to be rather a right to pay out of the fund in hand than a right of set-off. It has also been said that the right rests upon the equitable principle that the legatee is not entitled to the legacy while he retains a part of the assets out of which it ought to be paid. The legacy is, accordingly, regarded as applied, pro tanto, in payment of the debt. Armour v. Kendall (1885) 15 **R. I.** 193, 2 Atl. 311.

In Oxsheer v. Nave (1897) 90 **Tex.** 568, 37 L.R.A. 98, 47 So. 7, it is said that "the right to have the debt of the legatee or distributee charged to him in the adjustment of the legacy, or the distributive share, is called a right of 'set-off,' or of 'retainer.' But the inaccuracy of the former expression is pointed out in Cherry v. Boultbee (1839) 4 Myl. & C. 442, 41 **Eng.** Reprint, 171, 3 Jur. 1116, 9 L. J. Ch. N. S. 118, and has frequently been recognized in other cases. So, the improper use of the word 'retainer' in the same connection has been commented upon. Re Akerman [1891] 3 Ch. (**Eng.**) 212, 61 L. J. Ch. N. S. 34, 65 L. T. N. S. 194, 40 Week. Rep. 12. The right, in our opinion, rests not so much upon any rule of set-off, or of retainer, as upon the broad principles of equity."

The right and duty of the administrator to apply the distributive share or interest of a distributee in the personal estate of an intestate, to the debts of such distributee, are based upon the doctrine of retainer, and not so much upon the right of set-off proper. Lester v. Toole (1917) 20 **Ga. App.** 381, 93 S. E. 55.

In Re Akerman [1891] 3 Ch. (**Eng.**) 212, it was said by Kekewich, J., "The Lord Chancellor, Lord Cottenham, in the case of Cherry v. Boultbee (**Eng.**) supra, took occasion to remark that the expression 'set-off' is very inaccurately used in cases of this kind, and he might have added, no doubt, that inaccuracy implies confusion. I will venture to add to that remark that the term 'retainer,' also, is inaccurately used in cases of this kind. I have heard more of 'retainer' in this case than I have heard of 'set-off,' but neither the one term nor the other can really be used with propriety, and either, I think, equally introduces confusion. The principle is to be found laid down in Cherry v. Boultbee, in the passage to which I have just referred, and also in Courtenay v. Williams (1844) 15 L. J. Ch. N. S. (**Eng.**) 204, 8 Jur. 844; and no doubt, if search were made, it would be found to have been laid down in many other cases. It is this: A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is, in truth, retained by the representative of the estate; nothing is, in strict language, set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back. That is expanding what the Lord Chancellor calls, in Cherry v. Boultbee, 'a right

to pay out of the fund in hand,' rather than a set-off, and is in conformity with what the Lord Chancellor, Lord Lyndhurst, in Courtenay v. Williams, says (15 L. J. Ch. N. S. 208): 'The defendant's, the legatee's, demand (the court says) is in respect of the testator's assets, without which the executor is not liable; and it is very just and equitable for the executor to say, that the defendant, the legatee, has so much of the assets already in his own hands, and consequently is satisfied pro tanto.'"

In Re Melton [1918] 1 Ch. (Eng.) 37, Scrutton, L. J., after referring to the foregoing passage, said: "I do not think it necessary to decide exactly what the right of the executors is. I am rather disposed to agree with Kekewich, J., that it is not retainer. I have great difficulty, in spite of the dictum of the Lord Chancellor in Cherry v. Boultbee (1839) 4 Myl. & C. 442, 41 Eng. Reprint, 171, 3 Jur. 1116, 9 L. J. Ch. N. S. 118, in seeing how it is a lien."

In Cull v. Howard [1918] 2 Ch. (Eng.) 146, Sargent, J., said that, notwithstanding what was said by Kekewich, J., in Re Akerman, he thought that the right, where it exists, is properly called one of retainer.

In Tillie v. Springer (1891) 21 Ont. Rep. 585, it is said: "This right is not one of retainer, or 'set-off,' in the proper use of these terms; but it is, viewed from the side of the beneficiary, his right to receive payment of the legacy, having regard to the amount of debt due to the testator's estate; and, viewed on the side of the executor, his right to be paid the debt out of the fund in hand."

In Turner v. Turner [1911] 1 Ch. (Eng.) 716, 21 Ann. Cas. 810, Cozens-Hardy, M. R., said: "I think that the more logical and correct mode of explaining that doctrine is this: You, the debtor, have in your hands part of the assets of the testator, and you cannot claim any part of the assets of the testator, out of which, of course, your legacy must be paid, without bringing into the estate that portion which is now in your pocket; or, in other words, your legacy must be treated as paid, pro tanto, out of the assets of the testator which you have in your pocket."

Inasmuch as the legatee's demand for his legacy is in respect of the testator's assets, without which the executor is not liable, it is very just and equitable for the executor to say that the legatee has so much of the assets already in his own hands, and consequently is satisfied pro tanto. Jeffs v. Wood (1723) 2 P. Wms. 128, 24 Eng. Reprint, 668.

The right to retain depends upon the principle that the legatee or distributee is not entitled to his legacy, or distributive share, while he retains in his own hands a part of the fund out of which that and other legacies, or distributive shares, ought to be paid, or which is necessary to extinguish other claims on that fund; it being against conscience that he should receive anything out of the fund without deducting therefrom the amount of that fund which is already in his hands, as a debtor to the estate. Smith v. Kearney (1848) 2 Barb. Ch. (N. Y.) 533; Merritt v. Jenkins (1880) 17 Fla. 593; Irvine v. Palmer (1892) 91 Tenn. 463, 30 Am. St. Rep. 893, 19 S. W. 326; Re Foster (1902) 38 Misc. 347, 77 N. Y. Supp. 922.

The ground upon which an administrator is entitled to retain so much of the distributive share of a distributee as will satisfy a debt due from the latter to the estate is that the heir or distributee makes a demand upon the administrator, in respect to assets in his hands as administrator, and the just and equitable answer in such a case is that the person making the demand has already in his hands assets belonging to the estate, in excess of the amount of the distributive share which he is demanding. Fiscus v. Moore (1890) 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362.

Where an heir, or distributee, was indebted to the ancestor in his lifetime, and continues indebted to his estate, this indebtedness is assets in the hands of the administrator, both for the payment of debts of the decedent and for the purposes of distribution; and both personalty and realty, includ-

ing the debt of the distributee to the estate, being a common fund for equal distribution, either by allotment or by a sale and division of proceeds among all the distributees, those not indebted to the estate are entitled to have the sum due from one who is so indebted collected from him, or, failing in this, they have a right to share in the assets as if such collection had been made, and the debtor distributee shares in the estate, only upon the like assumption of payment by him; so that, if his debt is equal to or greater than the value of one share in the distributable estate, including the claim against him, and that claim is not paid by him, he is never entitled to anything from the estate. Streety v. McCurdy (1894) 104 **Ala.** 493, 16 So. 686.

There exists a right to have an equal distribution of the estate between heirs, devisees, and legatees, and for that purpose there exists in equity a lien and right to have such portion of an estate, whether real or personal, as goes to the heirs, applied to the payment of a debt due from the heir to the estate. New v. New (1890) 127 **Ind.** 576, 27 N. E. 154.

In Barnett v. Thomas (1905) 36 **Ind.** App. 441, 114 Am. St. Rep. 385, 75 N. E. 868, it is said that "a debt due a decedent becomes a part of the assets of his estate, and if such debt is due and owing from an heir who is entitled to share in his real estate, or the distribution of his personal estate, equity demands that an account be taken of it, to the end that an equal distribution may be made."

Conditions of its exercise.

The duty and obligation resting upon the administrator or executor to withhold and apply, to the extent of the debt, the amount which would otherwise have been payable to the heir, or legatee, are in no manner controlled or affected by the solvency or insolvency of such heir, or legatee. Lambright v. Lambright (1906) 74 **Ohio** St. Rep. 198, 78 N. E. 265, 6 Ann. Cas. 807; SENNEFF v. BRACKEY (reported herewith) ante, 978.

It is not necessary that the executors should first proceed in a suit at law and obtain judgment. Esmond v. Esmond (1910) 154 **Ill.** App. 357.

In order to present a proper case for the exercise of the right of retainer, there must be money payable against money payable. It is not enough that the subject of the gift is something which has an easily ascertainable money value. Re Savage [1918] 2 Ch. (**Eng.**) 146.

Until it can be known what the amount of the legacy is, the executor is in no condition to compel a legatee, even by a proper bill, to submit to a deduction of indebtedness from the legacy. Jeffers v. Jeffers (1891) 139 **Ill.** 368, 28 N. E. 913.

There can be no retainer in respect of a debt not yet due (see III. c, infra).

Executors who have set apart and appropriated assets to meet a legacy cannot retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of the testator. Ballard v. Marsden (1880) L. R. 14 Ch. Div. (**Eng.**) 374, 49 L. J. Ch. N. S. 614, 42 L. T. N. S. 763, 28 Week. Rep. 914.

The right to appropriate a legacy to the satisfaction of an indebtedness of the legatee to the testator may be defeated by a provision in the will that the legacy shall not be liable, under any circumstances, for the legatee's debts (as for example, in Elwart's Estate (1913) 52 **Pa.** Super. Ct. 321). The question as to what provisions will have this effect does not come within the scope of this note, and is not here considered.

b. Arising from testamentary provision for deduction of debts from share of legatee.

The right of retainer arising out of a testamentary provision that a legatee shall account for his indebtedness to the testator, as a condition of receiving his legacy, differs from the right which exists independently of testamentary direction only in this, that the legatee cannot dispute the amount of such indebtedness, where such amount is fixed by the testator (Townsley v. Townsley (1914) 167 **Iowa,** 226, 149 N. W. 262; Nalle v. State Deposit & T. Co. (1913) 120 **Md.** 187, 87 Atl. 770; Dunshee v. Dunshee

(1914) 243 Pa. 599, 90 Atl. 362); or his liability therefor, by reason of the debt having become barred by the Statute of Limitations (Rose v. Gould (1852) 15 Beav. 189, 51 Eng. Reprint, 509, 21 L. J. Ch. N. S. 360; Gray v. Hayhurst (1910) 157 Ill. App. 488; Holt v. Libby (1888) 80 Me. 329, 14 Atl. 201; Baker v. Safe Deposit & T. Co. (1901) 93 Md. 368, 48 Atl. 920, 49 Atl. 623; Cummings v. Bramhall (1876) 120 Mass. 552; Allen v. Edwards (1883) 136 Mass. 138; Eichelberger's Estate (1890) 135 Pa. 160, 19 Atl. 1006, 1014; Gillingham's Estate (1908) 220 Pa. 353, 69 Atl. 809; Bird's Appeal (1857) 2 Pars. Sel. Eq. Cas. (Pa.) 168); or having otherwise become unenforceable, legally (Pierce v. Loomis (1916) 224 Mass. 226, 112 N. E. 1027).

The question as to what language is sufficient to constitute the indebtedness of a legatee or devisee a charge upon the subject of the gift is not covered in this note.

It is competent for the testator to charge the share of a legatee, whether he was right or wrong in respect to the existence of the indebtedness. Townsley v. Townsley (1914) 167 Iowa, 226, 149 N. W. 262; Eichelberger's Estate (1890) 135 Pa. 160, 19 Atl. 1006, 1014.

Where the testator directs that the sums of money, loans, or advances which he has made to his children shall be brought into his estate, and form part thereof, and that, in the division of his estate, they shall be charged against the shares of his children, the only questions which the court will consider are the identity of the charges and the proofs submitted to support them. Nalle v. State Deposit & T. Co. (1913) 120 Md. 187, 87 Atl. 770.

Where the will fixes the amount of indebtedness with which the legatee is to be charged, the court will not inquire into the transactions and business dealings between the testator and the legatee, prior to the making of the will, for the purpose of showing that the testator made a mistake in the amount of the indebtedness; though it will attempt to ascertain such amount, if the indebtedness of the legatee is charged against his share of the estate in general terms, or if the amount of the indebtedness charged in the will was subsequently reduced by payments, or if the amount of the indebtedness is left open for future determination. Dunshee v. Dunshee (1914) 243 Pa. 599, 90 Atl. 362.

But a recital in a will executed after the release of a note, in which the note was listed among those due from the legatee, does not create an affirmative liability against him. Townsley v. Townsley (Iowa) supra.

c. Court in which right may be asserted.

On account of the equitable character of the right, it has, in some cases, been made a question whether it may be asserted otherwise than in a court of equity. The weight of authority is to the effect that the right may be asserted in a court of probate (Mahon v. Bowers (1836) 1 How. (Miss.) 275; Re Lietman (1899) 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307; Stenson v. H. S. Halverson Co. (1913) 28 N. D. 151, L.R.A.1915A, 1179, 147 N. W. 800, Ann. Cas. 1916B, 1289; Springer's Appeal (1857) 29 Pa. 208; Re Colwell (1888) 15 N. Y. S. R. 742), even though such court is powerless to decide whether the claim in question is a valid and existing indebtedness (Re Colwell (N. Y.), and Springer's Appeal (Pa.) supra), or to direct the course to be taken by the executor or administrator in the matter (see Re Harper (1916) 95 Misc. 464, 158 N. Y. Supp. 1000); although there are some decisions to the contrary. See Bondurant v. Thompson (1849) 15 Ala. 202; Hancock v. Hubbard (1837) 19 Pick. (Mass.) 172; Ford v. Talmage (1889) 36 Mo. App. 65.

Thus, it has been held that the fact that probate courts have no equity jurisdiction does not negative their power to deduct a debt due the estate by a legatee from a legacy due the debtor under the will, inasmuch as it involves the collection of a debt due the estate, which falls within the duty of the executor or administrator, and the distribution of the estate, which falls within the power and duty of the probate court. Re Lietman (1899) 149

Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307.

The fact that a probate court is powerless to decide whether the claim in question is a valid and existing indebtedness will not preclude it from allowing the executor to deduct it from the amount of the legacy, the objectant having the right to appeal to another tribunal to settle the dispute. Re Colwell (1888) 15 N. Y. S. R. 742.

The right to inquire into and determine the indebtedness of a distributee of the estate, and to order a deduction of the same from his share, is an incident to the authority of the court to make settlement and distribution of a decedent's estate. Stenson v. H. S. Halverson Co. (1913) 28 N. D. 151, L.R.A.1915A, 1179, 147 N. W. 800, Ann. Cas. 1916B, 1289.

It is competent for the orphans' court to decree that the amount of purchases made at an administrator's sale by a distributee be deducted from his distributive share of the estate. Mahon v. Bowers (1836) 1 How. (Miss.) 275.

As a preliminary to a distribution the orphans' court may settle all questions of advancement or of debts that are to stand for advancements, but it cannot go further and decide that a distributee is in debt beyond his share of the estate; and such a decision can furnish no foundation for any process to compel payment of a debt, or of any part of it. Springer's Appeal (1857) 29 Pa. 208.

But in Bondurant v. Thompson (1849) 15 Ala. 202, it was held that a set-off of a debt due to the estate by one of the distributees, against the share of such distributee, cannot be allowed, where the orphans' court is without jurisdiction to adjudicate cross demands.

And in Ford v. Talmage (Mo.) supra, it was held that a probate court has no jurisdiction to determine the indebtedness to a deceased person's estate of one of its distributees; and to set off the amount of such indebtedness against such distributee's share of the estate in making an order of distribution. This decision, however, is overruled in Re Lietman (Mo.) supra, where it is held that probate courts have the power to make such deduction, without the intervention of a court of chancery.

In Hancock v. Hubbard (1837) 19 Pick. (Mass.) 172, the court said: "It is clear, we think, that a court of probate cannot take notice of a debt due from an heir to the estate and, in effect, direct the payment of it in the form of a decree of distribution. It is a matter not within the jurisdiction of that court, and a decree thus directing the distributive share of one heir to be paid over to another, on the ground of compelling payment of a debt due by such distributee to the estate, is wholly void. It is, in this respect, similar to a decree directing an administrator to pay a debt, which is a subject not within the probate jurisdiction, and is therefore void, and imposes no duty on the administrator to pay such debt." In Green v. Nelson (1847) 12 Met. (Mass.) 567, it is said that the cases of Proctor v. Newhall (1820) 17 Mass. 93, and Hancock v. Hubbard (1837) 19 Pick (Mass.) 167, do not deny the right of set-off, if a suit is brought against an administrator by the heir of an intestate for his distributive share; but that, on the contrary, they sanction that doctrine, and only hold that in making the decree of distribution the judge of probate cannot make any deduction from the share of any of the heirs, on account of any debt due by them to the estate of the intestate.

The surrogate cannot authorize the executors to pay the legacy, or to refuse payment thereof, on the request of the executors for instructions, where there is an unpaid note of the legatee in the hands of the executors, of the same amount as the legacy; but the matter is one within the discretion of the executors. Re Harper (1916) 95 Misc. 464, 158 N. Y. Supp. 1000.

Where the indebtedness of an heir may be set off against his interest in the land inherited (as to which see IV. b, 1, infra), the fact that, by reason of his indebtedness to the decedent, an heir took no share in the real estate, may be adjudicated in an action to quiet title, instituted by his

coheirs. Lockwood v. Whitlesey (1912) 23 **Ohio** C. C. N. S. 241.

III. Debts in respect of which the right may be asserted.

a. In general.

In order that the right of retainer may be exercised, the amount to be deducted must be known or ascertainable (Re Hodgson (1878) L. R. 9 Ch. Div. (**Eng.**) 673, 48 L. J. Ch. N. S. 52, 27 Week. Rep. 38); and a legacy or distributive share may not be retained to satisfy a debt not yet due (Re Rees (1889) 60 L. T. N. S. (**Eng.**) 260; Re Abrahams [1908] 2 Ch. (**Eng.**) 69, 77 L. J. Ch. N. S. 578, 99 L. T. N. S. 240; Hayes v. Hayes (1879) 2 **Del.** Ch. 191, 73 Am. Dec. 709. **Contra,** Ross v. M'Kinny (1828) 2 Rawle (**Pa.**) 227; Sproul's Appeal (1884) 105 **Pa.** 442).

An administrator cannot set off an indebtedness against a distributive share, to the prejudice of the distributee's creditors, where the indebtedness was fraudulent. Rawlins v. Rawlins (1885) 75 **Ga.** 632.

Secured debts.

The fact that the indebtedness to the estate of an insolvent distributee is partially secured by a lien on other property does not in any wise affect the right to offset it against his share in the estate (Oxsheer v. Nave (1897) 90 **Tex.** 568, 37 L.R.A. 98, 40 So. 7); nor is the right of retainer lost by taking additional security for the indebtedness to the estate. Rice v. Bradley (1914) 159 **Ky.** 293, 166 S. W. 1013.

Indebtedness incurred after decedent's death.

Except in Louisiana, where the matter is regulated by statute (Flower v. Myrick (1897) 49 **La.** Ann. 321, 21 So. 542), the right of retainer is not confined to debts owing to the decedent in his lifetime; but, in accordance with the equitable principle upon which such right is based, extends to the case of an indebtedness to the estate incurred after the decedent's death.

Alabama.—Brown v. Lang (1848) 14 Ala. 719; Goodman v. Benham (1849) 16 Ala. 625; Lang v. Brown (1852) 21 Ala. 179, 56 Am. Dec. 244.

Arkansas.—Wilson v. Slaughter (1890) 53 Ark. 137, 13 S. W. 515.

Florida.—Merritt v. Jenkins (1880) 17 Fla. 593.

Indiana.—Koons v. Mellett (1889) 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95; New v. New (1890) 127 Ind. 576, 27 N. E. 154.

Kentucky.—Ball v. Townsend (1821) Litt. Sel. Cas. 325; Taylor v. Jones (1895) 97 Ky. 201, 30 S. W. 595.

Maryland.—Manning v. Thruston (1882) 59 Md. 218; Gosnell v. Flack (1892) 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Hoffman v. Armstrong (1899) 90 Md. 123, 44 Atl. 1012; Linthicum v. Polk (1901) 93 Md. 84, 48 Atl. 842.

Mississippi.—Mahon v. Bower (1836) 1 How. 275; McGee v. Ford (1846) 5 Smedes & M. 769.

Missouri.—Hopkins v. Thompson (1898) 73 Mo. App. 401.

New Hampshire.—Wilson v. Edmonds (1852) 24 N. H. 517.

New Jersey.—Young v. Schelly (1891) — N. J. Eq. —, 21 Atl. 1049.

New York.—Clapp v. Meserole (1864) 1 Abb. App. Dec. 372, affirming (1863) 38 Barb. 661; Haskin v. Teller (1878) 3 Redf. 316; Re Stacey (1915) 89 Misc. 88, 152 N. Y. Supp. 717.

North Carolina.—Allen v. Smitherman (1849) 41 N. C. (6 Ired. Eq.) 341; Ramsour v. Thompson (1871) 65 N. C. 628; Grant v. Edwards (1885) 92 N. C. 447.

Ohio.—Re Ellis (1894) 5 Ohio S. & C. P. Dec. 330; Lambright v. Lambright (1906) 74 Ohio St. 198, 78 N. E. 265, 6 Ann. Cas. 807.

Pennsylvania.—Baughman v. Divler (1800) 3 Yeates, 9; Ross v. M'Kinny (1828) 2 Rawle, 227; Manifold's Estate (1843) 5 Watts & S. 340; Ammon's Appeal (1869) 63 Pa. 284; Sproul's Appeal (1884) 105 Pa. 442; Baily's Estate (1893) 156 Pa. 634, 22 L.R.A. 444, 27 Atl. 560.

South Carolina. — Bobo v. Vaiden (1883) 20 S. C. 271; Small v. Usher (1907) 77 S. C. 115, 67 S. E. 623.

England.—Jeffs v. Wood (1723) 2 P. Wms. 128, 24 Eng. Reprint, 668; Sims v. Doughty (1800) 5 Ves. Jr. 243, 31 Eng. Reprint, 567; Skinner v. Sweet (1818) 3 Madd. Ch. 244, 56 Eng. Reprint, 499, G. Cooper, 54, 35 Eng. Reprint, 475; Willes v. Greenhill (1860) 29 Beav. 376, 54 Eng. Reprint,

763; Re Knapman (1881) L. R. 18 Ch. Div. 300, 50 L. J. Ch. N. S. 629, 45 L. T. N. S. 102; Re Whitehouse (1887) L. R. 37 Ch. Div. 683, 57 L. J. Ch. N. S. 161, 57 L. T. N. S. 761, 36 Week. Rep. 181; Re Hervey (1889) 61 L. T. N. S. 429; Re Watson [1896] 1 Ch. 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571; Re Melton [1918] 1 Ch. 37, 34 Times L. R. 20, 52 L. J. N. C. 386, 143 L. T. Jo. 409.

Canada.—Bain v. Malcolm (1887) 13 Ont. Rep. 444.

Legatees who, had they diminished the assets by any conduct on their part in the testator's lifetime, either by being indebted to him, or otherwise, must make them good, are in no better position if they diminish the assets subsequently to his death, but before the estate has been administered and distributed. Re Knapman (1881) L. R. 18 Ch. Div. (Eng.) 300, 50 L. J. Ch. N. S. 629, 45 L. T. N. S. 102.

Debt contracted by one under disability.

There is a difference of opinion upon the question whether the right to retainer is affected by the disability of the debtor to contract the debt. In England, it has been held that there is no right of retainer in respect of debts which the legatee or distributee was under a legal disability (as in the case of a married woman without separate estate) to incur (Re Wheeler [1904] 2 Ch. (Eng.) 66, 73 L. J. Ch. N. S. 576, 52 Week. Rep. 586, 91 L. T. N. S. 227); while, in Pennsylvania, it has been held to be immaterial that the distributee was, at the time of receiving money from the decedent, a married woman, and therefore incapable of contracting any debt (Bucknor's estate (1890) 136 Pa. 23, 20 Am. St. Rep. 891, 19 Atl. 1069); and that the amount of a mortgage given by a married woman to her father for borrowed money must be regarded, in equity, as a part of her father's estate in her possession, and distributable as such (Re Willock (1894) 24 Pittsb. L. J. N. S. (Pa.) 446).

Debt of executor or administrator to estate.

The administrator must set off his own debt against his distributive share, and his sureties are responsible for his failure to do so. Sanchez v. Forster (1901) 133 Cal. 614, 65 Pac. 1077.

See also cases under III. g, infra.

b. Debts arising out of discharge of contingent liability by decedent's estate.

Sums which the estate has been compelled to pay by reason of the decedent's suretyship for a distributee, or legatee, are a proper subject of retainer. Willes v. Greenhill (1860) 29 Beav. 376, 54 Eng. Reprint, 373; Re Watson [1896] 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571; Re Melton [1918] 1 Ch. (Eng.) 37, 34 Times L. R. 20, 52 L. J. N. C. 386, 143 L. T. Jo. 409; Bain v. Malcolm (1887) 13 Ont. Rep. 444; Wilson v. Slaughter (1890) 53 Ark. 137, 13 S. W. 515; Koons v. Mellett (1889) 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95; Taylor v. Jones (1895) 97 Ky. 201, 30 S. W. 595; Tournillon's Succession (1860) 15 La. Ann. 263; Manning v. Thruston (1882) 59 Md. 218; Hopkins v. Thompson (1897) 73 Mo. App. 401; Ramsour v. Thompson (1871) 65 N. C. 628; Re Ellis (1894) 5 Ohio S. & C. P. Dec. 330; Manifold's Estate (1843) 5 Watts & S. (Pa.) 340; Bailey's Estate (1893) 156 Pa. 634, 22 L.R.A. 444, 27 Atl. 560.

It matters not that the debts are paid since the death of the intestate, as they are contingent liabilities, on the payment of which by the administrator an equity arises which relates back to the time of the death of the intestate (Hopkins v. Thompson (Mo.) supra; Manifold's Estate (1843) 5 Watts & S. (Pa.) 340); and this equity cannot be disturbed by an act of the distributees, nor can it be displaced by a subsequent judgment obtained by the creditor of one of them (Manifold's Estate (Pa.) supra).

It is immaterial that the payments were not made until after the institution of a suit for the recovery of the legatee's share (Ramsour v. Thompson (1871) 65 N. C. 628); and that the distributee has died before the liability accrued by the discharge of an obligation on which the decedent was a sure-

ty, does not affect the right of retainer (Re Ellis (1894) 5 Ohio S. & C. P. Dec. 330).

Where testator empowered his wife, to whom he gave his entire estate for life, to give any child immediate possession of so much of the estate as she might see fit, not to exceed one sixth to any child, and requiring each child to account, in the final division of the estate, for what he had received from the widow in her exercise of this power, the other children have the right to require that the interest of one of them shall be subjected to the payment of a debt for which the testator was bound as his surety. Taylor v. Jones (1895) 97 Ky. 201, 30 S. W. 595.

A legacy from a surety to his cosurety, jointly and severally liable with him for the principal's default, is subject to deduction of the legatee's proportionate share of the amount the estate of the testator is compelled to pay upon such liability. Baily's Estate (1893) 156 Pa. 634, 22 L.R.A. 444, 27 Atl. 560.

An indebtedness to the estate, arising from the foreclosure of a mortgage given by the intestate to secure the debt of an heir, is a proper subject of retainer (Wilson v. Slaughter (1890) 53 Ark. 137, 13 S. W. 515); as are sums paid by the executor by reason of the testator's obligation under a mortgage given as security for a debt, and a sum deducted by the mortgagees from the proceeds of a sale, in satisfaction of their claims (Re Watson [1896] 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571).

It has been held that, if a surety gives a legacy to his principal, the latter cannot recover it from the estate of the former until he has satisfied or furnished indemnity against the demand for which the testator was his surety (Ross v. M'Kinny (1828) 2 Rawle (Pa.) 227; Sproul's Appeal (1884) 105 Pa. 442); but whether this doctrine would be accepted in other jurisdictions is, at least, open to question (see III. c, infra). The mere existence of a contingent liability of the testator's estate upon the legatee's bond, while justifying the retention of the legacy, is not sufficient to justify the refusal of interest thereon. Sproul's Appeal (Pa.) supra.

Sums which executors have been compelled to pay, after the testator's death, by reason of his suretyship for a son, are not within the operation of a provision of the will, directing his sons to repay "all sums of money that I have advanced to them during my lifetime." Re Whitehouse (1887) L. R. 37 Ch. Div. (Eng.) 683, 57 L. J. Ch. N. S. 161, 57 L. T. N. S. 761, 36 Week. Rep. 181.

c. Debts due in futuro.

Executors cannot retain a legacy, payable in præsenti, to satisfy a debt not due till a future date. Re Rees (1889) 60 L. T. N. S. (Eng.) 260.

Where, at the death of the testator, a debt is owing to him by a person to whom a share of residue is immediately given by the will, but the debt is payable by instalments, the executors are not entitled to retain the share of the beneficiary as against the future instalments of the debt that may become due, but are bound to pay it to the beneficiary without reference to such instalments. Re Abrahams [1908] 2 Ch. (Eng.) 69, 77 L. J. Ch. N. S. 578, 99 L. T. N. S. 240.

A legacy presently payable cannot be set off in equity against a debt of the legatee to the estate, not yet due; nor will equity interfere to restrain the recovery at law of a legacy, on the ground that the legatee is indebted in a bond to the testator, payable at a future day. Hayes v. Hayes (1879) 2 Del. Ch. 191, 73 Am. Dec. 709.

But compare the Pennsylvania cases cited in the preceding subdivision as holding that a legacy may be impounded to await the discharge of a future contingent liability.

d. Debts owed by legatee or distributee jointly with another.

The fact that a debt due by distributees to decedent's estate is joint will not prevent the amount of their debt being retained. Webb v. Fuller (1893) 85 Me. 443, 22 L.R.A. 177, 27 Atl. 346.

Where the administrator has a joint judgment against three of the distributees, he cannot set off more than two thirds of it in an action brought for

the use of two of them, without showing that there is nothing due from the estate to the third. Rudolph v. Underwood (1891) 88 Ga. 664, 16 S. E. 55.

Where a married woman and her husband become indebted to a testator's estate for money borrowed and used in purchasing a farm, which was conveyed to the wife, such indebtedness, being equitably the debt of the wife, may be retained out of a pecuniary legacy to her. Chafee v. Maker (1892) 17 R. I. 739, 24 Atl. 773.

This conclusion is reaffirmed in Dean v. Rounds (1893) 18 R. I. 436, 27 Atl. 515, 28 Atl. 802.

Opinions differ as to whether a debt due from a partnership may be retained out of the legacy, or distributive share, of an individual member. That the right of retainer may be exercised in such a case is held in Hemsley v. Hollingsworth (1913) 119 Md. 431, 87 Atl. 506; Ex parte Wilson (1909) 84 S. C. 444, 66 S. E. 675; Smith v. Smith (1861) 3 Giff. 263, 66 Eng. Reprint, 408, 31 L. J. Ch. N. S. 91, 7 Jur. N. S. 1140, 5 L. T. N. S. 302, has been regarded as a decision to the same effect; but in Turner v. Turner [1911] 1 Ch. (Eng.) 716, 21 Ann. Cas. 810, in which it was held that the principle that a legatee who is indebted to the testator's estate can receive nothing from the testator's bounty until he has brought into account the amount due in respect to the debt does not apply, where the debt is owed by a partnership, of which the legatee is a member, the court said with reference to the case of Smith v. Smith (Eng.) supra, which was relied upon as supporting the contrary view: "That case is not, in all respects, well reported; but I think it is easy to see the ground upon which the vice chancellor based his decision. In that case, there were debts due from William Smith, who was a partner in a firm, and the court held, according to the headnote, which is wrong, that the assignees of the firm indebted to the testator were not entitled to receive a legacy bequeathed to a member of the firm. William Smith was a member of the firm to whom the legacy was given, and the firm became bankrupt. It is perfectly settled law that, under the Bankruptcy Law of that date, the assignees were assignees not only of the joint estate, but also of the separate estate of each partner; and it is also perfectly settled law that such separate estate was applicable, first, to the payment of the separate debts, and next, to the extent of the surplus, to the payment of the joint debts. The point was argued by counsel, not as counsel for the joint estate, but as counsel for the assignees of the separate estate of William Smith, and the vice chancellor seems to me to have based his judgment on that view. Mr. Bacon appeared for the assignees in bankruptcy of William Smith, not for the assignees in bankruptcy of the firm, although they were the same individuals; it was William Smith's assignees who were claiming, in respect of his separate estate, the legacy which was given to him. The vice chancellor said this (1861) 3 Giff. 270, 66 Eng. Reprint, 411: 'On the second point, the question is, whether the same principle applies where a debt is not due from the legatee, but from the partnership firm of which that legatee was a member. No direct authority has been cited on either side. It seems to me that the principle which governs the case is this: That the legatee shall not be entitled to receive out of the estate of the testator any part of the bounty intended for him by the testator, until he has paid all his obligations in the shape of debts which may be due to that estate.' Pausing there for a moment, William Smith's separate estate was liable to the testator's estate for the debt, and that, I think, is the entire explanation of the case. Then the learned vice chancellor goes on: 'That seems to be an intelligible principle; and it is one which was settled by Lord Cottenham in the case of Cherry v. Boultbee (1839) 4 Myl. & C. 442, 41 Eng. Reprint, 171, 9 L. J. Ch. N. S. 118, 3 Jur. 1116. In that case Lord Cottenham said that the principle would be applicable, where the executor, who was bound to pay the legacy, was the same person who was entitled to receive payment of the debt. It seems to me that the principle which I have stated

is countenanced by what was said by Lord Cottenham in that case. I cannot satisfy my mind that it would be an intelligible principle to act upon, or that I should be justified in making an order that the assignees of this bankrupt partner'—not the assignees of the firm—'should be allowed to receive the legacy given to an individual partner who is the legatee, so long as the partnership debt of the firm of which he was a member remains undischarged.' That may or may not be a right decision; I am not prepared to say it was not correct; but it does not in any way support or warrant the proposition for which it was cited. It is consistent with the principle in Cherry v. Boultbee (Eng.) supra, because the testatrix's executors could have proved against the separate estate of William Smith, whose separate estate was vested in the assignees, and that brings us practically to the same position as though there had never been a firm, and the debt had originally been due from the legatee." And Fletcher Moulton, L.J., in concurring, said that he fully accepted the explanation of the case of Smith v. Smith above given.

An executor may retain out of a legacy a debt due to the testator from a firm of which the legatee was, at the time of the testator's death, the sole surviving partner. Ferris v. Burrows (1884) 34 Hun (N. Y.) 104, affirmed without opinion in (1885) 99 N. Y. 616.

e. Loan of estate funds.

Indebtedness to the executor, incurred after the testator's death, may be set off against a legacy. Jeffs v. Wood (1723) 2 P. Wms. 128, 24 Eng. Reprint, 668.

Notes taken by an executor for moneys of the estate loaned to a legatee are, in equity, a fair subject of set-off against a pecuniary legacy. Wilson v. Edmonds (1852) 24 N. H. 517.

Money of the estate borrowed from an executor by one to whom the testator had devised a share of his estate is, where his share of the personalty is insufficient to pay the debt, a charge upon his share of the realty given him by the will. New v. New (1890) 127 Ind. 576, 27 N. E. 154.

f. Debts incurred by purchase or rental of property from the estate.

Indebtedness incurred by a distributee, or legatee, for property purchased at the sale of the estate's effects may be set off against his distributive share, or legacy (Ball v. Townsend (1821) Litt. Sel. Cas. (Ky.) 325; Mahon v. Bowers (1836) 1 How. (Miss.) 275; McGee v. Ford (1846) 5 Smedes & M. (Miss.) 769; Haskin v. Teller (1878) 3 Redf. (N. Y.) 316; Allen v. Smitherman (1849) 41 N. C. (6 Ired. Eq.) 341; Baughman v. Divler (1800) 3 Yeates (Pa.) 9); even as against one to whom, after such purchase, the distributive share was assigned (Haskin v. Teller (1878) 3 Redf. (N. Y.) 316; Baughman v. Divler (Pa.) supra); and although such indebtedness is represented by notes, on which others are sureties, the rule that joint debts cannot be set off against a separate and several demand not being applicable (Ball v. Townsend (1821) Litt. Sel. Cas. (Ky.) 325).

But in Close v. Van Husen (1854) 19 Barb. (N. Y.) 505, it was held that no valid lien on the interest of one who was entitled to a share of the proceeds of a sale of the testator's land, to take place at the expiration of a life estate therein given to testator's widow, was acquired against one who, during the widow's lifetime, took a mortgage on the legatee's undivided share therein, by executors who sold such legatee a horse at public auction, taking in payment a note, with the understanding that if the note were not paid the executors might retain the amount from such heir's interest in the estate. The rationale of this decision appears to be that the executors had no authority to sell, during the lifetime of the widow, beyond what was necessary to pay debts and expenses of administration; and therefore that the court should not countenance an attempt on their part to secure themselves against the consequences of an improper act.

In Morgan's Estate (1888) 1 Pa. Dist. R. 94, the court expressed a doubt as to whether the orphans' court had jurisdiction to set off, against the share of a distributee, the difference between the distributee's uncompleted

bid for property at an executor's sale and the price obtained on a resale; but as, under the circumstances of the case, it was inequitable to charge the distributee with such difference, the necessity of deciding the question did not arise.

A note given by a legatee and cestui que trust to the trustee, as such, for the use of land belonging to the trust, may be set off against the income payable to the legatee out of the trust estate. Merritt v. Jenkins (1880) 17 Fla. 593.

g. Debts to estate arising out of conversion, waste, or misapplication of assets.

A right of retainer exists in the case of an indebtedness to the estate, arising out of the conversion, waste, or misapplication of assets by a legatee or distributee.

Alabama.—Brown v. Lang (1848) 14 Ala. 719; Goodman v. Benham (1849) 16 Ala. 625; Lang v. Brown (1852) 21 Ala. 179, 56 Am. Dec. 244.

Maryland.—Gosnell v. Flack (1892) 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Hoffman v. Armstrong (1899) 90 Md. 123, 44 Atl. 1012 (obiter); Linthicum v. Polk (1901) 93 Md. 84, 48 Atl. 842.

New Jersey. — Young v. Schelly (1891) — N. J. Eq. —, 21 Atl. 1049.

New York.—Clapp v. Meserole (1864) 1 Abb. App. Dec. 362, affirming (1863) 38 Barb. 661; Re Stacey (1915) 89 Misc. 88, 152 N. Y. Supp. 717.

North Carolina.—Grant v. Edwards (1885) 92 N. C. 447.

South Carolina.—Bobo v. Vaiden (1883) 20 S. C. 271; Small v. Usher (1907) 77 S. C. 115, 57 S. E. 623.

England.—Sims v. Doughty (1800) 5 Ves. Jr. 243, 31 Eng. Reprint, 567; Skinner v. Sweet (1818) 3 Madd. 244, 56 Eng. Reprint, 499, G. Cooper, 54, 35 Eng. Reprint, 475; Re Hervey (1889) 61 L. T. N. S. 429.

This is in accordance with the principle that, when a trustee who has a beneficial interest in a trust estate misappropriates a part of the trust property, a court of equity will decree the amount of his defalcation as a payment to himself of that much of his interest.

The right of retainer exists where the debt has been incurred to the estate itself by the distributee, as administrator, after the decedent's death. Gosnell v. Flack (1892) 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Hoffman v. Armstrong (1899) 90 Md. 123, 44 Atl. 1012 (obiter).

If the executor or administrator is a distributee, the amount due by him to the estate must be deducted, whether it was a debt due to the decedent, or incurred to the estate itself after the decedent's death. Linthicum v. Polk (1901) 93 Md. 84, 48 Atl. 842.

A legacy given to an executor may be applied to an indebtedness to the estate incurred by him. Young v. Schelly (1891) — N. J. Eq. —, 21 Atl. 1049.

The amount charged against executors who have been guilty of a devastavit is a proper subject of retainer. Clapp v. Meserole (1864) 1 Abb. App. Dec. (N. Y.) 362, affirming (1863) 38 Barb. (N. Y.) 661; Grant v. Edwards (1885) 92 N. C. 447.

In Sims v. Doughty (1800) 5 Ves. Jr. 243, 31 Eng. Reprint, 567, a retainer was allowed by a surviving executor as against the representatives of a deceased executor, who was also a legatee, in respect of a devastavit.

The amount to which an executrix, in respect of her receipts as such, has become indebted to the estate, may be retained out of an annuity given to her by the will. Skinner v. Sweet (1818) 3 Madd. Ch. 244, 56 Eng. Reprint, 499, G. Cooper, 54, 35 Eng. Reprint, 475.

An administrator cannot take a distributive share of the estate without making good a loss caused by his maladministration. Re Hervey (Eng.) supra.

The liability of a distributee to the estate as surety upon the administrator's bond may be set off against his distributive share. Bobo v. Vaiden (1883) 20 S. C. 271.

A distributee is not entitled to a distributive share until he has accounted for that part of the estate which he has converted to his own use. Small v. Usher (1907) 77 S. C. 115, 67 S. E. 623.

Funds belonging to the estate of

which a legatee has obtained possession after the testator's death are properly set off against the legacy. Re Stacey (1915) 89 Misc. 88, 152 N. Y. Supp. 717.

h. Debts owing to executor or administrator personally.

There is a difference of opinion as to whether a debt owing to an executor or administrator in his personal capacity is a proper subject of retainer. While there can scarcely be said to be a preponderance of authority on either side (see **pro:** Preston v. Davis (1903) 102 **Va.** 178, 45 S. E. 865; Kent v. Kent (1899) 2 **Va.** Dec. 674, 34 S. E. 32; Hooper v. Hooper (1889) 32 **W. Va.** 526, 9 S. E. 937; Fay v. Reager (1854) 2 Sneed (**Tenn.**) 200. **Contra:** Heister's Appeal (1848) 7 **Pa.** 455; Bradshaw's Appeal (1861) 3 Grant, Cas. (**Pa.**) 109; Gallen's Estate (1901) 25 **Pa.** Co. Ct. 265; Richbourg v. Richbourg (1824) Harp. Eq. (**S. C.**) 168; McLaughlin v. Barnes (1895) 12 **Wash.** 373, 41 Pac. 62,—all of which are set forth, infra); the view most consistent with the principle which underlies the right is that such indebtedness may not be retained, unless it has been contracted on the credit of the funds in the hands of the executor or administrator (see Smith v. Huger (1792) 1 Desauss. Eq. (**S. C.**) 247; Romig v. Erdman (1840) 5 Whart. (**Pa.**) 112, 34 Am. Dec. 533, — infra); although it may be a proper subject for set-off, where the executor or administrator is sued in his personal and not in his representative capacity (see Dubois v. Dubois (1826) 6 Cow. (**N. Y.**) 494, infra).

As above stated, it has been held, on the one hand, that a debt due to an administrator, individually, from a distributee, may, in equity, be allowed as a payment on the distributee's share of the estate (Preston v. Davis (1903) 102 **Va.** 178, 45 S. E. 865; Kent v. Kent (1899) 2 Va. Dec. 674, 34 S. E. 32); and that a debt due to an executor, individually, from a legatee, may be insisted on as part payment of the legatee's legacy (Hooper v. Hooper (1889) 32 **W. Va.** 526, 9 S. E. 937). And in Fay v. Reager (1854) 2 Sneed (**Tenn.**) 200, it is said, obiter, that an executor may retain a legacy to satisfy an indebtedness of the legatee to himself individually, as against an attaching creditor of such legatee; such creditor, having acquired no lien or priority of satisfaction by his attachment, and having no superior equity in the fund, has no claim to the interposition of a court of equity to deprive the executor of the advantage possessed by him, in having the fund in his hands.

On the other hand, it has been held that a note given to an executor individually cannot be considered as payment of a legacy (Heister's Appeal (1848) 7 **Pa.** 455); that an administrator cannot claim a set-off of a debt due him against the distributee, as this would be to mingle his private affairs with his trust duties, which the law will not allow (Bradshaw's Appeal (1861) 3 Grant, Cas. (**Pa.**) 109); that an administrator cannot set off a personal indebtedness against a person entitled to distribution, as the debts are not in the same right (Gallen's Estate (1901) 25 **Pa.** Co. Ct. 265; Richbourg v. Richbourg (1824) Harp. Eq. (**S. C.**) 168); and that an administrator cannot avail himself of his trust relationship to secure personal advantage in the collection of a claim against a distributee, arising independently of his administration of the estate (McLaughlin v. Barnes (1895) 12 **Wash.** 373, 41 Pac. 62).

An administrator cannot claim, upon an accounting, the right to apply the share of a distributee to a debt owing to himself, where the orphans' court is without jurisdiction to adjudicate upon cross demands. Kidd v. Porter (1848) 13 **Ala.** 91.

Where a court of competent jurisdiction has confirmed the final account of an administrator and, by its decree, directed a certain sum of money to be paid to a guardian as part of the estate of his wards, such administrator cannot set off against the amount so decreed to such guardian, a debt due to him from such guardian in his individual capacity, as such a proceeding would not only deprive the wards of their property, in a suit to which they are not parties, but

would effectually avoid, collaterally, the force and effect of the decree of distribution. Schriver v. Garrison (1887) 30 W. Va. 456, 4 S. E. 660.

An executor cannot retain the amount of a debt due to himself personally from a legatee, where the note given by such legatee is not legally enforceable against her, she being a married woman at the time of its execution. The appointment of the creditor as an executor gives him no greater legal or equitable right than he would have had without such appointment. Wooden v. Wampler (1879) 69 Ind. 88.

In an action of debt against an executor, on decree of a surrogate for the payment of a legacy, the executor may set off a demand due to him in his own right. Dubois v. Dubois (1826) 6 Cow. (N. Y.) 494.

In Smith v. Huger (1792) 1 Desauss. Eq. (S. C.) 247, it was held that, where an executor has become surety for a legatee upon the credit of the funds in his hands, and the legatee has died insolvent, the sums which the surety has been compelled to pay may be deducted out of the share to which the legatee was entitled.

And in Romig v. Erdman (1840) 5 Whart. (Pa.) 112, 34 Am. Dec. 533, it was held that one having a fund in his hands as executor, the interest of which was payable to the widow of the testator during her life, and the principal of which was to be divided among the children of the testator after her death, may set up as an equitable defense against the claim of an assignee of one of the children the payment of a bond by himself, as surety for the plaintiff's assignor, the time of becoming surety being previous to the assignment by the legatee to the plaintiff, though the payment was subsequent. The court said: "A surety is considered as having a right to all securities and means of payment in the power of his principal; and it would be presumed that the executor became surety on the faith of money in his hands, and is therefore entitled to retain it against the legatee himself, or one taking it by assignment from him; for such person takes it as an ordinary chose in action, not negotiable, and therefore liable to all equities existing at the time of the assignment."

i. Debts barred by Statute of Limitation.

The cases are in conflict upon the question whether there is a right of retainer in respect of debts which have become barred by the Statute of Limitations. The weight of authority, however, is to the effect that the amount of the statute-barred debt may be applied by the executor, or administrator, in satisfaction of the debtor's legacy, or distributive share. This is upon the theory that the Statute of Limitations bars only the right of action, and not the debt itself, and therefore that, where property of the debtor comes into the hands of the creditor, the statute does not preclude his appropriating such property to the payment of the debt. See, as upholding the right of retainer:

Alabama.—Noble v. Tait (1903) 140 Ala. 469, 37 So. 278.

Georgia. — Rawlins v. Rawlins (1885) 75 Ga. 632 (dictum).

Illinois.—Re Esmond (1910) 154 Ill. App. 357 (but compare Hesley v. Shaw (1905) 120 Ill. App. 92); Jordan v. Jordan (1915) 201 Ill. App. 44.

Indiana.—Holmes v. McPheeters (1898) 149 Ind. 587, 49 N. E. 452.

Iowa.—Garrett v. Pierson (1870) 29 Iowa, 304 (dictum).

Kansas.—Holden v. Spier (1902) 65 Kan. 412, 70 Pac. 348; Goodnough v. Webber (1907) 75 Kan. 209, 88 Pac. 879; Wilson v. Channell (1918) 102 Kan. 793, 175 Pac. 95.

Missouri.—Re Lietman (1899) 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307 (dictum).

New York.—Re Bogart (1882) 28 Hun, 465; Rogers v. Murdock (1887) 45 Hun, 30, 9 N. Y. S. R. 660; Re Smith (1895) 14 Misc. 169, 35 N. Y. Supp. 701 (dictum); Re Foster (1895) 15 Misc. 175, 37 N. Y. Supp. 36; Re Timerson (1903) 39 Misc. 675, 80 N. Y. Supp. 639; Leask v. Hoagland (1909) 64 Misc. 156, 118 N. Y. Supp. 1035, reversed on another ground in (1910) 136 App. Div. 658, 121 N. Y. Supp. 197 (but see Kimball v. Scribner (1916) 174 App. Div. 845, 161 N. Y. Supp. 511).

South Carolina.—Re Covin (1883) 20 S. C. 471; Sartor v. Beaty (1886) 25 S. C. 293; Ex parte Wilson (1909) 84 S. C. 444, 66 S. E. 675.

Vermont.—Tinkham v. Smith (1883) 56 Vt. 187.

England.—Courtenay v. Williams (1844) 3 Hare, 539, 67 Eng. Reprint, 494, 13 L. J. Ch. N. S. 461, affirmed in (1846) 15 L. J. Ch. N. S. 204; Smith v. Smith (1861) 3 Giff. 263, 66 Eng. Reprint, 408, 31 L. J. Ch. N. S. 91, 7 Jur. N. S. 1140, 5 L. T. N. S. 302; Coates v. Coates (1864) 10 Jur. N. S. 532, 33 Beav. 249, 55 Eng. Reprint, 363, 33 L. J. Ch. N. S. 448, 9 L. T. N. S. 795, 12 Week. Rep. 634; Gee v. Liddell (1866) 35 Beav. 629, 55 Eng. Reprint, 1041; Re Cordwell (1875) L. R. 20 Eq. 644, 44 L. J. Ch. N. S. 746; Re Akerman [1891] 3 Ch. 212, 61 L. J. Ch. N. S. 34, 65 L. T. N. S. 194, 40 Week. Rep. 12; Dingle v. Coppen [1899] 1 Ch. 726, 68 L. J. Ch. N. S. 337, 47 Week. Rep. 279, 79 L. T. N. S. 693 (obiter); Re Wheeler [1904] 2 Ch. 66, 73 L. J. Ch. N. S. 576, 52 Week. Rep. 586, 91 L. T. N. S. 227.

Contra: Holt v. Libby (1888) 80 **Me.** 329, 14 Atl. 201; Allen v. Edwards (1883) 136 **Mass.** 138; Boden v. Mier (1904) 71 **Neb.** 191, 98 N. W. 701; Kimball v. Scribner (1916) 174 App. Div. 845, 161 **N. Y.** Supp. 511; Harrod v. Carder (1888) 3 **Ohio** C. C. 479, 2 Ohio C. D. 274; Drysdale's Appeal (1850) 14 **Pa.** 531; Re Murray (1870) 2 Pearson (**Pa.**) 473; Reed v. Marshall (1879) 90 **Pa.** 345; Milne's Appeal (1882) 99 **Pa.** 483; Light's Estate (1890) 136 **Pa.** 211, 20 Atl. 536, 537; Sherer's Estate (1900) 17 Lanc. L. Rev. (**Pa.**) 382; Richardson v. Keel (1882) 9 Lea (**Tenn.**) 74.

In Louisiana, it is held that the heir cannot plead against collation that the debt which he owes is prescribed (Bougere's Succession (1876) 28 **La.** Ann. 743); nor can he be relieved from the duty to collate by prescription, after the succession has been opened (Skipwith's Succession (1860) 15 **La.** Ann. 209).

The cases which hold that a statute-barred debt cannot be brought into account are put either upon the ground that the local Statute of Limitations operates not simply to bar the remedy, but to extinguish the debt, and that the legatee or distributee is as much entitled to the benefit of the statute as anyone else (Light's Estate (1890) 136 **Pa.** 211, 20 Atl. 536, 537; Richardson v. Keel (1872) 9 Lea, 74); or upon the ground that as, in the local jurisdiction, the legatee or devisee is not compelled to resort to a court of equity to enforce its claim, but may bring an action at law, it is not within the power of the courts to compel him to do equity (see Allen v. Edwards (1883) 136 **Mass.** 138; Holt v. Libby (1888) 80 **Me.** 329, 14 Atl. 201; Hesley v. Shaw (1905) 120 **Ill.** App. 92; Kimball v. Scribner (1916) 174 App. Div. 845, 161 **N. Y.** Supp. 511).

It has been contended that a different rule should apply in the case of a distributee who owes to the estate a debt which has become barred than in the case of a legatee, in that, while a legatee takes by the bounty of the testator, the next of kin takes by operation of law; but in Re Cordwell (1875) L. R. 20 Eq. (**Eng.**) 644, the validity of this contention is denied, the court saying: "The duty of an administrator is to administer the estate of the intestate. In this instance, part of the estate consists of this debt, which is due to the estate, though the remedy for recovery of part of it may have become barred by statute. Until the debtor discharges his duty to the estate by paying the debt which he owes to it, he can have no right or title to any part of it under the statute. A legacy, no doubt, is a gift arising from the bounty of the testator, but a legacy can only be paid in the course of administration; that is to say, after all the claims of creditors of the estate and all the liabilities of debtors to the estate have been satisfied."

The right to retain exists as well where the indebtedness has become barred subsequently to the decedent's death, as where it became barred in his lifetime (Re Bogart (1882) 28 Hun (N. Y.) 466); but where the courts deny the right to deduct from the legacy, or distributive share, a debt which has become barred in the life-

time of the decedent, they also deny the right in case of a debt upon which the Statute of Limitations had not fully run at the time of decedent's death, but which subsequently became barred. Light's Estate (1890) 136 Pa. 211, 20 Atl. 536, 537, overruling Thompson's Appeal (1862) 42 Pa. 345, which had theretofore been followed in Re Murray (1870) 2 Pearson (Pa.) 473, and Lang's Estate (1885) 16 Pittsb. L. J. N. S. (Pa.) 9.

A right of retainer cannot be claimed in respect of a debt of over twenty years' standing, where the lapse of twenty years raises a presumption of payment. Sartor v. Beaty (1886) 25 S. C. 293.

A legacy may not be retained by an executor on the ground that the testator had signed, as security, the legatee's promissory note, where the note became barred by the Statute of Limitations as against both the promisors, before the death of the testator; and the situation is not changed by the fact that the note is held by the executor; since he has no right to waive in his own favor the bar of the Statute of Limitations, and to bind the estate of his testator by a new promise to himself to pay the debt which, at the date of his testator's death, could not have been legally enforced. Wadleigh v. Jordan (1883) 74 Me. 483.

The doctrine that where a legatee of a general legacy or share of residue, or the distributee of an intestate's estate, is a debtor to the estate, he is not entitled to receive his legacy without bringing the debt into account, does not require the sole residuary legatee of the debtor to bring a statute-barred debt into account before participating in the estate of the creditor. Re Bruce [1908] 2 Ch. (Eng.) 682, 4 B. R. C. 713, 78 L. J. Ch. N. S. 56, 99 L. T. N. S. 704, reversing [1908] 1 Ch. 850, 77 L. J. Ch. N. S. 434, 98 L. T. N. S. 834.

Where debtor has agreed to deduction.

Where sons, in borrowing money from their father, agreed that in case of its nonpayment it should be deducted from the share of their father's estate which, by his will, was devised for their use or benefit, it is immaterial that an action upon the note has become barred by the Statute of Limitations subsequently to the testator's decease; such an agreement amounting, in equity, to an assignment of the debtor's bequest as collateral security in payment of his note. Bower's Estate (1902) 12 Pa. Dist. R. 59.

Where debtor recognizes validity of obligation.

An attachment in execution against a legatee's interest in an estate will not prevent the legatee from confessing judgment to the executor of the estate for a debt barred by the Statute of Limitations, which was due the decedent in his lifetime. Sheppard's Estate (1897) 180 Pa. 57, 36 Atl. 422.

Where will directs deduction of debts.

Irrespective of the attitude of the courts in any particular jurisdiction on the question where a legacy may be retained in satisfaction of a statute-barred debt owed to the testator, it is uniformly held that where a testator directs that any debts due, or owing to him, from legatees, shall be brought into the division of the estate, or deducted from the share of the one so indebted, the debt must be deducted, though barred by the Statute of Limitations. Rose v. Gould (1852) 15 Beav. 189, 51 Eng. Reprint, 509, 21 L. J. Ch. N. S. 360; Gray v. Hayhurst (1910) 157 Ill. App. 488; Holt v. Libby (1888) 80 Me. 329, 14 Atl. 201; Baker v. Safe Deposit & T. Co. (1901) 93 Md. 368, 48 Atl. 920, 49 Atl. 623; Cummings v. Bramhall (1876) 120 Mass. 552; Allen v. Edwards (1883) 136 Mass. 138; Gillingham's Estate (1908) 220 Pa. 353, 69 Atl. 809; Bird's Estate (1851) 2 Pars. Sel. Eq. Cas. (Pa.) 168.

In such a case the legatee is a mere volunteer, and must take the bounty of the testator upon the terms upon which it is bestowed. Gillingham's Estate (1908) 220 Pa. 353, 69 Atl. 809.

Though the contention has been made in cases of this type that where the testator directs such indebtedness as, at the time of his decease, may be due from a legatee, to be deducted from his share, it must be assumed that only the indebtedness that is demandable and collectable by process of law can be deducted, the courts

have declined to recognize its validity. Ibid.

j. Debts barred by discharge in bankruptcy.

See also, in this connection, VII. infra.

As a logical sequence of the view that a distributee indebted to the estate is to be regarded as having already received part of the assets for distribution, in the form of the debt due by him, it follows that the debt of a distributee may be retained by the administrator, though an action therefor became barred, in the decedent's lifetime, by the distributee's discharge in bankruptcy. Wilson v. Kelly (1881) 16 S. C. 216; Sartor v. Beaty (1886) 25 S. C. 293.

A discharge under the Bankrupt Law does not release an heir from the obligation to collate. Cucullu's Succession (1854) 9 La. Ann. 96.

Where testator makes the indebtedness of a devisee a charge upon the property devised, by directing that, if it shall not be paid within one year, the executor shall sell the property and deduct the amount of the indebtedness from the proceeds, the devisee is not exonerated by a discharge in bankruptcy, such discharge not operating as an extinguishment of the debt, but merely to destroy the remedy, by enabling the debtor to plead the discharge in bar. Re Fussell (1905) 129 Iowa, 498, 105 N. W. 503.

The fact that the creditor proved the debt and received dividends in bankruptcy proceedings will not prevent the retainer of the amount of the debt remaining unpaid, this not being the same thing as a resolution of composition, where the creditor has agreed to accept a certain amount in satisfaction of the whole. Sartor v. Beaty (S. C.) supra.

In Re Orpen (1880) L. R. 16 Ch. Div. (Eng.) 202, 50 L. J. Ch. N. S. 25, 43 L. T. N. S. 728, 29 Week. Rep. 467, where, after the composition of the debts of a son, an adjudicated bankrupt, in which the father did not prove his claim and was not paid the composition, the father died, having bequeathed to the son a share of his estate, it was held that the executors were not entitled to a right of retainer against the bequest of the share of the estate for the whole debt, but only for the composition on the debt, and interest; the amount of composition having been substituted for the provable debt.

k. Debt owed by husband of distributee or legatee.

In the absence of statutory changes in the common law relating to the property of married women, a legacy to a wife is, at law, a legacy to her husband; hence, the executors have a right to satisfy the legacy by writing off a debt due from the husband to the estate of the testatrix (Ranking v. Barnard (1820) 5 Madd. Ch. 32, 56 Eng. Reprint, 806; Re Gordon (1822) 1 Glyn & J. (Ir.) 347; Re Briant (1888) L. R. 39 Ch. Div. (Eng.) 471, 57 L. J. Ch. N. S. 953, 59 L. T. N. S. 215, 36 Week. Rep. 825); and a distributive share claimed by a husband in right of his wife is subject to deduction in respect of his indebtedness to the estate. McGee v. Ford (1846) 5 Smedes & M. (Miss.) 769. A judgment obtained by the decedent against an insolvent son-in-law may be off set against the distributive share in the decedent's estate to which the son-in-law is entitled, in right of his wife. Barnet v. Yohe (1804) 4 Yeates (Pa.) 74, affirmed in (1808) 1 Binn. 358.

The right of an administrator to retain the share of a married woman against the debt of her husband is, however, subject to the equitable right of the wife to have a settlement made in her favor, adequate to her fortune; so that, where the settlement on her marriage was inadequate to the fortune she then possessed, the court will direct a further provision to be made in favor of her and her children, before offsetting her distributive share against her husband's debt. Elibank v. Montolieu (1801) 5 Ves. Jr. 737, 31 Eng. Reprint, 832, 12 Eng. Rul. Cas. 767; Carr v. Taylor (1805) 10 Ves. Jr. 574, 32 Eng. Reprint, 967, 8 Revised Rep. 40; Ranking v. Barnard (Eng.), Re Gordon (Ir.), and Re Briant (Eng.) — supra. The courts of Pennsylvania are not vested with the power exercised by the court of chancery in Eng-

land, of insisting on some provision for the wife, when the husband applies to them for the purpose of getting possession of her personal property. Yohe v. Barnet (1808) 1 Binn. (Pa.) 358.

A legacy given to a married woman, but payable by law to her husband, is in the same position, so far as the right of retainer is concerned, as a legacy to the husband himself. Inasmuch, however, as the husband's right is subject to the wife's chance of survivorship as long as the legacy is reversionary, and to her equity to a settlement when it becomes vested in possession during the marriage, the right of retainer for the husband's debt is also subject to those rights; and it would seem to be most consistent with sound principle that every right and power of the wife, as distinct from her husband, ought in such a case to prevail over the claim of retainer for the husband's debt. Re Batchelor (1873) L. R. 16 Eq. (Eng.) 481, 43 L. J. Ch. N. S. 101, 21 Week. Rep. 901.

Accordingly, there is no right of retainer in respect of a husband's debt to the testator, where the wife, having by statute an absolute power of disposal over any future or reversionary interest, has assigned for value a reversionary legacy. Ibid.

The indebtedness of a husband cannot be set off against a legacy to his wife, where he was divorced long before the distribution. Heister's Appeal (1848) 7 Pa. 455.

Where the distributive share of the wife is, under the Married Woman's Law, part of her separate estate, and not subject to the control and disposition of her husband, an administrator is not justified in refraining from the collection of a debt due from the husband, on the suggestion that the indebtedness should be liquidated by treating it as a credit on the distributive share of the wife, no such arrangement being obligatory on the wife without her express and unequivocal consent. Anderson v. Gregg (1870) 44 Miss. 170.

Where the marital right of a husband is held not to attach to property of the wife until it comes into possession, indebtedness incurred to an estate by a husband, for property purchased at an estate sale, cannot be set off against a distributive share of his wife. Roberts v. Adams (1871) 2 S. C. 337; Farrow v. Farrow (1879) 12 S. C. 169. And debts due to an estate by the husbands of devisees cannot be set off against the shares of their wives. Kennedy v. Badgett (1882) 19 S. C. 591.

An administrator cannot deduct from the distributive share of a married woman in a succession the amount of a purchase made by her husband at the succession sale. Thibodeaux Succession (1855) 10 La. Ann. 653.

Where a testator who had provided in his will that the business carried on by the firm of which he was a member should be continued by his son and his son-in-law, who should pay his estate the capital stock valued at $25,000, and directed that his estate should be equally divided among his children, made no provision for any deduction from his daughter's share on account of such capital stock, it is a just inference that he intended to exclude deduction from his daughter's share on that account. Re Tiernan (1883) 14 Pittsb. L. J. N. S. (Pa.) 185.

l. Interest on indebtedness.

Although there is no dissent from the proposition that the right of retainer carries with it also the right to retain interest, there is some difference of opinion as to whether interest should be computed up to the time of settlement, or only up to the time of the decedent's demise, the great weight of authority, however, favoring the former view. See Willes v. Greenhill (1860) 29 Beav. 376, 54 Eng. Reprint, 673; Re Akerman [1891] 3 Ch. (Eng.) 212, 61 L. J. Ch. N. S. 34, 65 L. T. N. S. 194, 40 Week. Rep. 12; Re Watson [1896] 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571; Bowen v. Evans (1886) 70 Iowa, 368, 30 N. W. 638; King v. King (1902) 107 La. 437, 31 So. 894; Re Foster (1902) 38 Misc. 347, 77 N. Y. Supp. 922; Rogers v. Murdock (1887) 45 Hun (N. Y.) 30; Adair v. Brimmer (1878) 74 N. Y. 539, 5 Mor. Min. Rep. 682; Verplanck v. De Went (1877) 10

Hun (N. Y.) 611; Re Downs (1903) 39 Misc. 621, 80 N. Y. Supp. 659. **Contra:** Tobias v. Richardson (1904) 26 **Ohio** C. C. 81, affirmed without opinion in (1905) 72 Ohio St. 626, 76 N. E. 1133.

Simple interest alone, however, should be charged, and not interest on the amount consisting of principal and accrued interest due at the testator's death. Re Downs (1903) 39 Misc. 621, 80 N. Y. Supp. 659.

A legatee for whom the testator was surety is chargeable with interest on the principal of the notes which the estate has been obliged to pay, though not with interest on the interest paid. Willes v. Greenhill (1860) 29 Beav. 376, 54 **Eng.** Reprint, 673.

Of course, where the testator directs that the indebtedness shall not bear interest, interest may not be retained. See Re Robert (1888) 111 N. Y. 372, 18 N. E. 843.

Where the decedent, by declaration in his account book, has fixed the rate of interest, his executors cannot charge a higher rate. Re Lown (1915) 165 App. Div. 552, 151 N. Y. Supp. 171.

The right of retainer carries with it also the right to retain interest. Re Watson [1896] 1 Ch. (**Eng.**) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571.

An heir by whom collation is due for the amount of a note, bearing interest, is a debtor for principal and interest for collation. King v. King (1902) 107 **La.** 437, 31 So. 894.

A legatee indebted to the estate may be charged with interest on his indebtedness from the testator's death. Re Akerman [1891] 3 Ch. (**Eng.**) 212, 61 L. J. Ch. N. S. 34, 65 L. T. N. S. 194, 40 Week. Rep. 12.

A general legacy does not operate immediately upon the death of the decedent as a payment of the legatee's debt to the estate; but such debt will continue to bear interest until such time as the legacy becomes properly payable, under the laws governing the settlement of estates. Bowen v. Evans (1886) 70 **Iowa,** 368, 30 N. W. 638.

Where the will directs the indebtedness of a legatee to be deducted from his share of the estate, or a right of retainer exists independently of any such direction, it extends to interest as well as to principal, and interest may be retained up to the time of settlement. Re Foster (1902) 38 Misc. 347, 77 N. Y. Supp. 922; Rogers v. Murdock (1887) 45 Hun (N. Y.) 30; Adair v. Brimmer (1878) 74 N. Y. 539, 5 Mor. Min. Rep. 682.

In Verplanck v. De Went (1877) 10 Hun (N. Y.) 611, where the will directed a certain sum paid the legatee by testator during his life "to go in diminution" of his share of the estate, interest thereon was charged to the date of settlement, the court saying: "It stands upon the same footing as any other debt due the estate, the time the debt is due being fixed as the day the will takes effect; its collection being deferred to the date of distribution of the legatee's share. It forms a portion of the assets of the estate, and the legatee receiving his share of it upon the distribution of his share."

In Re Downs (1903) 39 Misc. 621, 80 N. Y. Supp. 659, where testator directed that any indebtedness of his children and grandchildren, which any of them might owe him at his decease, should be treated as so much had and received on account of the provision made for them, a legatee who was required by the deceased to survive him for ten years, or, dying within that time, to leave issue surviving in order to qualify himself as a beneficiary, is chargeable with interest on his indebtedness to the date of distribution.

Where the theory is entertained that the debtor heirs inherit less by reason of their indebtedness, no interest should be charged thereon after the testator's death. Tobias v. Richardson (1904) 26 **Ohio** C. C. 81, affirmed without opinion in (1905) 72 Ohio St. 626, 76 N. E. 1133.

Interest on a note given by a distributee for property bought at the sale of the intestate's effects is not properly chargeable against such distributee, where the share of the distributee exceeds the amount of the note, and the distributee is not entitled to interest on his distributive share while in the hands of the administrator. McClendon v. Gomillon (1837) Dud. L. (S. C.) 48.

Where it was agreed by some of the distributees and the administrator that, at a sale of the personal effects, the distributees might purchase "as for cash," and the amount of their purchases be charged against their respective distributive shares, but some of the distributees were absent and others objected to this arrangement, those purchasing should be charged with interest upon the amount of their purchases, from the date thereof until the final settlement; as, otherwise, those purchasing would enjoy a benefit at the expense of those who did not. Smith v. Smith (1888) 101 N. C. 461, 8 S. E. 128, 131, 133.

Where a son executes a written instrument, acknowledging that his father has furnished him a specified sum of money, and agreeing that it may be charged as an advancement against such portion of his father's estate as he should become entitled to receive under his father's will, or that, at the option of the executors, it might be held as a debt due from him to his father's estate, and the executors elect to treat it as a loan, interest should be awarded from the day when the executors elected to treat it as such, and not from the time the money was advanced by the father. Cole v. Andrews (1903) 176 N. Y. 374, 68 N. E. 641, affirming (1903) 83 App. Div. 285, 82 N. Y. Supp. 152.

m. Miscellaneous.

The liability of a surviving partner, as such, to the estate of the deceased partner, is a proper subject of retainer. Noble v. Tait (1903) 140 Ala. 469, 37 So. 278; Hoffman v. Armstrong (1899) 90 Md. 123, 44 Atl. 1012.

The right of retainer exists in respect of a debt to which the testator has become entitled, as residuary legatee of the original creditor. Bousfield v. Lawford (1863) 1 De G. J. & S. 459, 46 Eng. Reprint, 182, 33 L. J. Ch. N. S. 26, 8 L. T. N. S. 619, 11 Week. Rep. 842.

A son is properly charged, in the settlement of his deceased father's estate, with debts paid by the father as his surety. Hayes v. Hayes (1889) 11 Ky. L. Rep. 441.

The amount to which a legatee, who was jointly and severally liable with the testator for breaches of trust which have been wholly made good out of the testator's estate, may be called upon to contribute to the estate, may be a subject of retainer. Re Eyton (1890) L. R. 45 Ch. Div. (Eng.) 458, 59 L. J. Ch. N. S. 733, 63 L. T. N. S. 336, 39 Week. Rep. 135.

Costs awarded in favor of the executor, in an action brought by legatees who are also next of kin of the testator, seeking a revocation of the probate, may be set off against the legacies. Re Knapman (1881) L. R. 18 Ch. Div. (Eng.) 300, 50 L. J. Ch. N. S. 629, 45 L. T. N. S. 102.

The court may direct the amount of a judgment for costs in favor of the estate, against a legatee who has brought suit for a claim against the estate, to be paid out of his legacy. Ammon's Appeal (1869) 63 Pa. 284.

The right of retainer does not extend to an indebtedness created, after the decease of the testator, by the legatee giving security to the estate for the indebtedness of other parties. Smee v. Baines (1861) 29 Beav. 661, 54 Eng. Reprint, 784, 31 L. J. Ch. N. S. 63, 7 Jur. N. S. 902, 4 L. T. N. S. 573, 9 Week. Rep. 802.

No rights of retainer exist in respect of a claim for consequential damage, arising from the enforcement of a mortgage given by the testator as security for the debtor. Re Watson [1896] 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571.

A debt owing to the testator by a person deceased is not a proper subject of set-off against a legacy to such debtor's children. Thatcher v. Cannon (1869) 6 Bush (Ky.) 541.

IV. Property against which right may be asserted.

a. Personal property.

1. Distributive shares.

There is no dissent from the proposition that the indebtedness of a distributee to the estate of his intestate may be set off against his distributive share of the personal property.

Alabama.—Noble v. Tait (1903) 140 Ala. 469, 37 So. 278.

California.—Re Angle (1905) 148 Cal. 102, 82 Pac. 668.

Kentucky.—Brown v. Mattingly (1891) 91 Ky. 275, 15 S. W. 353.

Maryland.—Gosnell v. Flack (1892) 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411 (obiter); Hemsley v. Hollingsworth (1913) 119 Md. 431, 87 Atl. 506.

Michigan.—Marvin v. Bowlby (1905) 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559 (obiter).

Minnesota.—Christians v. Christians (1909) 108 Minn. 157, 121 N. W. 633.

Missouri.—Hopkins v. Thompson (1897) 73 Mo. App. 401.

Nebraska.—Boden v. Mier (1904) 71 Neb. 191, 98 N. W. 701.

New Jersey.—Batton v. Allen (1845) 5 N. J. Eq. 99, 43 Am. Dec. 630.

New York.—Smith v. Kearney (1848) 2 Barb. Ch. 533; Adair v. Brimmer (1878) 74 N. Y. 539, 5 Mor. Min. Rep. 682; Wright v. Austin (1865) 56 Barb. 13; Re Robinson (1904) 45 Misc. 551, 92 N. Y. Supp. 967.

Ohio.—Lambright v. Lambright (1906) 74 Ohio St. 198, 78 N. E. 265, 6 Ann. Cas. 807; Re Ellis (1894) 5 Ohio S. & C. P. Dec. 330.

Pennsylvania.—Springer's Appeal (1857) 29 Pa. 208; Palmer's Estate (1878) 2 Del. Co. Rep. 180; Findley's Estate (1885) 3 Lanc. L. Rev. 190; Re Jones (1881) 29 Pittsb. L. J. 89.

South Carolina.—Re Covin (1883) 20 S. C. 471; Sartor v. Beaty (1886) 25 S. C. 293; Small v. Usher (1907) 77 S. C. 115, 57 S. E. 623.

Texas.—Oxsheer v. Nave (1897) 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7.

Vermont.—Tinkham v. Smith (1883) 56 Vt. 187.

Virginia.—Kent v. Kent (1899) 2 Va. Dec. 674, 34 S. E. 32; Preston v. Davis (1903) 102 Va. 178, 45 S. E. 865.

England.—Elibank v. Montolieu (1801) 5 Ves. Jr. 737, 31 Eng. Reprint, 832; Carr v. Taylor (1805) 10 Ves. Jr. 574, 32 Eng. Reprint, 967, 8 Revised Rep. 40; Re Cordwell (1875) L. R. 20 Eq. 644, 44 L. J. Ch. N. S. 746; Re Milnes (1883) 53 L. T. N. S. (Eng.) 534, 33 Week. Rep. 927.

But compare Anderson v. Gregg (1870) 44 Miss. 170, where it was said that, if distributees are debtors to the estate, there is no reason why their indebtedness should not be treated in the light of a set-off against their distributive shares, if so agreed with the administrator.

A compromise agreement in a will contest, in the nature of a family settlement, which, in effect, makes the estate distributable according to the Intestate Law, is not inconsistent with the idea that the indebtedness of the parties to the estate should be charged against their respective interests. Alburger's Estate (1899) 8 Pa. Dist. R. 114.

The statutory right of an administrator to set off any claim he may have in his official capacity upon a distributee, against the latter's distributive share, does not apply to articles of personal property ordered by the court to be specifically distributed to such heir. Rose v. O'Brien (1860) 50 Me. 188.

2. General or pecuniary legacies.

The indebtedness of a legatee to the testator or his estate may be set off against a pecuniary legacy or gift of residue.

Alabama.—Noble v. Tait (1903) 140 Ala. 469, 37 So. 278.

Illinois.—Jeffers v. Jeffers (1891) 139 Ill. 368, 28 N. E. 913; Esmond v. Esmond (1910) 154 Ill. App. 357; White v. Lewis (1915) 201 Ill. App. 105.

Iowa.—SENNEFF v. BRACKLEY (reported herewith) ante, 978.

Kentucky.—Carson v. Carson (1858) 1 Met. 300 (obiter).

Maryland.—Smith v. Donnell (1850) 9 Gill, 84; Hoffman v. Hoffman (1898) 88 Md. 60, 40 Atl. 712; Hoffman v. Armstrong (1899) 90 Md. 123, 44 Atl. 1012; Hemsley v. Hollingsworth (1913) 119 Md. 431, 87 Atl. 506.

Massachusetts.—Blackler v. Boott (1873) 114 Mass. 24; Nickerson v. Chase (1877) 122 Mass. 296.

Missouri.—Re Lietman (1899) 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307; Yates v. Burt (1912) 161 Mo. App. 267, 143 S. W. 73.

New Jersey.—Snyder v. Warbasse (1857) 11 N. J. Eq. 463; Brokaw v. Hudson (1876) 27 N. J. Eq. 135; Denise v. Denise (1883) 37 N. J. Eq. 163.

New York.—Rickets v. Livingston (1800) 2 Johns. Cas. 97, 1 Am. Dec. 158; Clarke v. Bogardus (1834) 12 Wend. 67; Smith v. Kearney (1848) 2 Barb. Ch. 533; Re Charlick (1882) 11 Abb. N. C. 56; Re Bogart (1882) 28 Hun, 466; Rogers v. Murdock (1887) 45 Hun, 32; Re Colwell (1888) 15 N. Y. S. R. 742; Wehle v. Koch (1892) 28 Jones & S. 429, 19 N. Y. Supp. 189; Re Foster (1902) 38 Misc. 347, 77 N. Y. Supp. 922; Re Warner (1902) 39 Misc. 432, 79 N. Y. Supp. 363; Re Bogert (1903) 41 Misc. 598, 85 N. Y. Supp. 291; Re Stacey (1915) 89 Misc. 88, 152 N. Y. Supp. 717; Smith v. Murray (1882) 1 Dem. 34; Dixon v. Storm (1881) 5 Redf. 419.

North Carolina.—Ramsour v. Thompson (1871) 65 N. C. 628; Grant v. Edwards (1885) 92 N. C. 447.

Ohio.—Lambright v. Lambright (1906) 74 Ohio St. 198, 78 N. E. 265, 6 Ann. Cas. 807.

Pennsylvania.—Baughman v. Divler (1800) 3 Yeates, 9; Keim v. Muhlenberg (1838) 7 Watts, 79; Strong v. Bass (1860) 35 Pa. 333; Thompson's Appeal (1862) 42 Pa. 345; Dull's Estate (1890) 137 Pa. 116, 20 Atl. 419; Johnson's Estate (1913) 22 Pa. Dist. R. 989.

Rhode Island.—Henry v. Fiske (1876) 11 R. I. 318; Armour v. Kendall (1885) 15 R. I. 193, 2 Atl. 311; Chafee v. Maker (1892) 17 R. I. 739, 24 Atl. 773, reaffirmed in Dean v. Rounds (1893) 18 R. I. 436, 27 Atl. 515, 28 Atl. 802.

South Carolina.—Smith v. Huger (1792) 1 Desauss. Eq. 247.

Tennessee.—Irvine v. Palmer (1892) 91 Tenn. 463, 30 Am. St. Rep. 893, 19 S. W. 326.

Texas.—Oxsheer v. Nave (1897) 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7.

Vermont.—Blair v. White (1888) 61 Vt. 110, 17 Atl. 49.

Virginia.—Lingle v. Cook (1879) 32 Gratt. 262.

West Virginia.—Hooper v. Hooper (1889) 32 W. Va. 526, 9 S. E. 937.

England.—Jeffs v. Wood (1723) 2 P. Wms. 128, 24 Eng. Reprint, 668; Sims v. Doughty (1800) 5 Ves. Jr. 243, 31 Eng. Reprint, 567; Ranking v. Barnard (1820) 5 Madd. Ch. 32, 56 Eng. Reprint, 806; Courtenay v. Williams (1844) 3 Hare, 539, 67 Eng. Reprint, 494; Willes v. Greenhill (1860) 29 Beav. 376, 54 Eng. Reprint, 673; Smith v. Smith (1861) 3 Giff. 263, 66 Eng. Reprint, 408, 31 L. J. Ch. N. S. 91, 7 Jur. N. S. 1140, 5 L. T. N. S. 302; Coates v. Coates (1864) 33 Beav. 249, 55 Eng. Reprint, 363, 33 L. J. Ch. N. S. 448, 10 Jur. N. S. 532, 9 L. T. N. S. 795, 12 Week. Rep. 634; Gee v. Liddell (1866) 35 Beav. 629, 55 Eng. Reprint, 1041; Re Batchelor (1873) L. R. 16 Eq. 481, 43 L. J. Ch. N. S. 101, 21 Week. Rep. 901; Re Akerman [1891] 3 Ch. 212, 61 L. J. Ch. N. S. 34, 65 L. T. N. S. 194, 40 Week. Rep. 12; Dingle v. Coppen [1899] 1 Ch. 726, 68 L. J. Ch. N. S. 337, 47 Week. Rep. 279, 79 L. T. N. S. 693; Re Melton [1918] 1 Ch. 37, 34 Times L. R. 20, 52 L. J. Ch. N. S. 386, 143 L. T. Jo. 409.

The reason for this is stated in Jeffers v. Jeffers (1891) 139 **Ill.** 368, 28 N. E. 913, where it is said that "it is undoubtedly true that, where a legacy or bequest is left to the testator's debtor, the indebtedness may be taken out of the legacy, for the reason [that] 'the legatee's demand is in respect of the testator's assets, without which the executor is not liable, and therefore the legatee in such case is considered by a court of equity to have so much of the assets already in his hands as the debt amounts to, and consequently to be satisfied pro tanto.'" So also in Re Batchelor (1873) L. R. 16 Eq. (**Eng.**) 481, 43 L. J. Ch. N. S. 101, 21 Week. Rep. 901, it was said that a legatee who is also a debtor to the testator's estate cannot (unless an intention that he should do so is manifested by the will) claim payment of his legacy without paying the debt; and therefore the executors may, in such a case, retain the debt out of the legacy, when payable.

The debt of a legatee may be deducted from the amount of a pecuniary legacy which the testator has directed to be held in trust for him (Stagg v. Beekman (1833) 2 Edw. Ch. (**N. Y.**) 89), or from the income of a fund to which he is entitled. Jordan v. Jordan (1915) 201 **Ill.** App. 44; Voorhees v. Voorhees (1867) 18 **N. J.** Eq. 223;

Leggett v. Leggett (1881) 24 Hun (N. Y.) 335; Re Foster (1902) 38 Misc. 347, 77 N. Y. Supp. 922; Fisher's Petition (1895) 19 R. I. 53, 31 Atl. 579.

It has been held that, in countries where the civil law prevails, an executor cannot retain the debt of the beneficiary out of an alimentary stipend which the father has provided in his will for his son. Muir v. Muir (1873) L. R. 5 P. C. (Eng.) 66, 43 L. J. P. C. N. S. 7, 30 L. T. N. S. 205, 22 Week. Rep. 268.

In Re Whitehouse (1887) L. R. 37 Ch. Div. (Eng.) 683, testator bequeathed all his residuary real and personal estate upon trust, as to one-fifth part thereof for his son Daniel absolutely, and as to another fifth part, to invest it and pay the income to his son George Frederick during his life, without power of anticipation, and after his death to hold the capital and income of his share in trust for his children in equal shares; and, if there should be no such child, then, subject to the trusts in favor of him and his issue, the testator directed that "his original share, and any share or shares which shall have accrued under this provision, shall accrue to and be held in trust for my other children in equal shares, but so that the further shares accruing to each of them shall be held by the trustees or trustee upon and subject to the like trusts and powers as are hereinbefore and hereinafter declared concerning their original shares;" and further declared similar trusts of the remaining three fifths, in favor of another son and two daughters. He also declared that, before any of his three sons should participate under the trust of the will, they should repay all sums of money advanced by the testator during his lifetime; but that, in case they should be unable to do so, "such advances shall be taken to be as part of their shares under the trusts of this my will." It was held that, having regard to the language used by the testator in the direction for accruer, in which, although the children were, as to the settled shares, only entitled to the income of them during their lives, testator treated such several shares as being the shares of those children, and the circumstance that, as regards the share of his son Daniel, testator directed an immediate payment, so that it was apparent that he contemplated the immediate winding up of his affairs, and not the postponement of the ascertainment of his final estate until those advances had been satisfied, the advances to a son who was unable to make repayment thereof were not to be repaid out of the income coming to him during his life, but out of the corpus of the share itself.

The indebtedness of an annuitant to the estate may be deducted from the annuity. Skinner v. Sweet (1818) 3 Madd. Ch. 224, 56 Eng. Reprint, 499, G. Cooper, 54, 35 Eng. Reprint, 475.

3. Specific legacies.

In the absence of a contrary intention expressed by the testator, the debt of a legatee may be set off by the executor against a specific legacy, consisting of money (see Re Taylor [1894] 1 Ch. (Eng.) 671, 63 L. J. Ch. N. S. 424, 8 Reports, 186, 70 L. T. N. S. 556, 42 Week. Rep. 373; Re Gamble (1913) 166 Cal. 253, 135 Pac. 970,—infra); but there is no right of retainer in the case of a bequest of specific chattels, as the two things cannot be measured one against the other. See Clarke v. Cotton (1831) 17 N. C. (2 Dev. Eq.) 51; Re Taylor (Eng.) supra; Re Savage [1918] 2 Ch. (Eng.) 146; Re Akerman [1891] 3 Ch. (Eng.) 212, 61 L. J. Ch. N. S. 34, 65 L. T. N. S. 194, 40 Week. Rep. 12,—infra.

A judgment recovered by an executor in favor of the estate may be set off against a testamentary gift of a share of the proceeds of certain property to the judgment debtor. Re Gamble (1913) 166 Cal. 253, 135 Pac. 970.

A specific legacy consisting of the profits of the business, represented by moneys in the hands of the executors, may be retained by them as against a debt owing by the legatee to the testator's estate. Re Taylor (Eng.) supra.

Executors may not charge a specific legacy of chattels, bequeathed to a coexecutor, with a debt due from him to the testator. Clarke v. Cotton (1831) 17 N. C. (2 Dev. Eq.) 51.

In Re Taylor [1894] 1 Ch. (Eng.)

571, it is said by Chitty, J.: "The law is settled that as against a specific devise, which is outside the duties of the executors, there is no retainer. It is equally plain that in the case of a specific bequest of leaseholds there is likewise no right of retainer. The two things cannot be measured one against the other, and the same rule prevails also in the case of specific chattels. If, in such cases, the right did exist, it would be not a right of retainer, but of lien."

The amount of the legatee's debt to the testator cannot be retained out of government stock, specifically bequeathed, such stock not being money, though capable of being easily turned into money. Re Savage [1918] 2 Ch. (Eng.) 146.

There can be no right of retainer in respect of a debt owing from a specific legatee to the estate of the testator. Re Akerman [1891] 3 Ch. (Eng.) 212. In this case the court said: "A specific devise or bequest is a thing taken apart, and given directly to the devisee or legatee. It is extracted from the testator's estate before the residue is ascertained, and under no circumstances, so long as the specific gift takes effect, can the property so given form part of the residue. On the other hand, a debt due to the estate of a testator is part of the residue. It has to be paid in whole or in part,—in whole, if it can be recovered,—in order that the residue may be constituted; and there is, therefore, a clear distinction between a specific legacy and a residuary legacy, so far as concerns a debt due from the legatee to the estate."

b. Real property.

1. Acquired by inheritance.

There is a difference, not so much of opinion as of result, among the decisions dealing with the question whether the right of retainer may be asserted with respect to real property passing to the debtor by inheritance. Those which refuse to apply the doctrine of retainer, or set-off (see Wheeler & M. Mercantile Co. v. Knox (1918) — Ark. —, 206 S. W. 46; McClellan v. Solomon (1887) 23 Fla. 437, 11 Am. St. Rep. 381, 2 So. 825; Russell v. Smith (1901) 115 Iowa, 261, 88 N. W. 361; Scobee v. Bridges (1888) 87 Ky. 427, 9 S. W. 299; Smith v. Brogee (1882) 4 Ky. L. Rep. 447; Cockerill v. Lindon (1897) 19 Ky. L. Rep. 1379, 43 S. W. 451; Proctor v. Newhall (1820) 17 Mass. 81; Jones v. Treadwell (1897) 169 Mass. 430, 48 N. E. 339; Marvin v. Bowlby (1905) 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559; Olney v. Brown (1910) 163 Mich. 125, 128 N. W. 241; Manning v. Brown (1890) — N. J. Eq. —, 20 Atl. 381; Sartor v. Beaty (1886) 25 S. C. 293; Mann v. Mann (1873) 12 Heisk. (Tenn.) 245; Re Milnes (1883) 53 L. T. N. S. (Eng.) 534, 33 Week. Rep. 937, — infra, and cases cited in the next subdivision), do so on the theory that the realty descends directly to the heirs upon the death of the ancestor, and vests in them, subject only to the qualification created by statute, which makes the real property of a decedent liable for his debts. In such a case, as the administrator has nothing to do with the real property, except as he may resort to it in order to pay debts, there is no opportunity to set off the debt of the heir against his interest in the realty. The cases in which the right of retainer is recognized (see Streety v. McCurdy (1894) 104 Ala. 493, 16 So. 686; Brown v. Mattingly (1891) 91 Ky. 275, 15 S. W. 353 (obiter); Trabue v. Henderson (1904) 180 Mo. 616, 79 S. W. 451; Wright v. Green (1911) 239 Mo. 449, 144 S. W. 437; Stenson v. H. S. Halvorson Co. (1914) 28 N. D. 151, L.R.A. 1915A, 1179, 147 N. W. 800, Ann. Cas. 1916D, 1289; Keever v. Hunter (1900) 62 Ohio St. 616, 57 N. E. 454; Lockwood v. Whitlesey (1912) 23 Ohio C. C. N. S. 241; Oxsheer v. Nave (1897) 90 Tex. 568, 37 L.R.A. 98, 40 S. W. 7, — infra, and see also cases cited in the next subdivision) have put their decisions on the ground that, under the local Statute of Distribution, realty and personalty are blended into one fund, distributable among the same persons, who, therefore, are in a position to require one another to account

for such portion of the decedent's estate as they have already received.

Thus, it has been held that, where one of several heirs is also administrator, the other heirs have no equitable lien on his interest in land of the estate for the payment of a claim which they may have against him on account of his fraudulent administration of the estate, which will take precedence of an attachment levied by a creditor on his interest. McClellan v. Solomon (1887) 23 **Fla.** 437, 11 Am. St. Rep. 381, 2 So. 825.

And that the indebtedness of an heir to the estate is not a lien on the realty inherited, until reduced to judgment. Russell v. Smith (1901) 115 **Iowa**, 261, 88 N. W. 361.

But a judgment against a distributee, forming part of the assets of the estate, constitutes a lien on the interest of the distributee in the real estate of the intestate, thereby giving the administrator the right to have such realty subjected to its payment, in addition to the right of retainer as to his share in the personal estate, if necessary. Sartor v. Beaty (1886) 25 **S. C.** 293.

In Wheeler & M. Mercantile Co. v. Knox (**Ark.**) supra, an action to enjoin further proceedings under an execution levied by a judgment creditor upon a debtor's interest in land inherited by him from his father, it was held that, under the Arkansas statute (§ 2636 of Kirby's Dig.), which provides that real estate of an intestate shall descend and be distributed to his kindred, subject to the payment of his debts and the widow's dower, taken in connection with the circumstance that the legislature, while making advancements a charge upon the heir's interest in intestate's real estate, omitted to make an heir's ordinary debt to his intestate a charge upon the heir's interest in the real estate, land descends to the heir free from his ordinary indebtedness to the intestate; and, accordingly, that a decree in a partition suit, in which it was determined that the heir was indebted to the estate in excess of his share, and that such share should be vested in other heirs by way of equitable offset, and a subsequent conveyance of his interest in such lands to the administrator of the estate to secure his indebtedness to the estate, did not take precedence over the lien of the judgment. The court said: "It seems that in the state where the doctrine of equitable offset, or retainer, is applied to both classes of property, it is because the statute of the state makes no distinction in the descent of personalty and realty. It was said in the case of Stenson v. H. S. Halvorson Co. (1914) 28 **N. D.** 151, L.R.A.1915A, 1179, 147 N. W. 800, Ann. Cas. 1916D, 1289, that 'the distinction thus drawn by the Michigan court between real and personal estates is not applicable in North Dakota, for, as above stated, by § 5186, Rev. Codes, the property, both real and personal, of one who dies intestate, passes to the heirs of such intestate, subject to the control of the county court, and to the possession of the administrator for the purposes of administration. In other words, no distinction whatever is made between the two classes of estates in this regard.' The case of Oxsheer v. Nave (1897) 90 **Tex.** 568, 37 L.R.A. 100, 40 S. W. 7, sustains the contention of appellees, but seems to be in conflict with the general rule that the doctrine of equitable set-off, or retainer, does not apply to real estate which descends immediately and directly to the heir upon the death of the intestate. In Arkansas, the distinctions between the two classes of property have been preserved. An administrator takes charge of the personalty for the purpose of administering on the estate. Not so with the realty. Unless it becomes necessary to appropriate real property to pay the indebtedness of the estate, the administrator cannot even take possession of it. It does not concern him, because lands are not administered through him. Lands descend in Arkansas directly to the heir, subject to the exceptions provided in the Statute of Descents and Distributions."

The realty of an intestate descends to his heirs, free of any lien for the debts due to the decedent. Scobee

v. Bridges (1888) 87 Ky. 427, 9 S. W. 299.

In Smith v. Brogee (1882) 4 Ky. L. Rep. 447, it was held that the estate of a decedent has no lien upon the interest of an heir, or distributee, for a debt due by him to the intestate, as against any other creditor; therefore, any creditor of the heir or distributee, who has, by diligence, obtained a lien upon the estate descended, is entitled to priority over the estate of the decedent.

Overpayment by the administrator to a distributee of personalty does not create a lien on the realty inherited by such distributee, which the other heirs may enforce. Cockerill v. Lindon (1897) 19 Ky. L. Rep. 1379, 43 S. W. 451.

In the division of real estate among heirs, no deduction can be made from the share of any one of them, on account of any debt due from him to the estate. Proctor v. Newhall (1820) 17 Mass. 81.

Administrators cannot set off against or deduct from an inherited share of real estate a debt due to the estate, in the same manner as they can set off against or deduct such a debt from a distributive share of personal property, which they must pay from the estate in their hands. Jones v. Treadwell (1897) 169 Mass. 430, 48 N. E. 339.

The distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness, either as against the land, or the proceeds thereof in the hands of the administrator; but such indebtedness is to be collected by proceedings, brought the same as for collecting any other indebtedness due the estate. Marvin v. Bowlby (1905) 142 Mich. 245, 4 L.R.A.(N.S.) 189, 113 Am. St. Rep. 574, 105 N. W. 751, 7 Ann. Cas. 559. In this case, the court said: "It is a recognized doctrine that the distributive share derived from personal property of an heir indebted to an estate may be retained by the administrator in payment of such debt. The same doctrine has also been applied to a debtor legatee by an unbroken line of authorities, from the earliest English decisions to the present time. The doctrine is founded upon principle as well as upon authority. It is, in fact, the collection of a debt due the estate. Personal estate is assets in the hands of the administrator. He is required by law to convert personal property into money, to collect all debts due the estate from all debtors, including heirs. The heir has no title or claim to personal estate, except a distributive share in the surplus after payment of debts and expenses of administration. No such doctrine has prevailed as to real estate. The title to the real estate vests in the heir at the date of the death of the ancestor. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of a will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate, in case there is not sufficient personal estate for that purpose. This statutory contingency is a modification of the common law, and no sale of real estate to pay debts of the estate could be made before this modification. It has been held repeatedly, not only that no sale of real estate can be made except for this purpose, but also that only so much of the real estate can be sold as may be necessary for that purpose, and that where, because of the indivisibility of real estate, the whole must be sold, the surplus, by the doctrine of equitable conversion, is considered as real estate, and, as such, goes to the heirs. There is one recognized exception to the general rule above stated. Indebtedness of the heir to the estate which may be held as an advancement may be considered in the division of real estate among heirs."

The right of the heirs of a decedent to take interests in land by descent is not affected by their indebtedness to the estate. Olney v. Brown (1910) 163 Mich. 125, 128 N. W. 241.

The debt of an heir at law to the intestate is not a charge upon land inherited. Manning v. Brown (1890) — N. J. Eq. —, 20 Atl. 381.

No lien attaches to the land descended to the heir for a debt due to the

ancestor's estate, which will take precedence of the claim of attaching creditors. Mann v. Mann (1873) 12 Heisk. (Tenn.) 245.

In Re Milnes (1883) 53 L. T. N. S. (Eng.) 534, 33 Week. Rep. 927, where testator devised and bequeathed the residue of his real and personal estate to trustees upon trust to convert and divide the proceeds equally among his children, with the exception of A, who, however, in consequence of the death of another child in testator's lifetime, became entitled to participate as heir and next of kin in the lapsed gift, it was held that the trustees and executors could retain A's debt to the estate out of so much of the residue coming to him as represented personal estate, but not out of the real estate which came to him as heir at law.

On the other hand, it has been held that the administrator has a right to subject lands of his intestate to the payment of a debt due by the heir to the estate, in priority and preference to the claims of a purchaser from the heir, and also, of course, to the lien of a creditor of the heir, attaching to the land on the death of the ancestor. Streety v. McCurdy (1894) 104 Ala. 493, 16 So. 686.

In Brown v. Mattingly (1891) 91 Ky. 275, 15 S. W. 353, it is said to be clear that the distributee's interest in the real estate should be extinguished, to the extent of the amount he has received from the ancestor, so far as it exceeds his interest in the personal estate. "He stands in the attitude of having received so much from the estate, and, if his distributive share in the personal estate is not equal to the amount thus received, the real estate ought to be held to be charged with the payment of the remainder in the division, and he to receive that much less. This is the only equitable rule; were it otherwise, the one heir might virtually get a double or treble portion." But in Thompson v. Myers (1894) 95 Ky. 597, 26 S. W. 1014, it is said that what was said in Brown v. Mattingly (Ky.) supra, as to the right to set off a distributee's indebtedness against his interest in the decedent's realty, was obiter.

The interest of an heir in land inherited by him is diminished by his indebtedness to the decedent. See Trabue v. Henderson (1904) 180 Mo. 616, 79 S. W. 451; Wright v. Green (1911) 239 Mo. 449, 144 S. W. 437.

Where no distinction is drawn between real and personal estate, but both are, by statute, subject to the control of the court and to the possession of any administrator appointed by the court for the purpose of administration, the indebtedness of an heir constitutes a prior equitable lien on his share of the realty, which will take precedence of the lien of a judgment docketed against him. Stenson v. H. S. Halvorson Co. (1914) 28 N. D. 151, L.R.A.1915A, 1179, 147 N. W. 800, Ann. Cas. 1916D, 1289.

In Keever v. Hunter (1900) 62 Ohio St. 616, 57 N. E. 454, it was held that a son, who was indebted to his father in an amount exceeding the value of his interest in his father's real and personal estate, took no interest in the lands of which his father died seised, which could be subjected to the payment of a judgment recovered against him, and upon which execution had been issued and levied upon the land. The decision is put upon the ground that to permit one to share in the estate which is diminished by his default, and to the prejudice of those whose rights are equal to his, is inequitable, and at variance with the policy defined in a statute, providing, in substance, that if an advancement is made in real estate the value thereof should be taken to be a part of the real estate to be divided; and if in personal estate, it should be taken to be a part of the personal estate to be distributed; and if, in either case, it exceeds the heir's share of the estate of like character, it shall be deducted from the other.

Where the indebtedness of an heir to the estate exceeded his distributive share therein, he inherits no interest in the real estate. Lockwood v. Whitlesey (1912) 23 Ohio C. C. N. S. 241.

In a jurisdiction under the statutes of which the real and personal property of an intestate descend alike to the heirs, charged with the payment of debts and subject to administration

for that purpose, both the real and personal property, when administered, being subject to distribution among the heirs in one proceeding, the debt of one of the heirs to the estate may be offset against his right to participate in the division of the realty. Oxsheer v. Nave (1897) 90 **Tex.** 568, 37 L.R.A. 98, 47 S. W. 7.

2. Proceeds of sale made in course of administration or distribution.

(a) Prefatory statement.

A like difference of opinion, based on grounds similar to those in the cases reviewed in the preceding subdivision, is found among the cases which have passed upon the question whether the right of retainer may be exercised as against the proceeds of a sale, made to pay debts or to facilitate division. See, as upholding the right of retainer, Nelson v. Murfee (1881) 69 **Ala.** 598; Streety v. McCurdy (1894) 104 **Ala.** 493, 16 So. 686; Lester v. Toole (1917) 20 **Ga.** App. 381, 93 S. E. 55; Fiscus v. Moore (1890) 121 **Ind.** 547, 7 L.R.A. 235, 23 N. E. 362; Barnett v. Thomas (1905) 36 **Ind.** App. 441, 114 Am. St. Rep. 385, 55 N. E. 868; Mullikin v. Mullikin (1829) 1 Bland, Ch. (**Md.**) 538; Duffy v. Duffy (1900) 155 **Mo.** 144, 55 S. W. 1002; Ayres v. King (1902) 168 **Mo.** 244, 90 Am. St. Rep. 452, 67 S. W. 558; Ayres v. King (1902) 168 **Mo.** 249, 67 S. W. 1100; Tobias v. Richardson (1904) 26 **Ohio** C. C. 81, 5 Ohio C. C. N. S. 74, affirmed without opinion in (1905) 72 Ohio St. 626, 76 N. E. 1133; Yohe v. Barnett (1808) 1 Binn. (**Pa.**) 358; Manifold's Estate (1843) 5 Watts & S. (**Pa.**) 340; Dickinson's Estate (1892) 148 **Pa.** 142, 23 Atl. 1053; Heister's Estate (1901) 26 **Pa.** Co. Ct. 49, 18 Montg. Co. L. Rep. 33; Hartman's Estate (1899) 12 **Pa.** Super. Ct. 69, 7 Lanc. L. Rev. 41; Ruiz v. Campbell (1884) 6 **Tex.** Civ. App. 714, 26 S. W. 295. **Contra:** Ball v. Green (1883) 90 **Ind.** 75; Smith v. Kearney (1848) 2 Barb. Ch. (**N. Y.**) 533; Fels v. Fels (1886) 1 **Ohio** C. C. 420, 1 Ohio C. D. 235; Sartor v. Beaty (1886) 25 **S. C.** 293; Towles v. Towles (1878) 1 Head (**Tenn.**) 601. Close v. Van Husen (1854) 19 Barb. (**N. Y.**) 505, which is set out in III. supra, is sometimes cited in this connection, but is really referable to another ground.

(b) Surplus arising from sale to pay debts.

In Nelson v. Murfee (1881) 69 Ala. 598, it was held that when a surplus of money, arising from the sale of lands to pay debts, remains in the hands of the personal representative for distribution, he is entitled to retain the share of an heir or distributee in such moneys, in payment of a debt which the latter owed to the decedent's estate, as against and in preference to the claim of a judgment creditor of such heir or distributee. The court said: "Now, however much money thus acquired and held will be treated as having the qualities of land for certain purposes of administration and concession . . . still, for all other purposes, it is only money, and money in the hands of the administrator. Any process or procedure to get it out of the administrator must necessarily be that which is adapted to the recovery of money as money."

The court, in Nelson v. Murfee (Ala.) supra, disclaimed any intention of deciding what the rights and remedies of the administrator would be, if the descended lands had remained unsold. But in Streety v. McCurdy (1894) 104 Ala. 493, 16 So. 686, it was said with reference to the decision in Nelson v. Murfee: "It is clear to us that this conclusion must be rested upon a broader ground than that stated in the opinion. As the proposition is there stated, the right of the administrator to the surplus proceeds of land of the intestate, sold for the payment of debts, is rested upon the mere fact of his possession thereof, which results from his having, and having exercised, the right to sell the lands and to devote such part of the proceeds as is necessary to the payment of the decedent's debts. This end being subserved, and a balance remaining in the administrator's hands, he would obviously have no more right to it because of his mere possession of it than a mortgagee, who sells under a power for an amount in excess of his debt, interest, and charges, would have to the surplus as

against the mortgagor or purchaser from him. To the retention of such surplus by either, there must be some right to it other than can be evolved out of or rested upon the mere fortuitous circumstance of possession. And hence we say that Nelson v. Murfee can be sustained only upon the theory, and must be taken to have determined, that the administrator has a right to subject lands of his intestate to the payment of a debt due by the heir to the estate, in priority and preference to the claims of a purchaser from the heir, and also, of course, to the lien of a creditor of the heir, attaching to the land on the death of the ancestor."

In Manifold's Estate (1843) 5 Watts & S. (Pa.) 340, it was held that the judgment creditor of a son, who was indebted to his father's estate in an amount greater than his distributive share of the proceeds of real estate, sold to pay the decedent's debts, was not entitled to any part of the fund by reason of his lien on the land, inasmuch as he succeeded to the rights of his debtor, and nothing more.

In Lester v. Toole (1917) 20 Ga. App. 381, 93 S. E. 55, it was held that the personal representative of an estate is entitled to retain the share of an heir in money derived from the sale of the realty belonging to the estate, made for the purpose of paying debts and making distribution, in payment of the debt which the latter owes to the intestate's estate, as against and in preference to the claim of an assignee or purchaser from such heir.

But in Ball v. Green (1883) 90 Ind. 75, it was held that an administrator cannot, as against a mortgagee of an heir, set off the indebtedness of the heir against the mortgagee's claim to the surplus proceeds of real estate, sold to pay the decedent's debts. The court said: "The administrator had authority to sell this land to pay the decedent's debts, but no power to sell in order to collect a claim from the owner. After the payment of the decedent's debts, the residue of the money, if any, will belong to Jesse Adams [the heir], and its retention by the administrator will not make the estate the debtor of Adams, nor will it make the administrator such debtor, except at the option of Adams. In addition to this, the appellee has a lien upon the money that is superior to any claim of the administrator, if indeed he has any, and which was not impaired or affected by the accidental circumstances that he had the custody of the money, and that Adams was indebted to him and to the estate. As against the appellee in our opinion, he could not retain the money for the purpose of collecting from Adams claims due the estate. As to these, he occupied no better position than any other creditor, and, as the appellee had acquired a specific lien, his claim must prevail."

In Fiscus v. Moore (1890) 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362, it was held that the right to retain the amount of a debt due from a distributee to the estate, out of his distributive share, is not confined to cases where the fund to be distributed arises out of the personal estate, but applies when real estate has been sold and the fund for distribution derived from that source. In this case, the court said: "It is contended, however, that the right to retain the amount of a debt due from a distributee to the estate, out of his distributive share, only obtains in case the fund to be distributed arises out of the personal estate, and that it does not apply when real estate has been sold and the fund for distribution is derived from that source. We can perceive no reason for such a distinction. Of course, where the administrator of an estate holds a claim, as such, against one of the heirs or distributees, he is entitled to avail himself of all the rights and remedies ordinarily available to any other person under like circumstances, no greater and no less. If the administrator is driven to pursue the ordinary remedy to collect a debt due the estate from an heir, he stands like any other creditor, and is put to a race of diligence with others; but if, in the proper course of administration, funds which constitute assets of the estate come into his hands by operation of law, which he holds as ad-

ministrator, in the distribution of which an heir or legatee asserts a right to participate, it is always a sufficient answer that the claimant has already in his hands more than his share of the assets of the estate. A proceeding by an administrator to acquire priority in respect to real estate which has descended to the heir, so as to charge upon it a debt due the estate, is one thing, while a proceeding by an heir, or his grantee, to compel the administrator to pay money which he holds in the capacity of administrator, is quite another, in case the heir has already received all he is entitled to out of the estate. . . . While it is quite true, as is contended, that, upon the death of the ancestor, the title to real estate descends to and vests in the heir, the fact must be kept in view that, unlike the rule at common law, the heir, according to the terms and policy of the statutes in this state, does not take an absolute title. Pending the settlement of the estate of his ancestor, the descent is subject to be intercepted and the title devested, whenever the personal representatives make it appear that the sale of the land is necessary to make assets for the payment of the ancestor's debts. The statute not only gives the administrator the right, but makes it his duty, when the personal property is not sufficient, to convert the real estate into assets for the payment of debts. Where this right is asserted, and the lands are sold and conveyed, the title to the land which descended to the heir is completely devested; and, although the heir may have sold and conveyed the land, the conveyance made by an administrator under the order of the court is not in any wise affected or impaired by the previous encumbrance or conveyance by the heir. This conclusion logically results from the fact that, under the statutes of our state, the real and personal property of an intestate descend to the same persons and in the same proportions, and both are equally chargeable with the payment of his debts, with the exception that the personal estate must be exhausted first."

(c) Of sale made for purpose of distribution.

In Mullikin v. Mullikin (1828) 1 Bland, Ch. (**Md.**) 538, it was held that there can be no distribution of the proceeds of the sale of an intestate's real estate, made for the purpose of making a division, until the distributees have accounted for such portions of the estate as they have received.

In Yohe v. Barnet (1808) 1 Binn. (**Pa.**) 358, where the real estate of an intestate, not being capable of a division among all his children without injury, was by order of the orphans' court assigned to particular children, who were to pay to the other heirs the amount of their share of the valuation of the land in money, it was held that the amount to which an insolvent son-in-law became entitled in the right of his wife should be considered as personal property, and that his indebtedness to the estate be deducted therefrom.

But in Smith v. Kearney (1848) 2 Barb. Ch. (**N. Y.**) 533, it was held that the principle of equitable retainer does not apply to a fund arising from the sale of real estate which descended to the debtor as one of the heirs at law of the testator, and which real estate has been converted into personalty by the accidental circumstance that the valid portions of the will could not be carried into effect in any other way than by a sale of the land; at least, where such conversion did not take place until after the heir's assignment of his interest therein. The court said: "Had it continued the property of the debtor of the estate until after the fund arising from the sale came into the hands of the executor and trustee by operation of law, for the benefit of such debtor, a question of equitable set-off, founded upon the insolvency of the latter, might have arisen; which it is not necessary now to discuss."

(d) Of partition sale.

It has likewise been held that, in proceedings between the heirs of a decedent for partition of his real estate, debts due and owing to the decedent from an heir must be taken into account, to the end that an equal

distribution may be made. Barnett v. Thomas (1905) 36 **Ind.** App. 441, 114 Am. St. Rep. 385, 75 N. E. 868; Duffy v. Duffy (1900) 155 **Mo.** 144, 55 S. W. 1002; Ayres v. King (1902) 168 **Mo.** 244, 90 Am. St. Rep. 452, 67 S. W. 558; Ayres v. King (1902) 168 **Mo.** 249, 67 S. W. 1100; Tobias v. Richardson (1904) 26 Ohio C. C. 81, 5 **Ohio** C. C. N. S. 74, affirmed without opinion in (1905) 72 Ohio St. 626, 76 N. E. 1133; Ruiz v. Campbell (1884) 6 **Tex.** Civ. App. 714, 26 S. W. 295, and cases following, infra.

In Dickinson's Estate (1892) 148 **Pa.** 142, 23 Atl. 1053, it was held that a fund produced by a sale in partition of the real estate of an intestate in the hands of the court for distribution should be applied to the liquidation of the indebtedness of one of the heirs to the decedent, as against creditors whose judgments against the heir were entered before the adjudication of partition. The court said: "The rights of all the creditors must depend upon the rights of this heir. They claim through him. His right to this share depends upon his right to have a proportional part of the valuation money of his father's real estate. It is the father's estate which is being distributed. All the interest this son has in the land, or the proceeds of the land, he derives from his father under the Intestate Laws of the commonwealth. That interest is an equal share with the other children in the decedent's other estate, whether real or personal. After proceedings in partition, each heir is entitled to receive a proportional part of the valuation money. A proportional amount is defined to be such a share as shall make each child equal with the others, after deducting his advancements. Dutch's Appeal (1868) 57 **Pa.** 467. If one child is allowed to retain what he has already received from his father, whether in the shape of money paid for his benefit at his request, and thus regarded as a debt, or paid directly to him for his use, and thus regarded as an advancement, and is also allowed to receive his full share of the estate besides, he is certainly receiving more than an equal share of the estate of the father. In equity, an equal distribution can only be effected by charging him with the advancement, or requiring him to pay his indebtedness by applying his share of the estate to that object. . . . The heir who owes the estate is presumed to have in his hands, already, assets of the estate sufficient to pay and satisfy his share. He is thus paid by operation of law, and the orphans' court, when it comes to distribute the fund, does equity by applying these assets to the payment of his share. Thompson's Appeal (1862) 42 **Pa.** 357. His share of the estate has been absorbed, as it were, and he therefore has no further interest in it. For this reason, there is nothing for the judgments to attach to, and they are not considered in the distribution. It will be seen that the right to appropriate the share in this way does not depend upon the common-law doctrine of set-off, but upon the exercise of the chancery powers vested in the orphans' court. . . . If we are correct in our view of the authority under which the court acts, then it makes no difference whether the funds in the hands of the court for distribution are the proceeds of real or personal property. Manifold's Estate (1843) 5 Watts & S. (**Pa.**) 341; Springer's Appeal (1857) 29 (**Pa.**) 208. All that is necessary is for the orphans' court to have control of the fund for the purpose of distribution, and the parties interested before it, and it will ascertain and enforce such equities as are necessary to equalize, as far as it can, the shares of the respective heirs in the estate of decedent."

A judgment entered against an heir after the death of the intestate is not entitled to payment out of the proceeds of a sale of the real estate of the deceased, sold under proceedings in partition, in preference to a subsequent judgment obtained by the estate upon suit brought to recover for money loaned to the heir by the intestate in his lifetime, in which suit the heir expressly waived the Statute of Limitations. Heister's Estate (1901) 26 **Pa.** Co. Ct. 49, 18 Montg. Co. L. Rep. 33.

In Hartman's Estate (1899) 12 Pa. Super. Ct. 69, 7 Lanc. L. Rev. 41, it was held that a fund produced by the sale of the real estate of a decedent under the Act of June 12, 1893, P. L. 461, providing for the sale of the real estate of a decedent whenever parties in interest desire the same to be converted into money for distribution, being before the orphans' court for distribution, that court will, upon the application of the administrator, set off the indebtedness of a distributee to the estate, against his distributive share, to the exclusion of a judgment of a creditor against him, obtained after the death of the intestate and before the sale of the realty.

On the other hand, it has been held that a debt due an estate cannot be deducted, in proceedings for the partition of its real estate, from the debtor's share of the land, or the proceeds thereof. Fels v. Fels (1886) 1 Ohio C. C. 420, 1 Ohio C. Dec. 235; Sartor v. Beaty (1886) 25 S. C. 293.

The indebtedness of an heir to the decedent's estate, which has not been reduced to a judgment, is no lien upon his interest in the lands inherited by him, and therefore cannot be deducted in apportioning the proceeds of a partition sale, where the heir has conveyed away his interest in the property. Towles v. Towles (1858) 1 Head (Tenn.) 601. The court said, however, that if the purchasers were not innocent purchasers, but obtained the conveyance without a fair consideration, or even upon full consideration, if to enable the heir to avoid his debt, their purchase and deed would interpose no difficulty in the way of an application by the administrator to subject the fund arising from the partition sale to the debt.

In Wallace v. Keyser (1866) 51 Pa. 493, it appeared that the heirs of an intestate who, in his lifetime, had obtained judgment against two of them, against whom other persons also obtained judgments after the decedent's death, having an opportunity to sell the real estate of the decedent, and all the parties being desirous to save the expense of judicial proceedings, and sell it free from the lien on the shares of the judgment debtors, by agreement in writing, reciting that the judgments subsequently obtained were liens on the shares of the judgment debtors, but not referring to the judgment of their father, stipulated with the judgment creditors that the sale should be made, and that the shares of the purchase money belonging to the judgment debtors should be paid to and received by a third person, and should be by him applied to the payment of such judgments, so far as such shares might liquidate the same, in the order of their lien priorities. The proceeds of the sale having been received by the third person in accordance with the agreement, a judgment creditor brought suit to recover the amount of his judgment out of the shares of the judgment debtors in such proceeds. The heirs sought to enjoin him from prosecuting his suit, upon the ground that the shares of the judgment debtors were only what remained of their father's estate, after paying their debts due him. It was held that, as the money in controversy was not a fund in course of distribution, the case did not fall within the class of decisions which hold that the debt of a legatee, or distributee, may be set off against the claims of the legacy, or share, in a court of law, or retained from a fund to be administered in a court of equity, the court saying: "In these cases the debtor is seeking the aid of the law, and is met by the principle that he must do equity before he receives it. But the plaintiffs here, without an advancement which diminishes the share, or a lien which encumbers it, are seeking active aid from a court of equity, upon principles of mere abstract justice. Abstractly, it is right that an heir to real estate who owed a debt to his ancestor should take his share less the debt; but the right is imperfect, and cannot be enforced until the party or the fund comes into the power of the law. In an action of ejectment, if the defendant should set up an independent debt against the plaintiff to bar recovery, the equity would be precisely of the same description. But equity in this respect follows the law. By the

Intestate Act the realty descends in fixed proportions, subject to no diminution of quantity, except by advancement or settlement; and this only by a legal retrospect, constituting it a present portion of the entire estate. . . . An heir needs no aid from a court of law or equity. His share being fixed by his relation, and possession taken by entry, he stands on his legal right of quantity against all claims, except by advancement or settlement, operating by way of qualification in the law itself which declares his proportion. In such a case equity cannot intervene against the law to administer a mere abstract principle of justice. Unless he is compelled to ask the aid of equity to come in upon a fund derived by conversion of the estate, there is no means of reaching him for a debt, except by the ordinary course of judgment and execution."

(e) Of sale directed by will.

Where the testator has directed his realty to be converted into money for the purpose of administering it, there is an equitable conversion of it into personalty, so that the right of retainer may be exercised. See Re Akerman [1891] 3 Ch. (Eng.) 212, 61 L. J. Ch. N. S. 34, 65 L. T. N. S. 194, 40 Week. Rep. 12; Koons v. Mellett (1889) 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95; Tillie v. Springer (1891) 21 Ont. Rep. 585, — infra.

Thus, the right of retainer may be exercised in respect of the proceeds of sale of residuary real estate, directed by the testator to be converted into money for the purposes of administration. Re Akerman (Eng.) supra.

The general lien of a judgment creditor of a legatee upon lands charged with a legacy, or upon the proceeds of a sale thereof, provided for in the will, is subject to any equities that may exist in favor of the estate against the legatee. Koons v. Mellett (1889) 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95.

In Tillie v. Springer (1891) 21 Ont. Rep. 585, where testator directed certain lands to be sold at the death of his widow, and gave a share of the proceeds to a son who was indebted to the father's estate, it was held that the executors were, in making proof of their claims, upon an assignment by the son for the benefit of creditors, in the position of secured creditors. The court said: "The distinctions once existing between the administration of real and personal estates, if not now annihilated, are so minimized as not to be of practical importance in the solution of such questions as arise in this action."

3. Surplus arising on mortgage foreclosure.

The right of an heir to a surplus arising on foreclosure of a mortgage given by the decedent to secure an indebtedness for which such heir was primarily liable is, as between himself and the other heirs, chargeable in equity with the amount of such indebtedness, it being equitable that the interest of such heir in the property inherited by him should first be subjected to the payment of the mortgage. Manning v. Brown (1890) — N. J. Eq. —, 20 Atl. 381.

In Wilson v. Slaughter (1890) 53 Ark. 137, 13 S. W. 515, it was said that if a part only of land mortgaged by a decedent to secure the debt of an heir had been taken under the mortgage to satisfy the debt, and the residue had stood for partition among the decedent's heirs, a court of equity would not have awarded the debtor any part of it; but, as between him and his coheirs, it would have treated him as having mortgaged his interest in the land, and the purchaser at the mortgage sale as having succeeded to his right.

The claim of the administrator to so much of the share of an insolvent heir in a surplus arising from the foreclosure of a mortgage, given by the decedent to secure the indebtedness of the heir, as may be necessary to satisfy the indebtedness of the heir to the ancestor, is superior to the claim of a judgment creditor of the heir. Hopkins v. Thompson (1898) 73 Mo. App. 401.

4. Forming part of mixed residuary estate.

In Devries v. Hiss (1890) 72 Md.

560, 20 Atl. 131, it was held that the equitable interest of a beneficiary of a testamentary gift of testator's residuary estate, which, as it turned out, consisted wholly of real property in trust for certain beneficiaries, was liable to be intercepted by a court of equity to make good his defalcation as executor and testamentary trustee.

Where testator manifests an intention to charge each of his children with all amounts advanced by him, or for which he might in any manner be liable, the administrators c. t. a. may, as against a son's judgment creditors, set off a judgment recovered against them on a bond in which testator was surety for his son, against the latter's share of the testator's realty. Stieff v. Collins (1885) 65 Md. 69, 5 Atl. 294.

5. Property specifically devised.

Inasmuch as the executor has nothing to do with realty specifically devised, unless it be needed for the purpose of paying the testator's debts, there is no opportunity for the executor to retain the debt, and, accordingly, it has been held that, unless the testator has made the indebtedness of the devisee to himself a charge upon the land, it passes free from any liability for such debt, except as it may be subjected thereto by the ordinary processes of law. See Campbell v. Martin (1882) 87 Ind. 577; SENNEFF v. BRACKEY (reported herewith) ante, 978; Dearborn v. Preston [1863] 7 Allen (Mass.) 192; Jones v. Treadwell (1897) 169 Mass. 430, 48 N. E. 239; Broas v. Broas (1908) 153 Mich. 310, 116 N. W. 1077; La Foy v. La Foy (1887) 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266; Thorp v. Amos (1843) 1 Sandf. Ch. (N. Y.) 26; Wisner v. Teed (1853) 9 How. Pr. (N. Y.) 143; Woodruff v. Snowden (1900) 10 Ohio S. & C. P. Dec. 123, 7 Ohio N. P. 520; Re Covin (1883) 20 S. C. 471; Egbert v. Butter (1856) 21 Beav. 560, 52 Eng. Reprint, 976; Fox v. Buckley (1876) L. R. 3 Ch. Div. (Eng.) 508, 25 Week. Rep. 508; Re Taylor [1894] 1 Ch. (Eng.) 671, 63 L. J. Ch. N. S. 424, 8 Reports, 186, 70 L. T. N. S. 556, 42 Week. Rep. 373 (obiter).

Other cases, however, regard the debt as the basis of an equitable charge. See Goodnough v. Webber (1907) 75 Kan. 209, 88 Pac. 879; Boyer v. Robinson (1901) 26 Wash. 117, 66 Pac. 119.

As the executor has nothing to do with real estate devised by his testator unless it be needed for the payment of the testator's debts, he has no right of retainer which will take precedence of the lien of an existing judgment against the devisee. Campbell v. Martin (1882) 87 Ind. 577.

As against devisees of real estate, either general or specific, there is no right to offset a mere debt of the devisee, although such amounts, if advancements, and, doubtless, if mere debts, should be brought into hotchpot, and charged against the devisee, or devisees, receiving them. SENNEFF v. BRACKEY. In this case it was, however, held to be clearly within the power of a court of equity to take from a specific devise made to a distributee a proper part of the funds of the estate in his hands at the time of testator's demise, and to decree the same to be a lien upon this specific devise.

In Dearborn v. Preston (1863) 7 Allen (Mass.) 192, it was held that the indebtedness of the devisee of a share in testator's realty, to the testator, cannot be charged thereupon, the court saying: "The reason why that rule should prevail in reference to devisees to whom real estate is given, without words of condition or limitation annexed to the devise, is even more strong and obvious than why it should be applied in reference to the inheritance of heirs at law. The testator may prescribe at his own pleasure the terms of his gift; and, if he desires and intends to do so, he may charge and encumber the estate devised with the duty and obligation of paying any debt which shall remain due from the devisee to the testator at the time of his decease. His omission to impose any such condition unequivocally evinces an intention to make his gift absolute and unconditional. And it is a plain and unavoidable consequence of an unrestricted and absolute devise, that the estate devised comes to the devisee entirely

free from any encumbrance, or liability to be, in any part, appropriated to the payment or discharge of any debt which was due from him to the testator."

Executors cannot set off against or deduct from a devise, a debt due to the estate, in the same manner as they can set off such a debt against or deduct it from a legacy which they must pay from the estate in their hands. Jones v. Treadwell (1897) 169 Mass. 430, 48 N. E. 339.

The interest of a devisee in the realty devised is not chargeable with his indebtedness to the testator's estate. Broas v. Broas (1908) 153 Mich. 310, 116 N. W. 1077.

In La Foy v. La Foy (1887) 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266, it was held that the debt of a devisee to the testator cannot be charged to the lands devised to him, in the absence of language in the will making such debt a charge, the court saying: "The devisee of lands occupies no such relation to the executor as that which exists between legatee and executor. No act is necessary on the part of the executor to put the devisee in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the testator out of any demand which the devisee might seek to enforce against the executor. If such a charge attaches against the land devised, it would be necessary for the executor to establish it by proceedings in which he is the actor."

Executors who have paid to legatees more than the amount to which they were entitled have no lien for such overpayment upon life interests in real estate devised to the same persons. Thorp v. Amos (1843) 1 Sandf. Ch. (N. Y.) 26.

In Wisner v. Teed (1853) 9 How. Pr. (N. Y.) 143, it was held to be no answer to a complaint in a partition suit, instituted by a purchaser on execution sale of the interest of the judgment debtor in property devised by his father, that the testator, at the time of his death, held notes and obligations against the son more than sufficient to balance the amount of the son's portion of the property.

A loan to one of the devisees of certain specific realty, though made after the making of the will, cannot be set off as against the devisee's interest therein. Woodruff v. Snowden (1900) 10 Ohio S. & C. P. Dec. 123, 7 Ohio N. P. 520, reversed in (1902) 23 Ohio C. C. 408, on the ground that the devise in question was not specific.

The indebtedness of a devisee to the testator's estate cannot be charged against lands specifically devised. Re Covin (1883) 20 S. C. 471.

In Egbert v. Butter (1856) 21 Beav. 560, 52 Eng. Reprint, 976, it was held that a legal estate for life, devised by the testator to an executor, was not liable to make good a devastavit.

In Fox v. Buckley (1876) L. R. 3 Ch. Div. (Eng.) 508, 25 Week. Rep. 508, it was held that a legal life estate in certain realty, devised by testator to one of his executors and trustees, could not be taken and applied in replacing losses occasioned by his breaches of trust, as against his other creditors.

On the other hand, it has been held that a devisee takes his share of property devised, subject to all existing equities in favor of the estate and against himself. Goodnough v. Webber (1907) 75 Kan. 209, 88 Pac. 879.

And in Boyer v. Robinson (1901) 26 Wash. 117, 66 Pac. 119, it was held that a debt due from a devisee of a share of testator's realty can be retained by the executor.

In Goodson v. Goodson (1909) 31 Ohio C. C. 627, where a testator, after the execution of a will by which he devised certain real estate to a son, bestowing his personal estate elsewhere, loaned the son a sum of money upon the agreement that it was "to be taken out of his estate," it was held that such loan was a charge in equity upon the real estate devised to such son by the will.

c. Derivative interests.

There is a difference of opinion as to whether the right of retainer may be exercised in respect of a share to which the debtor has become entitled,

either by assignment or by inheritance from a codistributee.

Thus, in Stammers v. Elliott (1868) L. R. 3 Ch. (Eng.) 195, 37 L. J. Ch. N. S. 353, 18 L. T. N. S. 1, 16 Week. Rep. 489, reversing (1867) L. R. 4 Eq. 675, it was intimated that the right of retainer may be exercised not only in respect of a share to which the debtor is entitled as one of the residuary legatees, but also in respect of the share which he takes as next of kin of other residuary legatees.

But, in Howland v. Heckscher (1846) 3 Sandf. Ch. (N. Y.) 519, where the widow of the intestate died before distribution, and an insolvent child became entitled to share in her estate as one of her legatees and next of kin, it was held that the legal representatives of the intestate father could not withhold from the widow's administrator any part of her share of the personal property of the intestate, in order to apply it to the debt due to the latter from the insolvent child.

Likewise, in Smith v. Kearney (1848) 2 Barb. Ch. (N. Y.) 533, it was held that the right of equitable retainer on the part of the executor does not extend to a share to which the debtor has become entitled, not under the will of the testator, or as one of his heirs at law, but as a distributee of the estate of a previous taker.

In Rust's Estate (1905) 31 Pa. Co. Ct. 531, it is held that where the indebtedness of a distributee exceeds the distributive share, the excess may be set off against another share, which the distributee has acquired by assignment.

But in Ruiz v. Campbell (1894) 6 Tex. Civ. App. 714, 26 S. W. 295, it was held that in a partition of land among heirs, one of whom has purchased the interest of several others, only the portion inherited may be subjected to the payment of a debt due the decedent by the heir purchasing such interests.

V. Persons who may claim the benefit of the right.

A surety for the payment of a debt which an insolvent distributee owes to the estate has the right to insist that the distributive share of the debtor be applied in his exoneration. Allen v. Smitherman (1849) 41 N. C. (6 Ired. Eq.) 341; Wright v. Austin (1865) 56 Barb. (N. Y.) 13.

In accordance with the doctrine of marshaling securities, the executor or administrator holding security for the debts of the estate may be required by another creditor, secured by mortgage on the same property, which is inadequate to satisfy both demands, to exercise his right of retainer before resorting to the security; though he is not bound to do so, to the detriment of the estate, in respect of the unsecured debts that the debtor owes it. Blair v. White (1888) 61 Vt. 110, 17 Atl. 49.

The right of equitable set-off may be exercised by one to whom the residuary estate has been given, on condition of paying debts and legacies. Green v. Nelson (1847) 12 Met. (Mass.) 567.

The personal representative of the decedent has no authority to waive his right of retainer to the prejudice of the estate, and to the benefit of another creditor of the distributee. Rice v. Bradley (1914) 159 Ky. 293, 166 S. W. 1013.

That codistributees may not only insist on the exercise of the right, but may virtually assert it themselves, is shown by the cases (for which see IV. b, 2, supra) in which the debt of an heir or devisee has been taken into account in apportioning the proceeds of a partition sale; and those which have involved the right to a surplus arising on mortgage foreclosure (for which, see IV. b, 3, supra.)

In Streety v. McCurdy (1894) 104 Ala. 498, 16 So. 686, it is said that the other heirs have an equitable lien for the debt which a coheir owes the estate, which lien is, in equity, superior to any right such heir or person claiming under or through him, by operation of law or otherwise, might otherwise have had in the descended land, on the theory that all the property of an estate,—land, chattels, and choses in action alike,—constitute a fund, first, for the payment of debts of the estate by the subjection thereto of the personalty and realty, in the order stated, and next for distribution to or

division among the heirs of the residue, and that both personalty and realty, including the debts of a distributee to the ancestor in his lifetime, being a common fund for equal distribution, either by allotment or a sale and division of proceeds among all the distributees, those not indebted to the estate are entitled to have the sum due from one who is so indebted collected from him, or, failing this, they have a right to share in the assets as if such collection had been made; and the debtor distributee shares in the estate only upon the like assumption of payment by him.

The executors cannot retain, on behalf of other residuary legatees, the amounts which such legatees have individually contributed to keep down interest on a mortgage given by the testator as security for the debt of their colegatee, such sums not having come out of the testator's estate, and no debt being due to the testator's estate in respect of them. Re Watson [1891] 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571.

A debtor to a testator who is also the creditor of the legatee cannot, by any interposition of the executors, apply the legacy to his debtor in discharge of his own debt, in the absence of any contract with the legatee for that purpose. Smee v. Baines (1861) 29 Beav. 661, 54 Eng. Reprint, 784, 31 L. J. Ch. N. S. 63, 7 Jur. N. S. 902, 4 L. T. N. S. 573, 9 Week. Rep. 802.

VI. Persons against whom the right may be asserted.

a. The debtor himself; legal disabilities; right of exemption.

That the right of retainer may ordinarily be asserted against the debtor himself needs no citation of authority; although, as has already been shown (see III. a, supra), there is a difference of opinion as to whether there is a right of retainer where the debtor was under a legal disability to incur the debt.

Inasmuch as the right to deduct the indebtedness of a distributee from his distributive share is based upon the theory that he has already in hand part of the fund to be distributed, he cannot defeat the right to deduction by claiming exemption. Duffy v. Duffy (1900) 155 Mo. 144, 55 S. W. 1002; Fiscus v. Fiscus (1891) 127 Ind. 283, 26 N. E. 831; Small v. Usher (1907) 77 S. C. 115, 67 S. E. 623.

It has been held that the right of the executor to retain the income of a trust fund, in satisfaction of a debt owing by the legatee to the testator, is not affected by the fact that such income is, by statute, not liable for the claims of creditors. Re Foster (1902) 38 Misc. 347, 77 N. Y. Supp. 922.

Re Foster (N. Y.) supra, is disapproved by the surrogate of King's county in Re Bogert (1903) 41 Misc. 598, 85 N. Y. Supp. 291, in which it was held that the income of a trust fund created for the benefit of the debtor could not be retained in satisfaction of a debt, the court saying: "There appears to be no case completely decisive of the question, except that of Re Foster (N. Y.) supra. After considerable reflection, I am unable to agree with the learned judge in his disposition of that case. It stands conceded that this income is exempt from the attack of a creditor, yet it must be remembered that an executor of an estate simply stands in the light of a creditor, and, if the estate can reimburse itself by retaining this income until the debt is paid, that then the estate would have a preference over the ordinary creditor of the cestui que trust. It does not seem that any such result should be accomplished. In the Foster Case the learned surrogate based his decision on the fact that any other decision would work an inequitable distribution. But this proposition is something which, it seems to me, the surrogate should not attempt to adjust. It is occasioned by the testatrix, and it would have been a simple matter for the testatrix to have provided for the matter; not having done so, it does not seem to me that it is the function of the surrogate to attempt to do it, but simply to consider the strict legal rights of the parties. The theory of retainer is that it is the executor's duty to collect all debts due the estate, and that such debts are

assets due the estate, which it is the executor's right to retain and offset against a legacy; but a trustee has no such powers. His duties are confined exclusively to investing and caring for the trust funds, and applying the same as directed by the trust; if the trustee was a different person than the executor, he would have no right to assist the executor by paying over such income to him. The fact that the executor and trustee are the same person does not alter the conditions and rights of the cestui que trust, except that under the provisions of the will in question it is unnecessary to show any formal transfer from the executor to the trustee."

b. Transferees, encumbrancers, or other creditors.

1. Assignees of debtor's interest.

It is unanimously held that the assignee of a legacy or distributive share, whether with or without notice of his assignor's indebtedness to the estate, takes subject to existing equities, and is in no better situation than his assignor would have occupied had the assignment not been made.

Alabama.—Streety v. McCurdy (1894) 104 Ala. 498, 16 So. 686.

California.—Re Gamble (1913) 166 Cal. 253, 135 Pac. 970.

Georgia.—Lester v. Toole (1917) 20 Ga. App. 381, 3 S. E. 55.

Maryland.—Mullikin v. Mullikin (1829) 1 Bland. Ch. 538.

Missouri.—Ford v. O'Donnell (1890) 40 Mo. App. 51; Hopkins v. Thompson (1897) 73 Mo. App. 401 (obiter).

New York.—Smith v. Kearney (1848) 2 Barb. Ch. 533; Clapp v. Meserole (1894) 1 Abb. App. Dec. 362, affirming (1863) 38 Barb. 661; Wright v. Austin (1865) 36 Barb. 13; Dixon v. Storm (1881) 5 Redf. 419.

North Carolina.—Allen v. Smitherman (1849) 41 N. C. (6 Ired. Eq.) 341.

Pennsylvania.—Baughman v. Dibler (1800) 3 Yeates, 9; Keim v. Muhlenberg (1838) 7 Watts, 79; Romig v. Erdman (1840) 5 Whart. 112, 34 Am. Dec. 533; Dull's Estate (1890) 137 Pa. 116, 20 Atl. 419; Rust's Estate (1905) 31 Pa. Co. Ct. 531.

Tennessee.—Irvine v. Palmer (1892) 91 Tenn. 463, 30 Am. St. Rep. 893, 19 S. W. 326.

England.—Re Knapman (1881) L. R. 18 Ch. Div. 300, 50 L. J. Ch. N. S. 629, 45 L. T. N. S. 102; Re Batchelor (1873) L. R. 16 Eq. 481, 43 L. J. Ch. N. S. 101, 21 Week. Rep. 901.

The assignee of a legacy takes it as an ordinary chose in action, not negotiable, and therefore liable to all equities existing at the time of the assignment. Romig v. Erdman (1840) 5 Whart. (Pa.) 112, 34 Am. Dec. 533.

An assignee for value has no equity which is superior to those of other distributees for whose benefit alone the administrator seeks to make the collection, as the assignee can in no event obtain any greater right by the assignment than his assignor could convey. Ford v. O'Donnell (1890) 40 Mo. App. 51. In this case the court said: "If his assignor at the date of the assignment was indebted to the estate, the administrator had a legal right to proceed against him to prosecute the claim to judgment, and to enforce such judgment against any property of the assignor. The administrator's equity rests in the fact that during administration, and until the distributive share is ascertained, he is remediless to enforce such claim, either in law or equity, in default of other property of the debtor, although the assets are in his hands all the time, and, if the amount were ascertained, he might offset one debt against the other, if sued. An assignment of a distributive share is not a conveyance of tangible property, but the assignment of an unliquidated claim which is always subject to cross demand existing at the date of the assignment. The administrator by this proceeding simply seeks the enforcement of a legal right, for which he had no legal remedy."

The right to set off the amount of the indebtedness against a legacy may be asserted as against an assignee of an antecedent debt of an insolvent legatee, though such assignment was made before the legacy became due and payable. Dixon v. Storm (1881) 5 Redf. (N. Y.) 419.

In Re Batchelor (1873) L. R. 16 Eq.,

(Eng.) 481, 43 L. J. Ch. N. S. 101, 21 Week. Rep. 901, it was said by Lord Selborne to be clear law that the assignee of a contingent or reversionary legacy would, when the legacy became payable, be subject to the right of retainer, if the legatee would himself have been subject to it in the absence of any assignment.

It has been intimated that a right of retainer in respect of an indebtedness to the estate, incurred subsequently to a transfer of the debtor's interest in the estate to a third person, whether voluntary or involuntary, should not be given precedence over the rights acquired by such third person (see Wisner v. Teed (1853) 9 How. Pr. (N. Y.) 143); at least, where notice of the assignment has been given to the executor or administrator (Ford v. O'Donnell (Mo.) supra, obiter); but this does not hold good in the case of indebtedness arising from maladministration of the estate, or from the discharge of an obligation of suretyship.

Thus, in Clapp v. Meserole (1864) 1 Abb. App. Dec. (N. Y.) 362, affirming (1863) 38 Barb. 661, it was held that an assignment of their legacies by executors, prior to a devastavit, does not preclude the amount charged against them from being deducted from the amount of their legacies, the court saying: "It is sufficient answer that these legatees, after the death of the testator, became possessed, as executors, of all his personalty, and under trusts of the will, were entitled to receive the rents and profits and proceeds of the sales of the whole real estate. Being both executors and legatees, the realization of their legacies depended upon the faithful performance of the trust, and it was not possible for the legatees to separate the interest from the duty. They could not convey away the former, and then waste the assets with which it should have been paid. The duty which attached to the legacy in the hands of the legatees followed it into the hands of the appellant."

So also, in Bobo v. Vaiden (1883) 20 S. C. 271, it was held that the assignee of a distributee who was also a surety on the administrator's bond is entitled only to what is left to such surety after paying his liability to the estate for the devastavit of the administrator, even though, at the time of the assignment, no devastavit had been established against the administrator, and the sureties had paid nothing.

The right to set off an administrator's distributive share against a claim for a loss resulting from his maladministration may be asserted against an assignee of his distributive share, whether the assignment was made before the breach of trust, or after. "The rule is that the trustee cannot take anything until after the breach of trust has been made good; the equity is paramount to any right of the trustee." Re Hervey (1889) 61 L. T. N. S. (Eng.) 429.

Payment by the estate of a surety of an amount for which the legatee is primarily liable may be set off against the legacy, even as against a purchaser of the legacy before such payment was made. Re Baily (1893) 156 Pa. 634, 22 L.R.A. 444, 27 Atl. 560.

When the testator directs in his will that his executor shall deduct from the value of the estate devised all moneys and accounts in which his children may be indebted to him at his death, the right of the executor, where a son's share of the personal estate is insufficient to offset his indebtedness to the estate, to deduct his debt from his share of the proceeds of land sold in partition proceedings, superior to the claim of an assignee of such heir's share in the estate. Smith v. Smith (1860) 13 N. J. Eq. 164.

2. Purchasers of property from debtor.

There is a difference of opinion as to whether a purchaser of realty from an heir, or devisee, takes subject to the indebtedness of such heir, or devisee, to the decedent. Of course, in those jurisdictions in which it is held that no right of retainer may be asserted as against interests in realty (see IV. b, supra), there can be no question as to the purchaser's taking a clear title.

It has been held that a purchaser of real estate from an heir, pending administration of the estate of the deceased, does not take it subject to the

indebtedness of the heir to the decedent,—at least, where the debtor is not insolvent. Russell v. Smith (1901) 115 Iowa, 261, 88 N. W. 361.

So also, in Letson v. Letson (1864) 17 N. J. Eq. 103, it was held that the indebtedness of a devisee to the testator is not a charge which can be enforced against the lands devised, in the hands of a bona fide purchaser without notice, such purchaser not being affected by any equity between the executor of the estate and the devisee.

And in Steele v. Frierson (1887) 85 Tenn. 430, 3 S. W. 649, it is held that the indebtedness of an heir to the intestate is not a lien upon the interest of the heir in the estate, and such share is therefore subject to the creditors of the heir, or to sale or assignment by the heir; and if the creditor obtains the first lien, either by levy or attachment, or obtains an assignment before the administrator has taken steps to fix a lien upon such interest, the creditor's right, in either case, will be superior. See also Towles v. Towles (1858) 1 Head (Tenn.) 601, under IV. b, 2, supra. In Irvine v. Palmer (1892) 91 Tenn. 463, 30 Am. St. Rep. 893, 19 S. W. 326, it was said with reference to Steele v. Frierson (Tenn.) supra: "Whether there was involved in the controversy before the court any personalty does not very clearly appear. The cases referred to in the opinion as sustaining the position assumed were cases involving realty alone. But be this as it may, the parties were content not to raise or present the question of retainer; nor was the same argued before or passed upon by the court."

But in Manifold's Estate (1843) 5 Watts & S. (Pa.) 340, it was said that the purchaser of real estate from an heir takes subject to the equitable right of his coheirs to have a debt owing to the decedent's estate deducted; "for it would be his duty to inquire into the debts of the deceased, and he must purchase at the risk of discharging all liens arising in favor of as well as against the estate."

And in Lester v. Toole (1917) 20 Ga. App. 381, 93 S. E. 55, it is said that the right of retainer may be exercised as against a purchaser from an heir.

One who takes from a devisee, without any consideration, a conveyance of the realty devised, takes it subject to the equitable rights of his codevisees to have money of the estate borrowed by the devisee treated as a charge upon his share. New v. New (1891) 127 Ind. 576, 27 N. E. 174.

A bona fide purchaser of the estate in expectancy of an heir apparent, though taking it subject to advancements made to the heir, does not take it subject to debts due from the heir to the ancestor's estate. Steele v. Frierson (1887) 85 Tenn. 430, 3 S. W. 649.

Where property constituting part of a legatee's share of the testator's estate has been handed over to his trustees in insolvency, and sold by them to purchasers without notice of any claim held by the executors, such claim cannot be asserted against the property; but the right of retainer may be exercised only in respect of such portion of the legatee's share as still remains unpaid. Hoffman v. Armstrong (1899) 90 Md. 123, 44 Atl. 1012.

3. Encumbrancers.

Encumbrancers occupy no better position than assignees or purchasers (see Fiscus v. Moore (1890) 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362; SENNEFF v. BRACKEY (reported herewith) ante, 978; Rice v. Bradley (1914) 159 Ky. 293, 166 S. W. 1013; Willes v. Greenhill (1860) 29 Beav. 376, 54 Eng. Reprint, 673; Re Knapman (1881) L. R. 18 Ch. Div. (Eng.) 300, 50 L. J. Ch. N. S. 629, 45 L. T. N. S. 102,—infra), even though the money advanced by the encumbrancer may have been applied in part payment of the debt to the estate (Rice v. Bradley (Ky.) supra); unless they have acted in reliance on an order of the court, showing clear title in the mortgagor. Re Eyton (1890) L. R. 45 Ch. Div. (Eng.) 458, 59 L. J. Ch. N. S. 733, 63 L. T. N. S. 336, 39 Week. Rep. 135.

One who takes a mortgage on real estate from an heir, pending settlement of the estate, can acquire no greater interest than that of the heir

himself; and, where the real property is sold in order to pay debts, his claim to the proceeds is subject to a deduction or set-off of the heir's indebtedness. Fiscus v. Moore (1890) 121 Ind. 547, 7 L.R.A. 235, 23 N. E. 362.

A judgment recovered by a special administrator against an insolvent devisee, who has property belonging to the testator which he has refused to turn over, takes precedence of a mortgage given by such devisee, either to secure pre-existing debts, or to persons who were aware of the situation. SENNEFF v. BRACKEY (reported herewith) ante, 978.

The right of a testamentary trustee to set off a distributee's indebtedness to the estate against the distributee's interest will prevail over the right of a creditor who has a mortgage, or other lien, on the distributee's interest; and this lien is not lost by the fact that the trustee takes additional security from the distributee. Rice v. Bradley (1914) 159 Ky. 293, 166 S. W. 1013.

The mortgagee of a residuary legatee's share takes subject to all the equities which exist between the legatee and the estate, including the liability of the legatee to indemnify the estate for such sums as it may be obliged to pay, by reason of the testator's suretyship for the legatee. Willes v. Greenhill (1860) 29 Beav. 376, 54 Eng. Reprint, 673.

The right of retainer may be claimed as against encumbrancers. Re Knapman (1881) L. R. 18 Ch. Div. (Eng.) 300, 50 L. J. Ch. N. S. 629, 45 L. T. N. S. 102.

The mere fact that money advanced by a mortgagee of a distributee's interest was applied by the distributee in part payment of his debt to the estate does not have the effect of postponing the right of the personal representative to assert a superior claim, against the interest of such distributee for the balance of the debt. Rice v. Bradley (Ky.) supra.

Persons who have honestly advanced money in reliance on an order of the court, showing a clear title of a legatee, should be protected against the subsequent assertion of a right of retainer. Re Eyton (1890) L. R. 45 Ch. Div. (Eng.) 458, 59 L. J. Ch. N. S. 733, 63 L. T. N. S. 336, 39 Week. Rep. 135.

4. General creditors.

The creditors of a legatee whose indebtedness exceeds his share of the personal estate are not entitled to have a receiver appointed of his interest therein. Armiger v. Reitz (1900) 91 Md. 334, 46 Atl. 990.

5. Attaching creditors.

The executor has the same right to set off the indebtedness of a legatee to the estate of the testator against an attaching creditor as he would have had against the legatee. Strong v. Bass (1860) 35 Pa. 333.

The right of retainer may be exercised as against an attaching creditor of a distributee (Palmer's Estate (1878) 2 Del. Co. Rep. (Pa.) 180; De Haven's Estate (1901) 5 Dauphin Co. Rep. (Pa.) 233; Brown v. Mattingly (1891) 91 Ky. 275, 15 S. W. 353); and will take precedence of an attachment in execution against the legatee's interest in an estate (Sheppard's Estate (1897) 180 Pa. 57, 36 Atl. 422).

An administrator is not liable as trustee in foreign attachment of a distributee, who owes him debts exceeding the amount of his own distributive share. Henshaw v. Whitney (1858) 11 Gray (Mass.) 223.

One who has accepted a residuary devise on condition of paying debts and legacies is not chargeable upon trustee process, at the instance of a creditor of a legatee, whose debt to the testator exceeded the amount of his legacy. Green v. Nelson (1847) 12 Met. (Mass.) 567.

In Maine, it is provided by statute that, "when an estate is solvent and a person to whom a share of it descends is indebted to the intestate at the time of his death, such debt creates a lien on his share, having priority to any attachment of it; and such lien may be enforced by suit and attachment of the share within two years after administration is granted." The lien given by this statute is superior to an attachment made by a creditor of a distributee, though made before any attachment by the adminis-

trator. C. A. Weston Co. v. Colby (1910) 107 Me. 104, 77 Atl. 637.

6. Judgment creditors and purchasers on execution.

The fact that another debtor has reduced his debt to a judgment, while the indebtedness of the legatee or distributee to the estate remains a simple contract debt, will not defeat a right of retainer. See Brown v. Lang (1848) 14 Ala. 719; Goodman v. Benham (1849) 16 Ala. 625; Lang v. Brown (1852) 21 Ala. 179, 56 Am. Dec. 244; Streety v. McCurdy (1894) 104 Ala. 498, 16 So. 686; Re Angel (1905) 148 Cal. 102, 82 So. 668; Armour v. Kendall (1885) 15 R. I. 193; Irvine v. Palmer (1892) 91 Tenn. 463, 30 Am. St. Rep. 895, 19 S. W. 326.

One holding a judgment, the lien of which would attach to the interest a distributee would have had in the property of the estate but for his indebtedness to it, is in no better plight than he, such lienor acquiring nothing, because his vendor or judgment creditor had and was entitled to nothing. Streety v. McCurdy (1894) 104 Ala. 498, 16 So. 686.

Accordingly, judgment creditors of a legatee having no visible assets, and who is indebted to the estate in an amount in excess of his legacy, cannot maintain a bill in equity against the executor to subject the legacy to the payment of their judgment. Armour v. Kendall (1885) 15 R. I. 193, 2 Atl. 311.

The right of other distributees to have waste and misapplication of the assets of the estate made good out of the share to which the administrator would be entitled as distributee takes precedence over the right of a judgment creditor of the administrator to subject such distributive share to the payment of his claim; and it is immaterial whether the sureties on the administrator's bond are solvent, and able to respond for the default. Brown v. Lang (1848) 14 Ala. 719; Lang v. Brown (1852) 21 Ala. 179, 56 Am. Dec. 244.

And the same is true in the case of an executor who has wasted the estate to a large amount, he being obliged to account to his colegatees for the abuse of his trust, before he can be entitled to receive his share of the estate. Goodman v. Benham (1849) 16 Ala. 625.

So, where it is held that an heir or devisee must account for his indebtedness before being allowed to take any interest in land or its proceeds, the right to require him to do so takes precedence of the claim of his judgment creditors. See Nelson v. Murfee (1881) 69 Ala. 598; Steiff v. Collins (1886) 65 Md. 69, 5 Atl. 294; Duffy v. Duffy (1900) 155 Mo. 144, 55 S. W. 1002; Stenson v. H. S. Halvorson Co. (1913) 28 N. D. 151, L.R.A.1915A, 1179, 147 N. W. 800, Ann. Cas. 1916B, 1289; Manifold's Estate (1843) 5 Watts & S. (Pa.) 340; Dickinson's Estate (1892) 148 Pa. 142, 23 Atl. 1053; Hartman's Estate (1899) 12 Pa. Super. Ct. 69, 17 Lanc. L. Rep. 41; Heister's Estate (1901) 26 Pa. Co. Ct. 49, 18 Montg. Co. L. Rep. 33; Boyer v. Robinson (1901) 26 Wash. 117, 66 N. W. 119. A judgment debtor of a devisee under a will acquires no lien against the devisee's interest in the realty of the estate, when the devisee is indebted to the estate in excess of the value of his share. Boyer v. Robinson (1901) 26 Wash. 117, 66 Pac. 119.

Where, however, land inherited or devised is regarded as passing to the heir or devisee, irrespective of his indebtedness to the decedent, it follows that the lien of a judgment will take precedence of any equitable right to charge such indebtedness upon the property.

Thus, it has been held that the lien of a judgment against a devisee is superior to the right of the executor to subject the property devised to the payment of the devisee's debt to the decedent. McCormick v. Hanks (1898) 105 Iowa, 639, 75 N. W. 494.

And that the lien of an existing judgment against a devisee cannot be devested by nor postponed to the lien of a junior judgment, upon a debt due from him to the testator before his death. Campbell v. Martin (1882) 87 Ind. 577.

But a creditor who, at the time he acquired his judgment lien on land directed by the testator to be sold for

the purpose of making division among the beneficiaries of his will, is bound to know that such lands will, by the terms of the will, be converted into money, takes his lien subject to all the equities existing in favor of the estate. Koons v. Mellett (1889) 121 Ind. 585, 7 L.R.A. 231, 23 N. E. 95, in which the court said that the case was governed by a different rule, and was to be distinguished from the cases where a party has acquired a specific lien for value, without notice of the existence of equities at the time such lien is acquired.

The claim of the administrator to so much of the share of an insolvent heir in a surplus arising from the foreclosure of a mortgage, given by the decedent to secure the indebtedness of the heir, as may be necessary to satisfy the indebtedness of the heir to the ancestor, is superior to the claim of a judgment creditor of the heir. Hopkins v. Thompson (1897) 73 Mo. App. 401.

Where a will provides that from the share of the testator's son shall be deducted the amount which the testator, as surety, shall have to pay for him, the right to make such deduction is paramount to the lien of a judgment recovered against the son, and to a conveyance of his interest in the estate, both of which were subsequent to the making of such payment. Haberstich v. Elliott (1901) 189 Ill. 70, 59 N. E. 557.

One who acquires the nominal interest of an heir or distributee indebted to the estate, by sale and purchase under judicial process, acquires the same right which the debtor has. If the debtor takes the property free from any deduction in respect of his indebtedness to the decedent, such indebtedness cannot be charged against the property in the hands of the purchaser (see Scobee v. Bridges (1888) 87 Ky. 427, 9 S. W. 299; Thompson v. Myers (1894) 95 Ky. 597, 26 S. W. 1014); but if the right of retainer might have been exercised against the debtor himself, it may likewise be exercised against the execution purchaser (see Wilson v. Slaughter (1890) 53 Ark. 137, 13 S. W. 515; Ayers v. King (1902) 168 Mo. 244, 90 Am. St. Rep. 452, 67 S. W. 558; Ayers v. King (1902) 168 Mo. 249, 67 S. W. 1100; Oxsheer v. Nave (1897) 90 Tex. 568, 37 L.R.A. 98, 47 S. W. 7).

A purchaser upon execution of the distributive share of a distributee, with actual knowledge of all the facts, takes no greater right than the debtor himself had. Wilson v. Slaughter (1890) 53 Ark. 137, 13 S. W. 515.

The purchaser of realty, sold under execution against an heir, is not bound to account to the other heirs for an amount which the estate has been compelled to pay, by reason of the decedent's suretyship for the judgment debtor. Scobee v. Bridges (1888) 87 Ky. 427, 9 S. W. 299.

The indebtedness of a devisee to the estate is not a pre-existing lien thereon, which may be asserted against the purchaser, upon execution sale, of his interest in the lands devised. Thompson v. Myers (1894) 95 Ky. 597, 26 S. W. 1014.

Neither an insolvent heir, nor a purchaser upon execution sale of his distributive share in the decedent's estate, is entitled to participate in the distribution of the surplus proceeds of the sale, under a mortgage given by the decedent to secure the debt of such heir, where the heir's share of the surplus does not exceed the amount of the debt. Wilson v. Slaughter (Ark.) supra.

The right to deduct the debt owing by an insolvent heir, from his share in the proceeds of a partition sale, takes precedence of the right of an execution purchaser of his interest in the property. Ayers v. King (1902) 168 Mo. 244, 90 Am. St. Rep. 452, 67 S. W. 558; Ayres v. King (1902) 168 Mo. 249, 67 S. W. 1100.

Where notice is given at a sheriff's sale of an interest of an heir in real estate, that such sale is subject to the equity of the payment of the heir's debt to the decedent's estate, the equity of payment runs with the land, and, in subsequent partition proceedings, the amount of the debt from the heir may be charged upon the purport allotted to the sheriff's vendee. Donaldson's Estate (1893) 158 Pa. 292, 27

Atl. 959, affirming (1893) 23 Pittsb. L. J. N. S. 260.

A creditor who acquires the nominal interest of an heir or distributee of an estate, by sale and purchase under judicial process, acquires no better right than the debtor has, and takes it subject to the right to offset against it and indebtedness of the heir or distributee to the estate. Oxsheer v. Nave (1897) 90 Tex. 568, 37 L.R.A. 98, 47 So. 7.

7. Assignees in bankruptcy.

See VII., infra.

c. Personal representatives of deceased debtor.

The administrator of a deceased distributee can be in no better position than he, and must be content with the residue, if any, after his debt to the estate is paid. Webb v. Fuller (1893) 85 Me. 443, 22 L.R.A. 177, 27 Atl. 346.

The insolvency of the estate of a deceased legatee does not entitle his personal representative to receive payment of the legacy in full, leaving the estate of the creditor to rank only with the other creditors; but the right of retainer may be exercised, in preference to other creditors of equal degree. Bain v. Malcolm (1887) 13 Ont. Rep. 444; Smith v. Huger (1792) 1 Desauss. Eq. (S. C.) 247.

d. Persons taking in right of or in place of the debtor.

1. Distributees taking in lieu of predeceased ancestor.

The cases which have passed upon the question whether the indebtedness owing to the remote ancestor by a predeceased immediate ancestor may be deducted, in determining the amount which the distributees are entitled to take in the remote ancestor's estate, are in conflict, the weight of authority being that such deduction cannot be made. See Ellis v. Dumond (1913) 259 Ill. 483, 102 N. E. 801; Wells v. Wells (1884) 6 Ky. L. Rep. 216; Destrehan v. Destrehan (1826) 4 Mart. N. S. (La.) 557; Morgan's Succession (1871) 23 La. Ann. 290; Kendall v. Mondell (1887) 67 Md. 444, 10 Atl. 240; Barnum v. Barnum (1893) 119 Mo. 63, 24 S. W. 780; Ilgenfritz's Appeal (1836) 5 Watts (Pa.) 25 (which, however, is, in effect, overruled in subsequent Pennsylvania decisions); Stokes v. Stokes (1902) 62 S. C. 346, 40 S. E. 662; Powers v. Morrison (1895) 88 Tex. 133, 28 L.R.A. 521, 53 Am. St. Rep. 738, 30 S. W. 851.

Contra: Head v. Spier (1903) 66 Kan. 386, 71 Pac. 833; Adams v. Yancy (1913) 105 Miss. 233, 47 L.R.A. (N.S.) 1026, 62 So. 229, 419; Batton v. Allen (1845) 5 N. J. Eq. 99, 43 Am. Dec. 630; Martin v. Martin (1897) 56 Ohio St. 333, 46 N. E. 981; Earnest v. Earnest (1835) 5 Rawle (Pa.) 213; M'Conkey v. M'Conkey (1840) 9 Watts (Pa.) 352; Hughes's Appeal (1868) 5 Pa. 179; Kenderdine's Estate (1897) 19 Pa. Co. Ct. 201.

Nor can any distinction be made between cases where the claimants are lineal descendants of the decedent (as in Adams v. Yancy (1913) 105 Miss. 233, 47 L.R.A.(N.S.) 1026, 62 So. 229; Earnest v. Earnest (1835) 5 Rawle (Pa.) 213; Ilgenfritz's Appeal (1836) 5 Watts (Pa.) 25; M'Conkey v. M'Conkey (1840) 9 Watts (Pa.) 352; Hughes's Appeal (1868) 57 Pa. 179; Batton v. Allen (1845) 5 N. J. Eq. 99, 43 Am. Dec. 630; Destrehan v. Destrehan (1826) 4 Mart. N. S. (La.) 557; Powers v. Morrison (1895) 88 Tex. 133, 28 L.R.A. 521, 53 Am. St. Rep. 738, 30 S. W. 851; Ellis v. Dumond (1913) 259 Ill. 483, 102 N. E. 801; Wells v. Wells (1884) 6 Ky. L. Rep. 216), or are only collaterally related (as in Head v. Spier (1903) 66 Kan. 386, 71 Pac. 833; Morgan's Succession (1871) 23 La. Ann. 290; Stokes v. Stokes (1902) 62 S. C. 346, 40 S. E. 662; Kendall v. Mondell (1887) 67 Md. 444, 10 Atl. 240; Barnum v. Barnum (1893) 119 Mo. 63, 24 S. W. 780; Martin v. Martin (1897) 56 Ohio St. 333, 46 N. E. 981; Kenderdine's Estate (1897) 19 Pa. Co. Ct. 201).

These divers views are the result of the difference in opinion as to whether statutes providing for succession in the case of the death of an immediate ancestor cast the inheritance directly upon the heir, or whether the heir, taking in the place of his ancestor, inherits simply as his representative, and therefore takes only what such ancestor would have taken

had he survived the decedent. It may be pointed out that it is not conclusive of this question that the statute may provide that, in the distribution of the intestate's estate, the heir shall take by representation, since such expression may be taken merely to denote the fractional part to be taken, and not the ultimate share.

2. Legatee or heir of original debtor.

The right of retainer may be exercised as against one to whom the legatee has bequeathed the legacy. Dean v. Rounds (1893) 18 R. I. 436, 27 Atl. 515, 28 Atl. 802.

In Snyder v. Warbasse (1857) 11 N. J. Eq. 463, where one of the residuary legatees died after the testator, but before receiving his legacy, and, by reason of his insolvency, his indebtedness to the testator could not be collected, it was held that the amount thereof might be deducted from his share as against his children.

3. Legatees taking the property devised or bequeathed in succession or by substitution.

(a) In general.

The indebtedness of one to whom an estate for life is devised may, in the absence of a provision in the will making it a charge against the property itself, be set off only against his interest in the property, and not against the interest of his children, to whom the remainder is given. Jordan v. Jordan (1916) 274 Ill. 251, L.R.A. 1917D, 563, 113 N. E. 631; Brackey v. Jensen (1914) 166 Iowa, 109, 147 N. W. 188.

And where a share of the testator's estate is given to one for life, and at his decease to be paid to his children, his indebtedness to the estate cannot be set off against the principal of the trust fund, directed to be invested for his benefit and that of his children in remainder. Voorhees v. Voorhees (1867) 18 N. J. Eq. 223.

Where property was devised in trust to pay over the net income to the testator's widow for life, and on her decease to pay over the principal to testator's children, the issue of any deceased child to take by way of representation, the trustees, in settling with the issue of a child dying in the widow's lifetime, cannot credit themselves with income which such deceased child has been allowed to take and appropriate to his own use. Dodd v. Winship (1882) 133 Mass. 359.

Nor can they credit themselves with a portion of the principal of the trust fund which the father of such children had been allowed to appropriate. Dodd v. Winship (1887) 144 Mass. 461, 11 N. E. 588.

Where the testator has provided that, in case of the death of any of the residuary legatees before the time of distribution, leaving issue, such issue shall take, they take free from any equities existing against their parents. Denise v. Denise (1883) 37 N. J. Eq. 163.

(b) As against issue of deceased legatee substituted by statute.

The courts have differed as to whether a testamentary provision, saved by statute from lapse, is subject to deduction in respect of the indebtedness of the original beneficiary to the testator. That the legacy passes to those entitled to it, without any deduction, see Carson v. Carson (1858) 1 Met. (Ky.) 300; Wallace v. Du Bois (1885) 65 Md. 161, 4 Atl. 402; Hemsley v. Hollingsworth (1913) 119 Md. 431, 87 Atl. 506; Wattenbarger v. Payne (1912) 162 Mo. App. 434, 145 S. W. 148. Contra: Denise v. Denise (1883) 37 N. J. Eq. 163; Baker v. Carpenter (1903) 69 Ohio St. 15, 68 N. E. 577; Re Adams (1887) 18 Pittsb. L. J. N. S. (Pa.) 285.

In holding that it is not so subject the court, in Carson v. Carson, supra, (Ky.) said: "The surviving issue take the estate devised, not as heirs at law or distributees of the deceased devisee, but as legatees, directly and immediately, under and by virtue of the will. They take 'as the devisee or legatee would have done if he had survived the testator,' the effect of which is to confer upon the surviving issue the same estate and interest under the will as if the devise or bequest had been directly to them, instead of to their father. Such being the obvious effect and operation of the statutes, upon what principle can the debt

against the ancestor of the appellants be regarded as a charge upon the legacy to which the latter are entitled as legatees? The legacy in contest certainly never vested in the ancestor in his lifetime, and at his death he had no interest in the estate of his father, which devolved upon his children as his legal representatives. They claim now, not in his right, but in their own right. Upon the death of the testator the legacy vested immediately in them, and can no more be subjected to the debts of their father than any other estate which may have been acquired by them, since his death, from any other source. If D. B. Carson had survived the testator, he would have taken the estate bequeathed, and the whole of it, subject only to the charge for the advancement as contained in the will. As legatee, he would have been entitled to one tenth of the residuary fund, without any encumbrance or charge, except such as the will itself created. It is very true that in enforcing the payment of the legacy the executor might have subjected a portion of it by way of set-off to the payment of the debts due by the legatee to the estate; but this right would have been founded upon equities wholly extrinsic, and having no connection with the will, or with any right derivable from it. So that it could not, with any propriety of speech, be said that the legatee, if he had survived, would have taken the estate bequeathed, subject to the payment of his debts to the testator."

So also, in Wattenbarger v. Payne (1912) 162 Mo. App. 434, 145 S. W. 148, it is said: "It is not correct to say that the legislature only provided a means whereby the grandchild could claim his father's legacy. The legislature enacted a law that, in the contingency of the father's death, made his child an original legatee of the grandfather. It is everywhere agreed that an applicable statute enters into and becomes a part of the testator's will. Therefore, should it not be said that the grandfather willed the legacy to his son, if he be alive at the grandfather's decease, but if he be dead, then to the children of the son? In such case there certainly would be no charge of the son's debts to the testator, unless directed in the will. If the lawmakers had desired that the grandchild's legacy should be charged with the debts of his father to his grandfather, it seems to me to be accusing them with a great oversight in not explicitly saying so."

On the other hand, in Denise v. Denise (1883) 37 N. J. Eq. 163, it was held that the statute was meant simply to put the issue of the deceased beneficiary in the place of their parents in the contingency specified, and give them a right to take what their parent would have taken if he had survived the testator, but that it was not intended to raise grandchildren to a plane higher than that which their parents could ever have occupied, or to give rights against the other beneficiaries of the will which the person in whose place they are substituted never would have been permitted to assert. The court criticizes the case of Carson v. Carson (Ky.) supra, as making very subtle and unwarranted distinction between the position of the primary legatee as a beneficiary under the will and his position as debtor to the testator's estate, saying: "I cannot concur in this reasoning. It appears to me to be unsound in its main premises. The law of the land constitutes a part of every will, and the rights of every legatee must be defined, measured, and enforced by its rules. The law says a legatee indebted to his testator must pay his debt, or his legacy may be applied in discharge of his debt. That being a standard by which the rights of a legatee thus situated must be measured, I cannot regard it as true, either in fact or in logic, that he takes his legacy free from his debt; on the contrary, I think the fact is that his legacy is so absolutely subject to the payment of his debt that if his debt happens to exceed his legacy he cannot collect a penny of his legacy. Besides, the construction adopted in the case just referred to entirely overlooks, as it seems to me, the imperfection in our legal system which this statute was intended to remove. . . .

Statutes must always be construed so as to give effect to the intent and object of the legislature, and this one, I think, must be so read as to cure the mischief it was intended to remedy; that is, it should be held to put the substituted legatee in the place of his parent, and to give him just what his parent would have been entitled to, subject to the same equities that his parent would have been subject to, and bound by the same rules of justice that his parent would have been bound by. He must take in the same manner that his parent would have taken."

A similar conclusion was reached in Baker v. Carpenter (1903) 69 Ohio St. 15, 68 N. E. 577, the court saying: "The statute, as its title shows, was designed and intended to relieve against a hardship, by preventing the lapsing of devises and legacies; and its sole purpose and effect, as we think, was and is, upon the happening of the contingency therein mentioned, to place the grandchildren of the testator in their parent's stead, and to give them the right to take what such parent would have taken if he had survived the testator. But certainly we think it was not the purpose, and could never have been the intention, of the legislature, by the enactment of this statute to secure to the grandchildren of the testator greater rights and privileges than their parent (the primary legatee) could have had; nor may we reasonably assume that it was the intention of the legislature to give to such grandchildren rights against other beneficiaries under the will which the person in whose place they stand, and for whom they are substituted, never would himself have been permitted to assert."

Under the Pennsylvania Act of April 8, 1833, preventing the lapse of legacies, which provides that the children of a legatee dying in the lifetime of the testator shall take pay "with like effect as if he had survived the testator," their father's indebtedness to the estate must be deducted from their distributive shares. Re Adams (Pa.) supra.

(c) As against legatee substituted by codicil.

Whether a legatee substituted by codicil takes subject to a deduction of the indebtedness to the testator of the person for whom he is substituted is a question of testamentary construction. Where he is only given what the person for whom he was substituted would have taken, he cannot claim more.

Thus, where a testator, after making specific devises of real estate to his children by his will, directed an equal division of his personalty among his three children, and, by codicil made after the death of one of such children, provided that his children should take the same interest their father would have taken, such children should be charged, in the distribution of the personalty, with the indebtedness of their father to the estate. Hummer v. Orndorff (1884) 6 Ky. L. Rep. 48 (abstract).

So, under a will by which the testator directed his residuary estate to be equally divided among his children, with the proviso that "there shall be deducted from the share of each of my children to whom I have made any advances the amount of such advances," and a codicil by which he revoked the devise to his son Robert "in my said will contained and set forth in the following words, so far as they affect my son, to wit," quoting the provisions, and then proceeded to devise "the share of my said son unto my daughter-in-law Mary, the wife of my said son Robert," it was held that as the testator in revoking the bequest to his son, had carefully avoided changing or annulling the mode in which the share of each child was to be ascertained, and then gave the share of such son to his daughter-in-law, the advancements made to the son should be deducted in ascertaining such share. Buehler's Appeal (1882) 100 Pa. 385.

So, where a testator, who by his will had distributed his estate among his children, and directed that whatever sums of money he had theretofore given or might thereafter give, loan, or pay for or to any of such legatees or

devisees, and which should remain unpaid to him at the time of his decease, should be considered and treated as part of his estate," so that the said several devises and bequests hereinbefore mentioned and made shall be subject to any loan, payment, claim, or charge I may have against said several devisees and legatees . . . and such loans, payments, claims, charges, and indebtedness so due and owing to me by each of said devisees and legatees shall, in the distribution of my estate, be deducted," after the death of one of his sons made a codicil by which he devised to a son of such son "all the estate, right, title, interest, property, claim, and demand in and to my estate real, personal, and mixed, which in my said will I have given, devised, and bequeathed to his father, my said son," the son takes subject to the deduction of his father's debts to the testator. De Haven's Estate (1903) 207 Pa. 147, 56 Atl. 402.

(d) Effect of provision in will to make debt a charge.

In Jordan v. Jordan (1916) 274 Ill. 251, L.R.A.1917D, 563, 113 N. E. 631, it was held that under a will giving a life estate to testator's son with remainder to his children, and directing that one of such children should pay advancements made him by testator, in default of which the amount should be deducted from any money that might go to the son, the amount must be deducted from the share going to the children in remainder, in case it is not paid during the son's lifetime; the shares of the contributors not primarily liable, to be made good from that of the one to whom the advancements were made. The ground for this decision, although not very explicitly stated, seems to be that, as a matter of construction of the will, it was the testator's intention to make such indebtedness a charge against the subject of the bequest, and not merely against the interest of his son therein.

A like intention was inferred in Youmans v. Youmans (1875) 26 N. J. Eq. 149, from a will in which testator, who had bequeathed to his sons and their wives life estates in certain property, with remainder to their children, directed: "The debts of my heirs lawfully due me, if not paid before my death, to be taken from their respective shares" therein.

And under a will giving the residuary estate to the children of testator's deceased brothers and sisters, one-third part to the children of each family, and directing that any debts owing to him by his brothers, or sister, or their children should be deducted from the share given to their children respectively, the amount due from each of the legatees and his or her parents to be deducted from the proportion so given to him or her respectively, and a codicil which revoked this provision and, instead, bequeathed to such of the children of his deceased brother and sister as should be living at his decease the sum of $3,500 each, "subject, however, to the debts of the several families as provided in my said will," the aggregate sums given to the children of each family are subject to be diminished by any indebtedness of the parents to the testator, and the share of each child by any indebtedness of such child. Pierpont v. Patrick (1873) 53 N. Y. 591.

Where, throughout his will, the testator used expressions indicative of an intention to charge lands devised to his son with debts owing by him, and gave one of such debts to his wife as a specific legacy, and further declared that the sums due from his son should be collected by the executors and form part of the personal estate to be divided among the testator's four daughters, and where, had the son taken the estate under the will, the amount of such debts would have been directly chargeable upon the land the debts of the son are a charge upon the property devised, and not merely upon the son's interest therein, and continue to be a charge thereon notwithstanding the son's failure or refusal to accept the devise, not only as against the son's children, but also upon the interest in the land which passed to others of the testator's heirs at law. Youngs v. Youngs (1905) 102 App. Div. 444, 92 N. Y. Supp. 546, af-

firmed without opinion in (1905) 183 N. Y. 550, 76 N. E. 1117.

Where the will provides that the donations which the testator may have made to his heirs, as well as the debts and advances which they owe him, shall be brought into his succession in order that the three branches of his heirs may be placed upon a footing of perfect equality, the children of a deceased heir are bound to collate their father's indebtedness to the testator. Bougere's Succession (1876) 28 La. Ann. 743.

Under a will by which testator directed his property to be equally divided among his children, but ordered that debts owing to him by any of his sons or sons-in-law, except those forgiven in the will, should be deducted from the share of such son or son-in-law, "whether given direct or in trust; and the proceeds only, after such deduction, be appropriated to such branch of my family," and gave a fixed part of his estate in trust for the separate use of his daughter Mary, "and at her decease the principal for her lawful issue," a debt owing by Mary's husband must be deducted from the share going to her and her issue. Hogeland's Appeal (1835) 1 Whart. (Pa.) 87.

But under a will by which testatrix directed the division of her property between her five children, and as to one of them directed; "I want his part for him for his life, and at his death, if he dies without lawful children, I want his part paid to my two grandchildren," naming them, the share taken by the grandchildren is not charged with the debts due by the life tenant to the testatrix. Cochran v. Cochran (1906) 43 Tex. Civ. App. 259, 95 S. W. 731.

And a provision of a will that if any of the legatees owe the estate anything at the testator's death, "either themselves, husbands, or wives, it shall be deducted out of their part of the legacy," does not have the effect to subject the part taken by the children, under a legacy to a woman and her children, to the deduction of the indebtedness of their father. Cannon v. Apperson (1885) 14 Lea (Tenn.) 553.

A will by which testator bequeathed a legacy to his daughter and her husband, and directed that, if the husband should be indebted to him at the time of his death, the debt should be deducted out of his legacy, does not sufficiently disclose an intention that the debt of the husband, who, in consequence of his decease in the lifetime of the testator, took no interest in the legacy, should be deducted from the interest taken by the wife. Davies v. Elmes (1839) 1 Beav. 131, 48 Eng. Reprint, 888.

VII. Effect of bankruptcy of debtor.

a. In decedent's lifetime.

The fact that a debt has become legally unenforceable, by reason of the debtor's discharge in bankruptcy in the decedent's lifetime, does not affect the right of retainer as against the debtor himself, or persons claiming under him. See III. j, supra.

Where, however, the legacy or distributive share is claimed by the debtor's trustee in bankruptcy, or assignee for the benefit of creditors, it may be a question whether the right of retainer is not restricted to the amount of the dividend to which the creditor is entitled.

It has been held that the trustee for creditors of an insolvent legatee takes subject to the executor's right to deduct such legatee's indebtedness to the testator, notwithstanding his assignor's discharge in insolvency in the testator's lifetime. Smith v. Donnell (1850) 9 Gill. (Md.) 84.

But in Cherry v. Boultbee (1839) 3 Jur. (Eng.) 1116, it was held (overruling Ex parte Mann, Mont. & M'Arth. 210) that where, at the testator's death, the legatee is an uncertificated bankrupt, the executors may not, as against the legatee's assignee in bankruptcy, set off the debt of the legatee to the testator, except to the extent of such dividend as they may be entitled to receive, the Lord Chancellor saying: "The right of the executor is rather a right to pay the legacy out of the fund in the hands of the other party than a cause of

set-off. The sum sought to be set off must, therefore, be payable by the party against whom the set-off is claimed. But the executors were never entitled to receive more than dividends on the debt. The bankrupt was never entitled to receive the legacy at all. Therefore, there never was a time when any person was entitled to receive the legacy and liable to pay the debt. Accordingly the right to receive the legacy and the liability to pay the debt were never both vested in the same person. The estate of the bankrupt would have been liable to pay dividends on the debt, if the debt had been proved; but nothing further."

Cherry v. Boultbee was followed in Bell v. Bell (1849) 17 Sim. 127, 60 Eng. Reprint, 1077, 13 Jur. 1040.

So, where the debt of a legatee who became a bankrupt in the lifetime of the testator has never been proved by the testator in his lifetime, or by his executors after his death, and no dividend has been declared in the bankruptcy, the executors are not entitled to set off or retain the amount of the debt due to the testator against the share of the bankrupt; nor, where the amount to be deducted is not known or ascertainable, any amount in respect of dividends on such debt. Re Hodgson (1878) L. R. 9 Ch. Div. (Eng.) 673, 48 L. J. Ch. N. S. 52, 27 Week. Rep. 38.

In Re Rees (1892) 60 L. T. N. S. (Eng.) 260, where a testator had proved in his lifetime against the estate of a liquidating debtor to whom he bequeathed a legacy, but the right to sue for the debt due on the proof was suspended by the Bankruptcy Act until after the date when the legacy was payable, it was held that the executors could not retain a legacy payable in præsenti, to satisfy a debt which would not become payable until a future date.

b. After decedent's death.

The exercise of the right of retainer is not precluded by the fact that the debtor, after the decedent's death, has gone into bankruptcy, or made an assignment for the benefit of creditors.

Thus, the right may be exercised against a trustee in bankruptcy, who is in no better case than the insolvent himself. Wick v. Hickey (1905) — Iowa, —, 103 N. W. 469; Gosnell v. Flack (1892) 76 Md. 423, 18 L.R.A. 158, 25 Atl. 411; Hoffman v. Armstrong (1899) 90 Md. 123, 44 Atl. 1012; Jeffs v. Wood (1723) 2 P. Wms. 128, 24 Eng. Reprint, 668; Carr v. Taylor (1805) 10 Ves. Jr. 574, 32 Eng. Reprint, 967, 8 Revised Rep. 40; Ranking v. Barnard (1820) 5 Madd. Ch. 32, 56 Eng. Reprint, 806; Richards v. Richards (1821) 9 Price, 219, 147 Eng. Reprint, 72; Courtenay v. Williams (1844) 3 Hare, 539, 67 Eng. Reprint, 494; Bousfield v. Lawford (1863) 1 DeG. J. & S. 459, 46 Eng. Reprint, 182, 33 L. J. Ch. N. S. 26, 8 L. T. N. S. 619, 11 Week. Rep. 842; Re Watson (1896) 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571; Re Melton (1918) 1 Ch. (Eng.) 37, 34 Times L. R. 20, 52 L. J. Ch. N. S. 386, 143 L. T. Jo. 409.

In Re Watson (Eng.) supra, the court, in holding that the bankruptcy of a legatee, occurring after the death of the testator, cannot affect the executor's right to retain, out of the bankrupt's share of the residue, the debt due from him to the testator's estate, said: "It is contended that they have a right of proof and nothing else, and that the bankrupt's share ought to be paid over to the assignees, leaving it open to the executors to prove in the bankruptcy, and get what they can. I do not see on what principle they can be compelled to do that. They have the money, and it is said that they ought to hand it over to the assignees, and then they, as trustees of the testator, in which capacity they have handed it over, should claim to get it back again from the bankrupt's estate; succeeding, as they necessarily must, except that there might be other creditors who would be entitled to share with them. I can see no reason why they should hand over what they have got belonging to the testator's estate, in order that they may get it back for that estate. And not only is there no principle in support of this contention, but I think there is clear authority against it."

A debt due from a devisee to his

testator does not constitute any lien upon the estate devised which will take precedence of the claim of his assignees in bankruptcy. Ex parte Barff (1848) De G. Bankr. Cas. (Eng.) 613, 17 L. J. Bankr. N. S. 22, 12 Jur. 668.

The right of retainer may be likewise be asserted as against a legatee's assignee for the benefit of creditors. Tillie v. Springer (1891) 21 Ont. Rep. 585, and cases cited infra.

Neither an assignee nor the creditors under a deed of assignment are bona fide purchasers for a valuable consideration, but have, at most, an equity which is inferior to the equity of the other heirs and devisees of the decedent. Taylor v. Jones (1895) 97 Ky. 201, 30 S. W. 595.

The amount of a note owing to the testator from a legatee may be set off as against the claim of the legatee's assignee for the benefit of creditors, where, at the time of the assignment the note was past due. Ferris v. Burrows (1884) 34 Hun (N. Y.) 104, affirmed without opinion in (1885) 99 N. Y. 616.

Where one of the next of kin, being largely indebted to the estate, made an assignment for creditors, preferring that debt, and the executor, besides having his distributive share, held a large fund set apart for legacies which were not yet payable, and the periods of payment were in part contingent, it was held that the executor, after applying to the debt his share of the assets in hand, must also apply the reasonable value of his interest in the surplus of the legacy fund, before enforcing payment of the balance of his debt from the assignee. Howland v. Heckscher (1846) 3 Sanf. Ch. (N. Y.) 519.

In Bousfield v. Lawford (1863) 1 DeG. J. & S. 459, 46 Eng. Reprint, 182, 33 L. J. Ch. N. S. 26, 8 L. T. N. S. 619, 11 Week. Rep. 571, where the original creditor bequeathed his residuary personal estate to his daughter, who survived him several years and bequeathed her residuary estate to her six children, one of whom was indebted to his grandfather, and who became bankrupt some time after his mother's death, it was held that, it having been ascertained before the bankruptcy that the testator's estate yielded a clear residue, exclusive of the amount of such debt, the executors of the daughter were entitled to retain such amount out of the son's share in his mother's estate, there having been, prior to the bankruptcy, a coexistence of right and liability in the same person.

But where the executor has made proof of the debt in bankruptcy, he is not thereafter entitled to exercise the right of retainer. Stammers v. Elliott (1868) L. R. 3 Ch. (Eng.) 195, reversing (1867) L. R. 4 Eq. 675. In this case it was said by Lord Chelmsford that "an executor has an absolute power over the debts due to his testator, and may deal with them as he pleases. If he, therefore, proves a debt under a bankruptcy, it has the same effect as if he were proceeding in his own right, and consequently the debt must be held to be satisfied." So, also, in Re Watson [1896] 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571, it was said by North, J., that, if the executors had proved their claim against the legatee in bankruptcy, their right of retainer would have been gone altogether, except possibly to the extent of some dividends.

The fact that the principal creditor has proved his claim in bankruptcy does not prevent the exercise of the right of retainer by the executors of the surety, in respect of the amount which they have been obliged to pay. Re Melton [1918] 1 Ch. (Eng.) 37. This case expressly overrules a decision to the contrary in Re Binns [1896] 2 Ch. (Eng.) 584, where it was said by North, J.: "The difficulty . . . is this,—that there is no debt in respect of which the trustees of the will can, at present claim to retain anything as against the trustees of the son's estate. The claim against that estate is made by the principal creditors; and the surety cannot, as against the principal creditors, set up an adverse claim of any kind. No doubt, when the principal creditors have been paid in full, the position

of matters would be different; but at present the principal creditors have a claim with respect to which, even after the security has been realized at its full amount, the dividends anticipated in the bankruptcy will still leave a very large sum owing to the bank. While that is so it seems to me that there is no claim which the father's trustees can set up against the son's estate, in respect of which they have any right to retain a part of the father's estate." In discussing the point in Re Melton (Eng.) supra, it was said by Swinfen Eady, L. J.: "It is said that the proof by the creditor against the estate affects the right of the surety; and that, where the creditor has proved against the estate of the bankrupt, the right of the representatives of the surety to make this deduction is lost. I cannot see why Mr. Potts contended that, by virtue of the bankruptcy and the proof by the creditor, the debt was gone, and that there was nothing owing in respect of which the executors had a right of retainer. . . . The only authority on which he relied in support of his proposition was the case before North, J., of Re Binns." And, after reviewing that decision, the learned judge expressed the opinion that the fallacy in the reasoning of North, J., in that case, was in considering the claim of the surety as one adverse to that of the principal creditors, saying: "The claim of the surety is not an adverse claim set up against the principal creditors. The suggestion is that it is set up against the principal creditors because the estate that would be divisible in bankruptcy is diminished by reason of this claim. The fallacy is that, at the date of the bankruptcy, what was claimed was not part of the debtor's estate. An equity that the testator's estate should be indemnified in respect of his liability under the guaranty arose at his death; and when the son became bankrupt there was already an equity, subject to which the trustees in bankruptcy took the sons' interest; and the trustees in bankruptcy took nothing more than the debtors had, and the debtors' interests under the will were subject to this equity." And Warrington, L. J., said: "In my judgment, therefore the answer to the claim put forward by the assignee, who is in the same position, of course, as Arthur [the bankrupt legatee], is that of the £313 requisite to repay the testator's estate, that which had been paid in satisfaction of the guaranty never formed part of the bankrupt's estate, so as to be divisible among his creditors. That completely answers the argument put before us, founded on the undoubted principle that, in bankruptcy, there can never be a double proof for the same debt. It is not a question of double proof at all." And, after referring to the passage above quoted from the opinion of North, J., Warrington, L. J., continued: "There are two statements there which seem to me to be unfounded, in the sense that they do not afford a foundation for the decision at which the learned judge arrived. The first of those statements is that 'there is no debt in respect of which the trustees of the will can at present claim to retain.' That seems to me to be quite incorrect. The trustees held a certain fund. They have a right to retain in their hands part of that fund in satisfaction of a claim which they have, and which they had before his bankruptcy against the debtor. It seems to me quite immaterial whether there was a set-off for which they could sue at that moment or not. The second mistake, I think, is found in the statement that the surety cannot, as against the principal creditors, set up an adverse claim of any kind. The answer is that the surety is not setting up an adverse claim against the principal creditors. What the trustees are here claiming never was distributable amongst the creditors of the bankrupt at all." And Scrutton, L. J., after expressing the opinion that the decision of North, J., was wrong, said: "I agree with the reasons which have been given by the other members of this court as to the exact grounds for saying that case was wrongly decided."

In Re Whitehouse (1887) L. R. 37

Ch. Div. (Eng.) 683, where a son for whom his father was surety, after the father's death, executed a deed, by which he assigned all his property for the benefit of his creditors, and the principal creditor proved his debt, reserving his right against the surety, and the father's executors were accordingly called upon to make good the difference between the amount of the debt and the dividends received from the assigned estate, it was held that the executors were entitled, either to choose whether they would stand on the original contract of principal and surety, in which case they would not be bound by the terms of the creditors' deed, but would be entitled to exercise their right of retainer, or that they might choose to go in under the deed, in which case they would be bound by the release contained in that deed, and must give up the right of retainer.

In Re Watson (1896) 1 Ch. (Eng.) 925, 65 L. J. Ch. N. S. 553, 74 L. T. N. S. 453, 44 Week. Rep. 571, it was intimated that, where the debtor who became bankrupt subsequently to the testator's decease, has obtained his discharge, the executors' right of retainer is gone, even though they may not have proved their claim in bankruptcy; but this view seems inconsistent with the theory upon which the right is founded, which is that the debtor has already received, to the extent of his debt, what he is entitled to from the estate.

VIII. Right of legatee or distributee to claim set-off.

While the question is not strictly within the scope of this note, the fact that one using it is likely to be interested in the question whether the legatee or distributee himself may, when it is sought to collect his debt to the estate, insist that it be paid by an exercise of the right of retainer, has dictated the inclusion of the decisions on the point.

Although a legacy cannot be operative as payment of a debt of the legatee to the testator, until it is made so by being applied as such (Blair v. White (1888) 61 Vt. 110, 17 Atl. 49), if the estate is solvent, so that the debtor will be entitled to receive payment of his legacy, the court may compel the executors to give him credit for the amount of his legacy, when they are seeking to enforce the claims of the estate upon him for the debt. Pom. Eq. Jur. § 541.

The executors of an estate, having sufficient assets in hand to pay debts, legacies, and charges, may allow the amount of a legacy to be set off against a mortgage due by the legatee to the estate. Re Holland (1902) 3 Ont. L. Rep. 406.

A legatee who was also indebted to the testator upon a bond may retain and set off his legacy against the amount of the bond debt. Campbell v. Graham (1831) 1 Russ. & M. 453, 39 Eng. Reprint, 175, 9 L. J. Ch. 234.

The right of the legatee to set off his legacy against his debt is, of course, conditional on a sufficiency of assets to pay testator's debts; and, in case of a deficiency of assets, the set-off will apply to so much, only, of the claim upon the legacy, as shall be found to be justly recoverable upon a full settlement of the estate. See Blackler v. Boott (1873) 114 Mass. 24.

But the court will not interfere to stay execution by executors against a legatee, unless it is clear that the estate is sufficient to pay the legacy. Dunn v. American Philosophical Soc. (1845) 2 Pa. St. 75.

The heir who owes a debt to a succession is entitled to collate it, and cannot be sued for the debt without proof of the insolvency or indebtedness of the succession, and the necessity of his paying. Davis v. Davis (1850) 5 La. Ann. 561.

The indebtedness of an heir to the estate is extinguished only to the amount coming to him from the estate, after the payment of all its debts. Brunetti v. Barnabé (1844) 7 Rob. (La.) 117.

Where the money is not needed for the payment of debts, a distributee need not pay his indebtedness into court, but is entitled to have it offset against his distributive share. Dorger v. Woodward (1904) 27 Ohio C. C. 123; Palmer's Estate (1878) 2 Del. Co. Rep. (Pa.) 180.

A distributee who has purchased lands under a proceeding to sell the lands of the intestate may, where it appears that all the debts against the estate have been paid, and that the funds arising from the sale of the land, when collected, will be held by the clerk of the court as trustee for all the heirs, and that the estate is in process of final settlement, and who shows that he will become entitled, on a final division of the estate, to more than the amount of his purchase money, enjoin further proceedings to enforce payment of such money. Parker v. Britt (1871) 4 Heisk. (Tenn.) 243.

But in Roberts v. Percival (1887) 8 Ky. L. Rep. 788, it was held that a distributee of a decedent's estate, who has executed a sale bond for property purchased by her at a sale under an execution, in favor of the administrator against a debtor to the estate, may not enjoin the collection of an execution issued upon the sale bond upon the ground that there is due to her as distributee, from the estate, which owes no debts, a much larger sum than the amount of the sale bond, where it does not appear that the administrator is insolvent, or that his bond is insufficient.

IX. Statutory provisions.

In some jurisdictions, the right to set off the debt of a distributee against his distributive share is embodied in statutory form.

The Louisiana Civil Code provides that "the collation of goods is the supposed or real return to the mass of the succession which an heir makes of property which he receives in advance of his share or otherwise in order that such property may be divided together with the other effects of the succession." art. 1305.

"The collation is made by taking less when the donee diminishes the portion he inherits in proportion to the value of the object he has received and takes so much less from the surplus of the effects of the succession." art. 1331.

The duty of collation under such provisions, is confined to the case of indebtedness incurred to the decedent in his lifetime, and does not extend to the case of an indebtedness to the succession. Flower v. Myrick (1897) 49 La. Ann. 321, 21 So. 542.

But a child is obliged to collate, in the participation of his father's succession, the amount of his own debts, assumed by his father and discharged by his father's succession. Tournillon's Succession (1860) 15 La. Ann. 263.

For other cases arising under the Louisiana statute, see Skipwith's Succession (1860) 15 La. Ann. 209; Bougere's Succession (1876) 28 La. Ann. 743, III. i, supra; Cuculla's Succession (1854) 9 La. Ann. 96, III. j, supra; King v. King (1902) 107 La. 437, 31 So. 894, III. l, supra; Destrehan v. Destrehan (1826) 4 Mart. N. S. (La.) 557, VI. d, 1, supra; Davis v. Davis (1850) 5 La. Ann. 561; Brunetti v. Barnabé (1844) 7 Rob. (La.) 117, VIII. supra.

Massachusetts Public Statutes, chap. 136, §§ 22, 23, which provide that the "debt due to a testator or intestate, or to his estate, from a legatee, heir, or distributee . . . shall be taken by such legatee toward his legacy, and by such heir or distributee toward his share in the estate of the intestate," have been held to relate only to personal estate, and do not authorize the sale, at the instance of an administrator, of real estate inherited by an heir, for the purpose of paying a debt due from him to the decedent's estate. Jones v. Treadwell (1897) 169 Mass. 430, 48 N. E. 339.

For decisions under the Maine statute, see Rose v. O'Brien (1860) 50 Me. 188, IV. a, 1, supra; C. A. Weston Co. v. Colby (1910) 107 Me. 104, 77 Atl. 637, VI. b, 5, supra. E. S. O.

COMMONWEALTH OF PENNSYLVANIA
v.
DOLLAR SAVINGS BANK, Appt.

Pennsylvania Supreme Court—June 30, 1917.

(259 Pa. 138, 102 Atl. 569.)

Constitutional law — due process — covering bank deposit into treasury.

1. A bank depositor is not deprived of his property without due process of law by a statute requiring the bank, at the expiration of a specified time during which no claim upon the account has been made, to turn the deposit over to the state treasurer for use of the state, if a right of action against the state for the amount is preserved to the depositor and his legal representative.

[See note on this question beginning on page 1054.]

Abandoned property — right of state.

2. Every sovereign state has jurisdiction to take charge of apparently abandoned or unclaimed property.

Constitutional law — right to raise question.

3. The bank cannot object to transferring an old unclaimed deposit account to the state because the statute makes no provision for notice to the depositor.

Notice — of intention to take deposit.

4. Notice to persons who deposited money in bank after the passage of a statute providing for covering deposits unclaimed for more than a specified time into the state treasury, to be held subject to the claim of depositors or their legal representatives, is not necessary, since they may be held to have acted with knowledge that such course would be pursued.

Constitutional law — obligation of contract.

5. No unconstitutional impairment of the obligation of a contract exists by taking an old unclaimed bank deposit into the state treasury, where it was made after the passage of the statute providing for such course.

Same — use without interest — right to question.

6. The bank cannot, in an action to compel it to turn an old unclaimed deposit into the state treasury, raise the question that no provision is made for payment of interest to the depositor after the state takes possession of the deposit.

Same — payment out of state treasury.

7. Providing for the payment out of the state treasury, upon proper establishment of the claim, of a bank deposit which had been taken over by the state because not claimed for a specified time, does not violate the constitutional provision that no money shall be paid out of the state treasury except upon proper appropriation or warrant.

Same — protection of bank — limitation period.

8. A bank is not prejudiced by the alleged unconstitutionality of a statute requiring it to turn over to the state unclaimed deposits at the expiration of thirty years, because the statute violates the provision that no limitation period shall apply against corporations different from those regulating actions against individuals, if the liability is transferred from the bank to the state, and the bank is protected by the receipt of the state treasurer.

APPEAL by defendant from a judgment of the Court of Common Pleas for Dauphin County in favor of plaintiff, for want of sufficient affidavit of defense, in an action brought to recover certain unclaimed bank deposits. *Affirmed.*

Sections 2 and 3, of the Act of April 17, 1872, entitled "An Act Relating to Unclaimed Deposits in Savings Banks, and Transfer of Stock," construed in the opinion, are as follows:

"That where any depositor with any savings fund, savings institution or savings bank whatsoever, or his legal representatives, shall omit to make any demand for the amount deposited by him, or for any part thereof, for the space of thirty years after the last deposit or payment was made by or to him, or his said representatives, no action or suit shall thereafter be brought or maintained by him or them, for the amount of such deposit, against such corporation, but the same shall be paid over instead to the state treasurer for the use of the state: Provided, that no one now having any such right of action shall be so barred, until the expiration of one year from the passage of this act: And provided, that it shall be lawful for such depositor or his legal representatives, at any time after the amount of his deposit shall have been paid over into the treasury of the commonwealth as aforesaid, to institute and prosecute an action of debt therefor, against the state treasurer for the time being, in the court of common pleas for Dauphin county; and on the recovery of judgment in such action, it shall be lawful for the court to issue thereon a writ, commanding such state treasurer, or his successor in office, to cause the amount thereof, with costs, but without interest, to be paid to the party entitled in the judgment, out of any unappropriated moneys in the hands of the state treasurer, or if there be no such moneys unappropriated, then out of the first moneys that shall be received by him, and to enforce obedience to such writ by attachment, as is provided by law, in respect to actions against counties and townships."

Section 3. "It shall be the duty of the treasurer or cashier, of every incorporated savings fund institution or bank in this commonwealth, on or before the 1st day of November, in each year after the present, to make returns to the auditor general, of the amount of all such unclaimed deposits as referred to in the previous section of this act, with the names and residences of the depositors, so far as known, and before the 1st day of January, then next ensuing, pay over the amounts so returned to the state treasurer, whose receipt therefor shall be a full and sufficient discharge of such saving fund institution or bank from any further liability to any such depositor."

Messrs. **James A. Stranahan, George C. Burgwin, and Hill Burgwin,** for appellant:

The act is contrary to the provisions of article III., § 21, of the Constitution of Pennsylvania, and therefore void.

Bank of United States v. Biddle, 2 Pars. Sel. Eq. Cas. 31; Second Nat. Bank v. Thompson, 44 Pa. Super. Ct. 200; Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507; Smith v. Mitchell, Rice, L. 316, 33 Am. Dec. 119; Baker v. Kelly, 11 Minn. 480, Gil. 358; Keyser v. Lowell, 54 C. C. A. 574, 117 Fed. 400; Kulp v. Brant, 162 Pa. 222, 29 Atl. 729; Sproul v. Standard Plate Glass Co. 201 Pa. 103, 50 Atl. 1003; Re Grape Street, 103 Pa. 123; Cole v. Economy Twp. 13 Pa. Co. Ct. 549.

The act is contrary to the provisions of article III., § 16, of the Constitution of Pennsylvania, in that it authorizes the payment of money out of the state treasury, but makes no appropriation to meet such expenditure.

Com. ex rel. Bell v. Powell, 249 Pa. 144, 94 Atl. 746; Stratton v. Green, 45 Cal. 149; Ristine v. State, 20 Ind. 328; Clayton v. Berry, 27 Ark. 129; State ex rel. Pyne v. La Grave, 23 Nev. 25, 62 Am. St. Rep. 764, 41 Pac. 1075; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373.

The act is void because it violates the 14th Amendment to the Constitution of the United States, and the 10th section of article 1 of the Constitution of Pennsylvania, in that it deprives a

person of property without due process of law.

Atty. Gen. v. Provident Inst. for Sav. 201 Mass. 23, 86 N. E. 912, 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661; 10 Am. & Eng. Enc. Law, 300; Bloom v. Burdick, 1 Hill, 139, 37 Am. Dec. 299; Philadelphia v. Miller, 49 Pa. 440; McGehee, Due Process of Law, p. 60; Cunnius v. Reading School Dist. 198 U. S. 458–477, 49 L. ed. 1125–1133, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121, 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16; Cooley, Const. Lim. p. 44; Craig v. Kline, 65 Pa. 413, 3 Am. Rep. 636; Alton's Estate, 220 Pa. 270, 69 Atl. 902; Selden v. Kennedy (Grandy v. Kennedy) 104 Va. 826, 4 L.R.A.(N.S.) 944, 113 Am. St. Rep. 1076, 52 S. E. 635, 7 Ann. Cas. 879; Clapp v. Houg, 12 N. D. 660, 65 L.R.A. 757, 102 Am. St. Rep. 589, 98 N. W. 710; Lee v. Allen, 100 Md. 7, 59 Atl. 184; Lavin v. Emigrant Industrial Sav. Inst. 18 Blatchf. 1, 1 Fed. 641.

Messrs. **William I. Swoope, J. B. Eichenauer,** and **Fox & Geyer,** for appellee:

The act in question does not deprive of property without due process of law or take private property for public use without compensation first made or secured within the meaning of the Constitution.

Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661; Pittsburgh v. Scott, 1 Pa. St. 309; Delaware County's Appeal, 119 Pa. 159, 13 Atl. 62.

The act is not unconstitutional because it prescribes a limitation of time for bringing an action against a corporation different from the general laws regulating actions against natural persons.

Bull's Estate, 11 Pa. Co. Ct. 441; Re Sixpenny Savings Fund Soc. 28 Pa. Co. Ct. 627; Keyser v. Lowell, 54 C. C. A. 574, 117 Fed. 400; Re Umbria Street, 32 Pa. Super. Ct. 333.

The act does not violate the constitutional prohibition against payment by the state treasurer only upon specific appropriation.

Com. ex rel. Bell v. Powell, 249 Pa. 156, 94 Atl. 746; People ex rel. McCauley v. Brooks, 16 Cal. 28; Com. ex rel. Elkin v. Griest, 196 Pa. 396, 50 L.R.A. 568, 46 Atl. 505.

A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it.

Cooley, Const. Lim. 7th ed. p. 232; Re Wilmington, 16 Pick. 96, 26 Am. Dec. 631; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 544, 58 L. ed. 719, 34 Sup. Ct. Rep. 359; Reed v. Home Sav. Bank, 130 Mass. 446, 39 Am. Rep. 468; Essex Public Road Board v. Skinkle, 140 U. S. 334, 35 L. ed. 446, 11 Sup. Ct. Rep. 790; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318.

Moschzisker, J., delivered the opinion of the court:

The commonwealth of Pennsylvania sued the Dollar Savings Bank of Pittsburgh, to recover the sum of $9,069.29, with interest from December 1, 1913, which it alleged was the aggregate of moneys placed in that institution by twenty-four depositors "who had omitted to make any demand for the amount deposited by them, or for any part thereof, for the space of thirty years after the last deposit was made." Plaintiff averred that, under the Act of April 17, 1872 (P. L. 62), it was the duty of the defendant to pay these deposits to the treasurer of the commonwealth. Judgment was entered for want of a sufficient affidavit of defense, and the savings bank appealed.

In addition to certain purely legal defenses, the affidavits of defense allege that twelve of the twenty-four depositors named in plaintiff's statement, subsequent to the expiration of the before-mentioned period of thirty years, had either added to, subtracted from, or withdrawn the entire amount of their respective accounts, totaling $6,312.13. The commonwealth filed an amended statement striking out all deposits as to which the bank had entered a defense on the merits, and reducing the amount claimed to $2,757.16.

The legal defenses are as follows: (1) The Act of 1872, supra, relied upon by plaintiff, "violates the 14th Amendment of the Constitution of the United States and the 10th section of article 1 of the Constitution of Pennsylvania, in that it deprives a person of property without due process of law:" (2) the act "is contrary to article 3, § 16, of the Constitution of Pennsylvania, in that it attempts to authorize the payment of money by the state treasurer without special appropriation:" (3) the act "violates article 3, § 21, of the Constitution of Pennsylvania, in that it prescribes a limitation of time within which an action may be brought against a corporation, different from the general laws regulating actions against natural persons."

In disposing of the first of the above propositions, we must keep in mind that the statute here in question is not an escheat act. In other words, it does not provide for seizing property presumed to be without an owner, but rather for the taking into possession by the sovereign commonwealth, for the protection of both state and owner, of a certain class of property which is subject to escheat. The act requires that, in all cases where for a period of thirty years any person has failed to exercise rights of ownership over a savings fund deposit, the amount thereof shall be handed to the state treasurer, whose receipt it declares a sufficient protection to the prior custodian. The rights of the owner are amply protected by giving him a cause of action against the commonwealth, with full provision for legal proceedings and final process, under which either he or his legal representatives may recover the amount of the deposit upon proof of identity. This is neither depriving the depositor of his property nor taking it for public use within the meaning of either the Federal or state Constitutions.

Constitutional law—due process — covering bank deposit into treasury.

The portion of the 14th Amendment to the Constitution of the United States depended upon by defendant is as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

And the relevant part of the Constitution of Pennsylvania reads thus: "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." [Art. 1, § 10.]

While, by operation of the Act of 1872, supra, right of action against the depositary is taken away, yet this is no substantial deprivation to the owner of the deposit, for instead of that right, as soon as his money is turned over to the state treasurer, he is afforded an action against the commonwealth and provided with a court in which, without limitation of time, he may prove his claim. True, the act says that the deposit shall be paid "to the state treasurer for the use of the state," but it also specially provides that when claimed by the depositor or his legal representatives, the amount proved shall be paid over to the party entitled thereto, "out of any unappropriated moneys in the hands of the state treasurer, or if there be no such moneys unappropriated, then out of the first moneys that shall be received by him," which in effect is a dedication, so far as may be necessary, of all unappropriated moneys in the state treasury to the purpose of satisfying duly proved claims under this act. Since the state, with its power of taxation, is always solvent, it would be impossible to give better security.

The act before us does not, in so many words, say that a savings fund deposit which for thirty years has been entirely neglected by its owner shall be presumed to have been abandoned, but it is plain that such is the theory upon which the legislation rests; and it is well established that every sovereign state has jurisdiction to take charge

Abandoned property—right of state.

of apparently abandoned or unclaimed property. Cunnius v. Reading School Dist. 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16; Id., 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121; Atty. Gen. v. Provident Inst. for Sav. 201 Mass. 23, 86 N. E. 912; Id., 221 U. S. 660, 55 L. ed. 899, 34 L.R.A. (N.S.) 1129, 31 Sup. Ct. Rep. 661. When, as here, such property is taken in charge by the state, and the owner or his legal representatives are given an unlimited right to reclaim, with a pledge of all unappropriated moneys in the public treasury, so far as may be necessary, to repay the amount thereof when duly proved, this is simply an exercise of authority over property actually within the jurisdiction of the state and liable to escheat, for the due protection of all parties in interest, including the owner; and is in no sense a taking or seizing for public use within the meaning of the constitutional provisions relied upon in this case.

Generally speaking, when property is taken under an out-and-out escheat act, or when the state provides a method of transferring to others property of a citizen who has been unheard of for a given period of time, some form of notice to the owner, by publication or otherwise, is required to make the proceedings in question "due process of law." Defendant contends that this rule applies in the present instance, and, since the legislation under attack does not provide for any such notice to depositors affected through its operations, defendant insists that in this respect the Act of 1872, supra, is fatally defective. Conceding for the sake of argument, defendant has a right to raise this constitutional point, yet, in so contending, it speaks only on behalf of the depositors whose money is being transferred to the state treasury, since the bank itself received due and formal notice of the present proceedings. When the case is viewed from the standpoint of these depositors, then the rule applies that "a court will never heed objections to the constitutionality of an act of assembly unless the complainants are affected by the particular feature alleged to be in conflict with the Constitution."

Constitutional law—right to raise question.

Furthermore, it is always essential for a complainant to show that he occupies such a position. Mesta Mach. Co. v. Dunbar Furnace Co. 250 Pa. 472, 476, 95 Atl. 585.

On the pleadings at bar, there being no averment to the contrary in the affidavits of defense, we must assume all the deposits in controversy to have been made subsequently to 1872; and hence that the respective depositors acted with full knowledge of the provisions of the statutes passed in that year. This being so, since the proceedings on the part of the state to obtain possession of these deposits were not instituted for the purpose of declaring an escheat or of passing the property in question over to another —in short, were not in antagonism to the owners, but for their benefit— there exists no absolute necessity for any form of notice to such owners, as the latter are presumed to know that after expiration of the thirty-year period the commonwealth, at any time, may take over the custody of their deposits in the manner provided by the act dealing with the subject in hand.

Notice—of intention to take deposit.

Before leaving this branch of the case, albeit defendant does not raise the point, it may be well to suggest that, since the deposits in controversy were all made subsequent to the Act of 1872, supra, in each instance the contract of the depositary must be treated as subject to the terms of the statute here in question; therefore, the present proceedings can in no sense be said to constitute an impairment of the obligation of these contracts. Finally, the fact that under the Act of 1872, supra, a depositor may not claim in-

Constitutional law—obligation of contract.

terest from the state, does not present a subject which calls for consideration at this time. "This is a matter with which . . . [the defendant] . . . is not concerned, and can arise only between the state and the claimant when he asserts [his] . . . right [of] . . . property." Provident Sav. Inst's Case, 221 U. S. 660, 665, 55 L. ed. 899, 903, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661.

Same—use without interest—right to question.

Defendant's second proposition rests upon the provision of the Constitution of Pennsylvania to the effect that "no money shall be paid out of the treasury, except upon appropriations made by law, and on warrant drawn by the proper officers in pursuance thereof." [Art. 3, § 16.]

We recently had occasion to construe this section in Com. ex rel. Bell v. Powell, 249 Pa. 144, 156, 94 Atl. 746, and there said, it "simply means that the public funds are not to be expended in any way except as directed by the lawmaking power." It was not the intention thereby to prevent the legislature from providing a special fund to be paid out in a designated manner, or to prevent the law-making power from pledging unappropriated funds for the return of moneys taken into the custody of the state under an act such as the one at bar, and concerning which money the state asserts no right or title paramount to that of the original owner. As to the Act of May 11, 1909 (P. L. 519), it is sufficient to say, we are not convinced that it impliedly repeals the provisions for repayment contained in the Act of 1872, supra; the later act was not intended to apply to circumstances such as there covered by the earlier one.

Same—payment out of state treasury.

The third proposition relied upon by the defendant involves a consideration of that portion of the Constitution of Pennsylvania which provides that "no act shall prescribe any limitations of time within which suits may be brought against corporations . . . different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided." [Art. 3, § 21.]

In entering upon this branch of the case, it may be well to notice that the title of the statute here before us gives no suggestion that the act is intended to apply solely to incorporated institutions; it is entitled, "An Act Relating to Unclaimed Deposits in Savings Banks, . . ." and, while other sections make reference to incorporated banks and savings funds, or "savings banks having a capital stock," yet § 2, which controls the present case, is written in language broad enough to comprehend all such institutions, whether incorporated or otherwise. It reads as follows: "Where any depositor with any savings fund, savings institution or savings bank whatsoever . . . shall omit to make any demand," etc.

True, later on this section contains the provision that after thirty years no suit may be instituted or maintained "for the amount of such deposit, against such corporation;" but it is argued by plaintiff that the word "corporation" is here used in "a generic sense . . . to cover unincorporated as well as incorporated" savings institutions. It is not necessary to decide this point, however, for we are convinced the court below expressed a proper view of the matter in the following excerpt from its opinion: "We do not look upon this provision of the statute [Act of 1872, supra] as a statute of limitations strictly so-called, such as was intended to be avoided by § 21 of art. 3 of the Constitution, but rather as an enactment for the protection of the savings banks against liability after it has paid over the deposit to the state treasurer. The statute takes away the remedy of the depositor against the bank, and substitutes for it the remedy against the state treasurer and the common-

wealth which has received the deposit. But, be that as it may, the other provision in the statute amply protects the savings bank. In the second section, it is provided that the state treasurer's receipt shall be a full and sufficient discharge of the savings bank from any further liability to the depositor. Both provisions . . . were intended to protect the savings bank; so, even if the first . . . be avoided . . . it still has full protection in the effect which the statute directs shall be given to the receipt of the state treasurer."

In other words, even if it be conceded that after the lapse of thirty years the depositor or his legal representatives might still have a right to sue the bank, yet, since the state has full jurisdiction to take over the custody of apparently abandoned property, the receipt of its treasurer, when produced by the defendant bank, would be a sufficient answer to such an action; hence, a bank cannot be in any wise prejudiced by the alleged unconstitutionality of the limitation. Then again, it is to be noticed that even after thirty years the Act of 1872, supra, does not deprive a depositor of either his remedy or right of action, but simply transfers the liability to him from the original depositary to the commonwealth of Pennsylvania.

Same—protection of bank—limitation period.

The assignments of error are overruled, and the judgment is affirmed.

Petition for rehearing denied.

ANNOTATION.

Constitutionality of statutes relating to disposition of old bank deposits.

Provident Inst. for Sav. v. Malone (1911) 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661, affirming (1909) 201 Mass. 23, 86 N. E. 912, and State v. Security Sav. Bank (1915) — Cal. App. —, 154 Pac. 1070, support the reported case (COM. v. DOLLAR SAV. BANK, ante, 1048), in upholding the constitutionality of the statute there involved, providing in substance that savings bank deposits which have remained inactive and unclaimed for a period of thirty years shall be paid over to the state treasurer for the use of the state, the act affording the depositor an action against the commonwealth, and designating a court wherein, without limitation of time, he may prove his claim. In both cases, as in the reported case, the attack upon the act was made by the bank; and the cases seem to agree that the bank cannot raise objections on behalf of the depositors, except so far as its own rights are involved in those of the depositors. It will also be observed that none of the statutes involved in these cases contemplated the extinction or forfeiture of the right of the depositor or his successors to the funds in question.

In Provident Inst. for Sav. v. Malone (U. S.) supra, the statute provides that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner, or his legal representative. "In the nature of the case, therefore," observes the court, "no depositor could except to the judgment of the probate court, which directed the money to be turned over to the treasurer; and it is claimed that, as the bank does not represent the depositors, it cannot be heard to raise the objection that their property has been taken without due process of law. . . . This may be true, except in so far as its rights are involved in those of the depositor. Savings banks are maintained in the expectation that the deposits may for years remain uncalled for, to the mutual advantage of bank and customer. So that, if the statute had provided that the money should be paid over to the receiver

general, if the owner after a short absence could not be found, or if the account remained inactive for a brief period, a very different question would be presented from that arising under an act which deals with absence and nonaction so long continued as to suggest that the Law of Escheats, or of lost property might be enforced. This, however, is not a Statute of Escheats, since it does not proceed on the theory that the depositor is dead, leaving no heirs. It does not purport to dispose of lost property, but deals with a deposit the owner of which, though known, cannot be found. The act is like those which provide for the appointment of custodians for the real and personal property of an absentee. In this case, though the money is on deposit with a bank which has faithfully kept its contract, yet the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that after long lapses of time changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act of ownership as to raise the presumption that he has abandoned his property. And, if abandoned, it should be preserved until he or his representative appear to claim it; or, failing that, until it should be escheated to the state. The right and power so to legislate is undoubted. Cunnius v. Reading School Dist. (1905) 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121. The statute here is reasonable in its terms, and is so framed as to work injustice to no one. It only applies to cases where no deposit has been made, no interest added on pass book, no check drawn against the account, for thirty years, and where no claimant is known and the depositor cannot be found. Before the money can be turned over to the receiver general, proceedings must be instituted in the probate court, and, under the decision of the supreme court of the state, personal notice must be given to the bank, and citation and notice, usual in the probate court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right. It is true that the rate of interest paid by the state is not the same as that paid by the bank; as to sums under $1,600 it is less, as to those over $1,600 it is more. But this is a matter with which the plaintiff in error is not concerned, and can arise only between the state and the claimant when he asserts a right to property long neglected and apparently abandoned. But the bank insists that there has been no abandonment; that the money is in safe hands where it was originally left, under by-laws which contemplated that the deposit might remain in the bank, without interest on sums over $1,600, until the corporation was dissolved. It contends that to deprive it of the benefit of such deposits is to take property without due process of law. But while there was a possibility that the money might so remain, the bank had no right to require that it should be so left. Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown. On dissolution, the share of a depositor who could not be found would be paid over to his legal representative, who might be an administrator, in case his death was established, or a guardian, in case of mental incapacity, or a trustee in bankruptcy, in case of insolvency, or a representative appointed under statutes applicable to abandoned property. But it is not necessary to wait for the dissolution of the bank. If the facts warrant it, a legal representative can be appointed at any time, with all the rights incident to such appointment, including that of withdrawing the funds and holding them for the true owner when he shall establish his claim. There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in

a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage earners, moving from place to place, there is special reason for intervening to protect their interest in this class of property, in banks as to which the state supervisory power is constantly exercised. The other questions as to payment without the production of the pass book, the rights and relations of the parties arising out of the charter and contract of deposit, present no Federal question. The statute does not violate the Constitution of the United States."

The statute in State v. Security Sav. Bank (1915) — Cal. App. —, 154 Pac. 1070, supra, provides, in substance, that every bank must make and return to the superintendent of banks, yearly, a sworn statement, showing the names of depositors known to be dead, or who have not made any further deposit or withdrawn any moneys during the preceding twenty years, together with the last known place of residence of such depositors, and the amount of their deposits, with the amount of the accrued interest, if any, thereon; and further provides that such deposits for which no claimant is known, or the depositor cannot be found, shall, together with the increment thereof, be deposited with the state treasurer in the same manner and subject to the same distribution as is provided for in § 1234 of the Code of Civil Procedure. The statute also provides for the release from further liability to such depositors of all such banks as shall have paid the said deposits into the state treasury, pursuant to the requirements of the section. It is contended in this case that the Bank Act, by taking unclaimed deposits without notice to bank or depositors, deprives the banks of a property right which they have in such deposits, by devesting them of the opportunity to earn such profits from the deposits as their possession would imply, and also by taking from them that which the depositors might demand of them at any time, and to which demand they could interpose no defense, for the reason that the deposits had been removed from their custody without any such notice to the depositors as would constitute due process of law; in this regard it is contended that the provision of the section which assumes to declare that the bank shall be no longer liable to its depositors for such deposits, after their transfer to the state treasury, does not accomplish its avowed object, because the depositors, not having been given any such notice of the change of possession of such funds as would amount to due process of law, cannot be bound by this provision of the act. The court, however, in refusing to sustain this contention, observed that, by the terms of the section under review, the right of the state to enforce payment into its treasury of the moneys which make up the sum of the present demand is predicated upon the verified statement and report of the respondent bank, already made to the proper state official, that it is possessed of these several sums of money, and that they have taken on the quality of unpaid deposits defined in the act. This being so, it is difficult to see what useful purpose any further notification on the part of the state of its intention to turn over these deposits to its treasurer would subserve, than that which has already been given by the terms of the statute, and acted upon by the respondent in making its verified statements in accordance therewith. But, in addition to this, it has been definitely determined that a bank, as a mere depositary, is not entitled to previous notice of the exercise on the part of the state of its right to lay hold of the funds of depositors in its hands, whenever, in the interest of public policy, the state assumes to exercise control over such funds. As to the contention that the Bank Act does not require such notice to be given to depositors as would constitute due process of law, the court states it is to be noted at the outset that the section of the Bank Act under review does not contemplate any

change in the ownership in the funds in question. It purports to deal with possession only, and to leave the matter of their ultimate ownership to be determined by such subsequent proceedings as are provided, through the reference in the section to the provisions of § 1234 of the Code of Civil Procedure. When that section of the Code is examined, it will be found to provide a procedure for the disposition of deposits in savings banks in process of liquidation, which embraces such notice to the owners of such deposits as would clearly satisfy the constitutional requirements as to due process of law; and that the procedure therein provided is adjustable to the conditions created by § 15 of the Bank Act. Reading § 15 of the Bank Act as a whole, it must be evident that its only purpose and effect in providing for the summary taking over of unclaimed deposits by the state treasurer is merely to work a temporary change in their possession until such time as they may be claimed by their owners, or the more ample procedure for their ultimate disposition, outlined in § 1234, Code of Civil Procedure, can be set in motion; or, in other words, to place such unclaimed deposits in custodia legis until their ownership can be adjudicated by a proceeding taken upon such notice to all concerned as will amount to due process of law, and thus render the adjudication as to the ultimate control and ownership of the property in question binding upon all persons interested.

The court also points out that as to any action instituted by the owner of such property against his depositary during the temporary period that such funds are in the custody of the state treasurer, pending the formal proceeding to determine their ultimate disposition, provided for in § 1234, Code of Civil Procedure, the depositor could not maintain suit against the depositary for such property, for the reason that against such action the latter would have the right to interpose the defense that the property was in custodia legis; and, as to the suggestion of the bank that, by the removal of these deposits from its possession, the contractual right of the depositor to receive interest on his deposit has been impaired without due process of law, the court observed that it does not appear that the depositors affected by this proceeding are entitled to receive any stated interest on their deposits; but, assuming that they are, the situation would not be changed, for if the bank is placed, by the terms of this section relieving it from liability, in a position to defend against the suit of the depositor for the amount of the deposit, after the same has been paid over to the state, the defense would, of course, also extend to the incident of interest, and therefore the bank cannot, for the same reason, rely upon this possible detriment to the depositor as a defense to this proceeding. J. D. C.

FRANK J. GOODSOLE
v.
SAMUEL JEFFERY, Plff. in Err.

Michigan Supreme Court—July 18, 1918.

(— Mich. —, 168 N. W. 461.)

Limitation of actions — open account — rent of piano.

Under a contract to rent a piano for monthly payments, to be applied on purchase price in case of election to purchase, an account kept by lessor of payments and amounts due is not a mutual open account within a statute making the limitation period on such accounts run from the last item;

and therefore the last entry of rent due will not govern the limitation period, if the last payment was prior thereto.

[See note on this question beginning on page 1060.]

(Moore, Fellows, and Bird, JJ., dissent.)

ERROR to the Circuit Court for Houghton County to review a judgment in favor of plaintiff in an action brought to recover an amount alleged to be due for rent of a piano. *Reversed.*

The agreed statement of facts is as follows:

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective attorneys, that the following shall be taken and considered as a statement of fact in this cause:

(a) The plaintiff rented to the defendant on August 8, 1906, a Fischer piano in pursuance of an oral contract between them.

(b) The contract for hire was that the defendant should rent the piano at the rate of $3.50 per month if he kept it less than a year, and at the rate of $2.50 per month if he kept it longer, the rent to apply on the purchase price in case defendant bought the piano.

(c) Rent accrued under this contract continuously for a period of fifty-seven months, from August 8, 1906, to May 8, 1911, at the rate of $2.50 per month, as shown in the account book of the plaintiff.

(d) Payments on account were made by the defendant during this period of fifty-seven months, as shown by the account book of the plaintiff, amounting to $29.

(e) May 8, 1911, is the last date of any item on either side of the account.

(f) The last item of charge against the defendant is May 8, 1911—$2.50 for hire or rent of piano for one month.

(g) The last item of credit, February 2, 1910, cash $5.

(h) The plaintiff declared orally on all the common counts in assumpsit, and especially on the count for rent and hire of personal property.

(i) The defendant entered a plea of the general issue and gave notice of the Statute of Limitations as a special defense.

(j) The defendant paid into court at the date of pleading the sum of $25 to cover accrued costs of $2.50 and $22.50 to cover payment for nine months' charge of piano at $2.50 per month.

(k) The contention of the defendant is that the account sued upon is an open account current.

(l) The contention of the plaintiff is that the account sued upon is a mutual open account current within the meaning of section 9732 of C. L. 1897.

(m) It is claimed by the plaintiff and admitted by the defendant that the return of the justice is incomplete, and it is hereby amended as follows to read: Plaintiff declared orally on all the common counts in assumpsit, and especially on the count for rent and hire of personal property.

(n) The amount claimed by the plaintiff as due is $113.50, and interest thereon at the rate of 5 per cent from October 9, 1916.

Messrs. **Galbraith & McCormack,** for appellant:

The account sued upon is an open account current, and all charges on account of rental of the piano, made more than six years prior to August 30, 1916, are outlawed, because each charge constitutes a separate right of action.

Kimball v. Kimball, 16 Mich. 217; Re Hiscock, 79 Mich. 536, 44 N. W. 947; Lester v. Thompson, 91 Mich. 250, 51 N. W. 893; Bay City Iron Co. v. Emery, 128 Mich. 508, 87 N. W. 652; Stoner v. Riggs, 128 Mich. 133, 87 N. W. 109; Jewell v. Jewell, 139 Mich. 586, 102 N. W. 1059; Hebinger v. Ross, 175 Mich. 246, 141 N. W. 629; 25 Cyc. 1118; Lapham v. Kansas & T. Oil, Gas & Pipe Line Co. 29 Ann. Cas. 816, note; Re

Girvin, 160 Fed. 197; White v. Campbell, 25 Mich. 463.

Messrs. **McClelland & Roberts** for appellee.

Ostrander, Ch. J., delivered the opinion of the court:

It will be seen from the statement of facts that the contract rested in parol, and that it was that plaintiff should lease to defendant, and defendant should hire or rent from the plaintiff, a piano, at a monthly rate of rental, the date of payment of which is not specified. The operation of the contract began August 8, 1906. The period for which it is sought to recover rent ends May 8, 1911, fifty-seven months at $2.50 a month. It seems that the plaintiff kept a memorandum on his book. It is not so stated in the statement of facts, but it is to be inferred that on the book he charged the defendant monthly, or at intervals, with the rent, and gave him credit for whatever sums were paid for rent. On May 8, 1911, plaintiff charged the defendant $2.50 for rent for one month, and on the book the last item of credit is February 2, 1910, cash, $5. The suit was begun August 30, 1916. The total payments for rent from August 8, 1906, to May 8, 1911, were but $29.

It is said in appellant's brief that the point in issue is whether the cash payment of $5 made February 2, 1910, rendered the account a mutual open account current. On the part of plaintiff it is said that the point may be stated as: Do the general cash payments made on the account, the last of which was $5, paid February 2, 1910, render the account a mutual open account current within the meaning of § 12,-324, Comp. Laws of 1915? The statute is: "In actions brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account."

The learned trial judge was of the opinion that the point had been adjudicated and settled in Payne v. Walker, 26 Mich. 60. In that case the action was for the recovery of fees for legal services rendered at various times from the year 1848 or 1849 to June, 1871, and payments were made upon the account in 1851, 1856, 1860, and 1871. The court held that the payments upon the account were sufficient to render it an open and mutual account so as to prevent the remedy thereon being barred by the Statute of Limitations. The distinction between the two cases would seem to be obvious. Of course, accounts may be mutual without being entered in a book; but suppose that, instead of a parol contract for the use of the piano, the contract had been in writing, and as payments were made upon it they had been indorsed upon the contract. Would anybody suppose that there was an open mutual account current? What would be open? Suppose a lease was made of premises for a period of years, and as payments of rent were made they were indorsed upon the lease. Could it be said that there was any mutual open account between the parties? Suppose money is loaned and, as security, a mortgage is taken. Each half year, or each year, the interest becomes due according to the terms of the contract, and, as it is paid, it is indorsed on the mortgage. Probably no one would suppose that there was an open mutual account current. What difference does it make if the plaintiff in this case, the landlord in the first case supposed, the mortgagee in the second supposed case, kept a book account of the transaction, in which he entered an item of debit on each due date and an item of credit when any money was paid? Manifestly, when a lawyer or doctor renders professional services and receives pay from time to time, or when a merchant sells goods from time to time, for which from time to time he receives partial payments, or upon which he gives credit for the value of services rendered by the buyer or goods furnished by the

buyer, an open account is made, and is mutual.

I know of no decision of this court, and think there is none to be found in any jurisdiction, holding that, where the dealings of the parties relate entirely to and are governed by a special contract for the payment of money, at agreed-upon periods, an open mutual account is established by performance of the contract obligation, whether a book account of it is kept or not. The trial court was in error, and, the defendant having pleaded the Statute of Limitations, judgment should have been directed in his favor for any part of plaintiff's demand which did not accrue six years before the action was begun.

Limitation of actions—open account—rent of piano.

The judgment is reversed, and a new trial granted.

Brooke, Stone, Kuhn, and **Steere, JJ.,** concur with **Ostrander, Ch. J.**

Moore, J., dissenting:

I think the case is within Payne v. Walker, 26 Mich. 60, and Hollywood v. Reed, 55 Mich. 308, 21 N. W. 313, and that the ruling of the court below should be affirmed.

Fellows and **Bird, JJ.,** concur with **Moore, J.**

ANNOTATION.

What constitutes an open, current account within the Statute of Limitations.

I. Introduction, 1060.
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I. Introduction.

"Where there is a mutual, open account between two parties, it is said that it implies that they have actually consented that each item shall not constitute an independent debt due immediately, to be paid or enforced at once, but that the items occurring from time to time, in favor of the respective parties, shall operate as mutual set-offs, and that the shifting balance, when either or both shall call for it, shall be the debt, and for this reason the Statute of Limitations does not run during such a state of mutual dealings, but only from the date of the last item." 17 R. C. L. p. 730. "The general doctrine, which takes the case of mutual accounts out of the operation of the statute, so long as the mutuality continues, was very early developed by the court as an equitable extension of the saving in favor of merchants' accounts. It was recognized that when parties, not strictly falling under the denomination of merchants, had a course of dealing so like that between merchants, consisting of mutual credit each to the other, the reason was the same for saving their accounts from the Statute of Limitations. The doctrine was also rested on the intrinsic equity of the case." 17 R. C. L. p. 804.

This exception has, in many jurisdictions, been given statutory expression. Although in some states the exception is of "open accounts," in others, of "running accounts" or "open current accounts," in still others, of "mutual, open, and current accounts," the fundamental idea is the same; and the decisions thereon may properly be considered together.

It has been expressly stated that the term "running account," when used in the Statute of Limitations, means an open, mutual account. Brock v. Wildey (1906) 125 Ga. 82, 54 S. E. 195.

II. Openness.

The term "open account" has two meanings. Ordinarily, it means an account the balance on which has not been ascertained; one which has not been closed, settled, or stated, but in which the inclusion of further dealings between the parties is contemplated. As employed in the Alabama

statute, it has also been held to connote a transaction some of the terms of which have not been agreed upon, such as the price to be paid, or the time for payment.

In common parlance an account is said to be open whenever there have been running or current dealings between the parties which are kept unclosed with the expectation of further transactions between them. Goodwin v. Harrison (1844) 6 **Ala.** 438; Battle v. Reid (1880) 68 **Ala.** 149.

An account is open and current where it is not closed, settled, or stated. Taylor v. Parker (1871) 17 **Minn.** 469, Gil. 447.

An account to be open must be unliquidated. Perrine v. Hotchkiss (1873) 2 Thomp. & C. (**N. Y.**) 370, affirmed on opinion below in (1874) 59 N. Y. 649.

The continuity of an account is broken where there has been a statement thereof and a balance agreed upon. Abbott v. Keith (1839) 11 **Vt.** 525.

An admission of indebtedness for a precise ascertained sum is not an open account. Drinkwater v. Holliday (1847) 11 **Ala.** 134.

A demand for a balance due upon an account stated is not an open account. Moore v. Crosthwait (1902) 135 **Ala.** 272, 33 So. 28.

An account cannot be considered as an "open account" where it was signed and rendered by the debtor with a statement in detail of its debtor and creditor items. Dixon v. Lyons (1858) 13 **La. Ann.** 160; Graham v. Sykes (1860) 15 **La. Ann.** 49.

An account rendered by the debtor, in which he acknowledges his indebtedness, is not an open account. Prudhomme v. Plauche (1875) 27 **La. Ann.** 133.

When an account between merchants, or between banker and depositor, has been balanced, and the balance carried forward, it is no longer an open, running account. Union Bank v. Knapp (1825) 20 **Mass.** 96, 15 Am. Dec. 181.

Where each of two series of transactions between brokers and their customer was considered by both parties to be closed at the time when active transactions under them ceased, they cannot be taken together as constituting an open, running account. Houghton v. Keveney (1918) 230 **Mass.** 49, 119 N. E. 447.

Where the balance is ascertained, the account ceases to be open, though one item has been omitted by mistake. Lancey v. Maine C. R. Co. (1881) 72 **Me.** 34.

An assignment of the ascertained balance upon a mutual, open, and current account operates to close the account, and a reassignment will not have the effect of reopening it, so as to prevent the application of the Statute of Limitations. Hall v. Stone (1891) 60 Hun, 309, 14 **N. Y. Supp.** 603.

An account for goods purchased upon which no payments have been made is not an "open account" within the meaning of the statute providing that an action to recover a balance due upon an open account may be brought within four years. Merchants' Collection Agency v. Levi (1889) 32 **Cal. App.** 595, 163 Pac. 870.

— as denoting incomplete agreement.

An account, whether of one or more items, founded on a contract some term of which is left unsettled by the parties, is an open account. Sheppard v. Wilkins (1840) 1 **Ala.** 62; Mims v. Sturtevant (1850) 18 **Ala.** 359; Battle v. Reid (1880) 68 **Ala.** 149; Gayle v. Johnson (1882) 72 **Ala.** 254, 47 Am. Rep. 405; Northern Alabama R. Co. v. Wilson Mercantile Co. (1913) 9 **Ala. App.** 269, 63 So. 34.

Conversely, in all cases where the contract is expressed and the duties of each party are defined at the time, it is not an open account (Maury v. Mason (1838) 8 Port. (**Ala.**) 211; Northern Alabama R. Co. v. Wilson Mercantile Co. (1913) 9 **Ala. App.** 269, 63 So. 34), whether it is evidenced by a writing or not (Union Naval Stores Co. v. Patterson (1912) 179 **Ala.** 525, 60 So. 807; Northern Alabama R. Co. v. Wilson Mercantile Co. (**Ala.**) supra).

A demand founded on a contract is not one on an open account. New Orleans, O. & G. W. R. Co. v. Lindsay

(1866) 4 Wall. (U. S.) 650, 18 L. ed. 328.

In Maury v. Mason (Ala.) supra, it was said: "Perhaps it will at all times be found easier to determine the cases which are not such than to define with accuracy and precision all those accounts which may be classed as such."

The fact that the price was not agreed upon between the parties is not the only criterion by which an open account may be determined. Goodwin v. Harrison (1844) 6 Ala. 438.

A contract for the sale of a quantity of rosin and turpentine at a price to be fixed by the market quotations on the days of delivery is not an open account. Union Naval Stores Co. v. Patterson (1912) 179 Ala. 525, 80 So. 807.

An account for goods sold at an agreed price is not an open account because nothing was agreed as to the period for the payment, where the general usage of the firm and the custom of the merchants, known to all its customers, including the defendant, was that the goods purchased during the season were to be paid for at the end of the year. Goodwin v. Harrison (Ala.) supra.

An account consisting of the price of a carriage purchased and paid for by the plaintiff for the defendant at his request, together with the cost of transportation, is not an open account. Caruthers v. Mardis (1842) 3 Ala. 599.

A claim for goods and merchandise sold at specified prices, or aggregating a specified sum, is not, on its face, an open account. Battle v. Reid (1880) 68 Ala. 149.

A claim for the agreed price of a horse sold by plaintiff to defendant is not an open account. Moore v. Crosthwait (1902) 135 Ala. 272, 33 So. 28.

III. Currency.

In order that an account may be considered an account current, or a running account, it must appear that, by agreement of the parties, express or implied, all the items thereof are to constitute one demand. The claims of each party must therefore be in the same right. In order that such an agreement may be implied, the account must not have become dormant for too long a time, and, according to the weight of authority, there must have been items on both sides within the statutory period. As to whether payments made by one party will keep the account current, there is a difference of opinion.

The term "account current," in its usual mercantile sense, implies an account which contains items of debit and credit between the parties from which the balance due to the one or the other is or can be ascertained. Wilson v. Calvert (1850) 18 Ala. 274.

—all items must constitute one demand.

A continuous, open, current account is an account which is not interrupted or broken,—not closed by settlement or otherwise, and is a running, connected series of transactions. Tucker v. Quimby (1873) 37 Iowa, 17.

An account is not a running account unless it appears that, by agreement of the parties, express or implied, all the items thereof are to constitute one demand. Harrison v. Hall (1879) 8 Mo. App. 167.

The difference between a running account and one that does not run is that in the latter each item is a separate cause of action in itself; the minds of the parties are presumed to have concurred only as to the single transaction. Ring v. Jamison (1876) 2 Mo. App. 584, affirmed on this point in (1877) 66 Mo. 424.

To constitute a running account for a number of items for work and materials, an express or implied agreement that the items should be furnished and paid for under one contract must be established. Macke v. Davis (1895) 61 Mo. App. 524.

But transactions may form a running account although each may involve a separate contract. Gibson v. Jenkins (1902) 97 Mo. App. 27, 70 S. W. 1076.

Where the account sued on is a running account kept open by agreement, express or implied, between the parties, constituting really one bill, composed of separate items morally connected one with another, so that it is clear that each separate item is not

meant to constitute a new and independent contract, each new item draws the preceding item to itself. Thompson v. Brown (1892) 50 **Mo.** App. 314.

Where there are charges and credits, it must be shown that the items are morally connected with each other, so that it is clear that each separate item is not meant to constitute a new and independent contract, or that the conduct of the parties makes it fairly inferable that it was their intention to have a future adjustment of their various transactions as of one account. Earls v. Earls (1916) — **Mo.** App. —, 182 S. W. 1018.

An account is not a running account which consists of two series of wholly disconnected transactions. Belles v. Belles (1831) 12 **N. J. L.** 339.

A demand for work and labor performed at different periods of time under different contracts does not constitute a "continuous, open, current account." Shorick v. Bruce (1866) 21 **Iowa,** 305.

Where one boards or provides for another continuously, this will constitute a continuous, open, current account within the meaning of the statute. Wendeling v. Besser (1871) 31 **Iowa,** 248; Moser v. Crooks (1871) 32 **Iowa,** 172; Beeler v. Finnel (1900) 85 **Mo.** App. 438.

An account of transactions between the parties pertaining to plaintiff's employment by defendant's decedent is a continuous account where the employment was practically continuous, though prices and the rate of compensation were varied at different times. Kilbourn v. Anderson (1889) 77 **Iowa,** 501, 42 N. W. 481.

But the continuity of an account for labor performed is broken by an interval of at least two years' duration. Gavin v. Bischoff (1890) 80 **Iowa,** 605, 45 N. W. 306.

An account consisting of charges on one side and items of credit on the other only during the period when the Statute of Limitations would not be a bar is not an "open, current, and running account." Re Clyde (1915) 155 N. Y. Supp. 621.

— must be claimed in the same right.

The continuity of an account is broken by the dissolution of a firm and the formation of a new one. Warren & Son v. Maloney (1888) 29 **Mo.** App. 101.

Running accounts with a partner, though he is a surviving partner, and as such has the collection of the partnership assets, cannot be called an account with the firm, and therefore are of no avail to stop the running of the statute against a partnership claim. Stewart's Appeal (1884) 105 **Pa.** 307.

The continuity of a running account is broken when the party or firm with whom it is made dissolves business and sells out to another party, to whom the account is transferred. Bust v. Long (1894) 75 **Mo.** App. 103.

But when the continuity of a running account is broken by a transfer of the business of one of the parties, it is competent for the debtor to contract with the successor of his creditor that the former account shall be treated as an open account and continue to run as such between the latter parties. Ibid.

— account must not have become dormant.

Mutual dealing will not have the effect of reviving liability as to items fully barred at and before the date of such dealing. Abbey v. Owens (1880) 57 **Miss.** 810.

The continuity of an account is interrupted by a cessation of dealings for a period of more than nine years. Hibler v. Johnston (1841) 18 **N. J. L.** 266.

An interval of twelve years will prevent an account from being considered as an open, current account. Perry v. Chesley (1885) 77 **Me.** 393.

An account consisting of ten items, seven of which were for services rendered prior to 1895, the date of the two items not being given, and the other for services in an action rendered between December 21, 1892, and February 28, 1896, the petitioner alleging inability to more specifically state the dates, will not, as a matter of law, be regarded as a continuous account. Novak v. Novak (1908) 137 **Iowa,** 519, 115 N. W. 1.

Two transactions four years apart, for one of which a bill was never ren-

dered, do not make out a case of "open and current account," or of "reciprocal demands between the parties." Loeffel v. Hoff (1881) 11 Mo. App. 133.

It will not necessarily destroy the continuity of an account that a break of a year occurs between the items; but its continuous and running character will turn upon the intention of the parties. Vogel v. Kennedy (1907) 127 Mo. App. 228, 104 S. W. 1151.

A single transaction on an account which has been dormant less than the statutory period, consisting of the debit of a small item and the credit of the amount necessary to cancel it a short time afterwards, is sufficient to bring the account within the operation of a statute providing that the cause of action on mutual accounts shall be deemed to accrue at the time of the last item proved in such account. Rogers v. Davis (1908) 103 Me. 405, 19 L.R.A.(N.S.) 126, 69 Atl. 618.

Where, from the commencement to the termination of the account, charges have been made at least as often as once in six years, and the last item is within six years and anterior to the commencement of the suit, the whole account is to be allowed. Chamberlin v. Cuyler (1832) 9 Wend. (N. Y.) 126.

The charges of a state asylum, made at the end of each quarter, form a continuous, open, current account, and a break of two years in such charges, caused by the patient's leaving the asylum without authority, during which period, while he spent part of the time at home and part in the county asylum, he remained at all times a charge on the county, does not destroy the continuity of the account. Cedar County v. Sager (1894) 90 Iowa, 11, 57 N. W. 634.

— must be dealings on both sides within limitation period.

It will not suffice if upon one side only there have been dealings within the period of limitation, but it must be shown that upon both sides there are items of indebtedness which accrued within such period. Abbey v. Owens (1880) 57 Miss. 810.

To constitute mutual accounts there must be mutual dealings and reciprocal demands within the six years. Gulick v. Princeton & K. Branch Turnp. Co. (1835) 14 N. J. L. 545.

An account containing charges of articles sold to the defendant, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not an account current or a mutual account, so that the charges within the six years will draw the previous charges out of the operation of the Statute of Limitations. Gold v. Whitcomb (1833) 14 Pick. (Mass.) 188.

An account all the charges of which are on one side is not a running account. McLaughlin v. Maund (1876) 55 Ga. 689.

In order to constitute a current account there must be items upon both sides, debit and credit. Where all the items are on one side, the last item, though within the statutory period, does not draw after it those of longer standing. Todd v. Todd (1849) 15 Ala. 743; Ware v. Manning (1888) 86 Ala. 238, 5 So. 632; Kimball v. Brown (1831) 7 Wend. (N. Y.) 322; Albro v. Figuera (1875) 60 N. Y. 630; Fennell v. Black (1898) 24 Misc. 728, 53 N. Y. Supp. 797; Elwood v. Hughes (1908) 109 N. Y. Supp. 25; Robertson v. Pickerell (1877) 77 N. C. 302.

In Missouri it is held that when it is fairly inferable from the conduct of the parties while the account is accruing that the whole may be regarded as one account, then none of the items are barred unless all are (Carson v. The Daniel Hillman (1852) 16 Mo. 256; Madison County Coal Co. v. The Colona (1865) 36 Mo. 446; Boylan v. The Victory (1867) 40 Mo. 244; Ring v. Jamison (1877) 66 Mo. 424; Chadwick v. Chadwick (1893) 115 Mo. 581; Thompson v. Brown (1892) 50 Mo. App. 314; Moore v. Renick (1902) 95 Mo. App. 202, 63 S. W. 936; Gibson v. Jenkins (1902) 97 Mo. App. 27, 70 S. W. 1076); but in the absence of evidence there is no presumption that all the items of a one-sided account constitute one demand. This must be proved (Thompson v. Brown (1892) 50 Mo. App. 314, supra).

It has been held that an account consisting of charges on one side and payments on the other is a running account. Scott v. Allen (1912) 26 **Ont.** L. Rep. 571.

And that an account consisting on its debit side of five items for goods sold within a period of six weeks, and on its credit side of payments made from time to time, is a continuous, open, current account, although there was something over a year and nine months between two of the payments. Keller v. Jackson (1882) 58 **Iowa,** 629, 12 N. W. 618.

But, on the other hand, it has been held that the giving of credit for payments made does not render an account an open, current account. Ford v. Clark (1884) 72 **Ga.** 760; Gunn v. Gunn (1885) 74 **Ga.** 555, 58 Am. Rep. 447.

IV. Homogeneity.

In order to raise the presumption that the various transactions between the parties constitute but one account between them, they must be of the same character.

So, where parties have dealings with each other consisting of transactions of an entirely different character, there must be some evidence tending to show an intention on their part to make such transactions part of a running account before they will be so treated. Earls v. Earls (1916) — **Mo.** App. —, 182 S. W. 1018.

An account which was broken by a hiatus of nearly two years, and was then resumed by charges of a different nature and outside of the ordinary business of the creditor, does not constitute an open, current account. Tucker v. Quimby (1873) 37 **Iowa,** 17.

The continuity of a mutual, open account relating to cattle transactions between the parties, and also including the loan of money from time to time, is not interrupted by the fact that the dealings in cattle ceased, while the loans were continued. Chadwick v. Chadwick (1893) 115 **Mo.** 581, 22 S. W. 479.

V. Mutuality or reciprocity.

Cross demands not necessarily mutual accounts.

It is not every open account current between parties, although they may severally have cross open accounts against each other, that is a mutual one within the meaning of the statute. Higgs v. Warner (1853) 14 **Ark.** 192.

Disconnected and opposing demands between two parties do not constitute a mutual running account. Green v. Caldcleugh (1835) 18 **N. C.** (1 Dev. B. L.) 320, 28 Am. Dec. 567; Stokes v. Taylor (1889) 104 **N. C.** 395, 10 S. E. 566.

There must be an assent of both parties that the items of the one account are to be applied to the liquidation of the other. Stokes v. Taylor (**N. C.**) supra.

In order to constitute a mutual and open account, there must be a mutual agreement, express or implied, that the items of the account upon the one side and the other are to be set against each other. In other words, there must be one account upon which the items on either side belong and on which they operate to extinguish each other pro tanto, so that the balance on either side is the debt between the parties. The mere right to set off independent debts under a statute allowing set-off is not sufficient to create a mutual and open account. Eldridge v. Smith (1887) 144 **Mass.** 35, 10 N. E. 717.

The fact that different items due between two parties may be set off against each other does not constitute a mutual and open account current between them, unless there was also a mutual agreement that such set-off should be made. Harding v. Covell (1914) 217 **Mass.** 120, 104 N. E. 452.

A demand on the part of one party, arising subsequently to that on the part of the other party, cannot be regarded as a mutual account. To be so, both must exist together. Cunningham v. Guignar (1838) Dud. L. (S. C.) 351.

An account is not mutual unless the parties have dealt with each other in the same relation, and unless the items upon the different parts of the account are capable of being set off against each other. Millet v. Bradbury (1895) 109 **Cal.** 170, 41 Pac. 865.

Mutual accounts defined.

To constitute a mutual, running account, there must be a mutual credit, founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. McNeil v. Garland (1871) 27 **Ark.** 343.

To bring the case within the saving clause of the Statute of Limitations, which provides that, in an action to recover a balance due upon a mutual, open, and current account where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side, it must appear, first, that the account between the parties consisted of reciprocal demands; second, that the same was open, as contradistinguished from an account stated; and third, that it consisted of different items of different dates; or, in other words, that it was an account current. Norton v. Larco (1866) 30 **Cal.** 126, 89 Am. Dec. 70.

A mutual account is one based on a course of dealings wherein each party has given credit to the other on the faith of indebtedness to him. Gunn v. Gunn (1885) 74 **Ga.** 555, 58 Am. Rep. 447; Smith v. Hembree (1907) 3 **Ga.** App. 510, 60 S. E. 126; Mobley v. Pendergrast (1910) 8 **Ga.** App. 565, 70 S. E. 18; Bank of Blakely v. Buchannon (1913) 13 **Ga.** App. 793, 80 S. E. 42.

A mutual account is one where there is an indebtedness on both sides. Brock v. Wildey (1906) 125 **Ga.** 82, 54 S. E. 195.

To render an account mutual, there must be an alternate course of dealing between the parties, giving rise to cross demands upon which they might respectively maintain actions. Miller v. Cinnamon (1897) 168 **Ill.** 447, 48 N. E. 45; Crum v. Higold (1889) 32 **Ill. App.** 282.

To create the element of mutuality, each party must have such charges against the other as would support an action. Dyer v. Walker (1863) 51 **Me.** 104.

Mutual accounts are those where each party makes charges against the other for property sold, services rendered, money advanced, etc. Baker v. Mitchell (1871) 59 **Me.** 223.

To make accounts mutual, they should appear to be open and current, and show a reciprocity of dealings. Webster v. Byrnes (1870) 32 **Md.** 86.

It is sufficient to prove mutual dealings between the parties, consisting of sales made or services performed by each party to or for the other, creating mutual debts, and which, by mutual agreement, are to be set off against one another. Safford v. Barney (1876) 121 **Mass.** 300.

To constitute a mutual account there must be a mutual credit, founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts, or an express or implied understanding that the mutual debts should be in satisfaction or set-off so far between the parties. Kimball v. Kimball (1867) 16 **Mich.** 211.

A mutual account implies a course of dealing where each party furnishes credit to the other on the reliance that, upon settlement, the accounts will be allowed so that one will reduce the balance due on the other. Re Hiscock (1890) 79 **Mich.** 536, 44 N. W. 947.

A mutual, open account is such as is made up of matters of set-off or accounts between the parties who have a mutual course of dealings under an implied agreement that one account shall be an offset against the other, so far as it will go. Lester v. Thompson (1892) 91 **Mich.** 245, 51 N. W. 893.

An account is mutual where such party has an account against the other. Taylor v. Parker (1871) 17 **Minn.** 469, Gil. 447.

A mutual account arises where there are mutual dealings, and the account is allowed to run with a view of an ultimate adjustment by a settlement and payment of the balance. Chadwick v. Chadwick (1893) 115 **Mo.** 581, 22 S. W. 479.

Although to constitute a mutual account of reciprocal demands, a defendant, when sued, must have an account against the plaintiff which he can interpose as a set-off to the extent

thereof, it is not needful that each party have an independent cause of action against the other. Green v. Disbrow (1879) 79 N. Y. 1, 35 Am. Rep. 496.

It is not necessary, in order to make an account a mutual or reciprocal demand, that each party have a cause of action against the other for his side of the account. There is but one cause of action in such case, and that is for the balance. Ibid.

Accounts are mutual where each party makes charges against the other. Ross v. Ross (1875) 6 Hun (N. Y.) 80.

Circumstances giving rise to inference of mutual dealing.

An agreement between the parties that the items of the one account shall be considered as partial payments upon the other may be inferred when one party, with the knowledge of the other, keeps an account of the debit and credit. Stokes v. Taylor (1889) 104 N. C. 395, 10 S. E. 566.

Demands must be in same right.

The theory upon which a mutual account is taken out of the statute is that the obligations on the one side are in law applied in payments or offsets to those on the other; but if a transaction between the parties does not create a debt or claim which may be so applied, such transaction cannot be regarded as a payment or offset to a debt, or be the foundation of a mutual account or reciprocal demand. Millet v. Bradbury (1895) 109 Cal. 170, 41 Pac. 865.

A mutual account implies the reciprocity of dealing between the parties to the account, and is made up of matters of set-off wherein each party has a right of action against the other; and a set-off can be pleaded only when the right of action is against the plaintiff in the same capacity as that in which he is prosecuting his claim. An individual obligation is not a matter of set-off to a partnership claim, or to a claim by the plaintiff in a representative capacity, nor can a partnership debt be a set-off to a claim by one of the members of the partnership. Flynn v. Seale (1906) 2 Cal. App. 665, 84 Pac. 263.

In the absence of any demand on the part of the cestui que trust and refusal on the part of the trustee to expend the trust funds for the benefit of the cestui que trust, the claim of the cestui que trust against the trustee, and a claim of the latter against the former for services rendered in his individual capacity, are not reciprocal demands, and do not constitute a mutual account. Millet v. Bradbury. (Cal.) supra.

An account due to a copartnership and an account due to the debtor by a member of the firm after the dissolution of the firm by the death of a copartner do not constitute a "mutual and open account current." Eldridge v. Smith (1887) 144 Mass. 35, 10 N. E. 717.

An account due a firm cannot, on the dissolution of the firm and assignment of the account to one of its members, be included without the debtor's consent in a mutual account between him and such assignee. King v. Post (1888) 12 Colo. 355, 21 Pac. 38.

Account on one side only.

An account all the items of which are on one side is not a mutual account. Wilson v. Calvert (1850) 18 Ala. 274; Mims v. Sturtevant (1850) 18 Ala. 359; Bradford v. Spyker (1858) 32 Ala. 134; Fraylor v. Sonoro Min. Co. (1861) 17 Cal. 594; Gwynn v. Hamilton (1885) — Cal. —, 7 Pac. 837; Beach v. Bennett (1901) 16 Colo. App. 459, 66 Pac. 567; Lark v. Cheatham (1887) 80 Ga. 1, 5 S. E. 290; Harris v. Jackson County Agri. Bd. (1881) 9 Ill. App. 272; Buntin v. Lagow (1825) 1 Blackf. (Ind.) 373; Harrison v. Hall (1879) 8 Mo. App. 167; Thompson v. Brown (1892) 50 Mo. App. 314; Macke v. Davis (1895) 61 Mo. App. 524; Bennett v. Davis (1817) 1 N. H. 19; Kimball v. Brown (1831) 7 Wend. (N. Y.) 322; Atwater v. Fowler (1833) 1 Edw. Ch. (N. Y.) 417; Edmonstone v. Thomson (1836) 15 Wend. (N. Y.) 554; Hallock v. Losee (1848) 1 Sandf. (N. Y.) 220; Palmer v. New York (1849) 2 Sandf. (N. Y.) 318; Becker v. Jones (1885) 37 Hun (N. Y.) 35; Lowber v. Smith (1847) 7 Pa. 381; Hudson v. Hudson (1902) 21 Pa. Super. Ct. 92; Davis's Estate (1852) 1 Phila. (Pa.) 360; Ingram v. Sherard

(1828) 17 Serg. & R. (Pa.) 347; Guichard v. Superveile (1904) 11 Tex. 522; Judd v. Sampson (1854) 13 Tex. 19; Richardson v. Vaughan (1893) 86 Tex. 93, 23 S. W. 640; Abbott v. Keith (1839) 11 Vt. 525; Hodge v. Manley (1853) 25 Vt. 210, 60 Am. Dec. 253; Fitzpatrick v. Phelan (1883) 58 Wis. 250, 16 N. W. 606; Dunn v. Fleming (1889) 73 Wis. 545, 41 N. W. 707; Hills v. Hoquiam (1916) 94 Wash. 63, 161 Pac. 1049; Beck v. Anderson (1913) 6 Sask. L. R. 283. The statement made in Chadwick v. Chadwick (1893) 115 Mo. 581, 22 S. W. 479, that although it is quite generally held that if the items are all on the one side, then the account is not mutual in the sense that the last item will draw after it the items previously charged, so as to stay the bar of the Statute of Limitations as to the whole account, the rule has been otherwise settled in Missouri, is apparently at variance with the Missouri cases above cited. But what the court meant seems to be that where all the items of a unilateral account constitute a single demand, the Statute of Limitations begins to run from the date of the last item.

Where goods are sold to be paid for in other goods, of which more are delivered than are required for payment, the transactions do not make a case of mutual accounts. Lowber v. Smith (Pa.) supra.

Cannot be created by agreement.

Where an account is not a mutual and open account, the parties cannot by agreement make it so. Parker v. Schwartz (1883) 136 Mass. 30.

Effect of credit items to give account a mutual character; majority view.

According to the weight of authority, the mere payment of money upon an account does not have the effect to render the account mutual, but operates simply as a reduction pro tanto of the claim. As said in Green v. Disbrow (1879) 79 N. Y. 1, 35 Am. Rep. 496, "The payments do not, in such case, enter into the account. They are at once applied and reduce the account." McNeil v. Garland (1871) 27 Ark. 343; Weatherwax v. Cosumnes Valley Mill Co. (1861) 17 Cal. 344; Norton v. Larco (1866) 30 Cal. 126, 89 Am. Dec. 70; Adams v. Patterson (1868) 35 Cal. 122; Rocca v. Klein (1888) 74 Cal. 526, 16 Pac. 323; Santa Rosa Nat. Bank v. Barnett (1899) 125 Cal. 407, 58 Pac. 85; Flynn v. Seale (1906) 2 Cal. App. 665, 84 Pac. 263; Copriviza v. Rilovich (1906) 4 Cal. App. 26, 87 Pac. 398; Lark v. Cheatham (1887) 80 Ga. 1, 5 S. E. 290; Liseur v. Hitson (1894) 95 Ga. 527, 20 S. E. 498; Smith v. Hembree (1907) 3 Ga. App. 510, 60 S. E. 126; Mobley v. Pendergrast (1910) 8 Ga. App. 565, 70 S. E. 18; Crum v. Higold (1889) 32 Ill. App. 282; Prenatt v. Runyon (1859) 12 Ind. 174; Perrill v. Nichols (1883) 89 Ind. 444; Webster v. Byrnes (1870) 32 Md. 86; Parker v. Schwartz (1883) 136 Mass. 30; Cousins v. St. Paul, M. & M. R. Co. (1890) 43 Minn. 219, 45 N. W. 429; Abbey v. Owens (1880) 57 Miss. 810; Green v. Disbrow (1879) 79 N. Y. 1, 35 Am. Rep. 496; Raux v. Brand (1882) 90 N. Y. 309; Compton v. Bowns (1893) 5 Misc. 213, 25 N. Y. Supp. 465; Re Gladke (1899) 45 App. Div. 625, 60 N. Y. Supp. 869; McDonald v. Jaffa (1900) 53 App. Div. 484, 65 N. Y. Supp. 1059; Lowenthal v. Resnick (1908) 110 N. Y. Supp. 1045; John Klein Wagon Works v. Hencken-Willenbrock Co. (1910) 67 Misc. 425, 123 N. Y. Supp. 119; Warren v. Sweeney (1868) 4 Nev. 101; Hussey v. Burgwyn (1859) 51 N. C. (6 Jones, L.) 385; Ingram v. Sherard (1828) 17 Serg. & R. (Pa.) 347; Hay v. Kramer (1841) 2 Watts & S. (Pa.) 137; Adams v. Carroll (1877) 85 Pa. 209; McArthur v. McCoy (1907) 21 S. D. 314, 112 N. W. 155; Cohen v. Shwarts (1895) — Tex. Civ. App. —, 32 S. W. 820.

But money paid by a debtor to a third party at the request of a creditor, and which is charged on an account between them, renders the account a mutual, open, and current account. Copriviza v. Rilovich (1906) 4 Cal. App. 26, 87 Pac. 398.

The same rule prevails where payments have been made in work (Smith v. Hembree (1907) 3 Ga. App. 510, 60 S. E. 126); or by the delivery of an article of personal property of a specified value, intended as a payment, and not as a set-off pro tanto (Norton v.

Larco (1866) 30 Cal. 126, 89 Am. Dec. 70; Rocca v. Klein (1888) 74 Cal. 526, 16 Pac. 323). If an article of personal property is delivered to the creditor with an understanding between him and the debtor that it shall apply as payment, the transaction will not constitute a mutual account consisting "of reciprocal demands" between them; but if, instead of delivering such property as payment, it is delivered without an understanding or agreement that it shall be taken as payment, it will be treated as a sale upon which an action might be maintained. Warren v. Sweeney (1868) 4 Nev. 101. When goods are delivered by a debtor to a creditor having an account against him, a mutual account is created. Green v. Disbrow (1879) 79 N. Y. 1, 35 Am. Rep. 496. Where there has been a sale or delivery of goods by the debtor to the creditor, unless it is shown to have been intended and accepted as a payment upon the account, a right of action accrues on behalf of the debtor for the price, and it constitutes the mutual account contemplated by the statute. Abbey v. Owens (1880) 57 Miss. 810. The fact that one of the defendants gave the plaintiff a lump of gold amalgam to be sent to the mint for coinage, the proceeds to be credited upon the account, does not render it a mutual one. Weatherwax v. Cosumnes Valley Mill Co. (1861) 17 Cal. 344.

Memoranda showing the delivery and return of goods by way of bailment, and not of sale, do not constitute a mutual and open account current between the parties. Kennedy v. Drake (1917) 225 Mass. 303, 114 N. E. 310.

Items of credit for goods or money "returned" do not render an account a mutual and open account. Campbell v. White (1871) 22 Mich. 178.

A credit for a demijohn's return to a liquor dealer by a customer does not render the account a mutual one. Lowenthal v. Resnick (1908) 110 N. Y. Supp. 1045.

Where a customer receives goods from a merchant without paying for them, and the merchant afterwards receives the goods back, and the thing is done for mutual accommodation and convenience, and not by way of actual trade or barter, it is a single transaction which terminates without giving the right to either side to make it a matter of account; but if the customer first purchases the goods for cash, and they are then returned and accepted, and by mutual consent, express or implied, the merchant is allowed to retain the price paid, the transaction is sufficient to convert the account into a mutual one. White v. Campbell (1872) 25 Mich. 463.

— minority view.

In some cases it has been held that payments upon an account are sufficient to render it an open and mutual account, so as to prevent the remedy thereon being barred by the Statute of Limitations. Payne v. Walker (1872) 26 Mich. 60; Hollywood v. Reed (1884) 55 Mich. 308, 21 N. W. 313; Lancieri v. Kansas City Improved Street Sprinkling Co. (1902) 95 Mo. App. 319, 69 S. W. 29; Noyes v. Cushman (1853) 25 Vt. 390. Regular payments for a period of time of a part of the monthly wages earned by a servant who has been working for his employer for several years without a settlement will make the account mutual for the purpose of determining whether any part is barred by the Statute of Limitations. Hay v. Peterson (1896) 6 Wyo. 419, 34 L.R.A. 581, 45 Pac. 1073.

But a credit given to defendant without his knowledge, on an account which he has always denied owing, will not make the account a mutual one. Bay City Iron Co. v. Emery (1901) 128 Mich. 506, 87 N. W. 652.

And a difference is to be observed between a payment on the general account, and payments made with specific application to one or more particular items. When such specific application is made, it is a mere recognition of those particular charges upon which the application is made, and cannot be considered an acknowledgment of an open, unliquidated account, or of any balance due thereon. Hodge v. Manley (1853) 25 Vt. 210, 60 Am. Dec. 253; Harris v. Howard (1884) 56 Vt. 695. And see also Penniman v. Rotch (1841) 3 Met. (Mass.) 216.

VI. Form of account.

In order to establish a "mutual and open account current" between the parties, it must appear that an account was kept. Theobald v. Stinson (1854) 38 Me. 149.

An account is not rendered a "mutual and open account current" by items of credit constituting partial payments, where the defendant kept no account and had no charges against the plaintiff. Dyer v. Walker (1863) 51 Me. 104.

It is immaterial whether the account of the transactions is kept by one or both of the parties (Millet v. Bradbury (1895) 109 Cal. 170, 41 Pac. 865; Hudson v. Hudson (1902) 21 Pa. Super. Ct. 92; Chambers v. Marks (1855) 25 Pa. 296; Hutchinson v. Pratt (1829) 2 Vt. 146; Chipman v. Bates (1831) 5 Vt. 143); nor is the form in which the account is kept material (Millet v. Bradbury (Cal.) supra), since it is not the form of the entries, but the fact of the mutual crediting, which is to be considered (Gunn v. Gunn (1885) 74 Ga. 555, 58 Am. Rep. 447).

It is not necessary that one party shall have given the other party credit on his account. Becker v. Jones (1885) 37 Hun (N. Y.) 35.

In order to make accounts mutual, it is not essential that they be kept only by one of the parties or by debit and credit in form. They need not be entered in a book, or even written at all. Miller v. Longshore (1911) 147 App. Div. 214, 131 N. Y. Supp. 1041.

It is not necessary that the account should have been kept in writing (Chambers v. Marks (Pa.) supra, semble); it is the character of the dealings, and not the manner in which they are evidenced, which must determine whether the transactions fall within the exceptions of the statute (Hudson v. Hudson (Pa.) supra).

The particular mode of keeping the account, whether on book or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms, is unimportant. Abbott v. Keith (1839) 11 Vt. 525.

But in Sidway v. Missouri Land & Live Stock Co. (1905) 187 Mo. 649, 86 S. W. 150, it was held that an action to recover for the value of services rendered from time to time cannot be considered as one on a running account where it does not appear that the account or a single item in it was ever reduced to writing and such a charge made against the defendant in any book account or on any paper or memorandum contemporaneous with the rendering of the alleged services for which the action was brought.

And in Earls v. Earls (1916) — Mo. App. —, 182 S. W. 1018, it was held that items consisting of a charge for hogs sold by a merchant to a customer, a check of the customer taken up by him, and for hay and pasture sold, cannot be considered as part of an open account between the merchant and his customer where none of the items were ever made a matter of written record, or included in a book account kept by the merchant, showing the items he was selling the customer out of the store.

VII. Character of items.

Open accounts.

The administration of the partnership business by a surviving partner is an open account between him and the estate of his deceased partner. Cannon v. Copeland (1869) 43 Ala. 201.

An account for advances made in the shape of acceptances of drafts and disbursements for necessary supplies, insurance, freight, etc., upon the proceeds of crops consigned and to be consigned by a farmer to a merchant, is an "open account." Andrew v. Keenan (1859) 14 La. Ann. 716.

A demand for sums due on witnesses' certificates is not one on an open account. Carville v. Reynolds (1846) 9 Ala. 969.

An action for breach of an agreement to support is not one upon a "continuous, open, current account." McCay v. McDowell (1890) 80 Iowa, 146, 45 N. W. 730.

A dividend declared on corporate stock is not an open account. Gulf Coal & Coke Co. v. Musgrove (1915) 195 Ala. 219, 70 So. 179.

Instalments of the subscriptions of stockholders of a corporation, fixed and required to be paid in by resolu-

tion of the board of directors, are not open accounts. New Orleans, J. & G. N. R. Co. v. Lea (1857) 12 La. Ann. 388.

A claim for an annuity for a sum certain created by deed, charged on lands and payable annually during the life of the annuitant, is not an open account. Taylor v. Forsey (1876) 56 Ala. 426.

Money paid on request is not an open account, the amount to be repaid not depending on any future liquidation or settlement between the parties. Gayle v. Johnston (1882) 72 Ala. 254, 47 Am. Rep. 405.

Freight charges between a railroad company and a consignee do not constitute an open account within the Statute of Limitations. Northern Alabama R. Co. v. Wilson Mercantile Co. (1913) 9 Ala. App. 269, 63 So. 34.

A tax bill is not an open account. New Orleans v. Locke (1859) 14 La. Ann. 867.

An action to recover the proceeds of property invested by the defendant is not one on open account. Maury v. Mason (1838) 8 Port. (Ala.) 211.

The indebtedness of one tenant in common to his cotenant for rent collected is not "an open or unliquidated account," within the meaning of the Statute of Limitations. Hairston v. Sumner (1894) 106 Ala. 381, 17 So. 709.

The demand of a joint maker of a note who has paid the same, against his comaker, for contribution, is not an open account. Truss v. Miller (1897) 116 Ala. 494, 22 So. 863.

A demand for money collected by plaintiff on a judgment in favor of himself and defendant's intestate jointly, relied upon as a set-off in an action brought by the plaintiff, is not one on an open account. Bradford v. Barclay (1863) 39 Ala. 33.

A claim by a county treasurer who has served for several successive terms, for a balance of salary claimed to have remained unpaid at the end of each term, is not in the nature of an open account. Griffin v. Clay County (1884) 63 Iowa, 413, 19 N. W. 327.

The claim of an officer of a corporation against the corporation for services, under various resolutions fixing his compensation for a definite term, is not in the nature of an open account. Porter v. Chicago, I. & D. R. Co. (1896) 99 Iowa, 351, 68 N. W. 724.

The account between agents and principal is not an open account, so as to be prescribed within three years. Dolhonde v. Laurans (1869) 21 La. Ann. 406; Beatty v. Hawkins (1893) 45 La. Ann. 512, 12 So. 887; Means v. Ross (1902) 106 La. 175, 30 So. 300.

The claim of an agent against his principal for services is not one on an open account. Cooper v. Harrison (1857) 12 La. Ann. 631; Millaudon v. Lesseps (1865) 17 La. Ann. 246.

But a claim for services rendered, the amount of compensation to be paid for which has not been fixed by the parties, and for which a recovery must be had upon a quantum meruit basis, is an open account. Gayle v. Johnston (1882) 72 Ala. 254, 47 Am. Rep. 405.

Current or running accounts.

A subsequent employment of one party by the other, and payment in cash for the services rendered, does not constitute such a course of mutual dealing as to constitute an open and current account. Meehan v. Figliuolo (1904) 88 N. Y. Supp. 920.

Where a servant usually leaves with his master a portion of his wages, the balance each year being carried forward to the succeeding year, the amounts constitute a running account. Murphy v. People's R. Co. (1884) 15 Mo. App. 595.

Payments made in defense of a lawsuit by one defendant on behalf of another constitute a running account, the last item of which brings the whole within the statutory time. Finney v. Brant (1853) 19 Mo. 42.

The quarterly payments made by a county for the support of an insane person from the date of his commitment until his death constitute a continuous, open, current account as against the county in which such patient has a legal settlement. Buena Vista County v. Woodbury County (1914) 163 Iowa, 626, 145 N. W. 282.

Fees received by a clerk and sheriff respectively, belonging to the other, may be treated by them as the subject of a mutual running account. Drouilliard v. Wilson (1853) 1 **Ohio** Dec. Reprint, 555.

The several items of overcharges on shipments made over defendant's railroad during a period of several years constitute an open, current account. Higley v. Burlington, C. R. & N. R. Co. (1896) 99 **Iowa**, 503, 61 Am. St. Rep. 250, 68 N. W. 829.

A claim for sums of money loaned at different times for which no notes were taken does not constitute a running account. Re Wooten (1902) 118 **Fed.** 670.

Loans made from time to time, each of which was due on demand and each drew interest from its date, do not constitute a running account. Re Girvin (1908) 160 **Fed.** 197.

Unpaid pensions do not constitute running accounts. Leonard v. United States (1883) 18 Ct. Cl. (**Fed.**) 382.

Mutual accounts.

The items properly allowable as comprised in a mutual and open account current are only those embraced in the dealings of the two parties with each other. King v. Post (1888) 12 **Colo.** 355, 21 Pac. 38.

A "mutual, open, and current account" means an account of dealing originally between the parties. A demand, purchased from a third person by one of the parties to an open and current account, against the other, without notice to or any recognition of its validity by the latter, does not become a part of the mutual account between them. Green v. Ames (1856) 14 N. Y. 225; and see also cases in V., supra, under, "Demands must be in same right."

Reciprocal demands which are not the proper subject of an unliquidated account will not constitute a mutual account. Becker v. Jones (1885) 37 Hun (**N. Y.**) 35.

It is not necessary, to support a mutual account, that there be items of merchandise sold to each party. Copriviza v. Rilovich (1906) 4 Cal. App. 26, 87 Pac. 398.

An account consisting of an indebtedness on one side and of a claim for goods sold on the other is a mutual account. Reid v. Wilson Bros. (1909) 109 Ga. 424, 34 S. E. 608.

An account showing various charges for goods furnished by plaintiff to the defendant, and the delivery of an article of merchandise by defendant to plaintiff in the ordinary course of business, either at an agreed price or upon an implied promise of the plaintiff to allow its value in account, is an open and mutual account. Penniman v. Rotch (1841) 3 Met. (**Mass.**) 216.

An account for supplies furnished on the one hand and for professional services on the other constitutes a mutual, current account. Miller v. Longshore (1911) 147 App. Div. 214, 131 **N. Y.** Supp. 1041.

Where it appears that one party rendered labor and services and furnished materials of various kinds for the use of the other as required, and such other on his part made payments in cash, sold the other party lumber and slabs, and in one instance gave a buggy, carriage, and a sum of money in exchange for another carriage, there is such a system of mutual debt and credit and course of reciprocal dealings as to constitute a mutual, open account current. Hannan v. Engelmann (1880) 49 **Wis.** 278, 5 N. W. 791.

The items of payments and receipts by two tenants in common concerning their joint estate constitute "an open and mutual account current." Dickinson v. Williams (1853) 11 Cush. (**Mass.**) 258, 59 Am. Dec. 142.

Where one tenant in common receives rents and profits on the one side, and on the other pays, inter alia, for taxes, in respect of which he has a personal claim against his cotenants, the account is a "mutual and open account current." Robinson v. Robinson (1899) 173 **Mass.** 233, 53 N. E. 854.

An action by a firm of commission merchants to recover from a commercial firm the excess of a draft drawn by the latter and taken up and paid by them, over the proceeds of merchandise subsequently shipped by the latter to and sold by the factors, is a suit upon mutual account. Dwight v.

Matthews (1901) 94 Tex. 533, 62 S. W. 1052.

A judgment or order granting costs may be treated by the parties as an additional item in an account current between them. Brotherson v. Consaulus (1886) 5 N. Y. S. R. 105.

An account consisting of a charge for an insurance premium and a credit of a return premium upon the cancelation of the policy is not a mutual account. Mobley v. Pendergrast (1910) 8 Ga. App. 565, 70 S. E. 18.

An account of a bank with a depositor, consisting of general deposits on one side and overdrafts on the other, is not a mutual, open, and current account, even though it was opened with a credit to the depositor. Santa Rosa Nat. Bank v. Barnett (1899) 125 Cal. 407, 58 Pac. 85.

The furnishing by defendant of articles of wearing apparel to plaintiff's children cannot be considered as making the account a mutual one where no entry or charge was ever made against the plaintiff for the amount, and there is evidence that the furnishing of such apparel was intended as compensation to the children for services rendered by them. Thompson v. Reed (1868) 48 Ill. 118.

It seems that items for chattels borrowed and not returned cannot form any part of a mutual, open, and current account. Swift v. Swift (1896) 5 App. Div. 587, 39 N. Y. Supp. 384.

The indebtedness of a tenant to his landlord for the latter's share of the proceeds of sales of hay belonging in part to the landlord is not enough to impress upon the tenant's account against the landlord the character of a mutual, open, running account, inasmuch as that which came into plaintiff's hands belonging to the defendant was money, and this could only enter into the account between them as a payment by defendant upon any sum which he was owing plaintiff. Pulver v. Esselstyn (1897) 22 Misc. 429, 50 N. Y. Supp. 756.

Items of debit for the contract price of a vessel, for extra work, and a credit for payments made, do not make a case of "reciprocal demands." Peck v. New York & L. U. S. Mail S. S. Co. (1859) 5 Bosw. (N. Y.) 226.

A demand for the value of the use and occupation of certain premises by one party which never was made the subject of an account or written charge, and a claim for rent subsequently accruing in favor of the other party, cannot be considered as constituting a mutual, open, and current account. Huebner v. Roosevelt (1876) 6 Daly (N. Y.) 337.

A claim for money loaned by one party and for rent due by the other party is not a case of running or mutual account. Bodell v. Gibson (1880) 23 Hun (N. Y.) 40.

Money loaned may be the subject of a mutual account (Plimpton v. Gleason (1885) 57 Vt. 604), though it is not ordinarily such. See Hudson v. Hudson (1902) 21 Pa. Super. Ct. 92.

An account containing items of moneys received and paid is not "a mutual, open, and current account where there is a reciprocal demand between the parties." Adams v. Olin (1893) 140 N. Y. 150, 35 N. E. 448.

A current account kept by a husband of his transactions with his wife's money does not constitute a "mutual account." Re Girvin (1908) 160 Fed. 197.

And notes held by each party against the other do not constitute a "mutual, open, and current account." Perrine v. Hotchkiss (1873) 2 Thomp. & C. 370, affirmed on opinion below in (1874) 59 N. Y. 649.

A sale of goods to one holding a nonnegotiable note of the vendor does not make a case of mutual accounts. Clark v. Maguire (1860) 35 Pa. 259.

An account on one side and a demand on the other, founded on a note, bond, record, or the like, does not constitute a mutual account. Mattern v. McDivitt (1886) 113 Pa. 402, 6 Atl. 83.

A sealed note on the one side and an open account on the other do not constitute "a mutual, open, and current account." Chapman v. Chapman (1889) 31 S. C. 405, 10 S. E. 106.

A note of hand cannot be regarded as the evidence of a mutual account. It has directly the contrary effect; it furnishes a presumption that the ac-

counts between the parties, to its date, have been settled. Cunningham v. Guignar (1838) Dud. L. (S. C.) 351.

A charge for services rendered in the management of another's property may be considered as an item of mutual account where defendant, in examining plaintiff's account of the fund in his hands, promised to pay therefor. Stoner v. Riggs (1901) 128 Mich. 129, 87 N. W. 109.

An account kept by the manager of a corporation in which he credited himself from time to time with salary, and charged against such credits items of cash received from time to time, is a "mutual, open account." Blom v. Blom Codfish Co. (1912) 71 Wash. 41, 127 Pac. 596.

The employment of another to perform certain services for a stated price, and payments made under that agreement, do not create a mutual, open account current between the parties. Harding v. Covell (1914) 217 Mass. 120, 104 N. E. 452.

A claim for services rendered is not one of a mutual, open, and current account where there is no evidence of any payments made, or proof that an account was kept or rendered. Leahy v. Campbell (1902) 70 App. Div. 127, 75 N. Y. Supp. 72.

Services rendered by a member of the household cannot be considered as items in a mutual account current. Graham v. Stanton (1901) 177 Mass. 321, 58 N. E. 1023.

The giving of clothing and of money to buy clothing by an employer to his employee from time to time will not, of itself, render the account between them a mutual account, consisting of reciprocal demands. Miller v. Cinnamon (1897) 168 Ill. 447, 48 N. E. 45, reversing (1895) 61 Ill. App. 429.

E. S. O.

SARAH ROACH

v.

J. H. FRANCISCO, Trustee et al., Plffs. in Certiorari.

Tennessee Supreme Court—October 27, 1917.

(138 Tenn. 357, 197 S. W. 1099.)

Homestead — alienation — privy examination.

1. Under a constitutional provision that a homestead shall not be alienated without the joint consent of husband and wife, a statute emancipating married women does not obviate the necessity of the wife's privy examination for the acknowledgment of a deed alienating such homestead, since such examination is necessary to give her deed validity.

[See note on this question beginning on page 1080.]

Acknowledgment — privy examination — telephone.

2. The privy examination of a married woman for the acknowledgment of a deed cannot be taken over the telephone.

Evidence — to contradict notary's certificate.

3. Parol evidence is admissible to show that the officer taking the privy examination of a married woman for the acknowledgment of a deed was not in her presence when he took the acknowledgment, and therefore that he had no power to act, notwithstanding his certificate states privy examination in proper form.

Same — sufficiency — unsupported testimony.

4. The certificate of the notary to the privy examination of a married woman for the acknowledgment of a deed may be overturned by her unsupported testimony, where she acted promptly, there is no suspicion surrounding her testimony and nothing unreasonable in the story which she relates, and there is no attempt to contradict her, and she is a person of good character.

Homestead — sale subject to homestead.

5. A surety who pays a note secured by a deed of trust of a homestead, which was not properly acknowledged by the wife, is entitled to a sale of the property, subject to her rights in it.

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Chancery Court for Campbell County in favor of plaintiff in a suit to enjoin the defendant trustee from selling a certain house and lot under the terms of a deed of trust executed to him. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **L. H. Carlock** and **J. Will Taylor** for plaintiff in certiorari.

Mr. J. N. Russell, for defendant in certiorari:

The privy examination of the complainant, pretended to be taken by the notary public, over the telephone, February 20th, 1914, was void and of no effect, and complainant is entitled to the relief prayed in her bill.

Wester v. Hurt, 123 Tenn. 508, 30 L.R.A.(N.S.) 358, 130 S. W. 842, Ann. Cas. 1912C, 329; Eldridge v. Hunter, 125 Tenn. 309, 40 L.R.A.(N.S.) 628, 143 S. W. 892; Funkhouser v. Fowler, 117 Tenn. 541, 101 S. W. 769; Bingler v. Bowman, 194 Pa. 210, 45 Atl. 80; Bradley v. Walker, 138 N. Y. 291, 33 N. E. 1079; Mettler v. Miller, 129 Ill. 630, 22 N. E. 529; Grider v. American Freehold Land Mortg. Co. 99 Ala. 281, 42 Am. St. Rep. 58, 12 So. 775; Borland v. Walrath, 33 Iowa, 130; Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; People's Gas Co. v. Fletcher, 81 Kan. 76, 41 L.R.A.(N.S.) 1161, 105 Pac. 34; Spivey v. March, 105 Tex. 473, 45 L.R.A.(N.S.) 1109, 151 S. W. 1037.

Testimony of complainant touching her alleged privy examination was admissible.

Wester v. Hurt, 123 Tenn. 508, 30 L.R.A.(N.S.) 358, 130 S. W. 842, Ann. Cas. 1912C, 329; Eldridge v. Hunter, 125 Tenn. 309, 40 L.R.A.(N.S.) 628, 143 S. W. 892; Mount v. Kesterson, 6 Coldw. 452; Rhea v. Iseley, 1 Shannon, Cas. 228; Currie v. Kerr, 11 Lea, 140; 1 Devlin, Deeds, 3d ed. art. 533; Grider v. American Freehold Land Mortg. Co. 99 Ala. 281, 42 Am. St. Rep. 58, 12 So. 775; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; Cheney v. Nathan, 110 Ala. 254, 55 Am. St. Rep. 26, 20 So. 99; Chattanooga Nat. Bldg. & L. Asso. v. Vaught, 143 Ala. 389, 39 So. 215; Russell v. Holman, 156 Ala. 432, 47 So. 205; Le Mesnager v. Hamilton, 101 Cal. 533, 40 Am. St. Rep. 81, 35 Pac. 1054; Lewis v. McGrath, 191 Ill. 401, 61 N. E. 135; Marden v. Dorthy, 12 App. Div. 188, 42 N. Y. Supp. 827, affirmed in 160 N. Y. 39, 46 L.R.A. 694, 54 N. E. 726; Greenleaf-Johnson Lumber Co. v. Leonard, 145 N. C. 339, 59 S. E. 134; Wheelock v. Cavitt, 91 Tex. 679, 66 Am. St. Rep. 920, 45 S. W. 796.

The Emancipation Statute does not abolish the privy examination of married women to deeds conveying their homestead.

Parlow v. Turner, 132 Tenn. 339, 178 S. W. 766; Knoxville R. & Light Co. v. Vangilder, 132 Tenn. 487, L.R.A.1916A, 1111, 178 S. W. 1117, 10 N. C. C. A. 820; Lillienkamp v. Rippetoe, 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, Ann. Cas. 1917C, 901; Baker v. Dew, 133 Tenn. 126, 179 S. W. 645; Bennett v. Hutchens, 133 Tenn. 65, 179 S. W. 629; Bailey v. Apperson, 134 Tenn. 716, 185 S. W. 710; Travis v. Sitz, 135 Tenn. 156, L.R.A.1917A, 671, 185 S. W. 1075.

The wife is not bound by any participation, unless she signed and acknowledged the deed as required by statute.

Williams v. Williams, 7 Baxt. 116; Mash v. Russell, 1 Lea, 544; Carter v. Hatton, 1 Leg. Rep. 326, 1 Shannon, Cas. 432; Kennedy v. Stacy, 1 Baxt. 220; Dickinson v. Mayer, 11 Heisk. 515; Neam v. Campbell, 1 Shannon, Cas. 673; Moore v. Hervey, 2 Shannon, Cas. 154.

Lansden, J., delivered the opinion of the court:

This bill was filed by Mrs. Roach to enjoin the defendant, as trustee, from selling a house and lot in La Follette, Tennessee, under the terms of a deed of trust executed to him. The complainant claims that she is entitled to homestead in the house and lot, and that the deed of trust is void as to her. She testifies that her husband brought the deed of trust to their home, and asked her to sign it. When she in-

quired of him what the paper was about he cursed and abused her, and she signed the paper in order to stop his abusive language, without any knowledge of its contents. Some time afterwards she was called over the telephone by some person who she supposed was Mr. Carlock, and was asked by this person if she signed the instrument, and she replied, over the telephone, that she did. The house and lot was all the real estate which the husband and wife owned, and they were living upon it. After getting the money, for which the deed of trust was executed, the husband deserted his wife and children. The deed of trust appears upon its face to have been regularly acknowledged by the complainant with her husband before George Stott, notary public.

The defendant Francisco was an accommodation indorser for Roach, the husband, and, in default of payment by his principal, he has paid the note, with interest, to the National Bank of La Follette, the payee therein.

Section 3753 of Shannon's Code provides as follows: "Every deed or other instrument of writing executed by husband and wife, and acknowledged or proved and registered in the manner hereinafter prescribed, shall bind them, their heirs or assigns. The officer or court before whom the execution of such deed or instrument is acknowledged or proved, shall examine the wife privily and apart from her husband, touching her voluntary execution of the same, and her knowledge of its contents and effect; and if she acknowledges or states that she executed the same freely and voluntarily, and without any compulsion on the part of her husband, and the clerk or other officer is satisfied that she fully understands the same, he shall, in addition to the certificate of probate or acknowledgment above prescribed, also put on the back of the deed, or annex to it, the following certificate:" (setting out the form of the certificate required).

In Wester v. Hurt, 123 Tenn. 509, 30 L.R.A.(N.S.) 358, 130 S. W. 842, Ann. Cas. 1912C, 329, this section of the Code was under construction, and we held that the privy examination of a married woman could not be taken over the telephone. In that case it was said: "The deed of a married woman living with her husband, conveying her general estate, is void without her privy examination. The form of this examination is prescribed by statute (Shannon's Code, § 3753), and every material part of this form is necessary to make the probate of the deed valid upon its face. The action of the officer taking the acknowledgment is a judicial one, and establishes by judicial force: (1) That there was a personal interview between him and the bargainor; (2) that this interview was private and apart from the husband; and (3) that the execution of the deed was confessed to have been made freely, voluntarily, and understandingly, and without compulsion or constraint from her husband, for the purposes therein contained. . . . These conclusions are abundantly established by all of our authorities. It is clear that if the officer taking the privy examination of the married woman does not have a personal interview with her, and does not propound the required questions to her while in her presence, he cannot determine judicially whether the deed has been executed in the manner and under the conditions that the law requires in order to make a valid conveyance of a married woman's estate. This is manifest from the language of the statute itself. The officer is to determine as a matter of judicial judgment that she did execute the instrument freely, voluntarily, and understandingly, and without compulsion or constraint, from her husband; and this he cannot do out of her presence, because her appearance, manner, and demeanor may become more

potent factors in ascertaining the truth of this than mere formal answers to questions."

The conclusion of the court in that case was that examination of a married woman under such circumstances "was a mere empty form, unauthorized by the statute, and the certificate made by the officer, although it contained the proper words, does not establish the facts certified to." Such a conclusion was inevitable from our previous decisions construing the foregoing section of the Code. It has been held that the omission of the words, "and having . . . been examined," is fatal to the validity of the certificate of privy examination. It was held that such an omission is not a mere verbal one which can be overlooked under the provision of § 3757 of Shannon's Code, because the requirement that the certificate shall show the examination requires the notary to perform an act that is not included in the fact of the mere acknowledgment of the execution of the instrument. Ellett v. Richardson, 9 Baxt. 293; Currie v. Kerr, 11 Lea, 142; Cox v. Railway Bldg. & L. Asso. 101 Tenn. 491, 48 S. W. 226; Childers v. Wm. H. Coleman Co. 122 Tenn. 122, 118 S. W. 1018.

We know as a matter of history that the legislature did not contemplate that this solemn act would be done by telephone, for the reason that there were no telephones when the statute was enacted in 1715, 1813, 1833, and we cannot construe such an acknowledgment to fall within it, because the words employed by the legislature forbid such a construction.

Acknowledgment—privy examination—telephone.

What we have said has been upon the assumption that the proof shows that the acknowledgment was taken over the telephone. The only direct proof on the subject is the testimony of Mrs. Roach. She is positive in her statement that such was the fact, and she was not cross-examined or otherwise contradicted in any way. The notary, it is shown, has absconded, and his whereabouts are unknown. It is shown by stipulation of counsel that neither the bank nor defendant Francisco knew anything about the relationship existing between Mr. and Mrs. Roach, nor did they participate in the fraud practised upon her. We have no doubt, after reading her deposition, about her acknowledgment having been taken over the telephone in the manner as she has stated. As intimated above, there is nothing to the contrary, and there is no impeachment of her testimony in any particular. The bank has been paid the sum due it, and the question here presented is between the surety of Mrs. Roach's husband and Mrs. Roach.

There are two questions made upon this testimony: First, it is said that the testimony itself is inadmissible to contradict the certificate of the notary; and, second, it is said that the unsupported testimony of the defrauded wife is insufficient to overturn his certificate.

Parol testimony has been received in many cases for the purpose of invalidating the officer's certificate, by contradicting the words contained in it. Shields v. Netherland, 5 Lea, 193; Edwards v. Boyd, 9 Lea, 204; Grotenkemper v. Carver, 9 Lea, 280; Ronner v. Welcker, 99 Tenn. 627, 42 S. W. 439; Cason v. Cason, 116 Tenn. 195, 93 S. W. 89.

In this case parol evidence is offered to show that the privy examination was not taken, either in law or in fact. When it appears that the officer did not make the privy examination, or that he was not in the presence of the married woman, his power to act is at an end, and his certificate is nothing but empty words. They have no verity and import nothing except the dereliction of the officer. It is offered to impeach the jurisdiction of the notary, and shows the certificate to be a forgery.

By the very terms of the statute, it is only acknowledgments taken

in the manner prescribed thereby that are binding upon the makers, and it should be obvious that parol evidence is admissible to show that the statute has not been complied with. If it were not so, the statute could be flagrantly disregarded, wives would be bound without warrant in law, and even forgeries would be unimpeachable, and landowners would be without remedy, although they never sold nor did they receive anything of value.

Evidence—to contradict notary's certificate.

It is unwise to lay down a fixed rule to determine the weight of evidence required to overturn the officer's certificate. The ascertainment of truth is the purpose of all judicial inquiry, and wherever the court is satisfied that the truth has been reached, it would be folly to refuse to accept it because of some arbitrary rule respecting the weight of evidence. When it is sought to impeach the certificate upon the unsupported testimony of the defrauded wife, or upon the unsupported testimony of the wife and husband, such testimony should and will be closely scrutinized for the purpose of determining its truth; and ordinarily, such testimony, after the lapse of a long period of years, would be insufficient. But when the defrauded wife acts promptly, and there is no suspicion surrounding her testimony, and nothing unreasonable in the story which she relates, and there is no attempt to contradict her, and she is a person of good character, her testimony may be sufficient. The truth of Mrs. Roach's statement is vouched for in that the defendants did not cross-examine her, did not offer anything to contradict her, she was immediately abandoned by her husband after the attempted execution of the deed of trust, and the notary public has absconded. In addition to all this, counsel representing defendants procured a stipulation that their answer might stand as a cross bill in the event Mrs. Roach succeeded in her original bill for the purpose of procuring a sale of the land subject to her homestead. We do not undertake to lay down a definite rule by which other cases are to be judged, but we are content to say that in this case we have no doubt of the truth of Mrs. Roach's statement. Cases may often arise, and, if an inflexible rule as to the weight of testimony required should be adopted, they doubtless would arise, in which no one but the defrauded landowner could testify to impeach the certificate of the notary, as in the case of a forged certificate. It could not be said, if the court were satisfied of the truth of the complainant's story, that he must lose his land because some official was willing to forge a certificate to a deed showing that he had conveyed it.

Same—sufficiency—unsupported testimony.

It is next said that it was not necessary to have Mrs. Roach's privy examination in order to make her deed valid and binding. It is said that the Bejach's Act (Acts 1913, chap. 26), emancipating married women, dispenses with the necessity of the privy examination. This act provides as follows: "Married women . . . are hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contracts in reference to it, and to bind herself personally, and to sue and be sued with all the

rights and incidents thereof, as if she were not married."

This enactment cannot be construed as dispensing with the necessity of a married woman's privy examination in alienating her homestead, although the language employed by the legislature may seem to be broad enough to do so. Section 11 of article 11 of the Constitution provides as follows: "A homestead in the possession of each head of a family and the improvements thereon, to the value, in all of $1,000 shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. Nor shall said property be alienated without the joint consent of husband and wife, when that relation exists."

Homestead—alienation—privy examination.

The privy examination is a part of the execution of the deed. It is the wife's examination, and not her signature, which gives it validity. Montgomery v. Hobson, Meigs, 437; Norment v. Wilson, 5 Humph. 310; Insurance Co. of Tennessee v. Waller, 116 Tenn. 11, 115 Am. St. Rep. 763, 95 S. W. 811, 7 Ann. Cas. 1078; Kobbe v. Harriman Land Co. 117 Tenn. 320, 98 S. W. 175; Taylor v. Swafford, 122 Tenn. 303, 25 L.R.A.(N.S.) 442, 123 S. W. 350.

A construction of the Married Woman's Act which would dispense with privy examination would make the act violate this section of the Constitution, as often construed by this court, and that, of course, we cannot give, unless we are compelled to do so by the very words employed by the legislature. Re Bowers, 137 Tenn. 189, 194 S. W. 1093. Therefore, we hold that the "disability on account of coverture" contemplated by the legislature was only such disability as was cast upon married women, either by the common law or by statute. It is beyond the power of the legislature to abrogate disabilities contained in the Constitution.

It has been uniformly held by this court that a married woman can convey her homestead only by the precise means provided by the Constitution and statutes. Cope v. Meeks, 3 Head, 387; Knott v. Carpenter, 3 Head, 542, 75 Am. Dec. 779; Gillespie v. Worford, 2 Coldw. 632; Mount v. Kesterson, 6 Coldw. 452; Laird v. Scott, 5 Heisk. 350; King v. Nutall, 7 Baxt. 224, and many other cases cited in the notes to § 3756 of Shannon's Anno. Code. We have recently held that the Married Woman's Act (Acts 1913, chap. 26) repeals disabilities created by statute on account of coverture, and starts the Statutes of Limitation running against a married woman as though she were a feme sole; but it should be observed that in each of those cases the disability from which the married woman was held to be emancipated was created by statute. This, of course, the legislature could remove, but it cannot remove a disability written in the Constitution.

As stated above, counsel agreed that the defendants might treat their answer as a cross bill and pray for a sale of the house and lot subject to the homestead of Mrs. Roach. This is clearly the defendant Francisco's right, and a decree will be entered here accordingly. If there is any question as to the value of the homestead being more than $1,000, the case may be remanded for the purpose of having homestead laid off to Mrs. Roach.

Same—sale subject to homestead.

It results that the decree of the Court of Civil Appeals is reversed, and a decree will be entered here in accordance with this opinion.

ANNOTATION.

Acknowledgment: necessity of privy examination of married women.

I. Generally, 1080.
II. Persons to whom requirement of privy examination applied:
a. Women residing or being out of the state, 1084.
b. Women living apart from their husbands, 1084.
c. Free traders, 1085.
III. Property and estates and interests therein to which requirement applied:
a. General and separate estates of married women, 1086.
b. Community and separate property, 1088.
c. Dower, 1088.
d. Homestead, 1089.
e. Personal property, 1090.
III.—continued.
f. Land warrants or certificates, 1091.
g. Money in court, 1091.
h. Miscellaneous, 1092.
IV. Instruments to which requirement applied:
a. Deeds, 1092.
b. Mortgages and deeds of trust, 1093.
c. Contracts to sell land, 1093.
d. Contracts charging separate estate with payment of debts, 1095.
e. Power of attorney, 1096.
f. Leases, 1096.
g. Miscellaneous instruments, 1097.
V. Effect of Married Women's Acts, 1098.

I. Generally.

By the common law a feme covert could not, by uniting with her husband in any deed or conveyance, bar herself or her heirs of any estate of which she was seised in her own right, or of her right of dower in the real estate of her husband. This disability was founded on the principle that the separate legal existence of the wife was suspended during the marriage, and was strengthened by the consideration that from the nature of the connection, there was danger that the influence of the husband might be improperly exerted for the purpose of forcing the wife to part with her rights in his favor. The only mode in which a feme covert could, at common law, convey her real estate, was by uniting with her husband in levying a fine. This was a solemn proceeding of record in the face of the court, and the judges were supposed to watch over and protect the rights of the wife, and to ascertain by a private examination that her participation in the act was voluntary and unconstrained. Martin v. Dwelly (1830) 6 Wend. (N. Y.) 9, 21 Am. Dec. 245.

As a substitute for this common-law mode of conveyance by levying a fine, there was early adopted in this country the practice of conveying by deed, joined in by husband and wife, with a separate examination of the wife before some court or officer. This practice was probably resorted to, in some of the colonies at least, from supposed necessity, without any statute authorizing it; but later it was recognized by statutes which generally provided for such conveyances, and required the separate examination of the wife.

A statute requiring a married woman to acknowledge the instrument by which she relinquished dower, on an examination apart from her husband, required an examination out of his hearing and sight and apart from him, in a state of separation as to place. It was not satisfied by an acknowledgment of one and then an examination and acknowledgment of the other, in each other's presence and hearing, though taken separately in the sense of not being taken all at once. Rogers v. Woody (1856) 23 Mo. 548.

And, under a statute requiring a private examination apart from the husband, a private examination is not enough unless it is apart from the husband. Garrison v. Fisher (1853) 26 Miss. 352.

And a certificate of acknowledgment to a deed by husband and wife, stating that the officer privately examined the grantors, but not stating that the wife's private examination was taken separate and apart from her

husband, was held insufficient in Cook v. Pittman (1907) 144 N. C. 530, 119 Am. St. Rep. 985, 57 S. E. 219.

And it was not enough that a wife, as recited in the certificate of acknowledgment, was examined, and that, apart from her husband, she acknowledged the execution of a deed of trust, unless she was examined separate and apart from her husband. Rice v. Peacock (1872) 37 Tex. 392.

In Warren v. Brown (1852) 25 Miss. 66, 57 Am. Dec. 191, it was held that under the statute in force the acknowledgment of the wife must not only be made separate and apart from the husband, but must be made on private examination, the court saying that the object of the statute might be as easily defeated if the examination was not made in private, as if made in the presence of the husband.

Where a statute required an acknowledgment by the wife separately from her husband, it was argued, because of the omission of the words "apart from her husband," contained in a later statute, that the statute was complied with by separate certificates of acknowledgment; but the court held that the statute did not require separate certificates, but that the facts should be acknowledged by the wife, separate from her husband, and away from his actual presence. Pratt v. Battels (1856) 28 Vt. 685.

That the husband in fact used no compulsion, or was opposed to the making of the instrument, did not dispense with the separate examination. Allen v. Shortridge (1863) 1 Duv. (Ky.) 34; Wannell v. Kem (1874) 57 Mo. 478; Jourdan v. Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724. Thus, in Allen v. Shortridge (Ky.) supra, where, under a statute, slaves could only be sold by a married woman in the mode prescribed for the conveyance of land, it was held that the statute required the acknowledgment to be made separate and apart from the husband, whether the sale was in opposition to or in accordance with his wishes; and hence, that an acknowledgment in his presence was invalid though he used no influence to induce the wife to make it, and, on the contrary, did not wish her to make it.

So, where a privy examination and an explanation on such examination of the contents or purport of the instrument were required by statute, it was held in Wannell v. Kem (1874) 57 Mo. 478, that the court had no power to say that such things were unnecessary in a particular case because in fact there was no compulsion and the wife was entirely familiar with the instrument and executed it without the slightest improper influence from her husband.

And, in a case involving the sufficiency of the certificate to show that the statute was complied with, the court said that, under the statute, a separate examination of the wife was essential, and that the magistrate had no discretion and no right to say that the wife's consent was voluntary unless the husband and the wife were separate. Jourdan v. Jourdan (1823) 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724.

In Johnson v. Clark [1908] 1 Ch. (Eng.) 303, 24 Times L. R. 156, 77 L. J. Ch. N. S. 127, 98 L. T. N. S. 129, it was held that a local custom for a married woman to dispose of her real estate by deed made with the concurrence of her husband, but without separate examination, as required by the Fines and Recoveries Act, was invalid because unreasonable (citing Needler v. Bishop of Winchester (1724) Hobart 220, 80 Eng. Reprint, 367; George ex dem. Thornbury v. Jew (1764) 2 Ambl. 627, 27 Eng. Reprint, 406, where it had been incidentally stated that such a custom would be bad).

But in Lloyd v. Taylor (1758) 1 Dall. (U. S.) 17, 1 L. ed. 18, a conveyance by a married woman of her estate without acknowledgment or separate examination was held valid because it appeared that it had been the constant usage in Pennsylvania for married women to convey in this manner.

An instrument executed by a married woman and her husband in August, 1849, while the Mexican law was still in force in California, was held sufficient to pass her title to real estate though her acknowledgment was not taken separate and apart from that of

her husband. Gallagher v. Pine (1875) 51 Cal. 94.

In Re Foster (1849) 7 C. B. 120, 137 Eng. Reprint, 49, it was held that where land was sold under the compulsory provisions of an act of Parliament relative to opening and widening streets, a rule requiring inquiry to be made of a married woman at the time of acknowledging a deed whether any provision was made for her in consideration of her giving up her interest was inapplicable.

In Patnode v. Deschenes (1906) 15 N. D. 100, 106 N. W. 573, where it was claimed by a married woman that a deed to the homestead intended as a mortgage was not explained to her by the notary who took her acknowledgment, the court said that the statute of North Dakota imposed on the notary no duty, and he was not required, to examine a married woman apart from her husband, or explain the nature of the instrument to her.

It is not intended to include in this note questions as to the effect of the absence of a privy examination where it was assumed or conceded that such examination was required by law. Some cases of this character have, however, been included to illustrate the different transactions to which the statute has been applied, and some have also been included because it was not clear whether the court was deciding, or merely stating as an assumed or conceded fact, that a privy examination was necessary. Many of the following cases belong to this latter class, and are probably of little value on the question embraced in this note: Kendall v. Miller (1858) 9 Cal. 591; McLeran v. Benton (1872) 43 Cal. 467; Carn v. Haisley (1886) 22 Fla. 317; Jett v. Rogers (1877) 75 Ky. 564; Louisville, St. L. & T. R. Co. v. Stephens (1895) 96 Ky. 401, 49 Am. St. Rep. 303, 29 S. W. 14; Singleton v. Cherry (1915) 168 N. C. 402, 84 S. E. 698; O'Neal v. Borders (1915) 170 N. C. 483, 87 S. E. 340; Prater v. Hoover (1860) 1 Coldw. (Tenn.) 544; Davis v. Bowman (1898) — Tenn. —, 46 S. W. 1039,—in which it is said that a married woman executing a deed must acknowledge it separate and apart from her husband, or that the acknowledgment is defective, or the deed void or ineffective, in the absence of such separate examination.

Russell v. Umphlet (1871) 27 Ark. 339, in which it was said that on a conveyance by a married woman, she must, in the absence of her husband, openly confess to an officer of the law that the conveyance was without undue influence and for the purposes specified.

Gill v. Fauntleroy (1847) 8 B. Mon. (Ky.) 177, where the court said that to constitute a valid acknowledgment, under the statute, by a married woman, of a deed for the conveyance of land, it was indispensable that she should be privily examined, and upon such examination should declare that she freely and willingly executed the deed. In this case there was a separate examination, but the certificate did not show that she freely and willingly acknowledged the instrument.

Moorman v. Board (1874) 11 Bush (Ky.) 135, where the court says that the acknowledgment and the consent that the conveyance may be recorded must be the free and unconstrained act of the wife, and that unless the one is made, and the other given, separate and apart from the husband, the presumption that she did not act freely and without constraint arises as a matter of law and is conclusive of the question. In this case also there was a separate examination, but the clerk taking the acknowledgment did not explain the instrument to the wife.

Tuthill v. Townley (1794) 1 N. J. L. 242, in which it was said that the deed of a feme covert, accompanied by an acknowledgment and privy examination to ascertain her voluntary acquiescence in the conveyance, was sufficient to convey her estate and to bar her dower, but that this examination and acknowledgment were essential ingredients, and without them the deed was wholly inoperative.

Den ex dem. Ives v. Sawyer (1838) 20 N. C. 179 (4 Dev. & B. L. 51), where it is said that if the certificate of commissioners appointed to take the private examination of a married woman touching her signature to a deed of her land does not show that the ex-

amination was private, the law is not complied with.

Askew v. Daniel (1848) 40 **N. C.** (5 Ired. Eq.) 321, in which it is said that the deed of a feme covert is of no effect in conveying her land until she is privily examined; and that until then the deed, as to her, is a blank paper and the title remains in her. In this case the married woman sued to enforce an agreement claimed to have been part of the transaction in which the deed was executed, and it was held that, even if the agreement had been incorporated in the deed, she could not have had specific performance because, as to her, the deed was void.

Williams v. Walker (1892) 111 **N. C.** 604, 16 S. E. 706, in which the court said that a married woman, not a free trader, could be devested of her title to her real estate only by the deed of herself and her husband, executed in proper form, she being privily examined separate and apart from her husband.

Carney v. Hopple (1866) 17 **Ohio St.** 39, in which it was said that a substantial compliance with the requirement of the statute that the wife be examined separate and apart from her husband was essential to the validity of a deed as against the wife, and that where the certificate of acknowledgment of a deed in which she joined to relinquish dower wholly failed to show compliance with the statute, it was void on its face.

Louden v. Blythe (1856) 27 **Pa.** 22, 67 Am. Dec. 442, in which the court said that a married woman, in conveying or mortgaging her land by joining with her husband in a deed for that purpose, must act voluntarily, and not by compulsion, and that this could only be proved by the certificate of the justice or judge that he examined her separately, and not in the presence of her husband, that he made the contents of the deed known to her, and that she declared her execution of it to be voluntary and free from coercion.

McCandless v. Engle (1865) 51 **Pa.** 309, in which the court said that to bind a married woman she must be examined separate and apart from her husband, and then and there declare that her execution of the instrument was of her own free will and without coercion or compulsion.

Graham v. Long (1870) 65 **Pa.** 383, in which it was said that a married woman's power to convey or charge her real estate was derived solely from the statute, and that the requirements of the statute as to her separate examination and acknowledgment must be pursued and must so appear upon the face of the magistrate's certificate. In this case land was conveyed to a woman and her two daughters, one of whom was married. The married daughter subsequently gave her mother a receipt for "money I had in the property my mother now owns," and it was contended that she loaned money to the mother with which to buy the property, that the deed, so far as it was in her favor, was to secure this loan, and that the receipt evidenced a repayment of the loan; but it was held that a mortgage or trust could not be established by this unacknowledged receipt. The court says: "The most formal and solemn declaration of trust by deed of a feme covert must be accompanied with a certificate of separate examination and voluntary acknowledgment or it is not worth the parchment or paper upon which it is written."

Spencer v. Reese (1895) 165 **Pa.** 158, 30 Atl. 722, where, in a suit to reform a defective certificate of acknowledgment not showing that on her separate examination the magistrate read or made known to a married woman the contents of a mortgage, the court said that it had been uniformly held that the requirements of the statute must be strictly complied with, and that this must appear in the officer's certificate.

Estes v. Turner (1902) 30 **Tex.** Civ. App. 365, 70 S. W. 1007, in which a certificate of acknowledgment by a husband and wife, certifying that the wife, being asked separately, said that she signed the instrument of her own free will without being forced or compelled by her husband, was held fatally defective for the reason, among others, that it did not recite a separate and privy examination.

De West v. Barthelow (1911) — **Tex.** Civ. App. —, 136 S. W. 86, in which it was held that the statute re-

quiring a privy examination of married women was mandatory, and that the homestead right of the wife could only be devested, so long as it was not abandoned, by a conveyance made by the husband and wife in the manner prescribed by law, and that no difference was recognized between the conveyance of the wife's separate property and the conveyance of the homestead.

II. Persons to whom requirement of privy examination applied.

a. Women residing or being out of the state.

In accordance with the general rule that instruments affecting the title to real estate are governed as to their execution, construction, and legal sufficiency by the laws of the state in which the real estate is situated (5 R. C. L. 952), statutes requiring the privy examination of married women in connection with instruments affecting real estate have generally been applied to married women residing or acknowledging the instrument outside the state. Smith v. Ingram (1902) 130 **N. C.** 100, 61 L.R.A. 878, 40 S. E. 984; Robinson v. Queen (1889) 87 **Tenn.** 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38; Steele v. Lewis (1824) 1 T. B. Mon. (**Ky.**) 48; Tarr v. Glading (1852) 1 Phila. (**Pa.**) 370.

Thus, in Smith v. Ingram (1902) 130 **N. C.** 100, 61 L.R.A. 878, 40 S. E. 984, it was held that a deed to land in North Carolina, executed in South Carolina by a resident of that state without privy examination, which was required in North Carolina, but not in South Carolina, was void, the court saying that the law of the place where the real estate was located governed.

So, in Robinson v. Queen (1889) 87 **Tenn.** 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38, it was held that where a married woman domiciled in Kentucky, where she had been emancipated under the laws of that state from the disabilities of coverture, conveyed land in Tennessee, the necessity for a privy examination depended upon the law of Tennessee.

In Steele v. Lewis (1824) 1 T. B. Mon. (**Ky.**) 48, it was held that a deed of confirmation executed by a husband and wife in Virginia, and not acknowledged by the wife on privy examination before the proper authority, but only proved in a Virginia court by witnesses, and sent to Kentucky and recorded, did not pass title to land in Kentucky.

And in Tarr v. Glading (**Pa.**) supra, it was held that an acknowledgment in 1802 of a deed barring her dower by a married woman, taken before a justice of the peace in Massachusetts, with no separate examination, was defective, and not cured by certain statutes subsequently passed.

But where a statute merely required a private examination apart from her husband of "any married woman residing in the state," it was held that a mortgage not acknowledged on private examination was good unless the grantor was a resident of the state. Andrews v. Shaffer (1855) 12 How. Pr. (**N. Y.**) 441.

And under a New York statute providing that the acknowledgment of a deed conveying land in the state by a married woman residing out of the state might be made in the same manner as if she were sole, the court in Platt v. Brown (1862) 30 **Conn.** 336, expressed the opinion, without directly passing on the question, that an acknowledgment by a woman not living in New York was good though she was not examined separately from her husband, and joined in the deed for the purpose only of releasing her dower.

In Re Halliday (1871) 40 L. J. Ch. N. S. (**Eng.**) 687, L. R. 12 Eq. 199, 19 Week. Rep. 966, on a petition for the court's sanction of a lease of land devised in trust, the separate examination of a married woman, required by a statute, was ordered dispensed with, where she was a resident of New Zealand, and considerable time would elapse in taking her examination, and such lapse of time would be prejudicial.

b. Women living apart from their husbands.

The few cases dealing with married women living apart from their husbands are not entirely harmonious. In North Carolina it was held in a case

involving a deed executed by a married woman living apart from her husband, without any discussion of that fact, that where the husband was not a party to the deed, and the wife was not privily examined as required by statute, the deed was inoperative. Scott v. Battle (1881) 85 N. C. 184, 39 Am. Rep. 694.

In Texas it was held that where a husband abandoned his wife and left the country, land acquired by the wife during his absence might be conveyed by her without the husband joining in the deed, and without the privy examination of the wife, whether the land became her separate property or community property. Wright v. Hays (1853) 10 Tex. 130, 60 Am. Dec. 200. The court said: "She is necessarily compelled to assume the position of the husband; to discharge his duty and incur his responsibility; and her powers should correspond to the position which, by the default of the husband, she is thus compelled to assume; and especially should the controlling power of the husband over the goods of the community be transferred to the wife. Her right in that property is equal to that of the husband. During his presence he has the administration subject to the trusts incumbent upon the property. This right of control must necessarily cease where he can and will no longer exercise it; and the wife, the other joint owner, must be vested with the authority or it cannot exist anywhere."

In New York it was held that a statute requiring a private examination apart from the husband had no application to a conveyance in 1846 by a woman separated from her husband by a judicial decree which devested the husband of all authority and control and all estate, right, and title in the wife's property. Delafield v. Brady (1888) 108 N. Y. 524, 15 N. E. 428, affirming (1886) 38 Hun, 404. The court said that the purpose of the statute was to protect a married woman against the coercion or improper influence of her husband; that by the decree of separation the woman was entirely freed from the control of her husband and was for most purposes practically a feme sole, not entitled to his protection, nor subject to his dominion; and that it would have been quite an idle, useless ceremony to require a private examination.

In California it was held that a statute requiring the certificate of acknowledgment to show an examination out of the hearing of the husband did not apply to a power of attorney and a deed executed by a woman who obtained an invalid decree of divorce, resumed her maiden name, and was living apart from her husband when the instrument was executed, because the reason for the rule requiring such fact to be shown in the certificate did not exist (Reis v. Lawrence (1883) 63 Cal. 129, 49 Am. Rep. 83); nor to a deed executed by a married woman who had been living apart from her husband for years, he not even being in the country (Hand v. Hand (1885) 68 Cal. 135, 58 Am. Rep. 5, 8 Pac. 705); but in Danglarde v. Elias (1889) 80 Cal. 65, 22 Pac. 69, the court, without making any mention of Reis v. Lawrence or Hand v. Hand (Cal.) supra, held that the statute applied to all married women without exception, whether living with or apart from their husbands.

See also Huff v. Glenn (1898) 101 Tenn. 112, 46 S. W. 766, cited under III. a, infra.

c. Free traders.

A married woman registered as a free trader under a statute authorizing her, when so registered, to contract and deal as if she were a feme sole, could not convey her land without the joinder of her husband in the deed and a privy examination. The words "contract and deal," as used in the statute, referred to contracts and trades in some business enterprise, and did not include conveyances of land. Council v. Pridgen (1910) 153 N. C. 443, 69 S. E. 404.

Where a married woman has never registered the statutory certificate to make herself a free trader, a deed or mortgage executed without her privy examination is not validated by a recital therein that she is a free trader, on the theory that the deed or mortgage is, in itself, a sufficient certificate to make her a free trader. Williams

v. Walker (1892) 111 N. C. 604, 16 S. E. 706.

III. Property and estates and interests therein to which requirement applied.

a. General and separate estates of married women.

As to conveyance of homestead in lands constituting the wife's separate estate, see III. d, infra.

As to personal property constituting the general or separate estate of a married woman, see III. e, infra.

As to contracts to sell land constituting the general or separate estate of a married woman, see IV. c, infra.

As to contracts charging the wife's separate estate with the payment of debts, see IV. d, infra.

As to conveyances of wife's general and separate estate under the Married Women's Acts, see V., infra.

No better outline of the rule as to the necessity for a privy examination in the conveyance of the general or separate estate of a married woman prior to the changes made by the Married Women's Acts can probably be found than that contained in Yale v. Dederer (1858) 18 N. Y. 265, 72 Am. Dec. 503. The court said that, prior to the statute of that state providing that every express trust should vest the whole estate in the trustee, it was well settled that a married woman could deal with and dispose of her separate estate as a feme sole unless restrained by the provisions of the trust deed or instrument, but that the separate estate upon which the courts of equity ingrafted this doctrine included only such rights and interests of the wife as would belong to the husband but for the limitation to her particular use, as her personal estate, the rents and profits of land during the marriage, and the inchoate title which, by the birth of a child, the husband might acquire as tenant by the curtesy. But her own reversion in land owned at the time of the marriage was a legal estate descendible to her heirs, to which equity did not and could not apply the doctrine stated. In reference to such an estate she only had the disposing capacity which the common law or some enabling statute allowed to her, and she could devest her title only by a fine and recovery in England, and in this country only by a conveyance with certain solemnities of examination and acknowledgment. And where an estate was conveyed directly to a woman after marriage, to her sole and separate use, she had the capacity of a feme sole with respect to the rents and profits, but the corpus could be disposed of only by fine or recovery or such other solemnity as the law required for the disposition of estates in land by married women. If, however, the deed in terms gave her the absolute power of disposal, then it seems she could, without the solemnities required by law, convey the whole estate.

So it is held in Wester v. Hurt (1910) 123 Tenn. 508, 30 L.R.A.(N.S.) 358, 130 S. W. 842, Ann. Cas. 1912C, 329, where the validity of a privy examination taken over the telephone was involved, that the deed of a married woman living with her husband, conveying her general estate, was void without her privy examination.

In a suit by heirs of a decedent for the sale of his land, it was held that where certain heirs were married women and the petition was filed in their names as well as in the names of their husbands, a privy examination regarding their consent to pass their real estate was not necessary, the lands having been acquired by descent, and not constituting their separate estate. Winchester v. Winchester (1858) 1 Head (Tenn.) 460. The court said that there had been cases in which the wife had been privily examined in court in regard to the passing of her separate estate, or in regard to her waiver of an equitable settlement, but that no case was known where the wife had been examined where it was sought to devest her of a mere legal interest in land held jointly with her husband.

As intimated in Yale v. Dederer (N. Y.) supra, where land was conveyed to a married woman, to her sole and separate use, with power to convey or otherwise dispose of it as fully as if she were a feme sole, she could convey

without privy examination. Sherman v. Turpin (1870) 7 Coldw. (**Tenn.**) 382.

So, where a deed conveyed land to a husband in trust for the separate use of his wife, and required him to convey or mortgage it on the request of the wife in writing, signed by her or by her authority, no privy examination was required on a mortgage of the land by the husband and wife. Sharpe v. McPike (1876) 62 **Mo.** 300.

But where land and personalty were conveyed to a married woman to her sole and separate use, with power to use and dispose thereof as she might think proper, and to change the realty into personalty or the personalty into realty when and so often as she thought proper, but without, in terms, giving her the right to convey as a feme sole, she could not convey the land without a privy examination. Robinson v. Queen (1889) 87 **Tenn.** 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38.

And, in the absence of any such power in the deed creating the separate estate, a privy examination was held necessary. Clayton v. Rose (1882) 87 **N. C.** 106; Council v. Pridgen (1910) 153 **N. C.** 443, 69 S. E. 404; Ewing v. Smith (1811) 3 Desauss. Eq. (**S. C.**) 417, 5 Am. Dec. 557; Davis v. Bowman (1898) — **Tenn.** —, 46 S. W. 1039; Radford v. Carwile (1879) 13 W. Va. 572; Huff v. Glenn (1898) 101 **Tenn.** 112, 46 S. W. 766. In England and Texas there are holdings apparently to the contrary. Sturgis v. Corp. (1806) 13 Ves. Jr. 190, 33 **Eng.** Reprint, 266, 9 Revised Rep. 169; Wm. Cameron & Co. v. Cuffie (1912) — **Tex.** Civ. App. —, 144 S. W. 1024.

In Clayton v. Rose (**N. C.**) supra, it was held that a statute providing that conveyances by husband and wife of any land acknowledged as therein provided, the wife being first privily examined, should be valid to convey all the estate, right, and title which the wife might have, applied to equitable estates, and that, in the absence of a power in the instrument creating the trust authorizing a different mode of transfer, a deed was inoperative unless the wife was privily examined.

And in Council v. Pridgen (1910) 153 **N. C.** 443, 69 S. E. 404, and Ewing v. Smith (1811) 3 Desauss. Eq. (**S. C.**) 417, 5 Am. Dec. 557 (involving the power of a married woman to charge her separate estate with the payment of debts by executing a bond), it was held that a married woman could not convey or charge her separate estate without a privy examination.

In Davis v. Bowman (1898) — **Tenn.** —, 46 S. W. 1039, it was held that a deed of a married woman was void on its face for want of a privy examination; that while the land was her general estate, such examination would have been necessary if it had been her separate estate; but that it would seem that where a married woman claimed under an instrument expressly authorizing her to convey as a feme sole, she might so convey and without a privy examination.

In Radford v. Carwile (1879) 13 **W. Va.** 572, in discussing the question as to a married woman's power to charge her separate estate with debts incurred by her, the court incidentally decided that a married woman could not dispose of her real estate in which she had a separate estate by deed or contract of sale as an incident of her ownership of such estate, but could only convey it in the same manner as she could convey real estate in which she had no separate property; that is, by uniting in a deed with her husband, and, after her privy examination, acknowledging the deed before an officer or court.

Huff v. Glenn (1898) 101 **Tenn.** 112, 46 S. W. 766, involved a statute giving married women abandoning or abandoned by their husbands, etc., the powers of a feme sole, and providing that their power to convey or mortgage their real estate should not depend on the concurrence of their husbands, providing their privy examination should take place before certain officers, and further providing that married women owning a separate estate settled upon them for their separate use should have the same power of disposition if not expressly withheld in the instrument under which they held the property. It was held that a married woman could convey her separate

estate only by having her privy examination taken by the officers specified.

But in Sturgis v. Corp. (1806) 13 Ves. Jr. 190, 33 Eng. Reprint, 266, 9 Revised Rep. 169, where bank annuities were conveyed in trust for A, for life, then in trust for M., a married woman, for her sole and separate use during her life, and then to be transferred to J., and M. and her husband, who had purchased J.'s interest, sold the property during A.'s life, and it was claimed that a proper assignment of the reversion could not be made without the private examination of M., the court said that where property was settled to the separate use of a married woman, examination was not necessary, and that she had as great a disposing power over her reversionary interest as over her interest in possession.

And in Berrett v. Oliver (1835) 7 Gill & J. (Md.) 191, it was held that while a deed of trust executed by a husband and wife to the wife's separate property did not operate as a legal conveyance because of the absence of a privy examination, it gave the mortgagee a specific lien in equity.

And it seems that in Texas, before the passage of the Act of February 3, 1841, with regard to the acknowledgment of deeds of married women to their separate estate, privy acknowledgment was not necessary to the validity of such deeds, notwithstanding the Act of 1840, adopting the common law. Wm. Cameron & Co. v. Cuffie (1912) — Tex. Civ. App. —, 144 S. W. 1024.

See also the various other cases cited in other subdivisions dealing with the land of married women. This subdivision includes only the cases in which the court bases its decision on the nature of the wife's estate.

b. Community and separate property.

As to separate personal property, see III. e, infra.

As to conveyance of separate property under Married Women's Acts, see V., infra.

The California statutes as to the manner in which conveyances by married women should be acknowledged were held to apply to all property, whether owned by the wife as her separate property or not, in Danglarde v. Elias (1889) 80 Cal. 65, 22 Pac. 69.

And the community property of a married woman and her former husband was, as between her and a second husband, her separate property, so that it could not be conveyed without a privy examination. Groesbeck v. Bodman (1889) 73 Tex. 287, 11 S. W. 322.

See also McLeran v. Benton (1872) 43 Cal. 467, under I. supra; Wright v. Hays (1853) 10 Tex. 130, 60 Am. Dec. 200, cited under II. b, supra; Tolman v. Smith (1887) 74 Cal. 345, 16 Pac. 189, cited under IV. b, infra; Munk v. Weidner (1895) 9 Tex. Civ. App. 491, 29 S. W. 409, cited under IV. c, infra.

c. Dower.

As to relinquishment of dower under Married Women's Acts, see V., infra.

Under a statute declaring that a feme covert should not be bound by her deeds but upon privy examination recorded, it was held that there was no difference between her conveyance of a life estate and a fee simple as to the mode of acknowledgment, and that a deed purporting to convey the entire dower interest in land was ineffectual as to such interest where there was no privy examination of the wife, but only proof of the execution of the deed by witnesses. Smith v. White (1840) 1 B. Mon. (Ky.) 16.

And a statute providing that when husband and wife should convey the estate of the wife or her right of, in, or to, any land the acknowledgment should be taken by a judge or justice, who should examine the wife separate and apart from her husband and make the contents of the instrument known to the wife, was applied to a conveyance of the husband's land in which the wife joined to bar dower. Kirk v. Dean (1810) 2 Binn. (Pa.) 341 (overruling Watson v. Bailey (1808) 1 Binn. (Pa.) 470, 2 Am. Dec. 462, so far as it intimated the contrary).

The deed involved in Kirk v. Dean (Pa.) supra, was not acknowledged at all, but so far as that case held that a wife joining in her husband's deed

to bar dower must be privately examined, it was followed in Thompson v. Morrow (1819) 5 Serg. & R. (Pa.) 288, 9 Am. Dec. 358.

In Clark v. Redman (1825) 1 Blackf. (Ind.) 379, it was held that to effect a relinquishment of dower, the acknowledgment of the wife must appear to have been made separate and apart from her husband.

But in White v. Graves (1871) 107 Mass. 325, 9 Am. Rep. 41, it was stated incidentally in discussing the right of a married woman to avoid her deed for fraud or undue influence of her husband, that by the law of that state the wife was capable of releasing her dower by joining in the deed of her husband without any separate examination of, or acknowledgment by, her before a magistrate.

See also Russell v. Umphlet (1871) 27 Ark. 339; Rogers v. Woody (1856) 23 Mo. 548; Tuthill v. Townley (1794) 1 N. J. L. 242; Carney v. Hopple (1866) 17 Ohio St. 39, cited under I. supra; Platt v. Brown (1862) 30 Conn. 336; Tarr v. Glading (1852) 1 Phila. (Pa.) 370, cited under II. a, supra.

d. Homestead.

As to conveyance of homestead under Married Women's Acts, see V., infra.

In Alabama a constitutional provision prohibits the alienation of the homestead "by the owner thereof if a married man" without the signature and assent of the wife, and a statute provides that the wife's signature and assent must be shown by an examination of her separate and apart from her husband. Thereunder the separate examination is required only when the property mortgaged or alienated is owned by the husband. It is not required in the case of a conveyance by a married woman and her husband of land of her statutory separate estate, though it be the homestead, as the owner of the homestead is not in such case a "married man." Weiner v. Sterling (1878) 61 Ala. 98; Dawson v. Burrus (1882) 73 Ala. 111; Spink v. Guaranty Bank & T. Co. (1913) 181 Ala. 272, 61 So. 302.

The separate examination is required only when the conveyance is made of the homestead of the husband; and hence, where the husband owned a life estate, and the wife the remainder, in land constituting the homestead, a deed was valid as to the fee belonging to the wife, though there was no separate examination of the wife. Campbell v. Noble (1906) 145 Ala. 233, 41 So. 745.

And after the adoption of such constitutional provision, but before the passage of the statute referred to, no separate examination was required on a mortgage of the homestead. Jones v. Roper (1888) 86 Ala. 210, 5 So. 459.

Nor was any separate examination or any certificate of such fact necessary on a mortgage of land of the husband embracing no part of the homestead. Orr v. Blackwell (1890) 93 Ala. 212, 8 So. 413.

But the certificate of the wife's separate acknowledgment was required to give validity to a mortgage of land of the husband constituting the homestead. Burrows v. Pickens (1900) 129 Ala. 648, 29 So. 694.

In Florida a statute provided that to render a conveyance, whether of separate estate or of dower, effectual to pass a married woman's estate or right, she must acknowledge separately and apart from her husband that she executed it freely and voluntarily. A constitutional provision authorized the alienation of the homestead by deed or mortgage duly executed by husband and wife. Thereunder it was held in Shad v. Smith (1917) — Fla. —, 76 So. 897, that a conveyance of the homestead by an owner who was a married person was not "duly executed" unless acknowledged by the wife in substantial compliance with the statute, and that where there was no acknowledgment by the wife, separate and apart from her husband, a conveyance of the homestead passed no title.

In Michigan constitutional and statutory provisions required the wife's signature to a conveyance or mortgage of the homestead, and another statute declared that when any married woman should join with her husband in a conveyance of real estate, her acknowledgment should be taken sepa-

rate and apart from her husband. Thereunder it was held that the free, separate acknowledgment of the wife was necessary to the validity of a mortgage of the homestead, though in regard to her separate estate the wife might act as if unmarried. Fisher v. Meister (1872) 24 Mich. 447. In this case the wife, when her so-called acknowledgment was taken, was just beyond the door of a room adjoining that in which was her husband, and she and the notary did not understand the same language.

See also Patnode v. Deschenes (1906) 15 N. D. 100, 106 N. W. 573; De West v. Barthelow (1911) — Tex. Civ. App. —, 136 S. W. 86, cited under I., supra.

e. Personal property.

In Texas at one time the statute required the wife's separate acknowledgment of any deed or writing purporting to be a conveyance of any estate or interest in land, slaves, or other effects, the separate property of the wife. Thereunder the sale of personal property, the separate property of the wife, by the husband, was held invalid in Tucker v. Carr (1873) 39 Tex. 98, the court saying that no distinction between real and personal estate, the separate property of the wife, was made by the statute.

But in Ballard v. Carmichael (1892) 83 Tex. 363, 18 S. W. 734, it was held that such statute applied only to written transfers of personal property, and that as no statute required transfers of personal property other than slaves to be in writing, a verbal transfer without any privy examination was valid. It was also incidentally pointed out that, under a later statute, there was no restriction on the conveyance of the wife's personal property.

In Selover v. American Russian Commercial Co. (1857) 7 Cal. 266, a statute providing that no sale or other alienation of any part of the wife's separate property could be made nor any lien or encumbrance created thereon unless by writing, signed and acknowledged by the wife on privy examination, was held to embrace the wife's personal property as well as the real property. The court said that there was certainly good reason for securing the freedom of the wife's will and action, as well in respect to her personal as real estate; that the increasing importance of the personalty in modern times rendered this the more necessary; and that while the statute imposed troublesome conditions upon the wife, they were intended for her benefit, and that she could to some extent avoid the inconvenience of a privy examination on the sale of every article of personal property by executing a power of attorney.

In Zuccarello v. Randolph (1899) — Tenn. —, 58 S. W. 453, it was held, after an examination of the statutes, that there was nothing in the law requiring a privy examination to validate a transfer of personal property constituting the general estate of a married woman except where the proceeds of property were in the hands and control of the court or the clerk of court. It was accordingly held that where a married woman mortgaged her land to raise money used by the husband in his business, and he subsequently made an assignment, naming her as preferred creditor, an order by her on the assignee for the payment of part of the amount coming to her to a former partner of the husband, who was liable for certain of the other debts, did not require a privy examination.

Where a will gave slaves to a married woman for her sole and separate use, without providing any mode of conveying or disposing thereof, it was held in Woodrum v. Kirkpatrick (1852) 2 Swan (Tenn.) 218, that she could not convey the slaves by a bill of sale without a privy examination, and that such bill of sale was void and left the title still in her.

But notwithstanding the statute requiring the privy examination before a public officer to validate a married woman's conveyances, a bill of sale of a slave in part payment of a debt incurred for the benefit of the wife's separate estate was held valid in Womack v. Womack (1852) 8 Tex. 397, 58 Am. Dec. 119, when made voluntarily and never retracted by the wife in her lifetime. The court said: "The debt for the part payment of which

the negro was sold being then chargeable exclusively upon the separate estate of the wife, she had a right to discharge out of either the corpus or profits of said estate. She might have been sued for its recovery, and on judgment the decree would have been that the execution be levied on her separate property. On proper application this might be restrained to the proceeds first, and if they were insufficient, then to be levied on the corpus of the property; but without specific directions the levy would be made and carried into effect on the property of the wife in the same mode in which executions against property are usually enforced. If she could be sued and forced out of her property to discharge this debt, what should prevent her from its voluntary payment and from alienating a portion of her property for that purpose if such mode of payment be deemed by her advisable?"

But in Gregory v. Van Vleck (1858) 21 Tex. 40, an unacknowledged bill of sale by a husband and wife to a slave, the property of the wife, was held invalid, the court distinguishing Womack v. Womack (Tex.) supra, on the ground that the sale involved in the case at bar was not made in satisfaction of any liability of the wife, or any claim chargeable upon her separate estate, or for her benefit, or that of her family.

As to slaves, see also Allen v. Shortridge (1863) 1 Duv. (Ky.) 34; Garrison v. Fisher (1853) 26 Miss. 352, cited under I., supra.

As to bank annuities, see Sturgis v. Corp (1806) 13 Ves. Jr. 190, 33 Eng. Reprint, 266, 9 Revised Rep. 169, cited under III. a, supra.

f. Land warrants or certificates.

In Groesbeck v. Bodman (1889) 73 Tex. 287, 11 S. W. 322, a statute requiring the privy examination of a married woman separate and apart from her husband to render effectual her conveyance of land was applied to an instrument purporting to be an assignment of unlocated land certificates where in fact, prior to the so-called assignment, the certificates, by location and survey, had lost the characteristics of personal property or choses in action and become realty.

As stated above, it was held in Ballard v. Carmichael (1892) 83 Tex. 363, 18 S. W. 734, that a statute requiring a privy examination in the case of any instrument purporting to be a conveyance of land, slaves, or other effects, the separate property of the wife, made a privy examination necessary in the case of written transfers of personal property, but that a verbal transfer without privy examination was valid. It was therefore held that a receipt for a specified amount in full for the interest of a married woman and her husband in unlocated land warrants or certificates which the receipt recited had been previously transferred by them would have been invalid for want of a privy examination if it had purported to be a conveyance, but that it was admissible in evidence as an admission of an earlier parol transfer.

So far as this case held that a written transfer of an unlocated land certificate by a married woman was invalid in the absence of a privy examination, it was followed in McDaniel v. Garrett (1895) 11 Tex. Civ. App. 57, 31 S. W. 721.

As to affidavit of consent to issuance of patent to another, see Countz v. Geiger (1797) 1 Call (Va.) 190, cited under IV. g, infra.

g. Money in court.

In Ezell v. Wright (1879) 3 Lea (Tenn.) 512, where there does not seem to have been any question of privy examination involved, the court construed certain statutes as forbidding the payment out of court of the proceeds of the real or personal property of a married woman except to her in person or as she might direct on privy examination, or upon power of attorney by husband and wife, upon privy examination of the wife.

In Rice v. McReynolds (1881) 8 Lea (Tenn.) 36, it was held that the statute requiring a privy examination in such case referred only to proceeds of the wife's property when sold by order or decree of the court, or when in court, and not to the payment of a legacy in the hands of an executor, where the

money was not brought under the control of the court at all. The case involved the right of a husband who was executor of his wife's father to appropriate a legacy due the wife.

Where the purchaser at a sale in a partition proceeding who had never received a deed had an equity to have a deed sufficient to defeat an action to recover possession, it was held in Farmer v. Daniel (1880) 82 N. C. 152, that the fact that payment of her share of the purchase money to a party who was a married woman was made by the clerk and master without any privy examination did not affect such equity.

In Re Shaw (1879) 49 L. J. Ch. N. S. (Eng.) 213, 41 L. T. N. S. 670, where land in which married women had interests was sold under order of court, the court refused to permit a married woman to take her share of the proceeds as personalty without separate examination, though it was contended that such examination was unnecessary because her share was less than £200.

And in Deignan v. Deignan (1884) Ir. L. R. 13 Eq. 278, the court refused to permit the payment of money in court to the credit of a married woman without a separate examination, stating that the examination was not dispensed with by making the payment on her separate receipt and for her separate use; but where it subsequently appeared that the marriage was after the enactment of the Married Woman's Property Act, and the married woman took under an intestacy, the court decided that no such examination was necessary.

And on an application for the sanction of the court to the purchase of land by the trustees of a settlement out of funds in court arising from the sales of settled hereditaments, the separate examination of a married woman joining in the application was directed, though some doubt was expressed as to whether the statute required it, the court saying that this would be the safer course. Re Arabin (1885) 52 L. T. N. S. (Eng.) 728.

As to proceedings in court, see also Winchester v. Winchester (1858) 1 Head (Tenn.) 460, cited under III. a, supra; Re De Tabley (1863) 11 Week. R. (Eng.) 936, 8 L. T. N. S. 719, cited under III. h, infra; also the English cases cited under V. infra.

h. Miscellaneous.

In Lippitt v. Huston (1867) 8 R. I. 415, 94 Am. Dec. 115, it was held that a statute requiring a wife acknowledging a deed or instrument to be examined separately and apart from her husband, and to declare that the deed shown and explained to her by the magistrate was her voluntary act, did not apply to the acknowledgment of deeds by persons seised in fee tail, which, to convey a fee simple, were, by another statute, required to be acknowledged before the supreme court or court of common pleas, such statute making no mention of any privy examination or explanation of the instrument. In this case, however, there was a privy examination, the objection being that the certificate did not show that there was any explanation.

In Re De Tabley (Eng.) supra, on a petition for authority to grant building leases over settled estates, the court, with the consent of the trustee, dispensed with the separate acknowledgment of a married woman whose interest in the settlement was remote.

In Sampson v. McArthur (1860) 8 Grant, Ch. (U. C.) 72, it was held that the statute requiring the examination of a married woman regarding her free and voluntary consent to the alienation of her estate applied only to the alienation of real estate, and not to the alienation of terms for years, and that therefore an assignment of a term for years did not require such examination.

As to remainders, see also Prater v. Hoover (1860) 1 Coldw. (Tenn.) 544, cited under I., supra; Sturgis v. Corp (1806) 13 Ves. Jr. 190, 33 Eng. Reprint, 266, 9 Revised Rep. 169, cited under III. a, supra; Campbell v. Noble (1906) 145 Ala. 233, 41 So. 745, cited under III. d, supra.

IV. Instruments to which requirement applied.

a. Deeds.

As to deeds in general, see the vari-

ous cases dealing with deeds, cited in the other subdivisions of this note.

Under a statute requiring marriage settlements to be acknowledged as therein prescribed, a deed executed before marriage, conveying the wife's property in trust for her separate use and benefit, and acknowledged after marriage, was not properly acknowledged where the wife's privy examination was not taken. Johnson v. Walton (1853) 1 Sneed (Tenn.) 258.

Merrill v. Nelson (1872) 18 Minn. 366, Gil. 335, involved a statute providing that when any married woman should join with her husband in a deed of real estate, her acknowledgment should be taken separately, apart from her husband. The deed involved did not mention the husband, but was signed by him. The court held that a joint deed of the wife's real property was not necessary; that it was only necessary that the deed should be made with the husband's consent, and that his signature to the deed sufficiently signified such consent. It then made an extremely technical distinction between a joint deed of husband and wife and a deed by the wife with the husband's consent, and held that the statute requiring an acknowledgment separate from the husband did not apply except to a joint deed.

In Bryan v. Stump (1851) 8 Gratt. (Va.) 241, 56 Am. Dec. 139, it was held without discussion that a partition of land owned by a man and a woman by a deed executed by the man and his wife and the woman and her husband, followed by continuous possession in severalty, was a valid and binding partition, though there was no certificate of the privy examination and acknowledgment of the women.

A deed of separation whereby the wife released all right in the husband's property, when otherwise valid, was not invalid because there was no separate acknowledgment by the wife, as required by statute in the case of a conveyance of real estate. Kaiser's Estate (1901) 199 Pa. 269, 85 Am. St. Rep. 785, 49 Atl. 79.

b. Mortgages and deeds of trust.

Statutes requiring the separate examination of married women applied to a mortgage by a married woman of her separate property, especially where other statutes provided that mortgages should be included in the term "conveyance," and that a mortgage could be created only by writing executed with the formalities required in the case of a grant of real property. Tolman v. Smith (1887) 74 Cal. 345, 16 Pac. 189. The court said: "Nor do we perceive why any different rule should exist as between the acknowledgment by a married woman of a mortgage or a deed. One of the main objects of the statute in giving the power to a married woman of alienating her real property seems to have been that she should be placed in a situation where she could be independent of her husband's control and influence as to the disposition of her separate estate. He might influence her just as much to her injury in executing a mortgage to secure his debt as by inducing her to deed away her land and give him the money."

And in Wood v. Wheeler (1890) 106 N. C. 512, 11 S. E. 590, a bond and mortgage executed by a married woman were held void where they were executed without the written assent of the husband and the mortgage was unaccompanied by privy examination.

See also the various cases dealing with mortgages, cited under other subdivisions.

c. Contracts to sell land.

Under statutes requiring the privy examination of married women in connection with conveyances of land, it was usually held that contracts for the sale of land, executed without such privy examination, could not be enforced against married women. Schwarz v. Regan (1902) 64 N. J. Eq. 139, 53 Atl. 1086; Knowles v. McCamly (1843) 10 Paige (N. Y.) 342; Miltenberger v. Crowly (1856) 27 Pa. 170; Rumfelt v. Clemens (1864) 46 Pa. 455; Caldwell's Appeal (1886) 4 Sadler (Pa.) 207, 7 Atl. 211; Munk v. Weidner (1895) 9 Tex. Civ. App. 491, 29 S. W. 409.

Thus, in Schwarz v. Regan (1902) 64 N. J. Eq. 139, 53 Atl. 1086, it was held that a contract by a married woman and her husband to convey land

belonging to the woman, in order to be specifically enforced must be acknowledged in accordance with the statute requiring conveyances to be acknowledged on private examination.

And such contracts with reference to land of which a married woman had the legal title were held unenforceable when not acknowledged on privy examination in Knowles v. McCamly (1843) 10 Paige (N. Y.) 342, and Miltenberger v. Crowley (1856) 27 Pa. 170.

See also Martin v. Dwelly (1830) 6 Wend. (N. Y.) 9, 21 Am. Dec. 245, where the holding is said to be the same although the court's language seems rather to intimate that the contract is unenforceable however acknowledged.

So, in Rumfelt v. Clemens (1864) 46 Pa. 455, it was apparently assumed that a statute requiring a private examination applied to a contract for the sale of the wife's title to land.

And in Caldwell's Appeal (1886) 4 Sadler (Pa.) 207, 7 Atl. 211, it was held that a married woman could bind herself to convey real estate only in the form provided by statute; that is, by signing her name and separately acknowledging that the instrument was her act and deed, and that she executed it without coercion or compulsion, before a magistrate or other person qualified to take acknowledgments, and that an agreement to sell was ineffective when there was no acknowledgment or separate examination.

And in Munk v. Weidner (1895) 9 Tex. Civ. App. 491, 29 S. W. 409, where a married woman and her sisters sued to partition land, the community property of her mother and stepfather and the suit was compromised by a payment to them by their stepfather and the execution of a receipt for the money in full payment and satisfaction of the amount due from their mother's estate, the court, in discussing the effect of the compromise and the receipt, said that it would be a novel doctrine which would authorize a court to enforce specific performance of an oral agreement, or a written one not privily acknowledged, of a married woman to convey her separate property in land which she could herself convey only in the manner and form provided by statute.

But in Kingsley v. Gilman (1870) 15 Minn. 59, Gil. 40, the court having held that under the statute a married woman, when joined by her husband, could make a valid contract to convey her real estate, further held that a statute providing that when any married woman should join with her husband in a deed of conveyance of real estate, her acknowledgment should be taken separate and apart from her husband, and that she should acknowledge that she executed the deed freely and without force or compulsion, did not apply to executory contracts, and that as no statute required a married woman to acknowledge such a contract, no acknowledgment was necessary. The court placed its decision in part on the ground that the statute defined the word "conveyance," as used in the chapter which provided for privy examination, as not including executory contracts, but it also said that the words "deed of conveyance of real estate" would not include executory contracts, according to any ordinary or authorized use of language, and, while apparently recognizing the impropriety of permitting a married woman to contract to convey without the acknowledgment required in the case of conveyances, the court said that "in view of recent legislation in reference to the rights and powers of femes covert it is perhaps unnecessary to regard the distinction made as of special importance."

And in Warren v. Dail (1915) 170 N. C. 406, 87 S. E. 126, it was held that a statute providing that every married woman should be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but that no "conveyance" of her real estate should be valid unless made with the written assent of her husband and on her privy examination, as required by law, did not except contracts to convey, as well as conveyances, and that, while such a contract, in the absence of a privy

examination, could not be specifically enforced, damages might be recovered for its breach.

And where land was conveyed to a married woman for her sole and separate use free from the control of her husband, with full power and authority as a feme sole to sell and mortgage or convey in any manner she might see proper, it was held in Peterson v. Richmond (1893) 93 **Tenn.** 71, 23 S. W. 53, that a title bond executed by her was valid without a privy examination.

d. Contracts charging separate estate with payment of debts.

In North Carolina the power of a married woman to charge her statutory separate estate by an engagement in the nature of a contract is measured and limited by the power to dispose thereof; and hence in an action on a note or bond not expressly charged on the statutory separate real estate of a married woman, it was held that if she, with the written consent of her husband, had expressly charged such separate estate by the bond or note, it would have been of no avail without privy examination, as, under the statute, a wife and husband could not dispose of separate real estate unless the wife was examined separate and apart from the husband. Farthing v. Shields (1890) 106 N. C. 289, 10 S. E. 998.

And in Thompson v. Smith (1890) 106 N. C. 357, 11 S. E. 273, it was held, in an action on a note expressly charging separate estate, that even though there was a beneficial consideration and an express charge, a married woman could not bind her statutory separate real estate by any undertaking in the nature of a contract without privy examination.

And in Wachovia Nat. Bank v. Ireland (1898) 122 N. C. 571, 29 S. E. 835, where the judge, writing the principal opinion, said that while a privy examination was required on a conveyance of real estate, the statute as to contracts merely required that they should be executed with the written consent of the husband, the majority of the court, though concurring on other grounds, expressly refused to concur in the intimation that a married woman could bind her separate real estate without acknowledgment and privy examination, saying that to so hold would be contrary to the traditions of the common law and the adjudged cases.

But in Tennessee, the only other state in which this precise question seems to have been decided, it seems to be the rule that a married woman may charge her separate estate with the payment of debts without privy examination unless the instrument creating the separate estate contains some express restriction on her power of disposition. Menees v. Johnson (1883) 12 Lea (**Tenn.**) 561; Warren v. Freeman (1887) 85 **Tenn.** 513, 3 S. W. 513.

Thus, in Menees v. Johnson (**Tenn.**) supra, where a married woman executed an instrument charging the payment of certain debts on her separate estate, the court said that the instrument was invalid as a charge upon realty by conveyance under the statute for want of a proper privy examination, but that a married woman might make a contract in writing expressly charging her separate estate within the power conferred, independent of the statute, and that the charge would be within the power if no restriction appeared to exist; and, the separate estate being held without restriction on the power of disposition, the charge on the separate estate was upheld.

And in Warren v. Freeman (**Tenn.**) supra, a note of a married woman expressly charged on her separate estate in land held under a conveyance imposing no restriction on her power of alienation was held valid though there was no privy examination. The chancellor had held that the note would have bound a married woman's separate estate in personalty, but not in land; but the court held that there was no distinction, because a charge on the separate estate did not pass or encumber the title and was not a lien thereon.

See also Council v. Pridgen (1910) 153 N. C. 443, 69 S. E. 404; Ewing v. Smith (1811) 3 Desauss. Eq. (S. C.) 417, 5 Am. Dec. 557; Radford v. Car-

wile (1879) 13 W. Va. 572, cited under III. a, supra.

e. Power of attorney.

Powers of attorney for the conveyance of land were required to be acknowledged on privy examination where such acknowledgment was required in the case of conveyances. Dubois v. Hepburn (1836) 10 Pet. (U. S.) 1, 9 L. ed. 325; Butterfield v. Beall (1851) 3 Ind. 203; Dampf's Appeal (1881) 97 Pa. 371.

Thus, in Dampf's Appeal (Pa.) supra, it was held that a power of attorney executed by a married woman to her husband, and merely acknowledged to be her free act and deed, without examination separate and apart from her husband and an explanation of its contents, and a statement in the certificate that it was executed without coercion or compulsion, did not authorize the husband to execute an instrument treated as an assignment of her interest in her father's estate, including land, so as to bind her.

And in Dubois v. Hepburn (U. S.) supra, it was held a fatal objection to a power of attorney executed by a husband and wife, under which the attorney attempted to execute a deed of partition of land in which the wife had an interest, that there was no separate examination of the wife or any acknowledgment by her, the proof of its execution being by the oath of a subscribing witness only.

And in Butterfield v. Beall (Ind.) supra, it was held that a power of attorney to sell land should be executed by a married woman with the same formalities required in the execution of a deed of conveyance, and that the instrument involved was not so executed because in the acknowledgment it was not certified that the wives were examined without the hearing of their husbands, though it was certified that they were examined separate and apart from their husbands.

But in Adams v. Schmidt (1905) 68 N. J. Eq. 168, 60 Atl. 345, it was held that while a power of attorney by a married woman, not executed by her separate and apart from her husband, was incompetent of itself to create a lien on land, the holder thereby acquired an equity to go into a court of equity and ask that court to create a lien in his favor.

See also Reis v. Lawrence (1883) 63 Cal. 129, 49 Am. Rep. 83, cited under II. b, supra; Ezell v. Wright (1879) 3 Lea (Tenn.) 512; Rice v. McReynolds (1881) 8 Lea (Tenn.) 36, cited under III. g, supra; Munger v. Baldridge (1889) 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159, cited under V., infra.

f. Leases.

As to leases under Married Women's Acts, see V., infra.

In Harbert v. Miller (1868) 4 W. N. C. (Pa.) 325, affirming (1868) 6 Phila. 531, it was held that a statute requiring a separate examination of the wife in the case of any grant, bargain and sale, lease, release, etc., included a lease of the real estate of the wife for a term of years. It was contended that the statute, in using the word "lease," referred to conveyances by way of lease and release; but the court held otherwise. The court said: "It is quite as important to the security of the wife's interests that a lease by her and her husband should be separately acknowledged as any other species of conveyance; for a term might be made to last for centuries and thus practically a fee simple be created. It is, however, enough that the statute requires a separate acknowledgment where there is a lease either for a long or a short term. It is the only way the wife can be bound in regard to her separate estate."

But in Darden v. Neuse & T. R. S. B. Co. (1890) 107 N. C. 437, 12 S. E. 46, it was held under a statute requiring the private examination of a married woman acknowledging a conveyance or other instrument concerning her interest in land, that no private examination was necessary where a lease executed by an executrix, while unmarried, was acknowledged by her after marriage, if, under any circumstances, such an instrument would require a privy examination. The court said that such lease did not affect any individual interest in land, and that the acknowledgment merely furnished

proof of an agreement previously made, within the scope of her power.

See also Re Halliday (1871) 40 L. J. Ch. N. S. (Eng.) 687, L. R. 12 Eq. 199, 19 Week. Rep. 966, cited under II. a, supra.

g. Miscellaneous instruments.

Under a statute merely requiring a declaration of homestead to be acknowledged as conveyances affecting real estate are required to be acknowledged, a declaration of homestead by a married woman is not required to be acknowledged in the manner required by law in the case of the conveyance of her separate property, but may be acknowledged by her in the manner provided by law for acknowledgments by persons other than married women, especially where the statute expressly requires a declaration of abandonment of homestead to be executed by the wife in the same manner required by law in the case of a conveyance by her of her separate real property. Clements v. Stanton (1873) 47 Cal. 60.

A statute entitled, "An Act Regarding Chattel Mortgages," and providing that whenever household or kitchen furniture was conveyed "by chattel mortgage or otherwise, as allowed by law," the privy examination of married women should be taken, did not apply to an absolute sale by a husband, evidenced by a bill of sale, but only to conveyances by chattel mortgage or in any other way by which a lien could be fixed on the property, as by deed of trust or conditional sale. Kelly v. Fleming (1893) 113 N. C. 133, 18 S. E. 81.

As to bills of sale, see also Allen v. Shortridge (1863) 1 Duv. (Ky.) 34; Garrison v. Fisher (1853) 26 Miss. 352, cited under I., supra; Woodrum v. Kirkpatrick (1852) 2 Swan (Tenn.) 218; Womack v. Womack (1852) 8 Tex. 397, 58 Am. Dec. 119; Gregory v. Van Vleck (1858) 21 Tex. 40, cited under III. e, supra.

In Summer v. Owen (1873) 2 Baxt. (Tenn.) 26, it was held that an agreement between the wife and children of a decedent and the wives of the sons, setting aside deeds executed by him to his children and to the wife of one of the sons, was a nullity as to the wife of such son, where her privy examination was not had.

In French v. Strumberg (1879) 52 Tex. 92, it was held that an instrument whereby a daughter acknowledged an advancement from her father, and, to the extent thereof, released her father's estate, was not within the terms of a statute requiring the privy examination of married women in the case of a "deed or other writing purporting to be a conveyance."

In Betts v. Simons (1896) — Tex. Civ. App. —, 35 S. W. 50, it was held that an agreement that land of a decedent's estate should be partitioned by the probate court in which the estate was being administered, pursuant to which there was a judgment partitioning the land, was not invalid because there was no privy acknowledgment thereof by a married woman.

Where the holder of a warrant for lands devised them to his wife, who made affidavit of her consent that a patent should issue to her second husband, it was held that, as it did not appear that the oath was administered apart from him, or that any inquiry was privily made of her as to her freedom of mind, the affidavit was not sufficient evidence of her consent to support a patent to the husband, the court saying that a married woman could convey her legal title only by deed, accompanied by privy examination, and that equity would require some equivalent testimony of her freedom of mind in parting with her equitable title. Countz v. Geiger (1797) 1 Call (Va.) 190.

As to declarations of trust, see Graham v. Long (1870) 65 Pa. 383, cited under I., supra.

As to order for payment of money, see Zuccarello v. Randolph (1899) — Tenn. —, 58 S. W. 453, cited under III. e, supra.

As to assignments, see Groesbeck v. Bodman (1889) 73 Tex. 287, 11 S. W. 322, cited under III. f, supra; Sampson v. McArthur (1860) 8 Grant, Ch. (U. C.) 72, cited under III. h, supra; Dampf's Appeal (1881) 97 Pa. 371, cited under IV. e, supra.

As to receipts, see Ballard v. Carmichael (1892) 83 Tex. 363, 18 S. W. 734, cited under III. f, supra; Munk v. Weidner (1895) 9 Tex. Civ. App. 491, 29 S. W. 409, cited under IV. c, supra.

As to instrument directing trustee of wife's separate estate to convey, see Richardson v. Pulver (1872) 63 Barb. (N. Y.) 67, cited under V., infra.

V. Effect of Married Women's Acts.

Under a statute providing that the acknowledgment of the deed of a married woman may be the same as if she were sole, it is immaterial that there was no separate examination of the wife. Spurgin v. Traub (1872) 65 Ill. 170.

And it has generally been held that statutes authorizing married women to convey or dispose of their property or specified kinds of property as if unmarried dispense with the privy examination required by prior statutes. This view has been taken in Arizona (where the statute authorized married women over twenty-one to convey or transfer their land without being joined by the husband as fully as if unmarried); Arkansas (where the Constitution provided that the real and personal property of any feme covert should be her separate property and might be conveyed by her as if she were a feme sole); Iowa (where a statute provides that a married woman may convey her interest in real estate in the same manner as other persons); Michigan; New York (where the statute provided that any married woman might hold to her sole and separate use and convey and devise real and personal property in the same manner and with the like effect as if unmarried). As will be noted below, a somewhat different view was taken in California, North Carolina, Tennessee, and West Virginia.

As supporting the view generally taken, see Miller v. Fisher (1875) 1 Ariz. 232, 25 Pac. 651; Charauleau v. Woffenden (1876) 1 Ariz. 243, 25 Pac. 652; Roberts v. Wilcoxen (1880) 36 Ark. 355; Shryock v. Cannon (1882) 39 Ark. 434; Bryan v. Winburn (1884) 43 Ark. 28; Stone v. Stone (1884) 43 Ark. 160; Simms v. Hervey (1865) 19 Iowa, 273; Grapengether v. Fejervary (1859) 9 Iowa, 163, 74 Am. Dec. 336; Watson v. Thurber (1863) 11 Mich. 457; Blood v. Humphrey (1854) 17 Barb. (N. Y.) 660; Andrews v. Shaffer (1855) 12 How. Pr. (N. Y.) 441; Yale v. Dederer (1858) 18 N. Y. 265, 72 Am. Dec. 503; Richardson v. Pulver (1872) 63 Barb. (N. Y.) 67.

In Charauleau v. Woffenden (1876) 1 Ariz. 243, 25 Pac. 652, supra, the court said: "Of course there can be no doubt that, under the Act of 1871, the wife may convey her separate property by her deed without being joined by her husband. This she may do without any consultation with or consent from him. To what end, then, having executed a deed for her separate property, should she be required to go before a notary or other officer and make this acknowledgment upon an examination separate and apart from her husband, etc.? If she desires to convey her property she may do so without his knowledge. If the husband has coerced or over-persuaded her into the execution of the conveyance, and she has been submissive to his will, is she likely to assert her own wishes and make the acknowledgment when in the presence of a notary? If this safeguard, so-called, for the wife's interest, was ever, under any law for the conveyance of her separate property, of any practical value, which we very much doubt, there can be no doubt that, under a law allowing the wife to convey without being joined with her husband, and without his consent or even knowledge, such a provision is a vain thing,—a needless, useless requirement, productive of no possible beneficent result."

In Blood v. Humphrey (1854) 17 Barb. (N. Y.) 660, supra, the court says: "This statute declares that a married female may not only take and hold real estate in the same manner and with the like effect as if she were unmarried, but that she may convey the same in the same manner and with the like effect. There is no doubt, if we are to give effect to the clear and explicit language of this statute, that this is a valid acknowledgment. . . Such, I have no doubt, was the design

of the framers of this statute as well from the plain and explicit language of the section under consideration as the other provisions of the act. The legislature intended to remove the entire disability which both the common law and the statute had thrown around married women not only as regards their right to take and hold, free and independent of their husbands, but also to remove the obstacles which the law had interposed against their conveying both by grant and devise, and to place them, so far as the lands which they held in their own right are concerned, on the same basis precisely as unmarried females."

In Shryock v. Cannon (1882) 39 **Ark.** 434, it was held that where land was conveyed to the wife before the adoption of the constitutional provision which was construed as dispensing with privy examination, without any words excluding the husband's marital rights, the acknowledgment of a deed of trust executed by the husband and wife should have been taken in the absence of the husband, as required by the statute. And in Blood v. Humphrey (N. Y.) supra, the holding was limited to the conveyance of land acquired by the wife after the passage of the act.

In Simms v. Hervey (1865) 19 **Iowa,** 273, supra, the court apparently placed its decision on the ground that there was no longer any statute requiring privy examination.

Watson v. Thurber (1863) 11 **Mich.** 457, supra, involved a mortgage by the wife of her own land to secure her husband's debts, and it was held that no privy examination was required.

In Andrews v. Shaffer (1855) 12 How. Pr. (N. Y.) 441, supra, it was held that a mortgage by a married woman, not acknowledged on privy examination, was nevertheless valid as against her, but the court seems to make its actual holding somewhat doubtful by adding: "It is not important to consider whether, under the Act of 1849, any different form of acknowledgment is required from a married woman than from any other person. It is sufficient for all the purposes of this case that she may convey in the same manner and with the like effect as if she were unmarried."

Yale v. Dederer (1858) 18 N. Y. 265, 72 Am. Dec. 503, involved the power of a married woman to charge her separate estate by executing a note as surety for her husband, and the court said that the wife might dispose of land in which she held the legal title without joining with her husband in the conveyance, and without the solemnity of private examination and acknowledgment.

In Richardson v. Pulver (1872) 63 Barb. (N. Y.) 67, supra, it was held that the statute requiring a privy examination was repealed by the Married Women's Act, and that therefore, where land had been conveyed in trust for a married woman by a deed which required the trustee to convey to such person as the married woman should, by an instrument in writing, duly acknowledged, constitute and appoint to receive such conveyance, an instrument executed by the married woman, directing the trustee to convey to herself, was "duly acknowledged" without any private examination, and that this was so though the trust deed was executed before the passage of the Married Women's Act.

In Allen v. Reynolds (1873) 4 Jones & S. (N. Y.) 297, it was held that the Married Women's Acts were not repealed and the requirement for private examination revived, by a later act providing that the wife's conveyance should not be valid without the written assent of the husband, or by a still later act, again declaring that a married woman might convey her real estate with like effect as if unmarried, but omitting the words "in like manner," contained in the earlier act, and that, notwithstanding the later acts, a wife's deed was valid without private examination.

In California it was held that statutes requiring the acknowledgment of a married woman to be taken on an examination separate and apart from her husband constituted a limitation upon the powers conferred upon her by a statute providing that husband or wife might enter into any engagement or transaction with the other or

any other person respecting property which either might enter into if unmarried. Tolman v. Smith (1887) 74 Cal. 345, 16 Pac. 189.

In North Carolina a constitutional provision authorized married women to devise and bequeath, and, with their husband's consent, convey their property as if unmarried. In a case involving a deed by a married woman in which her husband did not join, but to the execution of which he consented in writing, the court said that the requirement that the husband should execute the same deed with his wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure against coercion and undue influence from him; and that these were none the less necessary though the wife retained her full, real, and personal estate. Ferguson v. Kinsland (1885) 93 N. C. 337.

In Tennessee it is held in the reported case (ROACH v. FRANCISCO, ante, 1074) that a statute emancipating married women from the disabilities of coverture and abrogating the common law on this subject, and providing that marriage shall impose no incapacity on women as to the ownership, acquisition, or disposition of property, but that every married woman shall have the same capacity to acquire, hold, enjoy, and dispose of property, real and personal, as if she were not married, does not dispense with the privy examination required by prior statutes, so far as the homestead is concerned. As will be noted, this is placed on the ground that the disability is imposed by the Constitution, prohibiting the alienation of the homestead without the joint consent of husband and wife.

In West Virginia, where the statute provided that married women might take and hold to their separate use, and convey and devise, real and personal property in the same manner and with like effect as if they were unmarried, but further provided that no married woman living with her husband should sell and convey real estate unless the husband joined in the deed, it was intimated in Radford v. Carwile (1879) 13 W. Va. 572, and expressly decided in McMullen v. Eagan (1882) 21 W. Va. 233, that the law requiring the privy examination of married women was not altered or affected. In McMullen v. Eagan, the court said that to construe the statute as dispensing with a privy examination would take from a married woman the protection against the undue influence of the husband which had always been afforded her by law and upheld by the court, and that it could not be supposed that the legislature intended to do this, as it would very largely defeat the object of the act, which was to give married women increased protection against both the husband and his creditors.

In South Carolina also it was held that the privy examination required to render a renunciation of dower effectual was not affected by a constitutional provision that real and personal property of a married woman should not be subject to sale for her husband's debts, but should be held as her separate property and might be alienated as if she were unmarried, or by a statute providing that a married woman might devise or convey her separate property in the same manner and to the same extent as if she were unmarried, and that all deeds and mortgages and legal instruments should be executed by a married woman in the same manner and should have the same legal force and effect as if she were unmarried. Townsend v. Brown (1881) 16 S. C. 91; McKenzie v. Sifford (1897) 52 S. C. 104, 29 S. E. 388; Gainey v. Anderson (1910) 87 S. C. 47, 31 L.R.A.(N.S.) 333, 68 S. E. 888. This was placed in part on the ground that neither the Constitution nor the statute applied to the wife's dower right, and in part on the ground that the legislature had subsequently, in revising the statutes, included the statute requiring a privy examination in the case of a renunciation of dower, and that, still later, though repealing other related statutes, it had left the statute requiring such examination unchanged.

In McKenzie v. Sifford (1897) 52 S. C. 104, 29 S. E. 388, supra, it was

therefore held that an instrument executed by a wife by which she conveyed to her husband all right or claim of dower in any land then owned or thereafter acquired by him, and bound herself to execute a formal renunciation of her dower on all deeds of conveyance, was void when executed without a privy examination.

Statutes not authorizing married women to "convey" or "dispose" of their property as if unmarried, but only to "hold," "own, use, and enjoy," or "hold, own, possess, and enjoy" their property, do not dispense with the privy examination formerly required. Hogan v. Hogan (1878) 89 Ill. 427; Bradshaw v. Atkins (1884) 110 Ill. 323; Armstrong v. Ross (1869) 20 N. J. Eq. 109; Harbert v. Miller (1868) 4 W. N. C. (Pa.) 325, affirming (1868) 6 Phila. (Pa.) 531; Bingler v. Bowman (1899) 194 Pa. 210, 45 Atl. 80.

Thus, it has been held that a statute giving the wife the right to "hold, own, possess, and enjoy" her property does not dispense with the statutory certificate of acknowledgment on a conveyance of her property. Hogan v. Hogan (1878) 89 Ill. 427; Bradshaw v. Atkins (1884) 110 Ill. 323. Privy examinations are, however, dispensed with in Illinois by a later statute. See Spurgin v. Traub (1872) 65 Ill. 170, cited supra.

And a statute under which a married woman held land as a feme sole was held not to dispense with the privy examination required by an earlier statute, so that a mortgage by her of land so held was void as a mortgage, in the absence of such private examination, though, like any other debt, it might in equity be charged on the separate estate. Armstrong v. Ross (1869) 20 N. J. Eq. 109. The court said: "In New Jersey the legislature has never given to a married woman the power of disposing of her estate as a feme sole except in two cases,—one, where her husband is insane or in the state prison, and the other, where they are living separate by the decree of some competent court. In all other cases it has been carefully withheld; and the courts of the state cannot ignore the fact that the proposed acts to confer such powers have more than once been rejected by the legislature. . . . There is no reason in the state of the law for the court to dispense either with the joining of the husband or the separate examination."

And in Harbert v. Miller (1868) 4 W. N. C. (Pa.) 325, affirming (1868) 6 Phila. (Pa.) 531, it was held that an act declaring that every description of property accruing to any married woman during coverture should be "owned, used, and enjoyed" by her as her separate property, and requiring the separate examination in the case of certain specified instruments, was not a substitute for an earlier statute in regard to the form of conveyances by married women, so as to dispense with the separate examination in the case of a lease not specified in the later act.

And in Bingler v. Bowman (1899) 194 Pa. 210, 45 Atl. 80, it was held that neither the Act of 1848, practically putting an end to the husband's common-law present estate in his wife's land, and assimilating her estate and possession to that of a feme sole, nor the Acts of 1887 and 1893, enlarging her right and control over her separate property, but requiring her husband to join in her deed conveying her land, changed the mode of conveyance prescribed by prior acts, an essential part of which was a separate examination and acknowledgment of the wife. The court said: "The purpose of the Act of 1770 was twofold: first, to prevent the wife from selling her land without the husband's consent; secondly, to prevent compulsion on her to make sale against her real willingness. The first object was secured by the husband's joinder in the deed; the second, by the separate examination and acknowledgment of the wife. Both are parts of the system established by the act, and both are necessarily exempted from change by the clear intent of the later acts to preserve the system intact." The court also incidentally stated that none of the recent statutes have any application to a conveyance by a man of his

own lands, and that he is still unable, if married, to pass a title clear of dower without the joint execution and separate acknowledgment of the deed by his wife.

In Fisk v. Stubbs (1857) 30 Ala. 335, it was held that a statute requiring the privy examination of married women did not apply to conveyances under a statute authorizing conveyances of the wife's separate estate by the joint deed of her and her husband. The court said that the act requiring privy examination applied by its terms to deeds by the wife, and was not applicable to conveyances of her separate estate by husband and wife under the later act; and that, as the later act included personal property and made no distinction as to the mode of acknowledgment by the husband and wife, a privy examination, if necessary at all, would be necessary in the case of chattels, and it would also be necessary that the husband be privately examined, which would be unreasonable. The court also said that the later act prescribed that the deed be executed, proved, and recorded, and not that it be acknowledged.

In Danglarde v. Elias (1889) 80 Cal. 65, 22 Pac. 69, it was held that a statute providing that the wife might, with the consent of her husband, convey her separate property, did not control the question of how she might convey it, this being governed by the statutes requiring a separate examination.

In Munger v. Baldridge (1889) 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159, the court, in discussing the power of a wife to give a power of attorney to her husband under a statute authorizing married women to bargain, sell, and convey their real and personal property, and enter into any contract with reference thereto in the same manner, to the same extent, and with like effect as married men might in relation to their property, and making no distinction between a married woman and any other person in the manner of execution or acknowledgment of a conveyance of real estate, said that "we have no enactment, as some states do, that, in making a conveyance, she must undergo a private examination by an officer to learn whether she is intimidated by her husband, or is executing the conveyance against her will."

In Robinson v. Queen (1889) 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38, it was held that a statute construed as authorizing a conveyance by a married woman of her separate estate without her husband joining with her, if the instrument creating the separate estate did not withhold that power of disposition, did not authorize such conveyance without a privy examination, as apparently prescribed in such statute.

In Hayes v. Frey (1882) 54 Wis. 503, 11 N. W. 695, it was held that a statute requiring the acknowledgment of a married woman to be taken separately was impliedly repealed by a statute "for the protection of married women in the enjoyment of their own property."

In England it is held that a statute which would have required a married woman consenting to an application to the court to confirm contracts for the sale of portions of a settled estate to be examined apart from her husband is inapplicable where she was married since the commencement of the Married Women's Property Act. Riddell v. Errington (1884) 54 L. J. Ch. N. S. (Eng.) 293, L. R. 26 Ch. Div. 320, 50 L. T. N. S. 584, 32 Week. Rep. 680.

And no examination was necessary though the woman was married before the commencement of the act, where the property was acquired after its commencement. Re Batt's Settled Estates [1897] 2 Ch. (Eng.) 65, 66 L. J. Ch. N. S. 635, 45 Week. Rep. 614.

But the Married Women's Property Act did not dispense with such examination in the case of women married prior to its commencement, except as to property acquired after its commencement. Re Harris's Settled Estates (1884) 54 L. J. Ch. N. S. (Eng.) 208, L. R. 28 Ch. Div. 171, 51 L. T. N. S. 855, 33 Week. Rep. 393.

And where the court refused to permit the payment of money in court to the credit of a married woman without

a separate examination, it subsequently held such examination unnecessary on ascertaining that the marriage was after the Married Women's Property Act, and that the married woman took under an intestacy. Deignan v. Deignan (1884) Ir. L. R. 13 Eq. 278.

A. McT.

JOHN H. STEINKOPF

v.

BERTHA STEINKOPF, Appt.

MARTHA STEINKOPF, Respt.

Wisconsin Supreme Court—March 13, 1917.

(165 Wis. 224, 161 N. W. 757.)

Divorce — division of estate and alimony.

1. Under a statute permitting a final division of the estate in lieu of alimony in a divorce proceeding, the court cannot make such division and an award of alimony in addition.

[See note on this question beginning on page 1106.]

Evidence — support of judgment — affidavits.

2. Ex parte affidavits cannot be admitted in support of the construction of a judgment, the terms of which are definite and unambiguous.

Divorce — what is division of estate.

3. Awarding the wife the life use of the homestead and the household furniture therein in fee is a final division of the estate within the meaning of a statute permitting division of the estate in lieu of alimony in a divorce proceeding.

APPEAL by defendant from an order of the Circuit Court for Milwaukee County terminating the interest claimed by her under a judgment of divorce, in property of petitioner's deceased husband. *Reversed.*

Statement by **Siebecker, J.:**

This is a petition by Martha Steinkopf, the widow of John H. Steinkopf, asking for an order terminating the interest of the defendant, Bertha Steinkopf, in the plaintiff's property as the divorced wife of John H. Steinkopf.

In 1906 the plaintiff, John H. Steinkopf, brought an action for divorce against his then wife the defendant, Bertha Steinkopf. She counterclaimed for a divorce against him. Before trial of the action the parties entered into an oral stipulation with regard to making provision for the defendant's support. After such stipulation had been made, defendant withdrew her counterclaim for divorce. The judgment in the divorce action provides that the defendant is to receive $25 per month as alimony during the term of her natural life, and that the payment thereof be charged as a lien upon certain real estate of the plaintiff. Furthermore, the judgment awards to the defendant the use of their homestead in the city of Milwaukee and the household furniture and furnishings, silverware, pictures, etc., belonging to the parties. The defendant continued to occupy the homestead, and is still occupying it; she also received payment of $25 per month up to the time this proceeding was commenced. The plaintiff married the petitioner shortly after the divorce, and died on the 9th of March, 1910.

The circuit court ordered that the payment of $25 per month to defendant be terminated, and that the real estate described in the divorce judgment be freed of all lien

of the judgment, and the defendant devested of all right, title, and interest in and to said properties. From such order, this appeal is taken.

Messrs. **Quarles, Spence, & Quarles,** for appellant:

The agreement for the payment of alimony after the husband's death was valid and cannot be abrogated.

Stratton v. Stratton, 77 Me. 373, 52 Am. Rep. 779; Miller v. Miller, 64 Me. 484; Storey v. Storey, 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329; Stone v. Bayley, 75 Wash. 184, 48 L.R.A.(N.S.) 429, 134 Pac. 820; Mansfield v. Hill, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; Wilson v. Hinman, 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236; Barnes v. Klug, 129 App. Div. 192, 113 N. Y. Supp. 325; O'Hagan v. O'Hagan, 4 Iowa 509; 14 Cyc. 488.

Messrs. **Jeger & Klingelhoefer,** for respondent:

If the judgment under consideration is one for final division of the estate, it cannot now be modified in any manner. If, however, it is a judgment for alimony, it ceases to be effective on the death of the husband.

Lally v. Lally, 152 Wis. 56, 138 N. W. 651; Norris v. Norris, 162 Wis. 356, 156 N. W. 778; Maxwell v. Sawyer, 90 Wis. 352, 63 N. W. 283; Campbell v. Campbell, 37 Wis. 206; Blake v. Blake, 68 Wis. 303, 32 N. W. 48; Guenther v. Jacobs, 44 Wis. 354; Blake v. Blake, 75 Wis. 339, 43 N. W. 144; Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028; Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798; Kurtz v. Kurtz, 38 Ark. 126; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12.

Siebecker, J., delivered the opinion of the court:

The claim is made in behalf of Bertha Steinkopf, as the divorced wife of John Steinkopf, that she is entitled to the payment of $25 per month and the use of the homestead during the term of her natural life, under the terms of the divorce judgment. The trial court held that Bertha Steinkopf's right to such payments and the use of the homestead under this judgment terminated at the death of John Steinkopf, which occurred March 9, 1910. This conclusion was evidently based on the idea that the provision of the judgment for the benefit of Bertha Steinkopf constituted an award of alimony. The conduct of the parties since the entry of the judgment to the time of this application harmonizes with the claim that they treated it as a judgment giving the divorced wife a life interest in her former husband's estate, and entitling her to receive $25 per month during her life. It is claimed that the terms of the judgment award her such an interest, and that she is entitled to enforce payment of the $25 per month, as provided therein, out of the real estate upon which it is made a charge. In the recent cases of Lally v. Lally, 152 Wis. 56, 138 N. W. 651, and Norris v. Norris, 162 Wis. 356, 156 N. W. 778, this court reviewed, after elaborate argument and full consideration, the cases in this court dealing with this subject, in the light of the provision of § 2364, Stat., conferring power on courts to adjudge support and maintenance to a divorced wife, and to divide and distribute the husband's estate between them. These adjudications clearly establish that this statute permits of awarding to a divorced wife either alimony or a portion of the husband's estate by transferring to her the title to such portion of his property as the court may find she should receive under all of the facts and circumstances of the case. It is there considered that the statute contemplates that, if any provision is made for the benefit of the divorced wife, it is to be either an award of alimony or an award of a portion of the husband's estate. See cases cited in the Lally Case. Appellant's counsel contend that the provision of the judgment in question rests upon an agreement of the parties, and hence is enforceable according to the terms of such agreement if they are embodied in the judgment, upon the same grounds that a valid agreement of parties is enforced in the law; and cite to our attention the following

as instances enforcing such relief: Stratton v. Stratton, 77 Me. 373, 52 Am. Rep. 779; Storey v. Storey, 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329; Stone v. Bayley, 75 Wash. 184, 48 L.R.A. (N.S.) 429, 134 Pac. 820. The contracts of the parties in these cases were in writing, and the judgments disclose that the courts' decrees are in accordance with and an affirmance of the agreement of the parties. Such is not the fact in the instant case. Neither the findings of fact, conclusions of law, nor the judgment refer to any writing or agreement of the parties.

The record of the divorce action so far as exhibited in this proceeding presumptively rests wholly on the facts presented before the court as evidence of the facts and circumstances relevant to the husband's estate and the wife's legal and equitable rights thereto. True, some ex parte affidavits are offered in this proceeding supporting the contention that the court awarded to the divorced wife support out of the husband's estate pursuant to a verbal agreement between the parties. This cannot now be made the basis of a construction of the terms of the judgment, which are definite and unambiguous in their meaning. An inspection of the terms of the judgment and of the findings of fact and conclusions of law upon which it rests convinces us that the court manifestly intended to accomplish two objects for the wife's benefit; namely, to award to her $25 per month, to be paid in monthly instalments during her lifetime, and to grant her a life estate in the homestead and award her all of the household furniture and furnishings in the home belonging to the parties. The judgment dissolves the bonds of matrimony. It is then adjudged: "That the said plaintiff, John H. Steinkopf, pay to said defendant, Bertha Steinkopf, or cause to be paid out of his estate, the sum of $25 per month, in monthly instalments, on the 1st day of each month during the term of her natural life, as alimony."

Evidence—support of judgment—affidavits.

The payment of this sum is charged as a lien upon a part of the husband's real estate. Another provision of the judgment is: "That in addition to such allowance said defendant, Bertha Steinkopf, be and she is hereby allowed and awarded the sole use and occupation during the term of her natural life, of the homestead and stable of said plaintiff (describing them), and that she be and is hereby awarded and allowed the household furniture and furnishings, silverware, pictures, etc., belonging to said parties."

"The statute contemplates that when a wife is given a portion of her husband's estate as a final division of his property, such portion should by the judgment be transferred and set over to her, to be and become her separate estate, subject to her control and dominion, and capable of being disposed of by her will or otherwise." If the portion so awarded is in money, it may be made in payments at stated times. "But the number of payments, their time of commencement and termination, must be fixed by the judgment. They cannot rest upon any contingency." Lally Case, 152 Wis. 60, 61, 138 N. W. 653.

It is there further declared, 152 Wis. 62: "If it be urged and conceded that a final division of property in the form of monthly payments during life or widowhood is more advantageous to the wife than the receipt of a gross estate at once, the answer is that the statute does not contemplate or permit such a judgment, and no judgment of final division not within the statute can lawfully be made."

Testing the first provision of the judgment in the case before us by these rules, it is plain that the award to pay the divorced wife $25 per month is clearly an award of alimony. The other award in the divorce judgment above quoted is, however, of an entirely different

nature, as she is thereby granted an estate in the homestead property during her life, and the household furniture and other personal property therein owned by her husband is absolutely transferred to her. These provisions meet all the calls of a final division and distribution of such estate. They cannot in any sense be regarded as alimony. We have, then, a judgment of a dual character, from which neither party has appealed to correct the irregularity of the court in dealing with the husband's obligation towards the divorced wife. Upon the whole case we are persuaded that the court intended to award a judgment making a final division and distribution of the husband's estate between the parties, and accomplished that object in so far as the judgment awards the wife a life estate in the homestead property and transfers to her all the described personal property in their home. The provision for a payment by the husband to the wife of $25 monthly during her life is not a division of the husband's estate within the calls of the statute, and hence was an irregularity in the judgment awarding final division and distribution of his estate. See the Lally Case, supra, and the Norris Case, 162 Wis. 356, 156 N. W. 778, and cases therein cited. Since, however, the husband, during his lifetime, and those beneficially interested since his death, have voluntarily paid the sums pursuant to the judgment, we need not further consider the matter. So far as the future is concerned, it drops out of the case. The defendant, Bertha Steinkopf, is entitled to hold the life estate in the homestead as her separate property in addition to the personal property awarded her. The circuit court erred in devesting the defendant, Bertha Steinkopf, of all right, title, and interest in and to the homestead property described in the divorce judgment.

Divorce—what is division of estate.

Same—division of estate and alimony.

The order appealed from is reversed, and the cause is remanded to the Circuit Court, with direction to enter an order in accordance with this opinion.

ANNOTATION.

What amounts to a "final division and distribution" of estate within statute allowing such in lieu of alimony.

A diligent search has disclosed no cases in point outside of Wisconsin.

The question whether a judgment merely decrees alimony or a division and distribution of the husband's estate may be material not only as in the reported case (STEINKOPF v. STEINKOPF, ante, 1103), as affecting the question as to the termination of the provision upon the husband's death, but also as affecting the power of the court to modify the provision after the term, such power existing if the provision is treated as alimony; otherwise if regarded as a "division and distribution."

In the reported case (STEINKOPF v. STEINKOPF) the provision as to the use and occupation of the homestead was held to prevail over the provision as to monthly payments, and to characterize the decree as one for "division and distribution," rather than alimony.

It will be observed from the results in the cases that the recitals in the decree itself, purporting to characterize it in this respect, are not conclusive. Upon this point the court in Lally v. Lally (1913) 152 Wis. 56, 138 N. W. 651, observed that "in cases of doubt great weight should be accorded the recitals in the judgment, but they cannot be permitted to override the plain commands of the statute, nor can they change the inherent qualities of the judgment rendered. If the judgment in fact makes no final division of the husband's estate, it is not a

judgment of final division though so named therein. The label may be useful in ascertaining what kind of judgment is rendered, but it is not conclusive. If the judgment rendered bears all the characteristics of a judgment for alimony, and contains none of the essential requisites of a judgment of final division, then it is of little importance what name it gives itself."

The judgments in the following cases were held to make a final division and distribution of the husband's estate under the statute involved in the reported case:

—where the decree provided as "alimony to the plaintiff, and to enable her to support, educate, and properly care for the minor children," that certain real estate of the husband, "together with all the right, title, interest, and claim of the defendant, in and to the same," was thereby "transferred, passed, and set over to the plaintiff, to have and to hold to her own use, benefit, and behoof, with the appurtenances thereto belonging or in any wise appertaining, to her heirs and assigns forever, in fee simple;" and further provided that the judgment be recorded in the registry of deeds "with the same effect as a due and proper conveyance of the title of said lands to the plaintiff." Bacon v. Bacon (1877) 43 Wis. 197;

—where it was ordered that "the said defendant pay to the said plaintiff the sum of $3,900 out of said defendant's estate as alimony, support, and maintenance, and as a full and final division, partition, and distribution of said estate." Von Trott v. Von Trott (1903) 118 Wis. 29, 94 N. W. 798;

—where it was provided that the husband pay the wife a stated sum "as and for her permanent alimony and division of property." Kistler v. Kistler (1910) 141 Wis. 491, 124 N. W. 1028.

The judgment in Lally v. Lally (Wis.) supra, which provided for the payment monthly by the husband, his heirs, executors, and administrators, of a certain sum to the wife, and that such payments should cease upon the death or remarriage of the wife, and that upon a refusal or neglect of the husband to make the adjudged payments the wife might apply to the court for an order for their enforcement, was held not to make a division or distribution of the husband's estate, as provided by the statute under consideration, since it failed to divide or distribute the estate between the parties, and did not devest and transfer the title of any thereof to the wife. The court said: "The statute contemplates that when a wife is given a portion of her husband's estate as a final division of his property, such portion should by the judgment be transferred and set over to her, to be and become her separate estate, subject to her control and dominion, and capable of being disposed of by her will or otherwise. It is true the wife's portion may be required by the court to be paid to her in any reasonable number of payments, running through a series of years, because of the hardship upon the husband to pay it in one or several payments within a short time. But the number of payments, their time of commencement and termination, must be fixed by the judgment. They cannot rest upon any contingency nor be made defeasible by remarriage. Such provisions for a number of payments, however, do not prevent the wife from ascertaining, when the judgment is rendered, just how much of the estate she gets or when she is to receive it. Nor do they prevent her from mortgaging, selling, or bequeathing her portion. Such judgment is a division within the statute, and, like an ordinary money judgment, becomes a lien upon the husband's estate, and may be enforced like any money judgment,—not by an application to the court for a further order, in his discretion, as is provided for in the judgment in question.

"Assuming, but not deciding, that the court could, as a final division of property, require the wife to take an annuity, still the payments provided for in the judgment cannot be regarded as an annuity within the meaning of the statute relating to a final division of the husband's estate. It

ceases upon remarriage. No final division of property under the statute can be made so that the wife's share reverts to the husband upon her remarriage. Whatever is given her as her share of the property remains hers forever. She cannot be made to forfeit it by remarriage,—not even if she remarries her former husband. . . . The statute requires a final division, distribution, or transfer of title. Nothing less will satisfy it." Kerwin, J., wrote a dissenting opinion, Siebecker and Timlin, JJ., concurring in the dissent.

And in the following cases the judgments were held to be merely for alimony, and not decrees for a final division and distribution:

—where a certain sum annually to the wife was provided for "as alimony for her personal support and maintenance," payable in a certain way during her natural life in case she remained unmarried, but it was provided that, in the event of her marriage, such alimony should at once terminate, notwithstanding it was declared that such alimony should "be and stand as a final division of property between the plaintiff and defendant." Kempster v. Evans (1892) 81 Wis. 247, 15 L.R.A. 391, 51 N. W. 327;

—where a judgment provided for the payment so long as the wife lived, or until she remarried, of a certain sum monthly as a "final division and distribution of the estate, both real and personal, of the defendant, pursuant to the provisions of § 2364, Wisconsin Statute," and provided that, having the sum mentioned, the wife should have "no other or further right, title, interest, or claim of any kind whatsoever against said defendant, or in or to his property, and that each and every right or interest which the plaintiff has in and to the property of the defendant be and the same is hereby devested." Norris v. Norris (1916) 162 Wis. 356, 156 N. W. 778, Siebecker and Kerwin, JJ., dissenting;

—where, after agreement of the parties in open court that the wife accept a certain sum in full of alimony and for a full share of her claim in any property of which the husband was seised during coverture, a decree was entered that the husband pay the wife the sum agreed upon the execution by her of a release in full of all her dower right that she ever had or at any time might have in any of the real estate of the husband. Blake v. Blake (1887) 68 Wis. 303, 32 N. W. 48, followed on subsequent appeal in (1889) 75 Wis. 339, 43 N. W. 144;

—where a decree was entered devesting each of the parties of all interest in the real estate owned by the other, and confirming the title in each, and providing that the husband should pay the wife a certain sum annually, and awarding the household furniture, exclusive of the library, to the wife, and vesting title thereto in her. Palica v. Palica (1902) 114 Wis. 236, 90 N. W. 165;

—where it was adjudged that the husband pay to the wife's attorney for her, as alimony, a certain sum, and to her as further alimony a further sum on a given date, and another named sum every six months, and it was also provided that, to secure the payment of the said semiannual allowance of alimony, a named firm be appointed trustee to hold certain securities, and the husband was directed to execute a mortgage on his homestead to the trustee, and to keep on deposit with the latter a stated sum, secured by mortgages. Maxwell v. Sawyer (1895) 90 Wis. 352, 63 N. W. 283;

—where the judgment allowed a gross sum to the wife, and did not expressly state that it was to be regarded as a division of the husband's property between the parties. Hopkins v. Hopkins (1876) 40 Wis. 462;

—where a judgment provided that the husband should pay the wife a stated sum in full for alimony. Thomas v. Thomas (1876) 41 Wis. 229.

J. T. W.

GEORGE LEGAULT, Appt.,
v.
JOHN MALACKER, Respt.

Wisconsin Supreme Court—June 20, 1917.

(166 Wis. 58, 163 N. W. 476.)

Animals — injury by dog — prima facie case.

1. Although proof of scienter in case of injury by a dog has been abolished by statute, proof of the fact that a person has been bitten by a dog makes a prima facie case of liability for the injury against the owner or keeper.

[See note on this question beginning on page 1113.]

Appeal — overruling demurrer — effect on second appeal.

2. The sustaining of a complaint by the appellate court against general demurrer is conclusive on subsequent appeal in favor of the right of plaintiff to maintain the action.

Parties — action for death.

3. In case a child, injured by another's negligence, is ill for several weeks before death, the action for death must be brought by his administrator, and not by his parent, under a statute providing that such action shall be brought by the personal representative, except that, in case no cause of action in favor of the estate of the deceased is shown, the action may be brought by the parents.

Animals — injury by rabid dog — liability.

4. Although the statute has abolished the necessity of proving scienter in case of injury by a dog, the owner is not liable for injury done by a rabid dog unless its condition had existed for some time, and the owner, having knowledge or means of knowledge of its condition, failed to restrain or destroy it.

(Marshall, Kerwin, and Eschweiler, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marinette County, sustaining a motion for nonsuit in an action brought to recover damages for injuries to and death of plaintiff's minor son. *Reversed.*

Statement by **Winslow**, Ch. J.:

A general demurrer to the complaint was overruled by this court upon a former appeal in the present action. 156 Wis. 507, 145 N. W. 1081. After the return of the case to the circuit court, it was brought to trial before a jury. The plaintiff's proof tended to show that he was the father of Gregory Legault, a boy nine years of age, who was bitten by a dog kept by the defendant, and thereafter died. Proof was also made of medical and funeral charges. A motion for nonsuit was made on two grounds: (1) That the action being for damages resulting from death, it must be brought by an administrator under § 4256, Wis. Stat., and (2) that no negligence was shown on the part of the defendant. The motion was sustained on the first ground, and the plaintiff appeals.

Messrs. **Lehr & Kiefer** and **Michael Levin**, for appellant:

It was not necessary for the plaintiff to show that there was negligence on the part of the defendant in the manner in which he kept his dog.

Legault v. Malacker, 156 Wis. 508, 145 N. W. 1081.

Whether or not plaintiff has a legal cause of action is no longer open to question.

Zohrlaut v. Mengelberg, 158 Wis. 392, 148 N. W. 314, 149 N. W. 280; Schenck v. Sterling Engineering & Constr. Co. 155 Wis. 220, 144 N. W. 290.

Messrs. **Eastman & Goldman,** for respondent:

It was necessary for plaintiff to show that defendant was negligent.

Harris v. Hoyt, 161 Wis. 498, L.R.A. 1916C, 344, 154 N. W. 842, 11 N. C. C. A. 1012; Morey v. Lake Superior Terminal & Transfer Co. 125 Wis. 156, 12 L.R.A.(N.S.) 221, 103 N. W. 271, 18 Am. Neg. Rep. 282; Deisenrieter v. Kraus-Merkel Malting Co. 97 Wis. 284, 72 N. W. 735; Elliott v. Herz, 29 Mich. 202.

Plaintiff has no legal cause of action.

South Bend Chilled Plow Co. v. George C. Cribb Co. 105 Wis. 445, 81 N. W. 675; Finey v. Guy, 111 Wis. 296, 87 N. W. 255; Ellis v. Northern P. R. Co. 80 Wis. 459, 27 Am. St. Rep. 44, 50 N. W. 397; Cramer v. Stone, 38 Wis. 259; Schoenleber v. Burkhardt, 94 Wis. 575, 69 N. W. 343; Mohr v. Tulip, 44 Wis. 274; Keystone Lumber Co. v. Kolman, 103 Wis. 300, 79 N. W. 224; Noonan v. Orton, 27 Wis. 300; State ex rel. Brown v. Rusk, 23 Wis. 642, McCord v. Hill, 117 Wis. 306, 94 N. W. 65.

At common law no recovery could be had for wrongful death.

Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580; Usher v. West Jersey R. Co. 126 Pa. 206, 4 L.R.A. 261, 12 Am. St. Rep. 863, 17 Atl. 597; Shawnee Gas & E. Co. v. Motesenbocker, 41 Okla. 454, 138 Pac. 790.

The action for negligently causing death is purely the creature of the statute, and must be brought in the name of the personal representative of the deceased,—that is, the executor or administrator.

Whiton v. Chicago & N. W. R. Co. 21 Wis. 308; Woodward v. Chicago & N. W. R. Co. 23 Wis. 404; Regan v. Chicago, M. & St. P. R. Co. 51 Wis. 600, 8 N. W. 292; Schmidt v. Menasha Woodenware Co. 99 Wis. 302, 74 N. W. 797; Staeffler v. Menasha Woodenware Co. 111 Wis. 487, 87 N. W. 480; Hubbard v. Chicago & N. W. R. Co. 104 Wis. 160, 76 Am. St. Rep. 855, 80 N. W. 454; Stewart v. Louisville & N. R. Co. 83 Ala. 493, 4 So. 373, 13 Am. Neg. Cas. 1; Goodwin v. Nickerson, 17 R. I. 478, 23 Atl. 12; Usher v. West Jersey R. Co. 126 Pa. 206, 4 L.R.A. 261, 12 Am. St. Rep. 863, 17 Atl. 597; Killian v. Southern R. Co. 128 N. C. 261, 38 S. E. 873; Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Louisville & N. R. Co. v. Jones, 35 Fla. 407, 34 So. 246; Cincinnati, N. O. & T. P. R. Co. v. Adams, 11 Ky. L. Rep. 833, 13 S. W. 428; Weidner v. Rankin, 26 Ohio St. 522; Clark v. Kansas City, St. L. & C. R. Co. 219 Mo. 524, 118 S. W. 40; Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733; San Antonio & A. P. R. Co. v. Mertink, 101 Tex. 165, 105 S. W. 485; Johnson v. Phœnix Bridge Co. 133 App. Div. 807, 118 N. Y. Supp. 88; Whelan v. Rio Grande Western R. Co. 111 Fed. 326; Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435, 171 S. W. 79; Florida East Coast R. Co. v. Jackson, 65 Fla. 393, 62 So. 210, 4 N. C. C. A. 215; Winfree v. Northern P. R. Co. 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273; Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; 13 Cyc. 329; 1901–13, Cyc. Ann. 329–363, 1589; 1914 Cyc. Ann. 244, note 63; Tiffany, Death by Wrongful Act, § 616; 13 Cyc. 332, note 73; Dooley v. Seaboard Air Line R. Co. 163 N. C. 454, L.R.A.1916E, 185, 79 S. E. 970; Barker v. Hannibal & St. J. R. Co. 91 Mo. 86, 14 S. W. 281; Major v. Burlington, C. R. & N. R. Co. 115 Iowa, 309, 88 N. W. 815.

There can be no recovery by the plaintiff, as father, for damages resulting from the son's death.

Jackson v. Pittsburgh, C. C. & St. L. R. Co. 140 Ind. 241, 49 Am. St. Rep. 192, 39 N. E. 663; Bligh v. Biddeford & S. R. Co. 94 Me. 499, 48 Atl. 112; People's R. Co. v. Baldwin, 7 Penn. (Del.) 383, 72 Atl. 979; Carey v. Berkshire R. Co. 1 Cush. 475, 48 Am. Dec. 616; Cooley, Torts, 15, 16, 307; Hyatt v. Adams, 16 Mich. 180; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652; Murphy v. New York C. & H. R. R. Co. 88 N. Y. 445, 5 Am. Neg. Cas. 238.

Winslow, Ch. J., delivered the opinion of the court:

The complaint in the action is the same as it was when the case was before us upon a general demurrer. The damages which it seeks to recover are the expenses of the medical treatment and the value of the boy's services during minority, and which have been lost by reason of his death. No claim is made for the value of his services during his illness. The burden of the complaint is the recovery of death damages pure and simple, under what is familiarly known as

Lord Campbell's Act. Wis. Stat. §§ 4255 and 4256.

This complaint was sustained by this court against general demurrer upon the former appeal. This means, of course, that it was deliberately held that the complaint stated a good cause of action in favor of the plaintiff. It meant also that this question is settled for this case, whether we now deem the decision right or wrong. It has become the law of the case and is not to be departed from. Ellis v. Northern P. R. Co. 80 Wis. 459, 27 Am. St. Rep. 44, 50 N. W. 397; Schoenleber v. Burkhardt, 94 Wis. 575, 69 N. W. 343.

Appeal—overruling demurrer—effect on second appeal.

It is true that the only question debated upon the former appeal was whether it was necessary to allege scienter; but the question whether the plaintiff shows himself to have any right to recover damages is directly and necessarily involved in every case of general demurrer to a complaint for damages, and the decision upon such demurrer, sustaining the complaint, necessarily decides the question of the plaintiff's right to recover damages in case he proves the facts therein stated.

Were this prior decision not in the case, it seems that, under the provisions of § 4256, supra, an action to recover death damages in such a case as this could only be brought by the administrator of the boy's estate. That section provides that such an action should be brought by the personal representative of the deceased, except that in case there be no cause of action in favor of the estate of the deceased, and the surviving persons entitled to the recovery be the husband, widow, or parents, suit may be brought directly in his, her, or their name or names. The present case does not come within the proviso because it appears that the deceased was ill for several weeks, and hence there would be an action in favor of his estate to recover for his pain and suffering. The former decision settles the law for this case, but is not to be understood as settling the law for other cases upon this question.

Parties—action for death.

The defendant argues, however, that even if this proposition be conceded, still the judgment should be sustained because the evidence shows that the dog had hydrophobia, and that there can be no recovery in such case, unless it also appears that the defendant knew that the dog was rabid, and was negligent in not keeping him confined.

Upon the former appeal we held that it was unnecessary to allege scienter, and that an allegation that the dog attacked a person who was where he might lawfully be and in the exercise of care was a sufficient allegation that the dog was vicious. This is, of course, the law of the case on this point, and we have no doubt of its being correct as a legal proposition.

Animals—injury by dog—prima facie case.

In the subsequent case of Harris v. Hoyt, 161 Wis. 498, L.R.A.1916C, 344, 154 N. W. 842, 11 N. C. C. A. 1012, we held that while the statute abolishes the necessity of alleging and proving scienter, it does not impose an absolute liability. This also seems to us to be good law. The logical result of these holdings is that, on proof of the fact that a person has been bitten by a dog, a prima facie case of liability is made against the owner or keeper; this prima facie case may be defeated if it appear either by the plaintiff's evidence or by evidence introduced by the defendant that the plaintiff brought or helped to bring the dog's attack upon himself by provoking the dog, by lack of ordinary care, or by trespass of such a nature as is calculated to induce an attack.

This we think to be correct as a general rule, but the question now presented and argued is whether it applies to the case of a dog suf-

fering from rabies, as the evidence shows was the case here. This question was met and decided by the supreme court of Michigan in the early case of Elliott v. Herz, 29 Mich. 202, where a statute in similar terms was held not to apply to the case of a rabid dog. Chief Justice Cooley said in that case that the statute "manifestly refers to a vicious and destructive habit, from indulgence in which the mischief has resulted, and is inapplicable to the case of a rabid dog. What he does in his frenzy is wholly involuntary, and there is no such thing as his being accustomed to the mischief of madness, for the frenzy itself exists but once, and terminates his life. The phraseology of the statute is not suited to such a case, and it seems to me reasonable to suppose that if the legislature had purposed to give a remedy against the owner of a rabid dog for mischief done by him, especially if it was to be punitory in its nature, such remedy would have been given in more distinct terms, and been made to depend upon the owner's misconduct or negligence."

Same—injury by rabid dog—liability.

This seems to us to be good law and good sense. It finds support in Van Etten v. Noyes, 128 App. Div. 406, 112 N. Y. Supp. 888.

In the present case it seems that the dog which bit the deceased was rabid because it is proved that the deceased died from hydrophobia resulting from the bite. It does not appear, however, whether the dog became rabid suddenly, or whether the condition had existed for some time, so that the defendant either knew or had good reason to apprehend his condition. In the former case there would be no liability under the principle of the Elliott Case, but in the latter case there might be liability if the defendant, with such knowledge or means of knowledge, negligently failed to restrain or destroy him.

Judgment reversed, and action remanded for a new trial.

Marshall, J., dissenting:

I dissent from the opinion of the court that the statutory liability of the owner of a dog for injuries by it to persons or property does not apply to mad dogs. The statute abrogates the common-law rule and does not make any exception. It was competent to make the law cover all cases, and, if its language is given full effect, it does so.

In my opinion, the court should not judicially amend the statute. The better way is to take a law, when constitutional and plain, just as it is given, and let the legislature have the responsibility for the result. I think that is the logic of Legault v. Malacker, 156 Wis. 507, 145 N. W. 1081. It may be that, if a person, by his own wrongful conduct, causes a dog to injure him, he is not entitled to the protection of the statute; but that question is not before us.

If other jurisdictions, in dealing with statutes like ours, have minimized their effect by judicially reading out of them an exception to fit such facts as we have here, I am not inclined to follow them. The experience of years has led me, more and more, to appreciate that the unambiguous words of the law-making power, within constitutional limitations, should be administered according to their plain, ordinary meaning.

As suggested by Chief Justice Graves in Elliott v. Herz, 29 Mich. 204, the liability of dogs to go mad, in many states, was a common, if not the principal, moving cause of such legislation as ours, which rebuts the idea that the legislature here did not intend to include such cases. Woolf v. Chalker, 31 Conn. 121, 133, 81 Am. Dec. 175, 1 Am. Neg. Cas. 65; Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

The history of restrictive dog laws and the reasoning found in the cases referred to are quite convincing that the presumption to be indulged in should be rather in favor of a legislative purpose to protect

against dangers from mad dogs than one not to include such dangers. As said by Chief Justice Graves: "The law . . . is so distinct and positive, and its fundamental policy seems so evident, that" I cannot, "without invading the province of the legislature, assume . . . that the condition of the dog takes the case wholly or partly out of the act. To do that would be to repeal the law in respect to the most dangerous description of dogs."

The idea that it should no more be presumed that a law, absolute in terms, like the one in question, was intended to include insane dogs, than a law in such terms as to offenses by human beings was intended to include such, does not appeal to me. From time immemorial the latter have been held incapable of offending against the criminal law, while mad dogs have been regarded as proper subjects for summary destruction, with or without legislative authority, and the keeping of dogs, unless under such conditions as to prevent injuries therefrom, has been often prohibited, and there have been instances of prohibition under all circumstances. Danger from mad dogs has been one of the most common subjects of legislative prevention. That being the greatest danger from such animals, as before indicated, it seems illogical to reason that, by general language, as in our statute, only the lesser dangers were intended, and to support it by the charity of the law in respect to insane human beings.

The only judicial authority which can be found, so far as I am advised, contrary to the foregoing, is the opinion of two justices out of four in Elliott v. Herz, supra. The dissenting opinion by Chief Justice Graves seems much more logical. The statute there was different from ours in that it provided for double damages. The court did not support its views by authority. They do not seem to have been approved in any subsequent case. The reasoning in Jenkinson v. Coggins, 123 Mich. 7, 81 N. W. 974, rather impresses me that if the question were presented anew, the doctrine of the Elliott Case would be overruled. It is cited in some late textbooks with Van Etten v. Noyes, 128 App. Div. 406, 112 N. Y. Supp. 888, as holding that there is no liability for the acts of a dog which suddenly turns mad; but the latter case did not turn on a statutory regulation, and so is not in point.

Kerwin and **Eschweiler**, JJ., concur in the above opinion by **Marshall**, J.

ANNOTATION.

Validity, construction, and effect of statute eliminating scienter as condition of liability for injury by dog or other animal.

I. Introductory, 1114.
II. Validity of statute, 1114.
III. Construction as to whether statute does eliminate scienter, 1115.
IV. Scope of statute:
a. In general, 1118.
b. Nature of injuries to which statute applies, 1118.
c. Injuries inflicted by mad dog, 1120.
d. Applicability to one keeping or harboring dog, 1121.
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e. Applicability as affected by place of injury, 1122.
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V. Operation and effect of statute:
a. Pleading, 1123.
b. Evidence, 1124.
c. Damages, 1126.
d. Miscellaneous applications of statute, 1127.
VI. Repeal of statute, 1127.

I. Introductory.

At common law the owner of an animal not naturally vicious was not answerable for an injury done by it when in a place where it had a right to be, unless it was in fact and to his knowledge vicious. The view was generally entertained, however, that the necessity of proving knowledge, on the part of the owner, of the savage propensity of the animal, was dispensed with where an injury was inflicted by an animal while trespassing on another's land. As a mere trespass by a dog was unlikely to cause an injury, this exception to the general rule was not usually applied to dogs, except where the trespass was due to the voluntary act of the dog's owner, as by taking the dog with him when himself trespassing on another's premises. 1 R. C. L. pp. 1089, 1092, 1093, 1118. Partly because of the difficulty of proving the owner's knowledge of the vicious propensities of the animal, statutes have been passed in many of the states, as well as in England and some of the Canadian provinces, dispensing with proof of such knowledge in certain cases. Most of these statutes are limited to injuries inflicted by dogs, and some of them are still further limited to injuries inflicted on sheep by dogs; but the tendency appears to be to broaden their scope, as in some states where earlier statutes applied only to injuries inflicted on sheep, later statutes have included other injuries. This note deals with the validity, construction, and effect of statutes of this character. It does not deal with the necessity of proving scienter, or the sufficiency of such proof in the absence of statute.

II. Validity of statute.

Statutes expressly or impliedly eliminating scienter as a condition of liability have been applied and enforced in many cases, but their validity has rarely been questioned, and then, in most instances, the attack has been on some other provision contained in the same statute. The question has, however, been passed upon and squarely decided in favor of the validity of the statute in Holmes v. Murray (1907) 207 Mo. 413, 17 L.R.A. (N.S.) 431, 123 Am. St. Rep. 386, 105 S. W. 1085, 13 Ann. Cas. 845. The statute involved in that case authorized the owner of any sheep or other domestic animals killed or maimed by dogs to recover from the owner or keeper of the dogs, and it was assumed in that case, as well as in other cases, that this rendered proof of scienter unnecessary. The court said: "The contention of defendant is that this section undertakes to hold him liable for the vicious habits and traits of his dog, or those harbored by him, regardless of his knowledge of their vicious character, and that the enforcement of this statute would deprive him of his property without due process of law. This is a misconception of the meaning of the constitutional provision referred to." The court quotes from an earlier case in which they had adopted Webster's well-known definition of "law of the land," and then proceeds: "There is nothing in the statute which denies the defendant any of those rights, but, upon the other hand, the defendant was duly summoned to appear and defend the suit; he was given a full and careful hearing, and after a complete inquiry as to both the law and the facts of the case, he was adjudged to pay the damage. That is all the letter or the spirit of the Constitution guaranteed unto him. The legislature in no manner attempted to deprive defendant of his property without due process of law, but simply changed the common-law rule of his liability so as to impose a stricter liability. . . . Under the doctrine thus announced, before the plaintiff would be permitted to recover damages for injury done to his sheep by vicious dogs, he would be required to prove to the satisfaction of the jury in a court duly organized and constituted to hear and determine such matters that he was the owner of the sheep, and that the defendant's dogs injured or killed them; and from the evidence the jury would have to determine the amount of the damages. This is in no sense the taking of property without due process of law, and we must therefore decide this question against the defendant."

In another case the court, though rejecting the contention that a statute imposing liability for damages done by dogs dispensed with the necessity of alleging and proving the owner's antecedent knowledge of their vicious propensities, stated incidentally that it was entirely competent for Congress to pass a law containing such a provision. Murphy v. Preston (1887) 5 Mackey (D. C.) 514, 1 Am. Neg. Cas. 75.

In Fye v. Chapin (1899) 121 Mich. 675, 80 N. W. 797, 7 Am. Neg. Rep. 67, writ of error dismissed in (1900) 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; East Kingston v. Towle (1868) 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; and Slinger v. Henneman (1875) 38 Wis. 504,—other provisions contained in the same statute were attacked, and in one of the cases the whole statute, and in another the particular provisions attacked, were held unconstitutional; but in none of the cases was there any contention that it would be unconstitutional for the legislature to dispense with proof of scienter, or eliminate scienter as a condition of liability.

III. Construction as to whether statute does eliminate scienter.

It has been decided in some cases, and apparently assumed without controversy in many more, that a statute imposing liability generally, or for specified classes of injuries inflicted by dogs, impliedly eliminates scienter as a condition of liability without any express provision to that effect. The District of Columbia appears to be the only jurisdiction in which a contrary conclusion has been reached. It has been decided or clearly assumed that the statute had this effect in Kansas, Ohio, Vermont, and New Brunswick, where the statute imposed liability for killing or injuring sheep; in Illinois and Missouri, where liability was imposed for killing, wounding, or chasing sheep or other domestic animals; in Ohio and Pennsylvania, under statutes imposing liability for all damages done by dogs; in Iowa and Kentucky, under statutes imposing liability for all damages done by dogs except when the party injured was doing an unlawful act; in Maine and Massachusetts, where the statute provided that when a dog did damage, his owner or keeper should forfeit to the person injured double the amount of damage done; in New Hampshire, both with respect to a statute requiring the town to pay losses or damages suffered by reason of the maiming, worrying, or killing of sheep, lambs, or other domestic animals by dogs, and providing that the town might recover against the keeper or owner of any dog concerned in doing the damage or occasioning the loss, and with respect to a statute providing for taxing dogs to raise a fund out of which to indemnify persons injured by them, and further providing that the owner or keeper of a dog should forfeit to every person injured by it double the amount of the damages sustained by him; and in South Carolina, under a statute making the owner or person having the care or keeping of any dog liable for double the value of all sheep killed or injured by it.

For cases so holding or assuming, see Brent v. Kimball (1871) 60 Ill. 211, 14 Am. Rep. 35; Stuber v. Gannon (1896) 98 Iowa, 228, 67 N. W. 105; Alexander v. Crosby (1909) 143 Iowa, 50, 119 N. W. 717; Forsythe v. Kluckhohn (1913) 161 Iowa, 267, 142 N. W. 225; Ballou v. Humphrey (1871) 8 Kan. 219; Koestel v. Cunningham (1895) 97 Ky. 421, 30 S. W. 970; Bush v. Wathen (1898) 104 Ky. 548, 47 S. W. 599; Faulkner v. Hall (1912) 150 Ky. 416, 150 S. W. 506 (where the dog was owned by defendant's little girl); Hussey v. King (1891) 83 Me. 568, 22 Atl. 476, 1 Am. Neg. Cas. 118; Carroll v. Marcoux (1903) 98 Me. 259, 56 Atl. 848, 15 Am. Neg. Rep. 566; Pressey v. Wirth (1861) 3 Allen (Mass.) 191; Galvin v. Parker (1891) 154 Mass. 346, 28 N. E. 244; Trompen v. Verhage (1884) 54 Mich. 304, 20 N. W. 53; Curtwright v. Crow (1891) 44 Mo. App. 563; Jacobsmeyer v. Poggemoeller (1892) 47 Mo. App. 560; Holmes v. Murray (1907) 207 Mo. 413, 17 L.R.A. (N.S.) 431, 123 Am. St. Rep. 386, 105 S. W. 1085, 13 Ann. Cas. 845; East Kingston v. Towle (1868) 48 N. H. 57,

97 Am. Dec. 575, 2 Am. Rep. 174; Orne v. Roberts (1871) 51 N. H. 110, 1 Am. Neg. Cas. 157; Job v. Harlan (1862) 13 Ohio St. 485; Gries v. Zeck (1873) 24 Ohio St. 329; Kleybolte v. Buffon (1913) 89 Ohio St. 61, 105 N. E. 192, reversing (1912) 33 Ohio C. C. 211, 14 Ohio C. C. N. S. 511; Kerr v. O'Connor (1869) 63 Pa. 341, 1 Am. Neg. Cas. 242; Cockfield v. Singletary (1868) 15 Rich. L. (S. C.) 240; Adams v. Hall (1829) 2 Vt. 9, 19 Am. Dec. 690; Smith v. Buck (1890) 29 N. B. 268.

The statute involved in Job v. Harlan (1862) 13 Ohio St. 485, supra, made the owner or harborer of any dog killing sheep liable for all damage sustained, and authorized the killing of any dog of wandering habits after notice of such habits had been given to the owner, and neglect or refusal of the owner to confine him. The court said: "It is manifest that this statute does not make the owner's knowledge of the vicious propensities of his dog a prerequisite to a recovery for the injuries done by the dog; and the inference to be drawn from the 3d section, where scienter is expressly required, is opposed to any such construction. The liability of the owner is declared in express terms and without any qualification. It is therefore obvious that the 1st section as to the subjects of recovery embraced within its provisions abrogates the rule of the common law."

Orne v. Roberts (1871) 51 N. H. 110, 1 Am. Neg. Cas. 157, supra, involved a statute taxing dogs to raise a fund out of which to indemnify persons injured by them, and providing that every owner or keeper of a dog should forfeit to every person injured by it double the amount of the damages sustained. The court said: "In case the damage is paid by the town, it has a remedy over against the owner or keeper, and obviously without regard to the fact whether the owner or keeper had or had not knowledge of the vicious character of the dog. These provisions . . . apparently originated in the idea that much damage was done by dogs for which the injured person had no remedy by reason of the practical difficulty of charging the owner with knowledge of the mischievous character of the dog, and therefore assuming that such animals were naturally dangerous, and withal of little utility, it was thought best to make the owner or keeper of such dogs liable absolutely for injuries caused by them. . . . It is not seriously controverted that, so far as respects the provisions for the recovery for the actual or single damages, it is immaterial whether the owner or keeper of the dog had notice of the vicious propensities of the animal or not; but is urged that the double damages given by the statute are in the nature of a penalty, and that to constitute a penal offense, the defendant must have kept the dog with knowledge of his vicious habits. The language of the statute, however, is explicit . . . and we perceive nothing in the nature of the case or in our previous legislation that will justify the court in qualifying these provisions by assuming that such owner's or keeper's liability must depend upon his having notice of the vicious habits of the dog."

In Smith v. Buck (N. B.) supra, the supreme court of New Brunswick said: "If it is necessary to allege a scienter in an action for damages in this province, against the owner of a dog which had maimed or killed a sheep, I do not see why the act . . . was passed, as the common law already gave a remedy to a person whose sheep were killed if the owner of the dog knew of his mischievous propensity. . . . I draw the very opposite inference from the language of our act, and think that the intention was to enlarge the common-law liability of the owners of dogs, and not merely to declare by an act of the legislature what was the law already as regards the liability of the owners of dogs for damage done by them to sheep."

In Hussey v. King (Me.) supra, the court, in discussing the necessity of alleging and proving plaintiff's due care, said: "Such being the common law, the statute now comes in, and, in the case of dogs, removes the need of alleging and proving even the scienter. It makes the owner or keeper

of a dog prima facie absolutely liable for any injury done by the animal. It leaves him where the common law left the keeper of a wild animal,—in the position of an insurer. It removes from the keeper of a dog the protection of want of notice which the common law allowed. He now keeps a dog at his peril. If the dog does an injury, the injured party has an action both at common law and under the statute. At common law . . . the gist of the action was the keeping the animal after notice of his injurious propensities. Under the statute the gist of the action is simply the keeping of the dog. The statute has made all else immaterial."

In Cockfield v. Singletary (1868) 15 Rich. L. (S. C.) 240, supra, the South Carolina court of appeals said that, under the statute, the legal responsibility of the owner for mischief done by his dog was absolute, and wholly independent of any previous mischievous propensity in the dog, or his knowledge thereof, or his exercise of any degree whatever of care and diligence in keeping it confined.

Such a statute imposes an absolute liability on the owner of the dog. Kleybolte v. Buffon (1813) 89 Ohio St. 61, 105 N. E. 192, reversing (1912) 33 Ohio C. C. 211, 14 Ohio C. C. N. S. 511.

It is not necessary to allege or prove that the owner knew of the dangerous character and habits of the dog, or that the dog was in fact accustomed to bite. Pressey v. Wirth (1861) 3 Allen (Mass.) 191, and Galvin v. Parker (1891) 154 Mass. 346, 28 N. E. 244, supra. One keeping a dog does so subject to liability for the damage it may do. Kerr v. O'Connor (1869) 63 Pa. 341, 1 Am. Neg. Cas. 242, supra.

The statute merely dispenses with proof of scienter, and does not create a new and independent cause of action. Jacobsmeyer v. Poggemoeller (1892) 47 Mo. App. 560, supra.

That, under a statute imposing liability for injuries inflicted by dogs, the owner's knowledge of the dog's vicious habits is not a condition of liability, is also held in Reg. v. Perrin (1888) 16 Ont. Rep. 446, though in that case the statute provided expressly for a recovery, whether the owner of the dog knew or did not know that the dog was vicious or accustomed to worry sheep, and the question involved was whether it was necessary that the dog in fact should have been so accustomed. It was, however, said that the provision expressly dispensing with proof of knowledge was wholly unnecessary, as it was plain from what preceded that it was intended to impose liability whether the dog had or had not a propensity of killing or injuring sheep, and whether the owner or keeper knew or did not know of such propensity.

A contrary conclusion was, however, reached by the supreme court of the District of Columbia in Murphy v. Preston (1887) 5 Mackey (D. C.) 514, 1 Am. Neg. Cas. 75. The statutory provision therein involved, making owners of dogs liable for any damage done by them to the full amount of the injury inflicted, was, however, contained in a statute codifying various provisions respecting dogs, and the court places its decision to some extent on the ground that Congress did not intend to introduce any new principle of law. The court says: "The section does not explicitly dispense with the necessity of adhering to what, up to that time, was the undoubted requirement both as to averment and proof, and the question is to be decided according to the principles which apply where the courts are called upon to construe the provisions of a statute in derogation of the principles of the common law. In such a case the new law is not to be extended beyond the necessary and unavoidable meaning of its terms, for it will not be presumed that the legislature intended to make any innovation upon the common law further than the language absolutely expresses or necessarily implies. . . . To give a literal construction to the words would frequently be to substitute the letter for the spirit of the statute. So, the provision in § 5, that the owner should be liable in damages for injuries caused by his dog, was already recognized as the law. But we see nothing

in the language of that section that can induce us to declare that the absolute right of recovery for such injuries was designed to be secured under all circumstances, as if a quiet dog should be causelessly and brutally beaten, and, yielding to the instinct of self-protection, should snap at its tormentor, or, in flying from punishment, should come in contact with some brittle property belonging to the attacking party and injure it, or if the injured party was a burglar, who had been bitten at midnight by a faithful watch dog. And yet, according to the letter of the section, the owner of the dog would be held answerable in every such case in damages to the injured party. Neither of the defenses indicated is more certainly secured to the defendant by the common law than the principle that the owner of a dog should not be held answerable unless it is averred and made to appear that he was aware of the vicious propensities of the animal, and nevertheless neglected to keep it where it could not do harm to inoffensive persons; and it requires the use of more explicit language than that used in § 5 to deprive a defendant of either of these defenses, or to prevent him from showing that the plaintiff was himself guilty of such contributory negligence as might disentitle him to recover."

Under an early Pennsylvania statute it was held in Campbell v. Brown (1852) 19 Pa. 359, that scienter must be proved, but the provisions of the statute apparently required such a holding. The statute provided that a dog worrying sheep might be killed; that if he should have been known to worry sheep and information thereof should be given to the owner, it should be the duty of the owner to kill him; and that if he did not kill him, he should make full compensation for the damage done by the dog.

Under a statute providing that, in case of injuries by dogs to other animals or persons, the owner or keeper of the dog should be liable to the owner of such property or to the person injured in double the amount of damages sustained, and that it should not be necessary, in order to sustain an action, to prove that the owner or keeper knew that such dog was accustomed to do such damage or mischief, though the statute would seem to give little support to such contention, it was contended that double damages were not authorized unless the conduct complained of was malicious or reckless; and that there could be no recovery of double damages without proof that the owner of the dog was aware of its vicious nature. The court, however, said: "We think the statute in very plain terms authorizes it. After expressly giving double damages, it then, in immediate connection, provides that 'it shall not be necessary, in order to sustain an action, to prove that the owner or keeper knew that such dog was accustomed to do such damage or mischief.' This plainly refers to the action for double damages which is given in the first part of the section." Trompen v. Verhage (1884) 54 Mich. 304, 20 N. W. 53.

IV. Scope of statute.

a. In general.

Under a statute making the owner or possessor of a dog liable for any sheep killed by such dog without previous notice to the owner or possessor that the dog was mischievous or disposed to kill sheep, the owner or possessor is liable though the dog trespasses against the owner's wishes, and without his knowledge or consent. Fairchild v. Bentley (1858) 30 Barb. (N. Y.) 148, 1 Am. Neg. Cas. 210.

On the right to recover under statutes of this character irrespective of defendant's negligence or freedom from fault, see also Palmer v. Saccocia (1912) 33 R. I. 476, 82 Atl. 265, where, however, the necessity of scienter was apparently not involved or considered.

b. Nature of injuries to which statute applies.

A statute making the owner of a dog which shall kill or wound sheep liable without notice that it was mischievous does not apply where the sheep were only chased and worried, and not killed or wounded, nor where lambs were damaged by the killing

or wounding of their mothers. And in those cases there must be proof of the scienter to support a recovery. Auchmuty v. Ham (1845) 1 Denio (N. Y.) 495; Osincup v. Nichols (1867) 49 Barb. (N. Y.) 145.

But a statute imposing liability for killing or injuring sheep rendered it unnecessary to prove scienter in a case of mere worrying, not followed by death or any physical external injury. Job v. Harlan (1862) 13 Ohio St. 485. The court said: "The word 'injure,' used in the 1st section, is certainly broad enough to include an injury by means of a chasing or worrying, although no external hurt was occasioned by it. Among the popular significations of the word as given by lexicographers are 'to do wrong or harm to,'—'to cause loss or detriment to,'—'to impair,'—'to impair soundness of health,'—'to damage and lessen the value of,'—'to make worse,' etc., and there is nothing in the context, we conceive, to show that the word was used in a more restricted sense in the statute."

A statute making the owner of animals running at large in territory where a stock law is in force liable for all damages committed by them is not limited to damages to fields and crops, but includes injury to the person, caused by horses running at large, without regard to their mischievous or vicious tendencies; and it is therefore unnecessary to allege the viciousness of the horses. Wigginton v. Bruce (1917) 174 Ky. 691, 192 S. W. 850.

A Wisconsin statute made the owner or keeper of any dog wounding, maiming, or killing any cattle, horses, sheep, or lambs, or injuring any person, liable without proving notice to or knowledge by him that his dog was mischievous or disposed to kill or worry sheep. In Kertschacke v. Ludwig (1871) 28 Wis. 430, and Slinger v. Henneman (1875) 38 Wis. 504, the court expressed doubt as to whether this dispensed with the necessity of proving scienter in any action except one for killing or worrying sheep, but on a former appeal in the reported case (Legault v. Malacker (1914) 156 Wis. 507, 145 N. W. 1081) the court said that these doubts were not well founded, and held that the statute made allegation and proof of scienter unnecessary as well in the case of personal injuries as in any other case. The provision as to scienter had apparently been amended prior to this decision, so as to dispense with notice or knowledge that the dog was mischievous, or was disposed to kill, wound, or worry horses, cattle, sheep, or lambs.

Under a statute imposing liability on the owner or keeper of any dog, injuring any person or property, or killing, wounding, or worrying any live stock, and dispensing with proof of scienter, a person attacked by a dog could recover damages for injury to his clothing as well as to his person, without proof of scienter. Schaller v. Connors (1883) 57 Wis. 321, 15 N. W. 389. The court said: "But we do not think the section should receive the limited construction sought to be put upon it. The liability for the injury mentioned in the section manifestly includes not only damages to the body of the person injured, but also to the clothes he is wearing at the time. Such wearing apparel is so personal to the individual that we cannot think the legislature intended to exclude injuries to it from the application of the section."

In England it has been held that a statute making the owner of every dog liable for injuries done by it to any cattle or sheep, and providing that it shall not be necessary to show a previous mischievous propensity, or the owner's knowledge thereof, includes horses and mares in the word "cattle." It was therefore error to grant a nonsuit in an action for injury to a mare, because of the failure to prove scienter. Wright v. Pearson (1869) L. R. 4 Q. B. (Eng.) 582. The writer of one of the opinions says: "In its primary sense there is no doubt that cattle does include horses. I see nothing to exclude its application to horses except that it is followed by the word 'sheep;' cattle would include sheep, and this perhaps might imply that cattle is intended to be used in a limited sense. I am, however, of opinion that

it includes horses, and is not intended to be confined to cows and oxen. It is a remedial act, and horses are likely to be bitten by dogs. I have come to this conclusion without being quite satisfied that I know in what sense the legislature have used the word 'cattle.'"

And under such statute, where a dog frightened a horse, causing it to bolt, the resulting damage to the horse was within the statute. Elliott v. Longden (1901) 17 Times L. R. (Eng.) 648.

Of course, as said in Van Ness v. Desheimer (1886) 2 N. Y. City Ct. Rep. 208, note, a statute dispensing with proof of scienter in the case of injury by dogs to sheep or lambs leaves the common law regarding scienter in force with respect to attacks upon other animals or upon human beings.

It has also been held that there could be a recovery under statutes of the kind involved for an injury caused by a dog jumping and barking at a horse so as to frighten it (Sherman v. Favour (1861) 1 Allen (Mass.) 191); for a personal injury caused by a dog biting plaintiff's horse, causing it to run away or kick plaintiff, under statutes imposing liability if a dog should assault, bite, or otherwise injure any person (Malafronte v. Miloni (1913) 35 R. I. 225, 86 Atl. 146; Jenkinson v. Coggins (1900) 123 Mich. 7, 81 N. W. 974); for the expenses and loss of services sustained by a father whose minor son was bit by a dog, the statute making the owner liable to any person injured (M'Carthy v. Guild (1847) 12 Met. (Mass.) 291); for injuries to sheep under the same statute (Brewer v. Crosby (1858) 11 Gray (Mass.) 29); for injuries to a boy, caused by a dog jumping upon him in a playful mood, and throwing him to the ground (Hathaway v. Tinkham (1888) 148 Mass. 85, 19 N. E. 18); for injuries to a turkey under a statute imposing liability as to specified animals or other domestic animals (Holcomb v. Van Zylen (1913) 174 Mich. 274, 44 L.R.A. (N.S.) 607, 140 N. W. 521, Ann. Cas. 1915A, 1241); for injuries to a trespassing cow upon which defendant set a dog, under a statute containing an exception with respect to injuries received while trespassing (McIntire v. Plaisted (1876) 57 N. H. 606); and for a sheep which defendant's dog worried and killed while defendant was driving a flock of trespassing sheep from his premises (Grange v. Silcock (1897) 13 Times L. R. (Eng.) 565).

While these cases do not decide whether there could be a recovery without proof of scienter, the holding that there could be a recovery under a statute dispensing with proof of scienter would seem to imply that there could be a recovery without such proof.

See also Miles v. Schrunk (1908) 139 Iowa, 563, 117 N. W. 971, where the court intimates that under a statute imposing liability as to worrying, maiming, or killing certain animals, or attempting to bite any person, there might be a recovery though the dog was not engaged in any of such acts.

Where a colt following a mare which plaintiff was leading was bitten by a dog, causing it to jump against and upset the vehicle in which plaintiff was riding, the court, in Monroe v. Rose (1878) 38 Mich. 347, seemed to doubt whether the injury came within the statute, but apparently placed its decision against plaintiff on the ground that he did not allege a cause of action under the statute because he did not follow its language.

c. Injuries inflicted by mad dog.

The reported case (LEGAULT v. MALACKER, ante, 1109) and Elliott v. Herz (1874) 29 Mich. 202, appear to be the only cases which have passed upon the applicability of statutes of this kind to injuries inflicted by mad dogs. In each case the decision is against the applicability of the statute, but in each case there is a strong dissent. The argument in support of each view appears fully in the opinions in the reported case and in the quotations therein from Elliott v. Herz (Mich.) supra.

The New York appellate division has also apparently taken the view that such a statute does not apply to injuries of this kind, though the question was not before the court, as the New York statute applied only to injuries to sheep, and the case before

the court involved the death of a cow bitten by a mad dog. The court, however, refers to the statute, and says: "We are not aware, however, that it has ever been extended so as to include a case like this, or that the courts of our state have ever held that one who owns or harbors a dog is liable in a case such as this." Van Etten v. Noyes (1908) 128 App. Div. 406, 112 N. Y. Supp. 888.

d. Applicability to one keeping or harboring dog.

At common law a person harboring a dog was liable for its act if he knew it to be vicious, but a statute imposing liability on the "owner" of the dog without regard to such knowledge does not apply to one merely harboring or keeping a dog not owned by him, and to render him liable previous knowledge of the dog's vicious character must appear. Wormley v. Gregg (1872) 65 **Ill.** 251, 1 Am. Neg. Cas. 90; Alexander v. Crosby (1909) 143 **Iowa**, 50, 119 N. W. 717.

In Alexander v. Crosby (**Iowa**) supra, the supreme court of Iowa says: "The word 'owner' alone is not of technical significance, and is to be construed according to the context and approved usage of the language. . . . As employed in this statute it evidently signifies the person to whom the dog legally belongs, for, under the modern decisions, the dog is recognized as a species of property. . . . A statute creating a liability which did not exist before ought not to be so extended as to include others than those designated or fairly within its terms. Though enacted to remedy an evil, the legislature, in doing so, may well have had in mind the difference in situation of an owner and one who merely harbors. The owner may be assumed to be familiar with the nature of his animal, and if he elects to retain a dog whose manners are such as are likely to be corrupted by listening to the 'call from the wild,' this may well be at his own risk; but to charge one who does no more than furnish shelter to a wanderer and food to the stranger at his gate, without knowledge of the bad character of his guest, and render him liable, might well be thought an ungracious recompense for kindness to 'man's best friend.' Regardless of whether the distinction suggested had controlling influence with the lawmakers, however, the statute dispenses with proof of knowledge of the mischievous propensities of the dog only in case of the owner; and to render one who merely harbors a dog liable for injury done by it, previous knowledge of his vicious character is essential to recovery."

In Wormley v. Gregg (**Ill.**) supra, the court said that it was only in a case where the declaration alleged defendant to be the owner of the dog that the allegation of knowledge and proof thereof were dispensed with, and as the declaration followed common-law precedents, and alleged that defendant kept the dog, knowing that it was vicious, scienter must be alleged and proved.

But though a statute applies only to the owner, possession and harboring are evidence of ownership. Shultz v. Griffith (1897) 103 **Iowa**, 150, 40 L.R.A. 117, 72 N. W. 445.

It should be noted that the cases just referred to involve statutes the application of which is, by their terms, limited to owners. Most statutes of this kind apply to one harboring or keeping a dog, and the question just discussed does not arise. Under such statutes, however, the question has often arisen as to who is the owner, harborer, or keeper of the dog; but cases involving this question appear to have little, if any, bearing on the question of scienter. See, however, on this question, Burch v. Lowary (1906) 131 **Iowa**, 719, 117 Am. St. Rep. 443, 109 N. W. 282; Bush v. Wathen (1898) 104 **Ky.** 548, 47 S. W. 599; Davidson v. Manning (1916) 168 **Ky.** 288, 181 S. W. 1111; McCosker v. Weatherbee (1905) 100 **Me.** 25, 59 Atl. 1019; Barrett v. Malden & M. R. Co. (1861) 3 Allen (**Mass.**) 101; Collingill v. Haverhill (1880) 128 **Mass.** 218; Boylan v. Everett (1899) 172 **Mass.** 453, 52 N. E. 541, 5 Am. Neg. Rep. 169; Jenkinson v. Coggins (1900) 123 **Mich.** 7, 81 N. W. 974; Jacobsmeyer v. Poggemoeller (1892) 47 **Mo. App.** 560;

Holmes v. Murray (1907) 207 Mo. 413, 17 L.R.A.(N.S.) 431, 123 Am. St. Rep. 386, 105 S. W. 1085, 13 Ann. Cas. 845; Adams v. Brown (1910) 140 Mo. App. 434, 124 S. W. 1065; Auchmuty v. Ham (1845) 1 Denio (N. Y.) 495.

e. Applicability as affected by place of injury.

A statute requiring every owner or keeper of any dog to forfeit to any person injured by it double the amount of damage sustained does not apply to an injury inflicted by a dog in another state into which it has strayed, and, in the absence of evidence of defendant's knowledge that the dog was accustomed to attack and bite mankind, or evidence of the law of such other state, there can be no recovery. Le Forest v. Tolman (1875) 117 Mass. 109, 19 Am. Rep. 400, 1 Am. Neg. Cas. 138. The court said: "In order to maintain an action of tort founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. . . . This statute is not a penal but a remedial statute, giving all the damages to the person injured. . . . It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping or neglecting to restrain the dog, but in the act of the dog for which the master is responsible. The defendant having done no wrongful act in this commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that state, this action cannot be maintained."

Under a statute making the owner of a dog liable to any person injured by it while traveling the highway or out of the inclosure of the owner or keeper, and providing that in such case it shall not be necessary to prove that the owner or keeper knew that the dog was accustomed to do such damage or mischief, and another statute making any person keeping or harboring a dog liable for all damages done by it in the same manner as if he were the owner, the same liability is imposed upon a keeper or harborer as upon an owner, and the keeper or harborer is not liable for the acts of the dog within his inclosure except on proof of scienter. Oldham v. Hussey (1905) 27 R. I. 366, 62 Atl. 377.

Under statutes imposing liability only for injuries inflicted by dogs outside the inclosure of their owners, it has been held that a dog was outside the inclosure of its owner or keeper when at the home of plaintiff's parents, accompanied by defendant's servants, who were visiting there; defendant's contention apparently being that plaintiff's parents were, for the time being, the keepers of the dog, and that it was within their inclosure (Fye v. Chapin (1899) 121 Mich. 675, 80 N. W. 797, 7 Am. Neg. Rep. 67, writ of error dismissed (1900) 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71); when riding in the vehicle of its owner, which was being driven by him along the street (Peck v. Williams (1903) 24 R. I. 583, 61 L.R.A. 365, 54 Atl. 381); and when on its owner's premises, which were not surrounded by any fence, hedge, ditch, or other obstruction against encroachment (Whittet v. Bretsch (1916) 39 R. I. 31, L.R.A. 1916E, 710, 97 Atl. 18). But it seems that a dog enticed away from its owner by plaintiff's father was not outside the inclosure of its owner or keeper if, at the time it injured plaintiff, it was really living at the home of plaintiff' s father (Burnham v. Strother (1887) 66 Mich. 519, 33 N. W. 410, 1 Am. Neg. Cas. 144.

f. Applicability as affected by injured person's conduct.

Some statutes of this kind impose liability except when the party injured was doing an unlawful act, or when the damage was occasioned through the fault of the person injured. The cases discussing these

statutory exceptions and related questions treated in this subdivision have made no application of their holding to the question of scienter, and they probably have no weight in determining how far, or in what cases, scienter is eliminated as a condition of liability.

As to what constitutes an unlawful act or fault of the party injured within these exceptions, see, however, Shultz v. Griffith (1897) 103 **Iowa,** 150, 40 L.R.A. 117, 72 N. W. 445; Beckler v. Merringer (1906) 131 **Iowa,** 614, 109 N. W. 185; Dillehay v. Hickey (1902) 24 **Ky.** L. Rep. 760, 69 S. W. 1095, rehearing denied in (1902) 24 Ky. L. Rep. 1220, 71 S. W. 1; Garland v. Hewes (1906) 101 **Me.** 549, 64 Atl. 914; Milliken v. Fenderson (1913) 110 **Me.** 306, 86 Atl. 174; and White v. Lang (1880) 128 **Mass.** 598, 35 Am. Rep. 402.

As to effect of the fact that plaintiff was trespassing at the time of the injury, see Woolf v. Chalker (1862) 31 **Conn.** 121, 81 Am. Dec. 175, 1 Am. Neg. Cas. 65; Carroll v. Marcoux (1903) 98 **Me.** 259, 56 Atl. 848; Riley v. Harris (1900) 177 **Mass.** 163, 58 N. E. 584, 9 Am. Neg. Rep. 47; and Peck v. Williams (1903) 24 **R. I.** 583, 61 L.R.A. 351, 54 Atl. 381.

As to contributory negligence or other act or omission of the party injured, see Kelley v. Killourey (1908) 81 **Conn.** 320, 129 Am. St. Rep. 220, 70 Atl. 1031, 15 Ann. Cas. 163; Gregory v. Woodworth (1895) 93 **Iowa,** 246, 61 N. W. 962; Stuber v. Gannon (1896) 98 **Iowa,** 228, 67 N. W. 105; Bush v. Wathen (1898) 104 **Ky.** 548, 47 S. W. 599; Wooldridge v. White (1899) 105 **Ky.** 247, 48 S. W. 1081; Hussey v. King (1891) 83 **Me.** 568, 22 Atl. 476, 1 Am. Neg. Cas. 118; Raymond v. Hodgson (1894) 161 **Mass.** 184, 36 N. W. 791, 1 Am. Neg. Cas. 130; Quimby v. Woodbury (1885) 63 **N. H.** 370; Chickering v. Lord (1893) 67 **N. H.** 555, 32 Atl. 773; Peck v. Williams (1903) 24 **R. I.** 583, 61 L.R.A. 351, 54 Atl. 381; Harris v. Hoyt (1915) 161 **Wis.** 498, L.R.A. 1916C, 344, 154 N. W. 842, 11 N. C. C. A. 1012; and the reported case (LEGAULT v. MALACKER, ante, 1109).

V. Operation and effect of statute.

a. Pleading.

Under a statute dispensing with proof that the owner of a dog knew that it was mischievous or vicious, it is unnecessary to allege that the dog was in fact mischievous or vicious; at least, where it is alleged that the person injured was in the exercise of ordinary care and at a place where he might lawfully be, as in the case of a person attacked on the highway. Pressey v. Wirth (1861) 3 Allen (**Mass.**) 191; Galvin v. Parker (1891) 154 **Mass.** 346, 28 N. E. 244; Newton v. Gordon (1888) 72 **Mich.** 642, 40 N. W. 921; Legault v. Malacker (1914) 156 **Wis.** 507, 145 N. W. 1081.

A dog attacking a person under such circumstances is necessarily vicious. Legault v. Malacker (**Wis.**) supra.

"The only reason for the averment at common law was that it was necessary to show knowledge of such fact in the defendant before plaintiff could recover. The reason of the rule requiring the averment to be made having been entirely abrogated by statute, the rule itself must be allowed to go with it; otherwise a senseless form would be perpetuated, and which, as often as taken advantage of, would prove destructive of substantial rights." Newton v. Gordon (**Mich.**) supra.

In a South Carolina case it was held that where the declaration did not charge that the wrong was done against the form of the statute, or in any other way refer to the statute, the action would be treated as a common-law action and scienter must be alleged. Cockfield v. Singletary (1868) 15 Rich. L. (**S. C.**) 240.

But in Leone v. Kelly (1905) 77 **Conn.** 569, 60 Atl. 136, 1 Ann. Cas. 947, 18 Am. Neg. Rep. 19, it was held that the failure to recite the statute or count upon it did not render the action a common-law one, so as to require instructions on the subject of scienter; and in Mitchell v. Clapp (1853) 12 Cush. (**Mass.**) 278, it was held that the statute was remedial, and that the declaration need not allege that the acts were done against the form of the statute.

A statute such as this does not create a new or independent cause of action, and therefore, where plaintiff, suing for the value of sheep killed by dogs, alleged scienter, he was not required to prove it, on the theory that otherwise he would be suing on the common-law cause of action and recovering on the statutory cause of action. Jacobsmeyer v. Poggemoeller (1892) 47 Mo. App. 560. The court said: "At common law a person could not be made liable for injuries inflicted by vicious dogs belonging to him or under his control unless the complaint averred and it was established on the trial that such owner or keeper was advised of the mischievous traits of his dogs. The statute merely dispensed with all proof of scienter, and did not undertake to create a new or independent cause of action. It merely changed the common-law rule so as to impose a stricter liability. . . . Therefore the averments in the statement to the effect that the defendant had knowledge of the vicious character of the dogs and that he negligently permitted them to run at large were surplusage and required no proof to sustain them."

b. Evidence.

Though most, if not all, of the statutes of the kind under consideration, have provided that it shall not be necessary to prove, or to allege and prove, scienter, it has apparently been assumed in most jurisdictions that such a statute eliminates scienter as a condition of liability, and does not merely change the burden of proof, leaving it open to defendant to defeat liability by disproving scienter. That such has been the assumption would seem to follow from the fact that attempts to defeat liability by disproving scienter have rarely been made, while if it were understood that this could be done, such attempts would undoubtedly have been frequently made. That defendant cannot defeat liability by disproving scienter has been expressly held in Rhode Island (Kelly v. Alderson (1896) 19 R. I. 544, 37 Atl. 12; Whittet v. Bertsch (1916) 39 R. I. 31, L.R.A.1916E, 710, 97 Atl. 18); but a contrary view has been taken in British Columbia (Nevill v. Laing (1892) 2 B. C. 100).

In Kelly v. Alderson (R. I.) supra, the supreme court of Rhode Island, in discussing a statute imposing liability for injuries inflicted by dogs on the highway, or out of the inclosure of the owner or keeper, said: "The evident purpose of the statute is to give a remedy to a person who is bitten by a dog upon a highway, without reference to the defendants' knowledge of the viciousness of the dog. In other words, if the dog gets upon the highway, the owner is liable for whatever damage he may do. It is the risk which he takes from the fact that the dog is on the highway. The statute plainly extends the liability of an owner beyond his liability at common law, which was only for habits of which he had reason to know. Testimony, therefore, that the dog had not been known to bite before, was no defense to the action, and was not admissible upon this ground. It is argued that no new liability is imposed by the statute, but only a rule of evidence which excuses the plaintiff from proving the scienter. But, if the defendant can set up in defense the fact that he did not know of the bad habits of the dog, the plaintiff must meet the testimony in rebuttal by proving that he did, which is the very thing that the statute says he need not do. The provision is not that he need not prove the fact in the first instance. He need not prove it at all. Clearly, then, testimony relating to the scienter is not admissible as a defense."

In Whittet v. Bertsch (R. I.) supra, the same court held that the previous good character of the dog, if shown, would not exempt the owner or keeper from liability, and that evidence that the dog had always been peaceable prior to the infliction of the injury would not be admissible.

But in Nevill v. Laing (B. C.) supra, the supreme court of British Columbia, in discussing a statute providing that it should not be necessary for plaintiff to aver or prove that the dog had been accustomed to bite, but that, if otherwise entitled to a verdict, he should not be deprived thereof by reason of

the absence of such averment or proof, said: "The whole gist of this action is negligence in the defendant in keeping a dangerous thing,—a thing which it is lawful for him to keep, taking proper precautions, and not (as, for instance, large quantities of dynamite or other explosives) absolutely unlawful. In order to establish negligence the plaintiff must, previously to the recent statute, have established two things beside the ownership of the dog by the defendant; viz., first, that the dog was accustomed to bite mankind; and second, that the defendant knew it. And this obligation still continues notwithstanding § 30. The only effect of that section is to shift the onus so that while in an action before the recent statute, if no evidence whatever were given on these points, the verdict must have gone for the defendant, now, if no evidence be given on either side, the verdict must go for the plaintiff. But that does not mean that the mere bite is to be conclusive evidence; i. e., that the defendant is to be precluded from showing the peaceable character of the dog or his own ignorance of any vicious propensity. I think the statute means that the bite is to be prima facie evidence only, and that the defendant may give evidence on these points to contradict this presumption. And when evidence is adduced to the jury, they are bound according to their oaths to find according to what they consider its true weight to be."

Where, under a statute, the owner of a dog killing sheep is liable whether the dog was accustomed to kill and worry sheep or not, evidence that he had killed or worried sheep previously is inadmissible. East Kingston v. Towle (1868) 48 **N. H.** 57, 97 Am. Dec. 575, 2 Am. Rep. 174. The court said: "By the statute the owner of the dog is made liable for the damage done, whether the dog was accustomed to kill and worry sheep or not. We are not acquainted with any rule of evidence which will allow the character of the dog or the fact that he had killed or worried the sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief it is not competent to prove that he had done similar mischief before, more than it would be to prove that a defendant sued for an assault and battery had beaten other men before, or the same man."

But the admission of evidence of the vicious character of a dog in attacking a team, and the owner's knowledge thereof, or evidence that a dog biting a person had previously bitten others, has been held harmless; especially where the vicious character of the dog was conclusively proved by other evidence. Sanders v. O'Callaghan (1900) 111 **Iowa**, 574, 82 N. W. 969; Meracle v. Down (1885) 64 **Wis.** 323, 25 N. W. 412.

In Sanders v. O'Callaghan (**Iowa**) supra, the supreme court of Iowa says that while the statute was evidently intended to do away with the necessity of proving scienter, there was no reason for excluding proof of the things necessary to a right of action at common law. If this means that the evidence is admissible, and not merely that its admission is harmless, it apparently conflicts with East Kingston v. Towle (**N. H.**) supra.

In Kentucky, however, evidence of scienter is apparently admissible as a basis for awarding exemplary damages. Klingman v. Smith (1890) 12 **Ky.** L. Rep. 96; Dillehay v. Hickey (1902) 24 **Ky.** L. Rep. 760, 69 S. W. 1095, rehearing denied in (1902) 24 Ky. L. Rep. 1220, 71 S. W. 1.

And in Michigan it is held that evidence tending to show defendant's knowledge of the vicious character of the dog which injured plaintiff is admissible as bearing on the question of damages, probably meaning compensatory damages. Swift v. Applebone (1871) 23 **Mich.** 252. The court said: "But we think that in any case of such injury the fact of knowledge in the owner of the vicious disposition of his dog may very properly go to the jury as one to be taken into account by them in estimating the damages; and that one who knowingly subjects every person who passes his house to the risk of being torn by a savage beast cannot demand as a right that the

recklessness of his conduct shall be excluded from the jury when compensation to the injured party is being estimated. The jury should judge of such a case in view of all the circumstances; and as the sense of injury suffered will depend very largely upon the disposition shown by the owner of the dog to respect or disregard the rights of others, it is proper that the jury know what that disposition has been. Recklessness of conduct or the want of due and reasonable care is an important element in estimating the damages in most cases of tort, and we know of no reason why this case should be made an exception. It would be absurd to hold that if defendants had instigated the dogs to commit the injury, the plaintiff's recovery should be measured by the same standard that it would have been had the attack been made without their knowledge by an animal never known to be vicious before; and if malicious conduct on their part should affect the damages, reckless conduct cannot be regarded as immaterial. The true course in such cases, we think, is to place all the facts before the jury and let their opinion of the proper compensation to be awarded be formed of them all."

But where exemplary damages are not recoverable under the statute, whether the defendant had knowledge of the dog's viciousness or not, evidence that the dog had previously bitten another person, and that defendant had knowledge thereof, was not admissible as a basis for an award of exemplary damages. Kleybolte v. Buffon (1913) 89 **Ohio** St. 61, 105 N. E. 192, reversing (1912) 33 Ohio C. C. 211, 14 Ohio C. C. N. S. 511.

And under a statute giving only compensatory damages, evidence that the dog had not been known to attack any other person was not admissible in mitigation of damages, as compensatory damages could not be lessened by such testimony. Kelly v. Alderson (1896) 19 **R. I.** 544, 37 Atl. 12.

c. Damages.

A statute creating absolute liability on the part of the owner of a dog for damages done by it regardless of knowledge or negligence on the part of the owner contemplates only compensatory damages. Puls v. Powelson (1909) 142 **Iowa**, 604, 121 N. W. 1; Auchmuty v. Ham (1845) 1 Denio (**N. Y.**) 495; Kleybolte v. Buffon (1913) 89 **Ohio** St. 61, 105 N. E. 192, reversing (1912) 33 Ohio C. C. 211, 14 Ohio C. C. N. S. 511; Kelly v. Alderson (**R. I.**) supra.

In Kleybolte v. Buffon (1913) 89 **Ohio** St. 61, 105 N. E. 192, supra, the supreme court of Ohio said: "The statute which we have quoted is in derogation of the common law in that it dispenses with scienter. The court cannot read into it anything that does not come within the clear meaning of the language used, and the statute should not be given force beyond its plain terms. It is provided that the owner of the dog which inflicts the injury shall be liable to the person damaged to the full amount of the injury done. If it had been intended that the injured party should have the right to recover exemplary or punitive damages, or any damages other than actual damages, the legislature would have made such a provision." After referring to the rule in Ohio that, in cases involving fraud, malice, or insult, the jury may award exemplary damages, the court proceeds: "But in the case at bar, none of these elements were pleaded, nor was there any averment that there was wilfulness, wantonness, or recklessness on the part of the owner. The right of recovery was based upon the provisions of § 4212–2. The liability of the plaintiff in error was imposed upon him by reason of his ownership of the dog, and the damages recoverable were the full amount of the injury done,—actual damage sustained,—and the trial court erred in permitting the recovery of punitive or exemplary damages, designated additional damages in its charge." It should be noted that in this case the trial court admitted evidence of defendant's knowledge that the dog had bitten other persons as a basis for the award of exemplary damages, but the supreme court holds that such evidence should not have been admitted, thus holding that in an action under the statute, exemplary

damages cannot be recovered at all, and not merely that they cannot be recovered without proof of scienter; but, as the court laid stress on the facts that the complaint is insufficient at common law and that the action is brought under the statute, it may be that such damages could be recovered in a common-law action on proof of scienter.

On allegation and proof that the dangerous propensity of the dog was known to the defendant before the injury complained of, punitive damages may be recovered in Kentucky. Klingman v. Smith (1890) 12 Ky. L. Rep. 96; Dillehay v. Hickey (1902) 24 Ky. L. Rep. 760, 69 S. W. 1095, rehearing denied in (1902) 24 Ky. L. Rep. 1220, 71 S. W. 1.

In New York, under a statute making the owner of a dog liable without proof of scienter, for the value of any sheep or lambs killed or wounded by the dog, it seems that the full value of the sheep or lamb may be recovered, though it be only wounded. Osincup v. Nichols (1867) 49 Barb. (N. Y.) 145.

As to the extent of liability of the owner of a dog participating with other dogs in inflicting an injury, and the apportionment of the damages between the owners of the different dogs, see Russell v. Tomlinson (1817) 2 Conn. 206; Buddington v. Shearer (1838) 20 Pick. (Mass.) 477; Nohre v. Wright (1906) 98 Minn. 477, 108 N. W. 865, 8 Ann. Cas. 1071; Auchmuty v. Ham (1845) 1 Denio (N. Y.) 425; Adams v. Hall (1829) 2 Vt. 9, 19 Am. Dec. 690; Nelson v. Nugent (1900) 106 Wis. 477, 80 Am. St. Rep. 51, 82 N. W. 287; Fox v. Williamson (1893) 20 Ont. App. Rep. 610.

As to the procedure under statutes giving double damages, see Pressey v. Wirth (1861) 3 Allen (Mass.) 191; Orne v. Roberts (1871) 51 N. H. 110, 1 Am. Neg. Cas. 157.

d. Miscellaneous applications of statute.

Some other question arising under statutes of this kind, but appearing to have no bearing on the question of scienter, will be found discussed in Prescott v. Knowles (1874) 62 Me. 277; Galvin v. Parker (1891) 154 Mass. 346, 28 N. E. 244; Fish v. Skut (1856) 21 Barb. (N. Y.) 333.

VI. Repeal of statute.

Where a statute giving a right of action without alleging scienter was repealed after a cause of action accrued and an action was commenced, but before it was tried, plaintiff could not recover without alleging scienter. The statute created a cause of action or gave a remedy where one did not exist before the enactment of the law, and its repeal with no saving clause carried with it pending actions. Kertschacke v. Ludwig (1871) 28 Wis. 430.

A. McT.

H. M. McCARTNEY et al., Plffs. in Err.,

v.

CLOVER VALLEY LAND & STOCK COMPANY.

United States Circuit Court of Appeals, Eighth Circuit—May 5, 1916.

(146 C. C. A. 623, 232 Fed. 697.)

Corporation — authority of officer — necessity of writing.

1. A statutory provision requiring authority to enter into a contract which is required to be in writing, to be itself in writing, does not apply to contracts by executive officers of a corporation.

[See note on this question beginning on page 1132.]

Contract — employment of broker — writing — letters.

2. Letters may constitute the memorandum in writing necessary to make valid a contract employing a broker to sell real estate, under a statute making

invalid such contracts unless the same or some memorandum thereof is in writing.

Corporation — act of manager — binding effect.

3. A contract employing a broker to exchange real estate belonging to a corporation, which shall be binding on it, is shown by the fact that it was signed by the managing officer of the corporation, which was in a state of suspended animation, after consultation with the members of the board of directors, that the managing officer went, at the expense of the corporation, to examine the property to be taken over, and that the exchange was consummated by formal action of the board, although no authority to act for the corporation was expressly conferred upon the managing officer.

Broker — commission — effect of prospectus.

4. The obligation of a corporation to pay for services of a broker in selling its real estate is not, if the transaction has been fully consummated, affected by a provision in its prospectus that no brokerage commission will be paid except after written contract with the corporation in respect thereto.

Same — negotiation of sale by owner — effect.

5. A broker who produces a purchaser for real estate is entitled to his commission, although he does not conclude the bargain, if the terms were to be left to negotiations between seller and purchaser, and he rendered such aid as he was asked to render, while the sale was consummated to the customer produced by him.

ERROR to the District Court of the United States for the District of Utah (Marshall, District Judge) to review a judgment in favor of defendant in an action brought to recover the reasonable value of services rendered by plaintiffs as real estate brokers. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Carland, Circuit Judge, and Amidon and Van Valkenburgh, District Judges.

Messrs. **Pierce, Critchlow, & Barrette,** for plaintiffs in error:

The contract, as expressed in the correspondence between Wallace and McCartney, is sufficient to satisfy the California Statute of Frauds, because it contains all the elements which the California statute requires.

Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81; Cody v. Dempsey, 86 App. Div. 335, 83 N. Y. Supp. 899; Curran v. Hubbard, 14 Cal. App. 733, 114 Pac. 81, 83; Baird v. Loescher, 9 Cal. App. 65, 98 Pac. 49.

George Y. Wallace had actual authority on behalf of the corporation to employ McCartney to effect a sale of the defendant's ranch.

Re Cincinnati Iron Store Co. 93 C. C. A. 122, 167 Fed. 488; Jenkins S. S. Co. v. Preston, 108 C. C. A. 473, 186 Fed. 611; Salem Iron Co. v. Lake Superior Consol. Iron Mines, 50 C. C. A. 213, 112 Fed. 241; Oakes v. Cattaraugus Water Co. 143 N. Y. 436, 26 L.R.A. 544, 38 N. E. 461; Sherman v. Fitch, 98 Mass. 64; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; Cunningham v. German Ins. Bank, 41 C. C. A. 609, 101 Fed. 980; Murphy v. W. H. & F. W. Cane, 82 N. J. L. 557, 82 Atl. 854, Ann. Cas. 1913D, 643; M. Groh's Sons v. Groh, 80 App. Div. 85, 80 N. Y. Supp. 438; Melledge v. Boston Iron Co. 5 Cush. 179, 51 Am. Dec. 59.

Even though Wallace had not been vested with a prior authority to employ plaintiffs, still the corporation would have been bound by the contract made by him, as it subsequently ratified his acts.

Hayward v. Langmaid, 181 Mass. 426, 63 N. E. 912; Clews v. Jamieson, 182 U. S. 461, 483, 45 L. ed. 1183, 1194, 21 Sup. Ct. Rep. 845.

Defendant is, by fraud and estoppel, precluded from relying upon the Statute of Frauds; and Wallace's verbal promise, made to and relied upon by plaintiffs, that the defendant would pay them 5 per cent commission and would protect them in the matter of a written contract, is alone sufficient to accomplish this result.

Goodwin v. Horne, 60 N. H. 486; Swift v. Rounds, 19 R. I. 527, 33 L.R.A. 562, 61 Am. St. Rep. 791, 35 Atl. 45; Holliday v. Perry, 38 Ind. App. 588, 78 N. E. 877; 2 Pom. Eq. Jur. p. 423, § 921; Walker v. Bruce, 44 Colo. 109,

97 Pac. 250; Hidden v. Jordan, 21 Cal. 101; Seymour v. Oelrichs, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88; Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394; Dicerson v. Colgrove, 100 U. S. 578, 580, 25 L. ed. 618, 619; Glass v. Hulbert, 102 Mass. 35, 3 Am. Rep. 418; West v. Will C. Prather & Co. 7 Cal. App. 81, 93 Pac. 892.

Messrs. **Dey, Hoppaugh, & Fabian** and **George Y. Wallace** for defendant in error.

Amidon, District Judge, delivered the opinion of the court:

The plaintiffs are real estate brokers residing at Los Angeles, California, and the defendant is a Utah corporation owning a large ranch in the state of Nevada. Several years prior to the transactions here involved the company had sold its personal property and ceased active business. The only property which it owned was the ranch, which it was desirous of selling, or exchanging for productive property. It was a close corporation, consisting in the main of four controlling stockholders. Its president was old and in poor health so that he was unable to perform the duties of his office. The chief executive officer was a Mr. Wallace, who was treasurer and a director of the company. Its correspondence in the main emanated from and was addressed to him at his private office.

The plaintiff McCartney, in the month of February, 1913, learned of the desire of defendant to sell or exchange its ranch. At the same time he learned of a party by the name of Harris, who owned a large office building in Los Angeles, which he was desirous of exchanging for ranch property. Thereupon McCartney opened correspondence with Mr. Wallace, seeking to act as a broker in effecting the exchange. The correspondence was voluminous and continuous between Mr. Wallace and Mr. McCartney from that time until the exchange was finally consummated. There was no separate formal contract, distinct from the correspondence, employing plaintiffs as brokers. It is also true that all the letters were addressed to and signed by Mr. Wallace personally. The name of the corporation was not used, nor was Mr. Wallace's official position attached to his name in any of the letters. After the exchange was effected, plaintiffs demanded their commissions, and, upon the refusal of the company to comply with the demand, the present suit was brought, seeking to recover 5 per cent upon the value of the property exchanged. The case was tried to the court without a jury, a jury having been waived in writing. The court made findings of fact and conclusions of law, and entered judgment dismissing the complaint.

The plaintiffs requested findings of fact in their favor, and saved exceptions to the refusal of the court to make such findings, as well as to the findings actually made. It is conceded that the contract is controlled by the laws of California.

The trial court based its decision upon the following statutes of that state (Civ. Code):

"Sec. 1624. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: . . . (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

"Sec. 2309. An oral authorization is sufficient for any purpose, except that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.

"Sec. 2310. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

The trial court ruled that plaintiffs failed to make out a case upon two grounds: First, that there was no contract or note or memorandum thereof in writing, subscribed by

the defendant or by its agent, employing plaintiffs as brokers. Second, that Wallace, as agent of the corporation, had no written authority empowering him to employ the plaintiffs.

We think the decision was wrong upon both grounds. The correspondence is an ample note or memorandum of the contract employing plaintiffs to satisfy § 1624 of the California Code. It has been the uniform holding of the courts of that state that this statute does not require any formal contract. The "writing" which it demands may be embodied in letters and telegrams. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent. Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130, 131; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81; Naylor v. Adams, 15 Cal. App. 548, 115 Pac. 335. These decisions are in accord with the general rule on the subject in this country and England. Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950.

Contract—employment of broker—writing—letters.

Was the contract expressed in these letters the contract of the corporation? As already stated, they were signed by Mr. Wallace individually, and there was no power of attorney or resolution of the board of directors, formally authorizing him to employ plaintiffs. The evidence, however, shows that the corporation was in a state of suspended animation. There had not been a meeting of its stockholders since 1902. The directors then elected simply continued in office. The directors seldom met. Their action was usually taken by personal conferences among the members of the board, or by correspondence. The board consisted of Mr. Noble, the president, Mr. Wallace, the treasurer, Mr. Flowers, the secretary, who, however, had only a nominal interest; Mr. Stone, who resided in Wyoming, and Mr. Lyman, who resided in Omaha, Nebraska. Mr. Wallace testified that all the letters which he received from the plaintiff McCartney, and all the letters which he wrote to him, were submitted to the other members of the board, and fully canvassed by them, and the entire negotiation had their approval. At the instance of the other members of the board, Mr. Wallace went to Los Angeles to examine the office building which was to be exchanged for the ranch, and to confer with Mr. McCartney and the owner of the building in regard to the exchange. Mr. McCartney accompanied Mr. Harris the owner of the building, to inspect the ranch, at the instance of Mr. Wallace. Mr. Wallace's expenses incurred in these matters were paid by the corporation. The exchange which was brought about through the plaintiffs' agency was consummated by the formal action of the board, and it thereby accepted the benefit of their services. We think this evidence established a contract binding upon the defendant.

Corporation—act of manager—binding effect.

In our judgment § 2309 of the California Code requiring an agent's authority to execute a contract in writing to be itself in writing, does not apply to the executive officers of a corporation. It has never been the practice to require powers of attorney to confer authority upon such agents. We think the statute was intended to apply to agents proper; that is, persons who were not officers of the corporation. The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself. It was early decided that directors, though they are only agents of the corporation, are exempt from the rule which requires the authority of an agent to be in writing in order to vest him with power to execute a deed. Burr v. M'Donald, 3 Gratt. 215; Beckwith v. Windsor

Same—authority of officer—necessity of writing.

Mfg. Co. 14 Conn. 594; Despatch Line of Packets v. Bellamy Mfg. Co. 12 N. H. 205, 37 Am. Dec. 203.

Let it be once established that the making of the contract is within the scope of the officer's authority, then no separate writing is required from the board or the stockholders to meet the requirements of the Statute of Frauds. There has been much discussion in the courts as to the implied authority possessed by the different executive officers of a corporation. The cases on the subject are collected in the last edition of Cook on Corporations, §§ 715 et seq. The point at issue, however, in those cases, was not the form of the authority, but its extent. Nothing is said in any of them about the Statute of Frauds, although many of them involve deeds and mortgages of real estate, so that the power of an independent agent to act on behalf of the corporation could only have been given by a written power of attorney. The courts have never held, so far as we can discover, that the power of executive officers to execute contracts which would fall within the Statute of Frauds must be in writing. Counsel has cited us to no such case, and we have been unable to discover any. It has frequently been held that authority from the board to an executive officer to execute a deed or mortgage on behalf of the corporation can be shown by parol. If the matter was controlled by the Statute of Frauds, this, of course, could not be done. Boggs v. Lakeport Agri. Park Asso. 111 Cal. 354, 43 Pac. 1106; Northwestern Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584; Murray v. Beal, 23 Utah, 548, 65 Pac. 726. There are numerous authorities in which deeds and mortgages, executed on behalf of corporations by executive officers, without any resolution of the board, or any authority in writing, have been sustained. Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; G. V. B. Min. Co. v. First Nat. Bank, 36 C. C. A. 633, 95 Fed. 23; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309; Missouri P. R. Co. v. Sidell, 14 C. C. A. 477, 35 U. S. App. 152, 67 Fed. 464; First Nat. Bank v. G. V. B. Min. Co. 89 Fed. 439; Alaska & C. Commercial Co. v. Solner, 59 C. C. A. 662, 123 Fed. 855; Galbraith v. First Nat. Bank, 137 C. C. A. 194, 221 Fed. 386; Zihlman v. Cumberland Glass Co. 74 Md. 303, 22 Atl. 271; Starwich v. Washington City Glass Co. 64 Wash. 42, 116 Pac. 459, Ann. Cas. 1913A, 262; Alton Mfg. Co. v. Garrett Biblical Inst. 243 Ill. 298, 90 N. E. 704; Miller v. Bellamore Armored Car & Equipment Co. 86 Conn. 548, 86 Atl. 13; Ismon v. Loder, 135 Mich. 345, 97 N. W. 769; Smith v. Bank of New England, 72 N. H. 4, 54 Atl. 385; Indiana Bermudez Asphalt Co. v. Robinson, 29 Ind. App. 59, 63 N. E. 797; Burke v. Sidra Bay Co. 116 Wis. 137, 92 N. W. 568; Melledge v. Boston Iron Co. 5 Cush. 158, 179, 51 Am. Dec. 59. The rule is stated as follows by Cook, in the last edition (7th) of his work on Corporations (vol. 3, p. 2471): "A corporation may enter into a written contract, under seal, without a formal vote or written entry of a vote by the directors. Where the directors are present, and all assent to the execution of the contract, this is sufficient."

Here the employment of the plaintiffs was known to and approved by the stockholders of the corporation and the members of its board of directors. That approval was given in the manner in which the corporation, which had ceased its active business, had been accustomed to act. The board of directors were fully informed of the employment, and encouraged Mr. Wallace to go forward with the negotiations and to consummate the transaction, if possible. Finally, the board accepted the result of plaintiffs' employment and carried out the exchange. The corporation thus received, with full knowledge, the benefit of the plaintiffs' services. We think the contract of employ-

ment, under such circumstances, was as binding upon the corporation as if it had been authorized by formal vote of the board; and this is in accord with numerous decisions of the courts. Cunningham v. German Ins. Bank, 41 C. C. A. 609, 101 Fed. 977; First Nat. Bank v. G. V. B. Min. Co. (C. C.) 89 Fed. 439; Re Cincinnati Iron Store Co. 93 C. C. A. 122, 167 Fed. 486; Galbraith v. First Nat. Bank 137 C. C. A. 194, 221 Fed. 386; Thomp. Corp. § 1409.

Some time previous to the employment of the plaintiffs, the corporation issued a prospectus which closed with the following language: "No brokerage commission will be paid except after written contract with the Clover Valley Land & Stock Company with respect thereto."

Plaintiffs had this prospectus before them, and knew of the provision. We do not think, however, that this impairs their right to compensation. The provision quoted relates to executory contracts. It has nothing to do with the payment for services which had been fully rendered and accepted by the corporation. After the services had thus been rendered and accepted, there was no occasion for any contract to pay for them. The law imposed the duty.

Broker—commission—effect of prospectus.

A distinction should be drawn in this case between two classes of employment of real estate brokers. If the terms of the sale or exchange are specifically fixed in advance, and the broker undertakes to find a purchaser who will take the property upon the prescribed terms, then he is entitled to no commission unless he finds such a purchaser. The transaction here involved is not of that class. Here the terms of the exchange or sale of the ranch were to be left to negotiations between the defendant company and the purchaser produced by the broker. When that is the nature of the employment, if the broker produces a customer, and renders such aid as he is asked to render in consummating the sale, or exchange, then, if the vendor of the property accepts the purchaser and consummates the sale, or exchange, he becomes liable for a reasonable compensation or brokerage. That is the nature of the transaction involved in the present case.

Same—negotiation of sale by owner—effect.

It is hardly necessary to add that our reversal of the judgment of the trial court cannot properly be treated as an intimation that the commissions claimed in the complaint are a reasonable compensation for plaintiffs' services. That question is remitted to the trial court for its determination.

The judgment of the trial court is reversed, with directions to grant a new trial.

ANNOTATION.

Applicability to corporate officers and employees of statute requiring agent's authority to be in writing.

In accord with the decision in the reported case (McCARTNEY v. CLOVER VALLEY LAND & STOCK CO. ante, 1127), the view has been taken in other cases that the statutory provisions under consideration do not apply, where corporate officers attempt to enter into contracts for the corporation.

Thus, in Henry v. Black (1904) 210 Pa. 245, 105 Am. St. Rep. 802, 59 Atl. 1070, it was held that a stockholder and treasurer of a realty corporation needed no written authority from the corporation to take an option of real estate. It appeared in this case that the officer took an option in his own name and, together with a director, sold the property to the plaintiff, substituting the corporation as the vendor, and receiving a commission from the original owner; and that subsequently the treasurer attempted to

take a conveyance of the property in his own name, and sell to another. In upholding the first sale by the treasurer, the court said: "The Statute of Frauds does not protect a fraud of that character. That a corporation which can only conduct its business by and through its officers and employees must show, whenever called upon, a written authority to that officer to do that particular act, and, when that officer, acting for the company, executes a written contract by which the corporation is to receive the benefit of the first act performed by its officer, before it can be held up to that contract, must show a written authority, would be to stretch the inhibition of the statute far beyond anything contemplated by its framer. Much stress is laid in the argument of defendants' counsel on the entire absence of any writing showing that Coyle was the agent of the Union Realty Company in the transactions. But the business of the company was to take options for the sale of real estate; Coyle was one of its officers and employees, employed in conducting its business; when he took the option from Mrs. Black she agreed to allow his company a commission of $10,000 on a sale at the optional price; with Mrs. Black's written option, Coyle and Ewing offer the property for sale, at Mrs. Black's price, to Mrs. Henry; she accepts, and the Union Realty Company, not Coyle, sells to her; within a very few days Coyle, in the face of the written contract of his company to sell to Mrs. Henry, which he assisted in making, sells the property, for an additional fee to himself, to Mellon. What clearly results from these facts? A trust in Coyle in favor of his company, a palpable trust ex maleficio. It is immaterial that the realty company is not here asserting the trust in this suit; it asserted its title under the right which came to it through Mrs. Black's option, by its written contract of sale to Mrs. Henry. All its rights passed by that sale to her, and she can effectively assert them in spite of the quiescence of the realty company."

And in Riviera Realty Co. v. Henry (1913) 144 N. Y. Supp. 790, where a statute provided that an estate or interest in real property, other than a lease for a term not exceeding one year, could not be created unless by conveyance in writing subscribed by the person, "or by his lawful agent, thereunto authorized in writing," it was apparently recognized that an officer of a corporation might execute a valid lease, although not authorized in writing. The actual holding in this case, however, was that a valid lease by a corporation was not established, where it was merely shown that the lease was signed in the corporate name, followed by the signature of a certain person, and there was no evidence introduced to explain the signature and show that the person was an officer of the corporation, or an agent authorized in writing.

But in Clement v. Young-McShea Amusement Co. (1905) 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82, reversing (1905) 69 N. J. Eq. 347, 60 Atl. 419, where a statute provided that all leases created by parol, and not put in writing and signed by the parties, "or their agents thereunto lawfully authorized by writing," should have the force of leases at will only, it was held that a lease signed by the owner of a large majority of the stock of a corporation, of which he was a director, treasurer, and manager, would only have the force of a lease at will, because his authority was not conferred by writing. In discussing the right of the person dealing with such officer to assume his authority to execute a lease for a term of ten years, the court said: "Both the complainants, in now contending for the enforcement against the company of a contract made with Young as its agent, must assume the responsibilities growing out of that contention, and must show that in dealing with him as agent they bound the company as principal. The transaction between Young, as agent, and the complainants, was the delivery and acceptance of a lease for ten years, with the ancillary and incidental covenants. To render that transaction valid, either in law or equity, against Young's principal, his

authority must have been in writing; and, where a written authority is required by the very nature of the transaction, it is the duty of persons dealing with the agent to make inquires as to the nature and extent of the authority, and to examine it. Story, Agency, § 73. This, of course, implies that third parties have no right to assume the existence of such authority, when none is produced. It would be unreasonable to hold that an agent whose agency must, under a legislative rule of public policy, like the Statute of Frauds, be created by writing, might be dealt with as if such writing existed, without any effort to ascertain its existence. Equally unreasonable would it be to hold that an agent appearing to have merely unwritten authority to make leases, which under such a rule cannot, either at law or in equity, bind his principal for more than three years, may yet make a contract incidental or ancillary to a lease, which, in equity, will bind the principal for a longer period, in the discretion of the agent. These considerations prevent us from adjudging that the complainants had a right to assume that Young had the authority necessary to maintain their contract against the company."

The provisions under consideration, requiring agents' authority to be in writing, are held to apply to agents proper of a corporation, who are not its officers. Thompson v. New South Coal Co. (1903) 135 **Ala.** 630, 62 L.R.A. 551, 93 Am. St. Rep. 49, 34 So. 31; Sigmund v. Newspaper Co. (1899) 82 **Ill.** App. 178; Davis Bldg. Co. v. Schoenfeld (1916) 158 **N. Y.** Supp. 727.

The general rule was recognized in Donovan v. P. Schoenhofen Brewing Co. (1901) 92 **Mo.** App. 341, that, where a contract for a lease for more than a year is made with an agent, he must be authorized in writing; but this rule was held inapplicable where an agreement for a lease was made by the general agent of a corporation. The court here said: "Where the written contract for a lease for more than one year is made with an agent, and he was not authorized in writing, that renders the contract nonenforceable. For, construing §§ 3414 and 3418, Revised Statutes 1899, of the Statute of Frauds together, the law is that, while an agent can make a contract leasing lands and tenements for less than one year without authority in writing, he cannot do so for more than one year. Hoover v. Pacific Oil Co. (1890) 41 **Mo.** App. 317. The contract in this case was made with defendant's agent Dienger. But from the very necessity of the thing, that law may not have room for application, where the agent is the agent of a corporation, and the act of contracting for a lease, or of leasing, is such an act as is within the scope of his authority. For a corporation can only act through agents, and when the act of the agent is within the limit of the authority which his agency covers, it is the act of the corporation itself, and the agent may act as though he was the principal. Smith v. Missouri P. R. Co. (1895) 74 **Mo.** App. 55. In this case it appears from defendant's letter, introduced in evidence, that Dienger was its 'general agent for the West,' and that he had authority to sign a lease referred to in the letter, but not the one in question. The evidence in the case, including the letter, shows that Dienger's agency was to look after the sale of defendant's beer, which involved the renting of places where it might be sold. We, therefore, hold that in order to make a valid agreement for a lease, or the lease itself, Dienger did not need authority in writing."

The supreme court of Missouri, however, in a subsequent case, held the provision that no contract for the sale of land made by an agent should be binding, unless the agent was authorized in writing to make the contract, to be applicable to corporations equally with others (Lindhorst v. St. Louis Protestant Orphan Asylum (1910) 231 **Mo.** 379, 132 S. W. 666); and, in rejecting the conclusion in Donovan v. P. Schoenhofen Brewing Co. (**Mo.**) supra, said: "With all due regard for the opinion of that learned court, we are not favorably impressed with the reasoning by which the conclusions there stated are reached. The statute in question is general in its

provisions, and contains no such exception as that interpolated into it by the court of appeals. Nor is there any better reason suggested for saying that the authority of an agent of a corporation to sell its real estate need not be in writing than there is for saying that the agent of an individual for the same purpose need not be in writing. It is common knowledge that, prior to the enactment of the amendment to said § 3418, innumerable suits had been brought and prosecuted for the specific enforcement of contracts for the sale of real estate, made by agents who had no written authority authorizing them to make the sales; also, for the recovery of commissions alleged to be due such agents for making such sales. In order to put a stop to that character of litigation, and for the purpose of preventing fraud and perjury, the amendment in question was wisely enacted. The evil at which the statute was aimed was feasting upon corporations as well as upon individual landowners; and there has been no suggestion made why the one should not be protected therefrom as well as the other. The Donovan Case, before cited, is based upon neither reason nor authority. . . . In our opinion the rule announced in the Donovan Case is unsound, and should not be followed. We are, therefore, of the opinion that the contract authorizing Mittleberg to sell the land in question to appellants was invalid, for the reason that it was not in writing, as required by § 3418 of the Statute of Frauds."

It should be noted that the persons who acted in behalf of the corporations in the Donovan Case and in the Lindhorst Case were agents, but not officers, of the corporations. It may be further noted that the agent in the Lindhorst Case seems not to have been a general agent of the corporation, as was the agent in the Donovan Case, but was evidently a real estate agent who acted for anyone who might employ him. The significance of this distinction, however, is apparently discounted by the disapproval of the Donovan Case in the Lindhorst Case.

In Power v. Immigration Land Co. (1904) 93 **Minn.** 247, 101 N. W. 161, where two corporations had their offices in the same building, and were in some respects interested in business together, and a clerk in the office of the first corporation, at the request of the president of the second, had charge of such correspondence of the latter company as was referred to him, and it appeared that a letter proposing to buy land, addressed to the first corporation, was referred to the clerk for attention, and that he replied, accepting the offer on behalf of the second corporation, which owned the property, it was held that he could not bind such corporation by a contract for the sale of its land, without written authority, there being statutory provisions in force that any contract for the sale of land should be void unless the same was in writing, subscribed by the parties or by their agent, authorized in writing. The court stated that there was an entire absence of evidence tending to show that the clerk had any authority, either in writing or otherwise, to make the contract, that he was not an officer or stockholder in either corporation, and that the provision of the statute, requiring the authority of the agent to be in writing, was as much a part of the Statute of Frauds as the requirement that the contract for the sale of land should be in writing. J. T. W.

STATE OF INDIANA, Appt.,
v.
CHARLES JONES.

Indiana Supreme Court—October 11, 1916.

(185 Ind. 234, 113 N. E. 755.)

Perjury — affidavit for continuance.

Where a statement of the truth of the facts to be testified to by absent witnesses is, by statute, made a material part of an affidavit for continuance, one making such affidavit may be convicted of perjury, if to his knowledge such facts are not true, although the absent witnesses believed them to be true, and would have so testified if present.

[See note on this question beginning on page 1138.]

APPEAL by the state on reserved questions of law from a judgment of the Circuit Court for Knox County, acquitting defendant of the crime of perjury. *Appeal sustained.*

The facts are stated in the opinion of the court.

Messrs. **Evan B. Stotsenburg**, Attorney General, **Omer S. Jackson** and **Wilbur T. Gruber**, for the State:

The allegations made by defendant in his affidavit in support of the motion for a continuance were material, in the case in which a continuance was sought.

Weaver v. State, 154 Ind. 1, 55 N. E. 858; Morris v. State, 104 Ind. 457, 4 N. E. 148; Pettit v. State, 135 Ind. 393, 34 N. E. 1118; Ransbottom v. State, 144 Ind. 250, 43 N. E. 218; Cutler v. State, 42 Ind. 244.

Perjury may be committed by swearing falsely to an affidavit for the continuance of a cause.

State v. Flagg, 27 Ind. 24, 25 Ind. 243; State v. Anderson, 103 Ind. 170, 2 N. E. 332; State v. Johnson, 7 Blackf. 49; State v. Winstandley, 151 Ind. 316, 51 N. E. 92.

It is only when there is no evidence, or none upon a particular point, upon which a conviction could be based, that the court has a right to direct the jury to find the defendant not guilty.

State v. Banks, 48 Ind. 197; State v. Overholser, 69 Ind. 144; State use of Irvington v. Julian, 93 Ind. 292; State v. McCaffrey, 181 Ind. 200, 103 N. E. 801; Newport v. State, 140 Ind. 299, 39 N. E. 926; Wilson v. State, 175 Ind. 458, 93 N. E. 609.

Wade & Padgett and **Harry R. Lewis** for appellee.

Lairy, J., delivered the opinion of the court:

Appellee was tried in the court below on the charge of perjury, and was acquitted. The state appeals on reserved questions of law.

The offense charged is based on an affidavit made by appellee, and filed in another case, wherein he was charged with keeping a house of prostitution. In that case a motion for a continuance was filed, based upon the absence of certain witnesses whose attendance could not be procured at the trial. In support of such motion appellee filed an affidavit, in which he stated, among other things, the names of the witnesses and the facts to which they would testify if present, that the facts to which they would testify were true, and that he could not prove such facts by any other witness whose attendance could be procured. The facts to which such witnesses would testify, as shown by the affidavit, if true, would have constituted a complete defense, by showing that he had nothing to do with conducting the house of prostitution, but that it was conducted by his wife Dora B. Jones; that he had not been in or

about the house operated by his wife for two years prior to the return of the indictment, except on four or five occasions, when he went there to endeavor to persuade his wife to give up the business and come and live with him at some other place, promising to make a living for her in an honorable way; that on such occasions he was present for only fifteen or twenty minutes at a time, and that he had nothing to do with managing the house and received no part of the proceeds. In the case at bar, the indictment charges that said affidavit was falsely and corruptly made; that appellee swore therein that the facts to which such witnesses would testify, as stated therein, were true, whereas such facts were false, and were known to be false at the time he made the affidavit. The concluding part of the indictment upon which appellee was tried in this case is as follows: "Whereas in truth and fact, during all of the two years next prior to the return of the indictment mentioned in said affidavit, the said Charles Jones was in the house described in said affidavit as the 'Bungalow,' more than three or four or five times; and whereas in truth and in fact, on divers occasions, while there during the said period of two years prior to the return of said indictment, he, the said Charles Jones, stayed more than fifteen or twenty minutes at a time; and whereas in truth and in fact the said Charles Jones did conduct, manage, and operate said house and the business therein within the two years prior to the return of said indictment; and that the said Charles Jones, then and there well knowing that the said matters so as aforesaid deposed and declared by him to be true were then and there false, did then and there feloniously, wilfully, corruptly, and falsely swear and declare them to be true as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

Upon the trial, the state proceeded upon the theory that the indictment could be sustained, as to the falsity of the affidavit, by proof that the facts were untrue which the appellee had stated in his affidavit would be sworn to by the several witnesses, in the event the case was continued so as to enable him to procure their attendance. Upon this theory, the state offered evidence to prove that appellee was present at the house kept by his wife on numerous occasions within the two years preceding the return of the indictment, and that he stayed much longer than fifteen or twenty minutes at a time, sometimes staying there all night with his wife, and frequently taking his meals there. Evidence was also offered to prove that he gave directions to the cook to cut down the expenses in the kitchen, and that he stated to an officer, on one occasion when he was arrested in the house for intoxication, that it was his house, and that officers had no right to take him away from it. The defense objected to all this testimony, on the ground that it was not material whether the facts stated in the affidavit as those to which the absent witnesses would testify were true or false, the claim of the defense being that it was necessary for the state to prove that such facts were false from the standpoint of such absent witnesses. In other words, it was the contention of the defense that if it were true that the witnesses named would testify to the facts stated, in the belief that they were testifying truthfully, the defendant could not be convicted of perjury in making the affidavit, even though he knew at the time of making it that such facts were untrue. The trial court sustained the objections of the defendant to this evidence, and to other evidence of a like nature offered by the state, and at the conclusion of the evidence directed the jury to return a verdict for the defendant, which was accordingly done. The court erred in excluding evidence of this

character. Appellee swore by his affidavit that the facts to which the several witnesses would testify, as stated therein, were true. If those facts were untrue, and were known to be untrue at the time he made the affidavit, he might have been convicted of perjury by proof of such facts, together with other facts necessary to sustain the indictment. When a continuance is sought in a criminal case, on the ground of an absent witness, the statute requires that the affidavit shall state the facts to which such witness will testify, and that affiant believes such facts to be true. These are material parts of the affidavit. Burns's Anno. Stat. 1914, § 2089. If the state desires to avoid the continuance, it must admit that the facts stated in the affidavit as the evidence of the absent witness are true. Burns's Anno. Stat. 1914, § 2089. If such admission is made by the state, it cannot offer evidence to dispute such fact, or to impeach the credibility of the absent witness. Powers v. State, 80 Ind. 77. The state should have been permitted to offer evidence to prove that the things which appellee stated, in his affidavit for continuance, to be true, were false, and known by him to be so at the time he made the affidavit. Burns's Anno. Stat. 1914, § 2162.

Perjury—affidavit for continuance.

Appeal sustained.

ANNOTATION.

Assignment of perjury on affidavit for continuance.

While perjury, at common law, could be predicated only on a false oath in a judicial proceeding, the legislatures of most states have extended the crime to oaths made to any deposition, or affidavit, taken or made pursuant to the laws of the state. See 21 R. C. L., title, Perjury, p. 262. Therefore, it is generally held that perjury may be assigned on an affidavit for a continuance, which is false in any material statement therein. State v. Johnson (1843) 7 Blackf. (**Ind.**) 49; State v. Flagg (1865) 25 **Ind.** 243; State v. Flagg (1866) 27 **Ind.** 24; State v. Anderson (1885) 103 **Ind.** 170, 2 N. E. 332; State v. Winstandley (1898) 151 **Ind.** 316, 51 N. E. 92; State v. Shupe (1864) 16 **Iowa,** 36, 85 Am. Dec. 485; State v. Matlock (1896) 48 **La.** Ann. 663, 19 So. 669. And see the reported case (STATE v. JONES, ante, 1136).

The affidavit, to be the basis of a charge of perjury, must be false in respect to some statement which is material to the question before the court; that is, the propriety of granting a continuance. State v. Flagg (1865) 25 **Ind.** 243; State v. Flagg (1866) 27 **Ind.** 24; State v. Shupe (1864) 16 **Iowa,** 36, 85 Am. Dec. 485.

In State v. Flagg, 27 **Ind.** 24, the court stated the rule as follows: "It is alleged that the affidavit was filed for the purpose of procuring a continuance of the cause, and that the facts sworn to 'were material to the issues joined.' This averment is not sufficient. The cause was not on trial, and the affidavit could not be used on the trial of the issues. The purpose was to secure a continuance, and that, in the language of our statute, was 'the point in question.' . . . Our statute . . . removes all doubt, and requires that it must be material to the point then in question before the court."

It has been held that the statement of the absence of a witness from the county, and the inability of the affiant to procure his attendance after due diligence, was a material part of an affidavit for a continuance, which, if made falsely, would sustain a conviction for perjury.

State v. Shupe (**Iowa**) supra, wherein it was said: "The assignment of perjury was not upon that portion of the affidavit which set forth the facts expected to be proven by the witness; nor is that the only material part of the affidavit for continuance. Under

our practice, an affidavit for continuance has three material and essential parts. It must state the name and residence of the witness, and the facts showing the probability of procuring his testimony at the next term,—the facts constituting due diligence to obtain the witness, or his testimony,—and the facts to be proved by him, etc. Revision, §§ 3010, 3011. All these are necessary to constitute a good and sufficient affidavit for continuance. And, where a motion is made by a party to have his cause continued, each one of these essential parts becomes material to the issue arising upon such motion; and if, in his affidavit, he states, wilfully false, matters which are material to the establishment of one of these parts, he is guilty of perjury, although the matters stated in relation to the other two parts are wholly immaterial. . . . The issue before the court, at the time of the taking of the oath by the defendant, which is alleged to be false, was the collateral issue arising upon the motion for a continuance. One material fact, pertinent to that issue, was the absence of the witness from the county, and the consequent inability to procure his attendance; and it is upon the sworn statement of the defendant as to this material fact that the perjury is assigned. It would be as inconsistent with law as it is with good morals and common sense, to permit the party to escape the penalty of his perjury by asserting that his false oath was not material to the issues in the case, the trial of which he had thereby delayed, to the injury of his adverse litigant, and contrary to law and justice."

The materiality of the facts stated must be alleged, or must appear from the affidavit itself. State v. Johnson (1843) 7 Blackf. (**Ind.**) 49; State v. Anderson (1885) 103 **Ind.** 170, 2 N. E. 332.

In the case last cited, it appeared that the defendant moved for a continuance of a bastardy proceeding on the ground of the absence of witnesses. Neither in the affidavit, nor in the indictment for perjury based thereon, was the nature of the cause described. Holding that there was nothing to show that the alleged false statement was material, the court said: "In the indictment before us, there is no allegation of the materiality of the facts stated in the affidavit. Unless, therefore, the facts stated in the affidavit themselves show their materiality, the indictment is bad. It cannot be determined that the facts so stated are material, without a knowledge of the character of the case in which the affidavit was filed. All that is stated in the indictment as to the nature of that case is that it was a certain civil action, pending before the justice of the peace, wherein the state, on the relation of Ella Walker, was plaintiff, and appellee was defendant. It is said in argument that the case was a bastardy proceeding, but that does not appear from anything in the indictment. Presumptions and inferences cannot take the place of allegations in an indictment. If these were to be indulged, it might as well be presumed or inferred that Ella Walker was the relatrix in an action upon an official bond, as that she was the relatrix in a bastardy proceeding. If the case was any other than a bastardy proceeding, it is impossible to see how the affidavit or the facts therein stated were material for any purpose. The nature of the case is not shown, and hence it is not shown that either the affidavit, or the facts stated therein, were material for any purpose."

In State v. Johnson (1843) 7 Blackf. (**Ind.**) 49, a prosecution for perjury in an affidavit for the continuance of an action on a promissory note, it appeared that the affidavit stated the inability of the affiant to procure the attendance of an absent witness, after due diligence, and that the witness would testify as to a partial payment which the defendant claimed to have made on the note. It was held that the affidavit was sufficient, in itself, to show that the matter sworn to was material.

In State v. Matlock (1896) 48 **La. Ann.** 663, 19 So. 669, wherein the nature of the statements in which the prosecution was based does not ap-

pear from the report, it was held that the materiality of those statements was apparent. The court said: "It is also urged that it is averred in the indictment that the alleged perjury was on a material point in the controversy, and that the materiality does not appear in the indictment, and that, admitting the subject-matter was falsely sworn to, it was not material to the investigation of the case. The indictment charges that the perjury was the false swearing to an affidavit for a continuance. The affidavit was made in a judicial proceeding, was material in the controversy pending, as it had direct reference to the disposition of the case. But the false swearing to such an affidavit is directly within the meaning of § 857, Revised Statutes."

In State v. Flagg (1866) 27 **Ind.** 24, it appeared that certain interrogatories were filed, and with them an affidavit that the party filing them expected thereby to elicit certain information. Under the statute, a continuance thereon became necessary, unless the opposite party was ready to answer the interrogatories. In an indictment based on the affidavit, it was not averred whether the opposite party was thus ready to answer. Holding that the affidavit was none the less material, the court said: "The interrogatories filed with the affidavit would entitle the party to a continuance, if the plaintiff was not in court prepared to answer. The question then presented is, Whether facts falsely sworn to in an affidavit filed for the purpose of procuring a continuance of a cause, but which are not sufficient to entitle the party to such continuance, unless other facts also exist, which is not averred, will sustain an indictment for perjury. In the case of State v. Dayton (1850) 23 N. J. L. 49, 53 Am. Dec. 270, it was held 'that perjury may be assigned on an oath or affidavit which is insufficient to effect the purpose for which it was taken, without additional proof. And it is not necessary to show, or aver, that such additional proof was made.' Any other rule, it seems to us, would require not only that the facts stated should be material to the point in question, but that the affidavit should be absolutely sufficient to accomplish the purpose for which it was filed. And if the party making the application should succeed in securing his object, upon an insufficient affidavit, he might, when indicted, call in question the ruling of the court upon his application, and make his guilt depend upon the legal acumen of the court."

Compare the holding on what was apparently a previous indictment for the same offense. State v. Flagg (1865) 25 **Ind.** 243. M. B.

THOMAS SHANKS et al.

v.

JAMES D. ROBERTSON et al., Appts.

Kansas Supreme Court—October 6, 1917.

(101 Kan. 463, 168 Pac. 316.)

Evidence — parol — title to real estate.

1. When the title to real estate is only collaterally involved, the title deeds need not necessarily be produced. Parol evidence of ownership may be received.

[See note on this question beginning on page 1143.]

Same — sufficiency.

2. The evidence has been examined, and it is held that the demurrer thereto was properly overruled, and that the evidence was sufficient to sustain the judgment of the court.

Headnotes by JOHNSTON, Ch. J.

APPEAL by defendants from a judgment of the District Court for Mitchell County in favor of plaintiffs in an action brought to enjoin defendants from obstructing an alleged public highway. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Frank A. Lutz, A. E. Jordan,** and **Park B. Pulsifer,** for appellants:

The testimony of plaintiff as to ownership was secondary evidence, and incompetent.

Hite v. Stimmell, 45 Kan. 472, 25 Pac. 852; Westfield Cigar Co. v. Insurance Co. of N. A. 169 Mass. 382, 47 N. E. 1026; Kirkpatrick v. Clark, 132 Ill. 342, 8 L.R.A. 511, 22 Am. St. Rep. 531, 24 N. E. 71; Wigmore, Ev. § 1246; Miller v. Long Island R. Co. 71 N. Y. 381; Benson v. Files, 70 Ark. 423, 68 S. W. 493; Gilbert v. Odum, 69 Tex. 673, 7 S. W. 510.

The demurrer to the evidence should have been sustained.

Clark v. Mitchell County, 69 Kan. 542, 66 L.R.A. 965, 77 Pac. 284; Harden v. Metz, 10 Kan. App. 341, 58 Pac. 281, affirmed in 62 Kan. 867, 63 Pac. 1126; High, Inj. § 701; Schoonover v. Bright, 24 W. Va. 698; Schurmeier v. St. Paul & P. R. Co. 8 Minn. 113, Gil. 88, 83 Am. Dec. 770; Dryden v. Purdy, 97 Kan. 59, 154 Pac. 221; National Bank v. First Nat. Bank, 57 Kan. 118, 45 Pac. 79; Blaker v. Morse, 60 Kan. 29, 55 Pac. 274; Moline Plow Co. v. Rodgers, 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111; Larned v. Jordan, 55 Kan. 124, 39 Pac. 1030; Griswold v. Huffaker, 47 Kan. 691, 28 Pac. 696; Comstock v. Robertson, 72 Kan. 465, 83 Pac. 1104.

Mr. **R. M. Anderson,** for appellees:

The court having found that a public highway existed by prescription and adverse user by the public for more than fifteen years, the judgment restraining defendants from continuing the obstruction should be sustained.

Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43; State ex rel. Bond v. Mayer, 90 Kan. 470, 135 Pac. 666; Kansas City v. Burke, 93 Kan. 236, 144 Pac. 193, 92 Kan. 531, 141 Pac. 562; Carlson v. Allen, 90 Kan. 457, 135 Pac. 669; Meade v. Topeka, 75 Kan. 61, 88 Pac. 574; Southern P. R. Co. v. Ferris, 93 Cal. 263, 18 L.R.A. 510, 28 Pac. 828; 13 R. C. L. pp. 33 et seq.; Riley v. Buchanan, 116 Ky. 625, 63 L.R.A. 642, 76 S. W. 527, 3 Ann. Cas. 788; Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344; Rose v. Nolen, 166 Ky. 336, 179 S. W. 229; Carter v. Walker, 186 Ala. 140, 65 So. 170; Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244; 37 Cyc. 19; Barnes v. Daveck, 7 Cal. App. 487, 94 Pac. 780; Rose v. Farmington, 196 Ill. 226, 63 N. E. 631; Shellhouse v. State, 110 Ind. 509, 11 N. E. 484; State v. Green, 41 Iowa, 693; Southern Indiana R. Co. v. Norman, 165 Ind. 126, 74 N. E. 896; Hanson v. Taylor, 23 Wis. 547; Weld v. Brooks, 152 Mass. 297, 25 N. E. 719; Clark v. Hull, 184 Mass. 164, 68 N. E. 60; Sikes v. St. Louis & S. F. R. Co. 127 Mo. App. 326, 105 S. W. 700; Rhodes v. Halvorson, 120 Wis. 99, 97 N. W. 514; Berry v. St. Louis & S. F. R. Co. 124 Mo. App. 436, 101 S. W. 714; Howard v. Schmidt, 70 Kan. 640, 79 Pac. 142; Johnson County v. Minnear, 72 Kan. 327, 83 Pac. 828; Thorworth v. Scheets, 269 Ill. 573, 110 N. E. 42.

Mr. **C. L. Kagey** also for appellees.

Johnston, Ch. J., delivered the opinion of the court:

In this action the plaintiffs seek, by injunction, to compel the defendants to remove an obstruction placed by them across a road, alleged by the plaintiffs to be a public highway. Judgment was rendered in favor of the plaintiffs, and the defendants appeal.

The road in question runs north from the south line of section 3 in Logan township, Mitchell county, Kansas, along the half-section line, to a point 30 feet north of the center of the section. From the early settlement of the country, in 1866, until the improvement of the land in the vicinity of the road, public travel crossed section 3 at several places, going to and from fords across the Solomon river. With the improvement of section 3, the land was plowed, fences were built, and travel was confined to the half-section line, running from the south line of the section to and beyond the center of the section. In 1892, an attempt was made to lay out a public highway along this line. A short time later, in 1892, proceedings for laying out a private road along this half-section line were

had before the county commissioners. These proceedings resulted in the county commissioners ordering that a road be there established. This road was traveled by the public from the time the fences were built until in 1915, when the defendants erected a barrier across the road, near the south line of section 3, and ordered the plaintiffs not to use the road. This action was then commenced.

The defendants argue that the court erred in the admission of evidence. The plaintiffs alleged ownership and possession of certain land reached by the road in question. They were permitted to testify that they owned the land. No records or title documents were introduced in evidence. The defendants urge that it was error to permit the plaintiffs to testify that they owned the land. The title to the land was only incidentally in issue. "When the title to real estate is only collaterally involved, the title deeds need not necessarily be produced, but parol evidence may be received." 2 Enc. Ev. 286; St. Louis & S. F. R. Co. v. Noland, 75 Kan. 691, 90 Pac. 273. It was necessary for the plaintiffs to show that they had an interest in the road, different from that of the public generally, in order to entitle them to maintain the action. It was not error to permit the plaintiffs to testify that they owned certain lands affected by the road.

Evidence—parol—title to real estate.

The principal contention of the defendants is that there was not sufficient evidence to sustain the judgment. This question was raised by a demurrer to the evidence and by a motion for a new trial, which motion alleged that the judgment of the court was contrary to law and to the evidence. The court made the following finding of fact: "That at the time of the commencement of this action a public highway existed, by prescription and adverse use by the public, for more than fifteen years prior to the commencement of this action, along and upon that portion of the north and south center line of section 3, in Logan township, in Mitchell county, Kansas, extending from the south side of section 3 northward, to a point 30 feet north of the center of said section 3, and of a width of 20 feet, and being and extending 10 feet on each side of said portion of said center line, and that the defendants were, at the commencement of this action, maintaining an obstruction across the south end of said highway."

Without undertaking to recite the evidence in detail, it is sufficient to say that there was evidence tending to prove that the road from the south line of section 3, along the half-section line, to a point 30 feet north of the center of the section, had been used by the public in general, continuously and uninterruptedly, with the knowledge of the landowners, for a period of more than twenty years prior to the placing of the obstruction thereon by the defendants. There was also evidence tending to show that the use of the road by the public was adverse to the rights of the landowners, and under a claim of right by the public to use the road as a public highway, and that this use was not merely permissive on the part of the landowners, but was with their consent that the road be used as a public highway. In 37 Cyc. 21, this language is found: "To establish a highway by prescription the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely under claim or color of right, and not merely by the owner's permission, and continuously and uninterruptedly, for the period required to bar an action for the recovery of possession of land or otherwise prescribed by statute. When these conditions are present a highway exists by prescription; otherwise not."

The demurrer to the evidence was properly overruled. There was evidence sufficient to sustain the judgment of the court. The judgment was not contrary to law.

Same—sufficiency.

The judgment is affirmed.

Petition for rehearing denied, November 16, 1917.

ANNOTATION.

Parol evidence to prove title to real property when the title is only collaterally involved.

It has been very generally held, notwithstanding an expression of doubt in an early case (Smith v. Armistead (1845) 7 Ala. 698), that the rule that title and ownership of real property may not be proved by parol evidence, since it is not the best evidence, does not apply when the issue of title or ownership is collaterally involved; in which case, a prima facie right of ownership may be established by parol evidence from one qualified to speak.

Alabama.—Garrison v. Glass (1903) 139 Ala. 512, 36 So. 725; Moore v. State (1909) 159 Ala. 97, 48 So. 688.

Arkansas.—St. Louis & S. F. R. Co. v. Caldwell (1910) 93 Ark. 286, 124 S. W. 1034.

California.—Palmer v. Tripp (1857) 8 Cal. 95.

Connecticut.—Mathews v. Livingston (1912) 86 Conn. 263, 85 Atl. 529, Ann. Cas. 1914A, 195.

Georgia.—Central R. Co. v. Whitehead (1885) 74 Ga. 441; Gaston v. Gainesville & D. Electric R. Co. (1904) 120 Ga. 516, 48 S. E. 188; Davis v. Gaskins (1911) 137 Ga. 450, 73 S. E. 579.

Indiana.—Uhl v. Moorhous (1894) 137 Ind. 445, 37 N. E. 366.

Kansas.—SHANKS v. ROBERTSON (reported herewith) ante, 1140.

Kentucky.—Helen v. Spencer (1880) 1 Ky. L. Rep. 56.

Louisiana.—Barataria & L. Canal Co. v. Field (1841) 17 La. 421; Grevenberg v. Borell (1873) 25 La. Ann. 530; Phinney v. Holt (1862) 50 Me. 570.

Massachusetts.—Tucker v. Welsh (1821) 17 Mass. 160, 9 Am. Dec. 137.

Michigan.—Babcock v. Beaver Creek Twp. (1887) 65 Mich. 479, 32 N. W. 653.

Minnesota.—Cooper v. Breckenridge (1866) 11 Minn. 341; Johnson v. Carlin (1913) 121 Minn. 176, 179, 141 N. W. 4, Ann. Cas. 1914C, 705.

Missouri.—Re Mingo Drainage Dist. (1915) 267 Mo. 268, 183 S. W. 611; Morgan v. Garretson & G. Lumber Co. (1904) 105 Mo. App. 239, 79 S. W. 997; Levelsmeier v. St. Louis & S. R. Co. (1905) 114 Mo. App. 412, 90 S. W. 104.

North Carolina.—State v. Wilson (1840) 23 N. C. (1 Ired. L.) 32; State v. Jaynes (1878) 78 N. C. 504; Carden v. McConnell (1895) 116 N. C. 875, 21 S. E. 923; Ledford v. Emerson (1905) 138 N. C. 502, 51 S. E. 42.

Oklahoma.—Newcomer v. Sheppard (1915) — Okla. —, 152 Pac. 66.

Oregon.—Hodson v. Goodale (1892) 22 Or. 68, 29 Pac. 70.

South Carolina.—Lowry v. Pinson (1831) 2 Bail. L. 324, 23 Am. Dec. 140; Gist v. McJunkin (1845) 2 Rich. L. 157; Pickett v. Lyles (1874) 5 S. C. 275; Pelzer Mfg. Co. v. Sun Fire Office (1892) 36 S. C. 213, 15 S. E. 562; Elrood v. Cochran (1901) 59 S. C. 467, 38 S. E. 122.

South Dakota.—Share v. Coats (1912) 29 S. D. 603, 137 N. E. 402.

Texas.—Howard v. Britton (1888) 71 Tex. 286, 9 S. W. 73; Bexar County v. Terrell (1890) — Tex. —, 14 S. W. 62; Smith v. Eckford (1891) — Tex. —, 18 S. W. 210; Wilson v. State (1894) — Tex. Crim. Rep. —, 24 S. W. 649; Oaks v. West (1901) — Tex. Civ. App. —, 64 S. W. 1033; International & G. N. R. Co. v. Hall (1904) 35 Tex. Civ. App. 545, 81 S. W. 82; Wetzel v. Satterwhite (1910) 59 Tex. Civ. App. 1, 125 S. W. 93; Larrabee v. Porter (1914) — Tex. Civ. App. —, 166 S. W. 395; Campbell v. Peacock (1915) — Tex. Civ. App. —, 176 S. W. 774; Joy

v. State (1899) 41 Tex. Crim. Rep. 46, 51 S. W. 933.

Washington.—Littlefield v. Bowen (1916) 90 Wash. 286, 155 Pac. 1053, Ann. Cas. 1918B, 177.

Federal.—May v. Sheehy (1831) 4 Cranch, C. C. 135, Fed. Cas. No. 9,335; Chicago, St. P. M. & O. R. Co. v. Gilbert (1892) 3 C. C. A. 264, 10 U. S. App. 375, 52 Fed. 711.

"The reason for the distinction," says the court, in Re Mingo Drainage Dist. (1915) 267 **Mo.** 268, 183 S. W. 611, "is not far to seek. For whenever an action is brought, wherein the question of title to land is the sole issue to be determined in the case, and wherein the judgment will become final and conclusive proof of such title, the best evidence of which the conditions permit should be adduced. But where, as here, it is merely collateral, and the producing of the best evidence would involve so great a labor and so huge a volume of record evidence as to render the making of proof impossible, from the viewpoint of practicability, we are permitted to hold, in consonance with the authorities, that the rule as to the best evidence does not apply."

Instances, however, are not wanting where it would seem that this rule might have been, but was not, applied. See Allen v. Smith (1853) 22 **Ala.** 416; Arnold v. Cofer (1902) 135 **Ala.** 364, 33 So. 539; Wallace v. Wallace (1883) 62 **Iowa,** 651, 17 N. W. 905; Hoitt v. Moulton (1850) 21 **N. H.** 586; Putnam v. Goodall (1855) 31 **N. H.** 419.

In Horwitz's Jones on Evidence, § 203, it is said: "We have so far dealt with the necessity for production of the written document, but it often happens that parol testimony as to a fact may be primary evidence, although there is written evidence of the same fact. It is difficult to lay down any rule which will accurately define in what cases it is not necessary to produce a writing as the best evidence. There is much conflict in the cases upon this subject, arising more, perhaps, out of the application of the rule to differing cases than as to the rule itself. All the cases recognize the principle that, where the contents of the instrument are required, it must be produced, or its absence excused. If the essential fact to be proved is not the contents of a written instrument, but an independent fact, to which the writing is merely collateral, or of which it is merely an incident, there is no reason for the application of the rule under discussion. In such cases, the contents of the document are no part of the issue, and there is no agreement that the writing shall be the sole repository of the fact. When the parol evidence is as near to the fact testified as to the writing itself, then each is primary, and the act or oral statement may be proved."

Professor Wigmore, in discussing the subject of the production of documents collateral to the issue says (2 Wigmore, Ev. § 1253): "In the great majority of instances where the terms of a document are not in actual dispute, it is inconvenient and pedantic to insist on the production of the instrument itself and to forbid all testimonial allusion, however casual, to its terms. . . . But in any case, the misfortune of inconsistent precedents and the disadvantage of an obscure definition can be obviated, by applying strictly that salutary doctrine of judicial discretion. Let the trial judge determine absolutely, and without review, the application of the principle to each case. Whether a document is 'collateral' is practically a question whether it is important enough, under all the circumstances, to need production; and the judge presiding over the trial is fitted to determine this question finally."

E. S. O.

FERDINAND MARTINEAU et al.
v.
DAN FOLEY et al.

Massachusetts Supreme Judicial Court—October 18, 1918.

(231 Mass. 220, 120 N. E. 445.)

Labor union — boycott — liability.

1. The circulation by a labor union among master masons of a statement that members of the union would refuse to work for certain contractors for the false reason that they had been working nonunion masons, for the purpose of preventing such contractors from securing mason work, which results in putting the contractors out of business, gives them a right of action for damages, although the purpose of the union was the lawful one of furthering the interests of its members.

[See note on this question beginning on page 1149.]

Conspiracy — liability for injury.

2. Although the gist of an action against a labor union for putting a contractor out of business, by a conspiracy to send false notices to persons whom he employs, is not the conspiracy, but the damages inflicted in pursuance of it, when the conspiracy is shown the contractor can look beyond the one who sent the notices to all the participants in the conspiracy, irrespective of the degree of their participation in the wrongful act.

Evidence — statement to conspirator.

3. In an action by a contractor against a labor union for damages for ruining his business by unlawful conspiracy, the president of the union may be asked what the contractor said to such president.

Same — extent of injury.

4. A contractor suing a labor union for damages for conspiring to break up his business may testify that he could not get laborers, and had to give up jobs, and the amount of profits thereby lost.

Same — proof of fact already in evidence.

5. A party to a suit cannot complain that the other party is permitted to prove a fact which he himself has already proved.

EXCEPTIONS by defendants to rulings of the Superior Court for Franklin County made during the trial of an action brought to recover damages for alleged unlawful conspiracy of defendants to ruin plaintiffs' business. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. **John F. Jennings** and **William P. Jennings**, for defendants:

There was a well-defined trade dispute between the plaintiffs and the defendants, as members of the union, and there was direct competition; and the act complained of was justifiable from the standpoint of any of the defendants who may have been shown by the evidence to have participated therein, certainly if the statement was true.

Burnham v. Dowd, 217 Mass. 356, 51 L.R.A.(N.S.) 778, 104 N. W. 841; Bowen v. Matheson, 14 Allen, 503; Com. v. Hunt, 4 Met. 133, 38 Am. Dec. 346; Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; Walker v. Cronin, 107 Mass. 564; Worthington v. Waring, 157 Mass. 421, 20 L.R.A. 342, 34 Am. St. Rep. 294, 32 N. E. 744.

The fact that the defendants were members of the union at the time, and continued so to be "by payment of dues," is not evidence of their participation in the tort alleged.

Lawlor v. Loewe, 109 C. C. A. 288, 187 Fed. 526, 223 U. S. 729, 56 L. ed. 633, 32 Sup. Ct. Rep. 527.

A mere continuance of membership is not sufficient to create an individual tort liability, and mere membership will not bind anybody, ordinarily, for any

further payment or liability than initation fee and annual assessment.

Volger v. Ray, 131 Mass. 439; Ray v. Powers, 134 Mass. 22; Lawlor v. Loewe, supra; Wrightington, Unincorporated Asso. pp. 275, 276.

Messrs. **William A. Davenport** and **Charles Fairhurst**, for plaintiff:

A reasonably free labor market is a common-law right.

L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897; Walker v. Cronin, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Pickett v. Walsh, 192 Mass. 582, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Burnham v. Dowd, 217 Mass. 359, 51 L.R.A.(N.S.) 778, 104 N. E. 841; Gompers v. Buck's Stove & Range Co. 221 U. S. 418–439, 55 L. ed. 797–805, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492.

The circulation of a false report about the business of a person is actionable.

Harvey v. Chapman, 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 304; Vegelahn v. Guntner, 167 Mass. 103, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Rice v. Albee, 164 Mass. 88, 41 N. E. 122; M. Steinert & Sons Co. v. Tagen, 207 Mass. 394, 32 L.R.A. (N.S.) 1013, 93 N. E. 584.

A boycott instituted without justification is illegal.

Folsom v. Lewis, 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316; Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; Baush Mach. Tool Co. v. Hill, 231 Mass. 30, 120 N. E. 188; Fairbanks v. McDonald, 219 Mass. 291, 106 N. E. 1000; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, L.R.A.1917F, 755, 116 N. E. 801; Shinsky v. Tracey, 226 Mass. 21, L.R.A.1917C, 1053, 114 N. E. 957; Martineau v. Foley, 225 Mass. 107, 113 N. E. 1038; Bogni v. Perotti, 224 Mass. 152, L.R.A.1916F, 831, 112 N. E. 853; Martell v. White, 185 Mass. 257, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; McGurk v. Cronenwett, 199 Mass. 457, 19 L.R.A.(N.S.) 561, 85 N. E. 576; Harvey v. Chapman, 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 304.

All members of an association are liable for all overt acts illegally done pursuant to the general scheme agreed upon by the association.

Irving v. Neal, 209 Fed. 471; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Newell v. Borden, 128 Mass. 31; Lawlor v. Loewe, 235 U. S. 522, 536, 59 L. ed. 341, 349, 35 Sup. Ct. Rep. 170; Baush Mach. Tool Co. v. Hill, 231 Mass. 30, 120 N. E. 188; Wyeman v. Deady, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129, 8 Ann. Cas. 375; Locke v. Stearns, 1 Met. 560, 35 Am. Dec. 382; Sutton v. Workmeister, 164 Ill. App. 105; Wilcox v. Arnold, 162 Mass. 577, 39 N. E. 414; Martin, Labor Unions, § 94.

Plaintiffs were entitled to recover once for all their entire damages sustained from the unlawful acts of the defendants.

Hanson v. Innis, 211 Mass. 301, 97 N. E. 756; Weston v. Barnicoat, 175 Mass. 456, 49 L.R.A. 612, 56 N. E. 619; Fay v. Guynon, 131 Mass. 35; Sawyer v. Com. 185 Mass. 356, 70 N. E. 438; Gunter v. Astor, 4 J. B. Moore, 12, 21 Revised Rep. 733; Walker v. Cronin, 107 Mass. 555; Lowrie v. Castle, 225 Mass. 37, 113 N. E. 206; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; Moore Spinning Co. v. Boston Ice Co. 210 Mass. 364, 97 N. E. 62; Randall v. Peerless Motor Car Co. 212 Mass. 352, 99 N. E. 221; Loughery v. Huxford, 206 Mass. 324, 92 N. E. 328; Gagnon v. Sperry & H. Co. 206 Mass. 547, 92 N. E. 761; Neal v. Jefferson, 212 Mass. 517, 41 L.R.A. (N.S.) 387, 99 N. E. 334, Ann. Cas. 1913D, 205; Nelson Theater Co. v. Nelson, 216 Mass. 30, 102 N. E. 926; Weston v. Boston & M. R. Co. 190 Mass. 298, 4 L.R.A.(N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 Ann. Cas. 825, 19 Am. Neg. Rep. 306; Speirs v. Union Drop Forge Co. 180 Mass. 87, 61 N. E. 825; Dennis v. Maxfield, 10 Allen, 138.

De Courcy, J., delivered the opinion of the court:

The principal questions raised by the exceptions are, whether the evidence warranted a verdict for the plaintiffs, and, if so, whether the verdict could be for more than nominal damages. The jury could find the material facts to be as follows: The plaintiffs, Ferdinand Martineau and Arthur F. Martineau, had been engaged in the building contracting business at Turner's Falls since June 1, 1905, under the firm name of F. Martineau & Son. For some years the net annual profits of the business were $3,000, after each partner had withdrawn $1,500 as wages. In July, 1915, they had entered into certain contracts to erect and alter buildings, and were negotiating for others, intending themselves to do the carpenter work. They asked one Merriam, a mason contractor, to do the plastering or brick work for them on the town hall job, but he refused, showing them the following notice:

Bricklayers' and Plasterers' Union
No. 36 of Massachusetts.
Headquarters 304 Main St.
Meetings 1st and 3d Wednesday Evenings.
Greenfield, Mass., July 11, 1915.

A. O. Merriam,
Phillips St., Greenfield, Mass.

Dear Sir:—

A notice is hereby given to all union contractors that it was voted that all union masons will not work for Martineau & Son, contractors, of Turner's Falls, until further notice, as said firm has been working nonunion masons.

Bricklayers' & Plasterers' Int. Union No. 36.

Similar notices had been sent to the other mason contractors in the vicinity who had working agreements with the union. This was pursuant to a vote passed by the union on July 9, 1915: "That all contractors be notified not to do any more work for Messrs. Martineau & Son, contractors, Turner's Falls, because all union men are to keep away from his jobs because he hires nonunion masons."

The plaintiffs had not been asked to enter into any agreement with the union, never had received any complaint from the organization, and were not notified that such a vote was contemplated or was passed. On learning of the notice, one of the plaintiffs saw the president of the union, and told him they were willing to sign any agreement; but the union, at a subsequent meeting, discussed the matter and refused to take any action. As the plaintiffs were unable to hire bricklayers, they took no more building contracts. Ferdinand obtained employment as foreman in a mill, and Arthur F. worked wherever he could get a job.

As matter of fact, it was not true that the plaintiffs customarily hired nonunion masons, as the notice implied. The only semblance of support for that statement was the employment of one Vivier, two months before, to do seven hours' brick work on the town hall job; and they did not know he was a nonunion man.

These facts, and their legitimate inferences, plainly show an intentional and harmful interference with the business of the plaintiffs. The defendants not only refused to have business relations with the plaintiffs, but combined to prevent contracting masons from having business relations with them. It is apparent from the charge of the trial judge that the wrongful act of the defendants, on which the plaintiffs relied, was the means employed by the members of the union to accomplish their purpose, namely, the circulation of a statement which was known to be untrue and was circulated to prevent the plaintiffs from employing or contracting with master masons. Even assuming that the purpose of the defendants was a lawful one, the means they employed to accomplish it were unlawful. The sending out of this false statement, with intent to destroy the business of the plaintiffs,

was malicious within the legal meaning of that word, was without legal justification, constituted an unlawful conspiracy, and entitled the plaintiffs to recover substantial damages. M. Steinert & Sons Co. v. Tagen, 207 Mass. 394, 32 L.R.A.(N.S.) 1013, 93 N. E. 584; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Burnham v. Dowd, 217 Mass. 351, 360, 51 L.R.A.(N.S.) 778, 104 N. E. 841; Cornellier v. Haverhill Shoe Mfg. Asso. 221 Mass. 554, 562, L.R.A. 1916C, 218, 109 N. E. 643. The Peaceful Persuasion Act does not purport to justify attempts to persuade, which are "a part of an unlawful or actionable conspiracy," Stat. 1913, chap. 690.

Labor union—boycott—liability.

It may be added that the defendants have not argued their exceptions to portions of the judge's charge. We find no error therein.

The gist of the action was not the alleged conspiracy, but the damage inflicted in pursuance of it. But when a conspiracy was shown, the plaintiffs could look beyond the secretary who sent out the untrue and harmful notices, and recover from each defendant who participated in the conspiracy, irrespective of the degree of his activity in the wrongful act. The jury were warranted in finding that these defendants either authorized or adopted the circulation of the untrue notice, or that it was sent out in pursuance of the common purpose agreed on by the combination. Evidence in support of this conclusion appeared, for instance, in the provisions of the by-laws of the union, binding each member to acquiesce in the will of the majority; the terms of the agreement between the union and the contractors and builders; the answer to interrogatory 16, that the notice complained of was mailed by the defendant Foley "as corresponding secretary, acting in his official capacity, on behalf of the union as such;" the stipulation at the trial that all the defendants were members of the union when the vote was passed and when the notice was sent out, and were bound by the answers; the action of the union at its regular meetings in declaring and enforcing the boycott against the plaintiffs, in pursuance of the object of the association to compel the exclusive employment of union labor; and the failure of any of the defendants to dissent from the use of the wrongful means employed. Burnham v. Dowd, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; Harvey v. Chapman, 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 304, and cases cited; Martineau v. Foley, 225 Mass. 107, 113 N. E. 1038; Baush Mach. Tool Co. v. Hill, 231 Mass. 30, 120 N. E. 188, July 16, 1918; Lawlor v. Loewe, 235 U. S. 522, 59 L. ed. 341, 35 Sup. Ct. Rep. 170; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 249, 62 L. ed. 260, 275, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461.

Conspiracy—liability for injury.

What has been said disposes of all the exceptions of the defendants except those relating to the admission of evidence. The competency of many of the questions objected to is too plain for discussion. That is true, for instance, of the question to the defendant Alex, president of the union: "What did this young Mr. Martineau say to you?" and the answer: "He asked me what . . . the union had decided." The testimony of the plaintiff Arthur F. Martineau that he could not get bricklayers, and consequently could not go on with the Chevalier and Chapman street jobs, and that their profits on these contracts would be about $200 on one and 10 per cent on the cost of the building on the other, was rightly admitted. The plaintiffs had been employed by

Evidence—statement to conspirator.

Same—extent of injury.

Chevalier to do his work on a percentage basis, and their bid on the Chapman street job had been accepted. Many other questions were rendered harmless by the answers given. The defendants themselves put in evidence the length of time which Vivier worked for the plaintiffs, and cannot complain that the plaintiffs were permitted to prove that same fact. Upon examination we find no merit in the exceptions taken to the admission of evidence.

Same—proof of fact already in evidence.

Exceptions overruled.

ANNOTATION.

Liability of labor union or its members, for circulating false statements with respect to industrial disputes.

It is to be observed that this note does not take up the general question of the right of a labor union to publish and circulate statements relative to industrial disputes, for the purpose of securing the aid of the public, or a portion of the public, by inducing them to divert their trade from a particular employer with whom a labor organization is having an industrial controversy. The courts are not agreed as to the liability of a labor organization under these circumstances, the disagreement in part being due to the different view taken with regard to the lawfulness of a boycott. As to the precise question under consideration, it has been held that a labor organization will be enjoined from publishing and circulating false statements with regard to an industrial controversy, made for the purpose of injuring the business of the employer of labor to which the statement relates. Philip Henrici Co. v. Alexander (1916) 198 Ill. App. 568 (false statements by the pickets that there was a strike on at this place of business): Harvey v. Chapman (1917) 236 Mass. 191, L.R.A. 1917E, 389, 115 N. E. 304 (false statements of a strike by complainant's employees, and the statement that plaintiff was unfair to labor, etc.); M. Steinert & Sons Co. v. Tagen (1911) 207 Mass. 394, 32 L.R.A.(N.S.) 1013, 93 N. E. 584 (false statements that there was a strike of complainant's workingmen); Beck v. Railway Teamsters' Protective Union (1898) 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13 (false statements relative to the merits of the controversy between the employer and employees); Matthews v. Shankland (1898) 25 Misc. 604, 56 N. Y. Supp. 123 (false statement charging that the employer ran a nonunion office, and had discharged union workmen).

And the right of free speech has been held not to be unlawfully restricted by enjoining a labor union from publishing circulars and placards, containing the false statement that a strike is now on at the plaintiff's works against cheap labor and the sweating system, such publication being injurious to the business of the plaintiff. Collard v. Marshall [1892] 1 Ch. (Eng.) 571, 61 L. J. Ch. N. S. 268, 66 L. T. N. S. 248, 40 Week. Rep. 473.

It has been held that equity will not enjoin the publication by a labor union of libelous matter relative to an industrial conflict, although injury is thereby occasioned to the libeled person's trade and profession. Richter Bros. v. Journeymen Tailors' Union (1890) 24 Ohio L. J. 189. And equity has refused to enjoin a labor union from issuing circulars, letters, placards, and posters, containing innuendoes of a possible libelous character. Butterick Pub. Co. v. Typographical Union (1906) 50 Misc. 1, 100 N. Y. Supp. 292.

And it has been held that while it is within the jurisdiction of the court to enjoin the use by a labor union of placards and statements threatening persons who patronize the complainant, in connection with the picketing of his premises, the injunction should not be so extended as to prevent the defendants from expressing opinions of the complainant and his business, which, at the most, would constitute

merely a slander. Goldberg, B. & Co. v. Stablemen's Union (1906) 149 Cal. 429, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219.

Under the Constitution of Montana, in effect providing that no laws shall be passed impairing the freedom of speech, and that every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty, equity will not enjoin the publication by a labor union of matters claiming to be libelous and injurious to an employer of labor, with whom the labor union is having an industrial conflict. Lindsay & Co. v. Montana Federation of Labor (1908) 37 Mont. 264, 18 L.R.A.(N.S.) 701, 127 Am. St. Rep. 722, 96 Pac. 127.

While not strictly within the scope of this note as to facts, in Marx & H. Jeans Clothing Co. v. Watson (1902) 168 Mo. 144, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391, in holding that an employer of labor was not entitled to enjoin the publication of circulars by a labor organization, setting forth its grievance against him, the court said, quoting Gantt, P. J., in Life Asso. of America v. Boogher (1876) 3 Mo. App. 173: "Enough is stated to inform us that defendant has uttered a malicious, false, scandalous, and libelous statement respecting the plaintiff, and that, with the purpose of inflicting injury on the plaintiff, defendant proposes and threatens to repeat and enlarge the wrong and injury already inflicted; that the resulting loss to the plaintiff will be great, and irreparable by civil action, because of the insolvency of the defendant; and thereupon the aid of a court of justice is claimed, to prevent that for which, if perfected, it cannot give compensation. It is obvious that, if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured by the Constitution of Missouri to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution. . . . In Missouri, where we are expressly forbidden by the Constitution to assume the power we are asked by the plaintiff to exercise, our answer cannot be doubtful. It is hardly necessary to quote the familiar language of our organic law, which has always declared 'that every person may freely speak, write, or print, on any subject, being responsible for the abuse of that liberty.' If it be said that the right to speak, write, or print thus secured to everyone cannot be construed to mean a license to wantonly injure another, and that, by the jurisdiction claimed, it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, our answer is that we have no power to suspend the right for a moment, or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right, except by the fear of the penalty, civil or criminal, which may wait on abuse. The general assembly can pass no law abridging the freedom of speech or of the press. It can only punish the licentious abuse of that freedom. Courts of justice can only administer the laws of the state, and, of course, can do nothing by way of judicial sentence which the general assembly has no power to sanction."

But few cases have passed upon the question as to the liability of a labor organization in an action for damages for publishing or circulating false statements relative to an industrial controversy. In Harvey v. Chapman (1917) 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 304, in giving relief by injunction, the court also awarded damages to the employer for the injury to him by statements complained of, and in the reported case (MARTINEAU v. FOLEY, ante, 1145) damages were awarded against a labor union for publishing false statements that an employer employed nonunion help, where the publication was in furtherance of a conspiracy to injure an employer.

In Vacher & Son v. London Soc. [1912] A. C. (Eng.) 107, 82 L. J. K. B. N. S. 232, 107 L. T. N. S. 722, 29 Times

L. R. 73, 57 Sol. Jo. 75, 50 Scot. L. R. 649, it is held that the Trade Disputes Act 1906, which, in effect, provides that an action against a trade union in respect of any tortious act shall not be entertained by any court, precludes the court from entertaining an action in behalf of an employer of labor against a trade union, to recover damages for alleged libelous statements relative to such employer's relation to his employees.

A case of interest on this subject, but not strictly within the scope of the note, is Axton-Fisher Tobacco Co. v. Evening Post Co. (1916) 169 Ky. 64, L.R.A.1916E, 667, 183 S. W. 269, Ann. Cas. 1918B, 560, holding it libelous per se to publish of an employer of labor that he employed a negro as foreman over white men and women, and that it may be libelous, although not libelous per se, to publish of an employer of labor that he paid his employees less money and compelled them to work longer hours than other companies engaged in a similar business. It is also held that statements that an employer is on the unfair list of a labor organization, and has its principal work done in scab shops, is libelous where made so by reference to the inducement and innuendoes contained in the petition. The court said that "ordinarily to say that a business house had been put on the 'unfair list,' or that it had its printing done in 'scab' shops, would convey but little meaning of the effect such a charge might have on the business of the concern so designated. In the usual and customary use of the words, and according to their ordinary and natural meaning, it could hardly be said as matter of law that a publication charging that a business establishment had been put on the 'unfair list,' or charging that it had its printing done in 'scab' shops, would affect the business referred to in such a way as to cause it to suffer pecuniary loss, thereby making the publication libelous per se. It appears, however, from the publications themselves, that these words have a special and significant meaning, when applied by labor unions to business concerns that have been guilty of such conduct as to arouse the enmity of these organizations. But, aside from and independent of this, we may look to the matter set out as inducement in the petition for the purpose of showing the relation, in a business way, between the tobacco company and union labor; and to the innuendo for the purpose of showing the defamatory meaning and application of the publications, as manifested by their effect upon members of labor unions in business dealings with the tobacco company, and the consequent business injury suffered by the tobacco company."

A. G. S.

EDWARD A. GROSS, Appt.,
v.
STATE OF INDIANA.

Indiana Supreme Court—November 1, 1917.

(— Ind. —, 117 N. E. 562.)

Arrest — justice of the peace.

1. A justice of the peace is subject to arrest on a criminal charge, unless exempted by Constitution or statute.

[See note on this question beginning on page 1156.]

Appeal — weight of evidence — power to determine.

2. The supreme court has no authority, on appeal, to consider questions which require a determination of the weight of conflicting evidence.

Same — violent assault — liability.

3. A justice of the peace who in endeavoring to make an arrest unlawfully attempts to commit a violent injury upon the person sought to be arrested, or, having the present ability, is about

violently to injure him by the use of more force than is reasonably necessary under all the circumstances of the case, is himself subject to arrest.

Trial — instruction — omission of exceptions.

4. The court need not, of its own motion, include a statutory exception in giving to the jury a definition of a crime, if the exception was a matter of defense and not brought into the case.

Same — necessity of tendering instructions.

5. An instruction as to persons privileged from arrest is not erroneous for failure to define the right to resist unlawful arrest, in the absence of tendered instructions upon that subject.

Criminal law — instructions as to penalty — standing in community.

6. An instruction in a criminal case that, in fixing the penalty, the jury may consider the standing of the man in the community, is erroneous, where the only evidence upon the question relates to the business in which he is engaged.

Evidence — knowledge of jurors.

7. The rule permitting jurors, in determining the credibility of evidence offered, to use their common knowledge, does not permit the supplying of facts by the jury personally, from their own number, or from any source other than at the trial.

APPEAL by defendant from a judgment of the Circuit Court for Lake County convicting him of a misdemeanor and overruling his motion for new trial. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **McMahon & Conroy** and **Bruce & Youkey**, for appellant:

Defendant was not taken into custody to be held to answer for a public offense, and was not informed under what authority the police officer on the street acted; so out on the street, or up in the court room, he had a right to resist the officer or officers who sought to afterwards effect the arrest, and hence the drawing of the weapon was not unlawful.

Plummer v. State, 135 Ind. 308, 34 N. E. 968; Miers v. State, 34 Tex. Crim. Rep. 161, 29 S. W. 1074; State v. Cantieny, 34 Minn. 1, 24 N. W. 458, 6 Am. Crim. Rep. 418.

Defendant was a justice of the peace and, as such, was a peace officer, and had a right to arrest without a warrant this third person who had committed a misdemeanor in his view and sight; and the Gary police officer had no legal right to arrest defendant while he was so doing, and hence the drawing of the weapon was not an unlawful act.

Montgomery v. Sutton, 67 Iowa, 497, 25 N. W. 748; Mosley v. State, 23 Tex. App. 409, 4 S. W. 907.

Defendant was entitled to have the jury advised as to his rights under the law in the premises.

State v. Maddox, 74 Ind. 107.

The instruction as to the escape of an arrested person and the right of an officer to pursue and retake him was erroneous.

Sutherlin v. State, 148 Ind. 702, 48 N. E. 246; Newport v. State, 140 Ind. 303, 39 N. E. 926; Myers v. State, 121 Ind. 19, 22 N. E. 781; Elliott, App. Proc. § 631.

The court had no right whatever to instruct the jury on the reputation or character of defendant.

Barker v. State, 48 Ind. 168; Myers v. State, 121 Ind. 19, 22 N. E. 781; Newport v. State, 140 Ind. 303, 39 N. E. 926; Sutherlin v. State, 148 Ind. 702, 48 N. E. 246.

Messrs. **Ele Stansbury**, Attorney General, **U. S. Lesh, Elmer E. Hastings, Edward M. White, and John G. McCord**, for the State:

Defendant had no right, by virtue of his office (justice of peace), to attempt to commit a violent assault upon Marovich.

State v. Maddox, 74 Ind. 105.

Where one, expecting an attempt will be made to arrest him, deliberately prepares arms for immediate use, and deliberately draws, waves, points, or aims a revolver at the peace officer, he violates the law.

Miller v. State, 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836, 21 S. W. 925.

The question of self-defense does not arise in a case in which a person sought to be arrested kills the officer seeking to make the arrest.

State v. Shaw, 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51; Floyd v. State, 82 Ala. 16, 2 So. 683; Hardin v. State, 40 Tex. Crim. Rep. 208, 49 S. W. 607.

While it is the duty of an officer attempting to arrest to make known his

purpose and the capacity in which he acts, if that purpose and that capacity are known to the party when the arrest is attempted, and the arrest is otherwise legal, submission to it is a duty, and resistance is unjustifiable.

Tiner v. State, 44 Tex. 128; Appleton v. State, 61 Ark. 590, 33 S. W. 1066; Robinson v. State, 93 Ga. 77, 44 Am. St. Rep. 127, 18 S. E. 1018, 9 Am. Crim. Rep. 570.

The right of self-defense is allowed to a citizen as a shield, and not as a sword; and in the exercise of this right a party must act honestly.

Fields v. State, 134 Ind. 55, 32 N. E. 780; Gillett, Crim. Law, §§ 230, 504.

Peace officers may arrest without a warrant, when a misdemeanor is committed within their view, and for felony, when they have cause to believe that such crime has been committed.

Doering v. State, 49 Ind. 56, 19 Am. Rep. 669, 1 Am. Crim. Rep. 60.

A policeman is a peace officer, and is authorized to arrest and detain any person found violating any law of this state until a legal warrant can be obtained.

Weser v. Welty, 18 **Ind.** App. 669, 47 N. E. 639; Vandeveer v. Mattocks, 3 Ind. 479; Boaz v. State, 43 Ind. 60; Scircle v. Neeves, 47 Ind. 289; Doering v. State, 49 Ind. 56, 19 Am. Rep. 669, 1 Am. Crim. Rep. 60; Wiltse v. Holt, 95 Ind. 469.

If a person arrested escapes, or has been rescued, the person from whose custody he made his escape, or was rescued, may pursue and retake him at any time and within any place in the state.

Gillett, Crim. Law, § 147.

Where an arrest has once been lawfully made, and the arrested person tries to break away, the officer is bound to retake him, even though he has voluntarily permitted him to escape.

Clark v. Cleveland, 6 Hill, 344; Arnold v. Steeves, 10 Wend. 515; Gano v. Hall, 42 N. Y. 67.

The words, "the standing of the man in the community," in the instruction, constituted a careful and an unobjectionable admonition to the jury of the importance of the cause they were called upon to decide, considering the rights of the defendant, and the interests of the society for the protection of which laws had been enacted.

Stout v. State, 90 Ind. 13; Re Darrow, 175 Ind. 53; Eacock v. State, 169 Ind. 488, 82 N. E. 1039; Blocher v. State, 177 Ind. 356, 98 N. E. 118; Weigand v. State, 178 Ind. 623, 99 N. E. 999; Dorsey v. State, 179 Ind. 531, 100 N. E. 369; Griffiths v. State, 163 Ind. 555, 72 N. E. 563; Gillett, Crim. Law, § 916; State v. Haynes, 7 N. D. 357, 75 N. W. 267.

Myers, J., delivered the opinion of the court:

Appellant was prosecuted upon an affidavit, for a misdemeanor—drawing a dangerous weapon on one James Orr. This appeal is from a judgment on a verdict of conviction by a jury. A motion for a new trial was overruled, and this ruling is the only error assigned. In support of this motion it is urged that the verdict is not sustained by the evidence, is contrary to law, and the trial court erred in giving to the jury instructions 3, 4, 5, 7, 8, and 11, and in refusing to give instruction 1, tendered by appellant.

On December 3, 1915, appellant was a justice of the peace, and had his office or court room on the second floor of a building in the city of Gary, and was also proprietor of a wholesale liquor store located on the first floor of the same building. On the above date, one Vincent Marovich was a defendant in an attachment and garnishment proceeding in appellant's court. On the evening of that day, and while appellant was in his wholesale place of business, Marovich entered, and sought to have him release the money covered by the garnishee proceedings. A controversy arose between them, and possibly some blows were struck. Appellant attempted to arrest Marovich, who then ran out of the room onto the street, appellant after him with a quart bottle in his hand, apparently intending to use it on Marovich. The threatened use of the bottle was within the presence and sight of J. H. Carlson, a plain-clothes member of the Gary police force, who took hold of and stopped appellant, and caused him to drop the bottle. They knew each other and the official position each held. There is evidence tending to show that Carlson at that time arrested

appellant, and also evidence to support a finding that no such arrest was made. It is conceded that no further attempt was made to arrest or take appellant into custody until probably twenty minutes after the occurrence on the street, and not until appellant had gone to his office and become engaged in a matter connected with his official duty. While he was thus engaged, Cralson and a Gary policeman entered appellant's office, and, without a warrant, announced their purpose of taking him to the police station. Appellant demanded to see their authority for so doing, and declined to go with them unless they had a warrant for his arrest. A few minutes later other Gary policemen came, and then appellant took from his desk drawer a revolver, and stepped back to the wall of the room, and ordered the policemen to depart therefrom, further saying that if they undertook to take him by force, or come nearer than a certain distance from him, they would do so at their peril. During this parley between appellant and policemen, pistols were exhibited and threatened to be used on both sides. Finally the matter was compromised by the removal of the patrol wagon, which was standing in the street in front of the stairway leading to appellant's office, and the departure of all of the policemen except the captain, whom appellant accompanied to the police station.

Neither of the first two specifications of the motion can be sustained, for the reason that to do so would require us to determine the weight of conflicting evidence, involving the question of whether or not Carlson legally arrested appellant while on the street, and, if so, did he voluntarily release him from custody? Appellant insists that he was acting as a peace officer when Carlson interfered, to the advantage of an offender who thereby escaped. True, justices of the peace in this state are conservators of the peace (§ 15, art. 7, Constitution of Indiana), and by statute they are authorized to arrest and detain any person found violating any law of this state until a legal warrant can be obtained. Burns's Anno. (Stat. 1914, § 2013). But from the record before us, it can hardly be said that Carlson had the purpose accredited to him by appellant. Carlson was a peace officer, and the demonstration of appellant in his attempt to arrest Marovich was in the presence and sight of Carlson, who assumed to and did act to prevent the overtaking of the third party. The propriety of the interfering officer's action, under all the circumstances in this case, was a question for the jury. The jury must have found, and there is evidence to the effect, that Carlson did arrest appellant while on the street, and that appellant, either by force, or in some other manner, freed himself from custody. If the jury so found, then, as a matter of law, Carlson was authorized to pursue appellant and retake him into custody without having first procured a warrant for his arrest. Burns's Anno. Stat. 1914, §§ 2000, 2001; Cooper v. Adams, 2 Blackf. 294; 1 Bishop, Crim. Proc. 2d ed. § 163.

Appeal—weight of evidence—power to determine.

The general rule requires that every citizen of this state submit to a lawful arrest. The exceptions to this rule are stated in the Constitution of the United States (§ 6, art. 1), and the Constitution of this state (§ 8, art. 4, and § 12, art. 2), but justices of the peace are not exempted by either of these provisions. However, by statute, justices of the peace are privileged from arrest on civil process while engaged in hearing or determining a trial. Burns's Anno. Stat. 1914, § 3302.

Arrest—justice of the peace.

In this case, the arrest, if any, was not upon civil process, and therefore appellant was in no better position to successfully resist arrest than any other citizen. But he,

like any other citizen, had a right to resist an unlawful arrest. 1 Bishop, New Crim. Law, § 868. But not to the extent of taking the life of the aggressor, as in case of a felonious assault; for in the latter case life is in danger, while in the former liberty only, which may be secured by a resort to the laws. If appellant in his endeavor to arrest Marovich was unlawfully attempting to commit a violent injury upon him, or, having the present ability, was about to violently injure him by the use of more force than was reasonably necessary under all the circumstances,—a question for the jury,—he thereby became an offender himself, and a subject for arrest. Plummer v. State, 135 Ind. 308, 34 N. E. 968. And his resistance to arrest was unwarranted, and emphasizing his intention by drawing a pistol was unlawful.

Same—violent assault—liability.

Appellant insists that instruction 3 was erroneous for the reason that the court failed to include therein the proviso which is a part of the section defining the offense charged. We cannot agree with this contention. This instruction refers only to the definition of the offense, the charge pleaded, and the penalty the jury might assess in case of a conviction. The first count upon which appellant was convicted is based upon Burns's Anno. Stat. 1914, § 2344. The exception noted in the proviso of that section is a matter of defense in a proper case, and being subsequent to the definition of the crime charged, it was not necessary, as a question of pleading, to negative it. Hewitt v. State, 121 Ind. 245, 23 N. E. 83; State v. Maddox, 74 Ind. 105; Gillett, Crim. Law, § 132a. This instruction was complete as to the subject covered, and no error intervened by the failure of the court, on its own motion, to include the proviso.

Trial—instruction—omission of exception.

Instructions 4 and 5 told the jury when and under what circumstances certain persons were privileged from arrest, but did not include justices of the peace within that class, except as against civil process while engaged in hearing or determining any trial. These instructions are said to be erroneous, for the reason they do not make any exception to the right of one to resist an unlawful arrest, or the right of self-defense as against an unlawful arrest. These instructions are not subject to the criticism offered. The points made against them should have been presented by tendered instructions. Colee v. State, 75 Ind. 511; Gillett, Crim. Law, § 915.

Same—necessity of tendering instructions.

By instruction 11 the court, after detailing the different forms of verdict to meet each phase of the case, told the jury: "If you find the defendant guilty, you will, of course, in a case of this kind, fix his punishment. Punishments in criminal cases are, we may say, first to punish the offender, and to prevent the commission of like offenses. It is also to protect the public and society, and stand as an example to prevent others from doing the same thing; and it is also for the purpose of reforming a defendant. If you find the defendant guilty, you will have those things in mind; and if you fix a penalty the jury should consider the circumstances surrounding the case, the situation of the parties, the standing of the man in the community, and fix your verdict and penalty at such an amount as, in your judgment, will serve as an example to prevent the defendant and others from doing likewise, and also to prevent a recurrence of the same offense."

Objection is made to that clause of the instruction, "standing of the man in the community." It is a well-settled principle in this state that instructions to a jury must be within the issues, and pertinent to the evidence. The only evidence in this case on which

Criminal law—instructions as to penalty—standing in community.

the jury might speculate as to the standing of appellant in the community comes from his admitted business. But the instruction in question told the jury that, in assessing punishment, it should consider the "standing of the man in the community." The clause "standing of the man in the community" is a broad and comprehensive statement, and as here used, properly interpreted, referred to appellant's place in the community in the estimation of others; his relative position in social, commercial, or moral relations, his repute, grade, or rank. According to the instruction, the jury was to consider appellant in the light of his standing in the community, as an element in aid to the fixing of a proper penalty. Without evidence to guide the jury in this particular, its action would be purely speculative, and an improper basis for determining a proper punishment. Drake v. State, 51 Ala. 30; Barker v. State, 48 Ind. 168. However, in our opinion, even though there were evidence of this character, it could not be considered for the purpose of enhancing or diminishing punishment.

In this consideration, we are not unmindful of the rule allowing jurors, in determining the credibility of the evidence offered, to use their common knowledge, gained from their own observation and experience in the affairs of life; but this rule cannot be extended to permit, if need be, the supplying of facts by the jury personally, from their own number or from any source other than at the trial. In this case, had the jury named the minimum penalty or approximately so, then there would be some reason for saying no harm was done appellant by the instruction; but when, as here, the penalty is 100 times the minimum, it will not do to say that the error was not harmful.

Evidence—knowledge of jurors.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

ANNOTATION.

Immunity of public officer from criminal arrest.

I. General rule, 1156.
II. Particular officers:
  a. Member of legislative body, 1156.
  b. Mail carrier, 1158.
  c. Diplomatic or consular officer, 1159.
  d. Other officers, 1160.

I. General rule.

While in both England and America public officers are, as a rule, exempted from arrest in civil cases while engaged in the performance of the duties of their office, this exemption is not extended to cases of a criminal nature, except in the one instance of ambassadors or ministers of a foreign country. United States v. Kirby (1869) 7 Wall. (U. S.) 482, 19 L. ed. 278; Williamson v. United States (1907) 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; United States v. Hart (1817) Pet. C. C. 390, Fed. Cas. No. 15,316; United States v. Wise (1842) 1 Hayw. & H. 82, Fed. Cas. No. 16,746a; Penny v. Walker (1875) 64 Me. 430, 18 Am. Rep. 269; Com. ex rel. Bullard v. Keeper of Jail (1877) 4 W. N. C. (Pa.) 540; Wellesley v. Beaufort (1831) 2 Russ. & M. 639, 39 Eng. Reprint, 538. And see the reported case (GROSS v. STATE, ante, 1151).

II. Particular officers.

a. Member of legislative body.

It is provided by the Constitution of the United States, and by the constitutions of practically all of the states, that members of Congress, or of the state legislature, shall be exempt from arrest while in attendance at a session of their body, or while going to or coming from the place of meeting, except in cases of treason, felony, or

breach of the peace. These exceptions are uniformly held to include all criminal offenses, so that the exemption applies only to arrest in civil cases. Thus, in Williamson v. United States (1907) 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163, wherein it was held that a member of Congress was not immune from arrest and punishment for conspiracy to commit subornation of perjury, the court, after an exhaustive review of the American and English authorities, said: "The terms treason, felony, and breach of the peace, as used in the constitutional provision relied upon, except from the operation of the privilege all criminal offenses."

Similarly, in United States v. Wise (1842) 1 Hayw. & H. 82, Fed. Cas. No. 16,746a, it appeared that a member of Congress was arrested on a warrant charging that he was about to commit a breach of the peace, and from the evidence it appeared that he was about to fight a duel with another member of the house. It was insisted that, as a member of Congress, the defendant was immune from arrest. The court decided against the plea of privilege, and the defendant was placed under bond to keep the peace.

And see Burton v. United States (1905) 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243, wherein it appeared that a member of the United States Senate was arrested and tried for a criminal offense, although the question of his immunity as a member of Congress was not directly passed on.

In Com. ex rel. Bullard v. Keeper of Jail (1877) 4 W. N. C. (Pa.) 540, a member of the general assembly was arrested on a charge of embezzlement, and it was insisted that, by virtue of the constitutional provision exempting members of the general assembly from arrest, except in cases of "treason, felony, violation of his oath of office, and breach or surety of the peace," he was immune, and entitled to be discharged. Holding that the immunity could be claimed only in civil cases, the court said: "The constitutional privilege claimed by the relator is borrowed from the privileges claimed by and accorded to members of the British Parliament. These privileges were recognized and enjoyed in Pennsylvania before any written constitution had been adopted. They were a part of our common law. The privileges, from very small beginnings, had, by accumulation, assumed alarming proportions. Parliament, being the judge of its own privileges, could not be confined within any certain limits, and for this reason the framers of the Federal Constitution inserted the clause defining what the privileges of members of Congress should be, and beyond which they should not go. The object was not to *create* the privileges therein expressed, for they were already established by our common law, but rather to render them certain, and fix limits within which they should be confined. The several states followed the national Constitution, and inserted similar clauses in all their constitutions. As the object was to *limit* the privilege from arrest to that then enjoyed by members of the British Parliament, and as the same language is employed as had been adopted in England to express the offenses for which members of Parliament could be arrested, to wit: 'Treason, felony, and *breaches of the peace*,' it follows that all offenses in England, comprehended in the words *breach of the peace*, are excepted from the privilege from arrest. Blackstone says there is no precedent for any such privilege, but only in civil suits. . . . It may be safely concluded that the privilege from arrest in America is, in no case, greater than the same privilege in England. We cannot, by a liberal construction of the language of our Constitution, enlarge the privileges of our legislators beyond those formerly enjoyed by members of the Parliament in England. See Story, Const. § 865. The reason of the law is its life, and while there is great reason for privileging public servants from civil detentions and arrests, there is none for shielding them from apprehension for crimes against the peace and dignity of the state."

But see State ex rel. Isenring v. Polacheck (1898) 101 Wis. 427, 77 N.

W. 708, wherein a member of the legislature was arrested on a charge of bribery. The Constitution of Wisconsin provided that "members of the legislature shall in all cases, except treason, felony, and breach of the peace," be privileged from arrest. The day after his arrest, and after being examined by a magistrate, he gave bail for his appearance at the next term of the court. Several steps were taken in this proceeding, but the defendant failed at any time to plead his immunity from arrest as a public officer. Thereafter he obtained a writ of habeas corpus, alleging that at the time of his arrest he claimed and still claimed his privilege from arrest. The court said that had he properly pleaded his privilege in due time he would have been entitled to his privilege from arrest, as bribery did not constitute a felony; but held that, immunity from arrest being a personal privilege, he had, by his failure to assert it, waived his right.

In Wellesley v. Beaufort (1831) 2 Russ. & M. 639, 39 **Eng.** Reprint, 538, it appeared that a member of Parliament was arrested under an attachment for criminal contempt. It was insisted that his membership in Parliament carried with it immunity from arrest. Answering this contention, the court said: "Against all civil process, privilege protects; but that against contempt for not obeying civil process, if that contempt is, in its nature, or by its incidents, criminal, privilege protects not: that he who has privilege of Parliament in all civil matters,—matters which, whatever be the form, are, in substance, of a civil nature,—may plead it with success, but that he can in no criminal matter be heard to urge such privilege; that members of Parliament are privileged against commitment, qua process, to compel them to do an act against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of a punishment, but rather in the nature of process to compel a performance; that in all such matters members of Parliament are protected; but that they are no more protected than the rest of the King's subjects from commitment in execution of a sentence, where the sentence is that of a court of competent jurisdiction, and has been duly and regularly pronounced."

But in Wilkes Case (1763) 2 Wils. 151, 95 **Eng.** Reprint, 737, 19 How. St. Tr. 989, it was held that a member of Parliament was privileged from arrest on a charge of publishing a seditious libel. However, immediately after the court rendered its decision in this case, the Parliament itself passed a resolution to the effect that no member thereof should be immune from criminal arrest.

b. Mail carrier.

In United States v. Kirby (1869) 7 Wall. (U. S.) 482, 19 L. ed. 278, it appeared that a mail carrier was arrested while in the discharge of his official duties, on a charge of murder. Holding that he was not exempt from criminal arrest because of his position, the court said: "All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process, while thus engaged. Process of that kind can, therefore, furnish no justification for the arrest of a carrier of the mail. This is all that is decided by the case of United States v. Harvey (1845) Brunner, Col. Cas. 540, **Fed.** Cas. No. 15,320, to which we are referred by the counsel of the government. The rule is different when the process is issued upon a charge of felony. No officer or employee of the United States is placed by his position, or the service he is called upon to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail, caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends."

In United States v. Hart (1817) Pet. C. C. 390, Fed. Cas. No. 15,316, it was held that a mail carrier could not, because of his position, escape arrest for reckless driving.

Similarly, in Penny v. Walker (1875) 64 Me. 430, 18 Am. Rep. 269, wherein it appeared that a mail carrier sought to justify an assault on a constable, who had attempted to arrest him for having in his possession intoxicating liquor, contrary to the law, on the ground that he was immune from arrest, the court, in denying his claim, said: "We think it would be a greater evil to hold the carriers of the mail a class privileged to resist the criminal process of the state, in the hands of officers duly qualified, than it would be to incur the risk of the brief and infrequent detention of the mail, when its carriers are found liable to arrest for criminal offenses. This defendant claims to intrench himself behind such supposed privilege in order to establish a defense to a suit which, of itself, imports a breach of the peace on his part, although the charge upon which the plaintiff arrested him was not of that character. We think such a claim cannot be allowed."

c. Diplomatic or consular officer.

By the modern law of nations, ambassadors and other public ministers are, in general, exempt from criminal arrest and prosecution. Ex parte Cabrera (1805) 1 Wash. C. C. 232, Fed. Cas. No. 2,278; Com. v. Kosloff (1820) 5 Serg. & R. (Pa.) 545; Re Anfrye (1876) 3 W. N. C. (Pa.) 188; State v. De La Foret (1820) 2 Nott & M'C. (S. C.) 217.

And this privilege from arrest on a criminal charge extends to a secretary or other attache of a foreign legation. Ex parte Cabrera (Fed.) supra.

Likewise, in the case of Re Anfrye (1876) 3 W. N. C. (Pa.) 188, it was held that an attache of the French legation, acting as a commissioner to the Centennial Exhibition, was immune from arrest on a charge of malicious prosecution.

But a minister, claiming to represent a revolutionary government which is not recognized by the United States, is not entitled to the privileges and immunities of diplomatic officers, and is subject to arrest. United States v. Skinner (1818) 2 Wheeler, C. C. 232, Fed. Cas. No. 16,309.

And it has been held that where an indictment is found against a political agent of a foreign country, after he has been requested by his government to resign, he is not entitled to the immunities of a diplomat, although he does not actually resign until after he is indicted. Ex parte Hitz (1884) 111 U. S. 766, 28 L. ed. 592, 4 Sup. Ct. Rep. 698.

However, the exemption from arrest accorded to ambassadors and ministers does not extend to consuls, and they may be held to answer for crime to the same extent as any other citizen. United States v. Ravara (1793) 2 Dall. (U. S.) 297, 1 L. ed. 388, Fed. Cas. No. 16,122.

In State v. De La Foret (1820) 2 Nott. & M'C. (S. C.) 217, wherein a foreign consul was indicted for assault and battery, the court stated the rule as follows: "That an ambassador or public minister of a foreign prince or state is not amenable to the laws of the nation to which he is sent, is, I believe, universally admitted. All the writers on the law of nations concur in opinion as to the existence as well as the propriety of this immunity: and no court in this country, either Federal or state, is known to have questioned its existence. In England, as early as the 7th of Anne, a statute was passed, exempting ambassadors and public ministers from the process of their courts, and the statute declares all such persons as should prosecute any writ or process against them, to be violators of the law of nations; and Congress, in 1790, passed an act of similar import; but neither of these acts extends to consuls. The privileges of ambassadors and public ministers are great, but they appear to be necessary. They are the representatives of nations, employed in the transaction of the most important concerns, the proper management of which requires the most perfect exemption from all possible influence or control. But a consul ap-

pears to be neither ambassador nor public minister. He is not the representative of his nation, nor is he employed in the management of national concerns. He is no more than a commercial agent, attending to individual interests."

Similarly, in Com. v. Kosloff (1820) 5 Serg. & R. (Pa.) 545, which was a prosecution of the Russian consul general at Philadelphia for rape, it was held that a consul was not entitled to the privileges and immunities of ambassadors and ministers.

d. Other officers.

In Re Election of Officers (1868) 1 Brewst. (Pa.) 182, it appeared that certain election officers had been advised that there had been a large issue of forged certificates of naturalization, and had declared that if any such papers were offered they intended to reject the vote and to impound the papers, whereupon they were threatened with arrest in case they took such action. On request to the court for instructions, it was held that, save for treason, felony, or a breach of the peace, an election officer could not be arrested at the polls, on Election Day, or in going to or returning from the polls, and that refusing a vote was neither treason, felony, or a breach of the peace, nor was the impounding of a forged naturalization paper, if done in good faith, larceny.

And see the reported case (GROSS v. STATE, ante, 1151) which holds that a justice of the peace is not exempt from criminal arrest. M. B.

BERT CROW, Appt.,
v.
STATE OF TENNESSEE.

Tennessee Supreme Court — October 28, 1916.

(136 Tenn. 333, 189 S. W. 687.)

Arson — charring fiber.

1. Under a statute providing for punishment of any person who shall set fire to a building, the offense is complete when the nature of the fiber of the combustible to which the fire is set is changed or charred.

[See note on this question beginning on page 1163.]

Appeal — error in period of sentence.

2. Error in the period of sentence may be corrected on appeal without reversal.

Same — error in charge.

3. Before error can be assigned upon the charge of the trial judge the entire charge must be contained in the bill of exceptions, or it must show affirmatively that the portion quoted is all that the trial judge said upon the subject.

Arson — malice as element.

4. When malice is, by statute, made an element of arson, it must be included in the definition of the offense given by the trial judge to the jury, in a prosecution for that crime.

Same — wilfulness.

5. Malice against a particular building is not a necessary element of the crime of arson, under a statute providing that any person who wilfully and maliciously burns a building shall be guilty of that crime, but it is sufficient that the fire is set wilfully.

Same — jail as building.

6. A jail is a building within the meaning of a statute providing for the punishment of anyone who sets fire to a house or building.

Same — fireproof building.

7. That the only combustible portion of a jail is the door does not prevent it being arson to set fire to the door.

APPEAL by defendant from a judgment of the Circuit Court for Carter County convicting him of maliciously setting fire to a building. *Judgment corrected and affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Allen and Clark** for appellant.

Mr. **William H. Swiggart, Jr.**, Assistant Attorney General, for the State.

Lansden, J., delivered the opinion of the court:

The plaintiff in error was indicted in the circuit court of Carter county for that he, "in the county aforesaid, then and there unlawfully, feloniously, wilfully, and maliciously did set fire to and burn the calaboose, a building the property of the town of Elizabethton, Tennessee, and against the peace and dignity of the state," and, in the second count thereof, that he "unlawfully, maliciously, feloniously, and wilfully did set fire to and burn a building, the city jail or calaboose, the property of the incorporation of the town of Elizabethton, Tennessee, said building being located and situated in the incorporated limits of said town, and against the peace and dignity of the state."

The jury returned a veredict that the "defendant is guilty of arson in the manner and form as charged in the indictment." Motions for new trial and in arrest of judgment were made, and separately overruled by the trial judge, who pronounced judgment that the plaintiff in error undergo "confinement in the penitentiary for a period of from three to ten years, in accordance with the verdict of the jury."

The preponderance of the evidence shows that plaintiff in error is a boy about nineteen years of age and was confined in the calaboose at Elizabethton, first for disorderly conduct; and, after he was released upon this charge he immediately interfered with an officer who was putting one Renfro into the calaboose upon a like charge, and the officer then in turn restored the plaintiff in error to the calaboose, and as he did so Renfro escaped. A short time after plaintiff in error was confined as stated, witnesses saw smoke puffing out of the window, and when the city marshal arrived at the calaboose he found that the bedding placed there for the benefit of prisoners was on fire, and was against the door of the building. The marshal says: "The fire had smoked and scorched the door, and charred it some at the bottom. We put the fire out."

The building was constructed of brick and concrete, except the door, which, it is shown in the evidence, was combustible and, we assume, was made of wood. At all events, it is shown definitely that the door was the only part of the building that would burn. The plaintiff in error made threats to different ones that if he was put in the calaboose he would burn it down, and while he was in arrest he practically conceded to the officers that he had set fire to the door. He says he knew that the building would not burn except the door, and that he knew it would burn.

The bill of exceptions states that "that part of the charge dealing with the testimony of witnesses, their credibility, weight, and credibility of evidence, etc., alike applicable to all cases, statutory definition of arson, etc., is omitted here."

The bill of exceptions recites a portion of the charge of the trial judge, which is as follows: "As to the facts of the case, gentlemen, I charge you that, if you find that the defendant set fire to the quilts in the jail or calaboose, and put them over against the door, and the door was charred in the least by the fire, that is, if the grain of the wood was destroyed by the fire, and the fire was wilfully and knowingly set to the quilts by the defendant, he is guilty. It makes no difference whether the building was fireproof or not, if the door could have been burned, and was burned as stated, the defendant would be guilty, and the fact that he may have only intended to effect his escape from the prison by attracting attention to the fire would make no difference, if he wilfully and purposely set fire to the said bedding."

In overruling the motion for new trial the court said that the facts

made the case a doubtful one, but that, as the question had not been directly passed upon by our supreme court, he was going to allow the verdict to stand, and let the supreme court settle it.

The judgment of the trial court that plaintiff in error undergo confinement in the penitentiary of the state for a period of from three to ten years was erroneous. It should have been that he undergo confinement in the penitentiary of the state for not less than two or more than twenty-one years. But this error can be corrected here without a reversal of the case. Cowan v. State, 117 Tenn. 247, 96 S. W. 973.

Appeal—error in period of sentence.

There is error in that paragraph of the charge just quoted in that it fails to contain the element of malice, which is essential under the provisions of our Code to be hereafter stated; but manifestly this court cannot say that such an error was prejudicial, for the reason that the entire charge is not set out in the bill of exceptions, nor is it stated that the paragraph quoted is the only part of the charge which bears upon the subject under discussion. We have frequently held that before error can be assigned upon the charge of the trial judge the entire charge must be contained in the bill of exceptions, or the bill of exceptions must show affirmatively that the portion quoted is all that the trial judge said upon the subject. Holder v. State, 119 Tenn. 178, 104 S. W. 225.

Same—error in charge.

By § 6529 of Shannon's Code, it is provided that "any person who wilfully and maliciously burns the house or outhouse of another, is guilty of arson, and shall be punished by confinement in the penitentiary not less than five nor more than twenty-one years."

By § 6530 it is provided: "Every person who wilfully and maliciously sets fire to or burns any house or building in a town or city, or procures the same to be done, shall be punished as for arson."

And by § 6531 it is provided: "Every person who shall wilfully and maliciously burn or set fire to any house, barn, stable or other valuable building, or any building containing valuable property therein . . . shall be imprisoned in the penitentiary not less than two or more than twenty-one years."

We have set out the foregoing sections of the Code to show the modifications of the common law which our legislature has made. The first section quoted contains the common-law definition of arson, and by the following sections it is made unlawful for any person to wilfully and maliciously "set fire to any building," etc. These sections dispense with the necessity that the subject of the arson should be destroyed by fire; it is sufficient, under them, that the prisoner set fire to the building wilfully and maliciously. The existence of malice, as a necessary ingredient of the offense, either at common law or under our statute, cannot be doubted. 5 C. J. 541, § 2.

Arson—malice as element.

But a particular intent or malice against a particular person or thing is not essential under our Code provisions, because none is prescribed by the statute, and none was required at the common law. It is sufficient to show that the accused was actuated by a malicious purpose, and that he set fire to the building wilfully, rather than negligently or accidentally.

Same—wilfulness.

It is suggested in the brief of plaintiff in error that setting fire to the calaboose was not an offense under the sections of the Code above quoted, because the jail or calaboose is not a building within the meaning of the statute, and also because this particular calaboose was constructed of concrete and brick, and would not burn. It is said that the nature of the con-

Same—jail as building.

struction negatives the malicious intent, because the plaintiff in error must have known that he could not burn it. But a sufficient reply to this is the conceded fact that the door, through which the plaintiff in error doubtless hoped to escape, was combustible and would burn, and he had set the quilts on fire and placed them against the door. They were so located and on fire when the marshal came to the calaboose. It is immaterial that the balance of the building was composed of fireproof material, if the door would burn. The purpose of this building was to confine those accused of violating the city ordinances, and the door was very essential to this purpose. As stated above, the legislature enlarged the definition of arson by providing "that it shall be a felony for anyone to set fire to a building."

Same—fireproof building.

At the common law the offense of arson was not complete unless there was a burning. Authorities have differed as to the extent and nature of the burning that is required to complete the offense, but under the statutes above quoted it is sufficient to complete the offense to set fire to the building. This means, of course, that there must be a burning; but it is sufficient if the nature of the fiber of the combustible to which the fire is set is changed or charred. 5 C. J. 544; 2 R. C. L. 498; Benbow v. State, 128 Ala. 1, 29 So. 553.

Same—charring fiber.

The judgment is corrected and affirmed.

Petition for rehearing denied.

ANNOTATION.

Burning as element of offense of arson.

I. Necessity of burning:
  a. Generally, 1163.
  b. Effect of particular statutory phrases, 1164.
II. What constitutes burning:
  a. Generally, 1166.
  b. Charring or scorching, 1168.
III. Method or means of applying fire, 1170.

I. Necessity of burning.

a. Generally.

Common-law arson was defined as the wilful and malicious burning of the dwelling house of another. See 2 R. C. L. title, Arson, p. 496. By the obvious requirement of the definition, some burning was essential to the offense. "To constitute arson at common law, there must be an actual burning of the house or some part of it." East, P. C. 1020. At common law, "as to what shall be said to be a burning so as to amount to arson, a bare intent or attempt to do it by actually setting fire to a house, unless it absolutely burns, does not fall within the description of incendit et combussit, which were words necessary in the days of law Latin, to all indictments of this sort." 4 Bl. Com. 220.

In the absence of a statute establishing a different rule, the cases are in accord in holding that, to constitute arson, it is not sufficient that fire was set near or against a building, but the building itself must to some extent be burned. Graham v. State (1867) 40 Ala. 659; Mary v. State (1862) 24 Ark. 44, 81 Am. Dec. 60; Cochrane v. State (1854) 6 Md. 400; Woolsey v. State (1891) 30 Tex. App. 346, 17 S. W. 546. And see the reported case (CROW v. STATE, ante, 1160) and the cases cited throughout this note.

The burning of chattels in or about a building is not a burning of the building, unless the fire is actually communicated to the building itself. Thus, setting fire to a bale of cotton in a building, the fire being extinguished after a small part of the cotton is consumed, and before fire is communicated to any part of the building, is not within a statute penalizing setting fire to or burning any building. Graham v. State (1867) 40 Ala. 659.

So, setting fire to an uncompleted boat in a shop is not arson, unless some part of the building becomes ignited. It must appear that "the building was actually set on fire." Com. v. Francis (1830) Thacher, C. C. (Mass.) 240.

In Dedieu v. People (1860) 22 N. Y. 178, it appeared that the accused set fire to his trunk and other belongings, which were in a room in a dwelling house. The fire was extinguished before any part of the building caught fire. It was held that he could not be convicted on an indictment charging the burning of the building.

In Rex v. Taylor (1759) 1 Leach, C. L. (Eng.) 49, 5 East. P. C. 1820, it appeared that the accused set fire to a quantity of paper, which was drying in the loft of a paper mill, but not to any part of the mill itself, and no part of the mill was consumed. The judges agreed that, "the prisoner not having set fire to any part of the mill," the conviction could not stand.

By the express terms of the Iowa statute, it is arson to set fire to any material with intent to cause a building to be destroyed. In State v. Johnson (1865) 19 Iowa, 230, it was held to be a violation of the statute to place a lighted candle in a pile of hay, in such a way that when the candle burned down the hay would be ignited, the court saying: "Nor can it make any difference that the material used was a candle, instead of hay, shavings, straw, or anything else." See also State v. Dennin (1859) 32 Vt. 158, stated at length, infra, I. b.

b. Effect of particular statutory phrases.

The various statutes defining arson sometimes use the term "burn," sometimes "set fire to," and sometimes both phrases, conjunctively or disjunctively. It has been held that the terms "burn" and "set fire to" are synonymous, and that the use of the latter term does not vary the common-law rule that burning is necessary to the offense. Graham v. State (1867) 40 Ala. 659; Benbow v. State (1900) 128 Ala. 1, 29 So. 553; State v. Taylor (1858) 45 Me. 322. And see State v. Jones (1891) 106 Mo. 302, 17 S. W. 366, wherein it was said that there was no merit in an objection that the averment that the accused "set fire to and burned" a building charged two offenses.

On this principle, an indictment charging that the accused "set fire" to a building has been held to be sufficient, under a statute penalizing the "burning" of a building. State v. Taylor (1858) 45 Me. 322.

The view that the terms "burn" and "set fire to" are synonymous is rested largely on the authority of East (Pleas of the Crown, p. 1020), who said: "To constitute arson at common law there must be an actual burning of the house, or of some part of it; though it be not necessary that any part be wholly consumed, or that the fire should have any continuance, but be put out or go out of itself. But merely putting fire into or towards a house, however maliciously, if either by accident or timely prevention the fire do not take, and no part be burned, does not amount to arson, at common law. The statute 9, Geo. I. chap. 22, does indeed, in enacting the felony, make use of the words 'set fire to;' but I am not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law; and the contrary opinion may be collected from what was said in Spalding and Breeme's Cases (Eng.) infra, and 'in the following Taylor Case (Eng.) infra." Of the cases referred to by East, but one seems to bear on the point. Rex v. Taylor (1759) 1 Leach, C. L. (Eng.) 49, 5 East, P. C. 1820, set out in supra, I. a. Rex v. Breeme (1780) 1 Leach, C. L. (Eng.) 220, and Rex v. Spalding (1780) 1 Leach, C. L. (Eng.) 218, turned entirely on the question whether the burning of a building by a tenant in possession was arson, and sustains his opinion only by reason of the holding that the statute did not, in that respect, change the common-law rule.

In other cases it has been held that the terms "burn" and "set fire to" are not synonymous. Cochrane v. State (1854) 6 Md. 400; State v. Hall (1885) 93 N. C. 571; Howel v. Com. (1848) 5

Gratt. (Va.) 664. Compare Polsten v. State (1851) 14 Mo. 463, wherein it was held that a defect in the allegation of "setting fire" was immaterial, in view of a proper allegation of "burning."

In Howel v. Com. (1848) 5 Gratt. (Va.) 664, it was said of the doctrine laid down by East: "We are not satisfied that 'setting fire to' and 'burning' have been established by any legal authority to be synonyms, so as to justify, in an indictment upon the statute, the substitution of the former words in the place of the other. 2 East, P. C. 1020, § 2, remarking upon the statute 9 Geo. I. chap. 22, says that that statute does, indeed, in enacting the felony, make use of the words 'set fire to,' but he was not aware of any decision which had put a larger construction on those words than prevails by the rule of the common law; and the contrary opinion may be collected (he says) from what is said in Spalding and Breeme's Cases (Eng.) supra, and in the Taylor Case (Eng.) supra. With all the respect which is justly due to this writer, upon an attentive inspection of the authorities which he has referred to, it will be discovered that there is nothing in these cases which decides that these expressions are identical in their meaning."

In State v. Hall (1885) 93 N. C. 571, in holding that, under a statute using the word "burn," an indictment charging that the accused "set fire to" a building was not good, the court said: "The distinction may appear to be a refinement unworthy to be upheld, but it is safest to follow approved precedents, and it is certainly possible to set fire to some articles, which, by reason of the sudden extinction of the fire, may fail to change, by charring even, the material to which it has been applied; so that the defendant may have done the act imputed, and yet not burned it within the meaning of the act, and if so, no judgment can be rendered against him."

In State v. Dinneen (1896) 7 Penn. (Del.) 505, 76 Atl. 623, in a charge to a jury, it was said that "burning" contemplated the destruction of the entire building, while "setting on fire . . . is equivalent to the destruction of the building when it is burned up."

The Vermont statute makes it an offense to "set fire, with intent to burn," to any building. In State v. Dennin (1859) 32 Vt. 158, a conviction was sustained on proof that the accused set fire to hay in a barn, no part of the barn catching fire therefrom, the court saying: "In the first place they allege that the operative words of the act itself, 'set fire to,' by their own natural and inherent signification, mean the same as 'burn' or 'set on fire,' and that to give them any less signification is to force them out of their natural office. But it seems to us that this claim as to the natural force and meaning of the words cannot be sustained, and that, though the words may perhaps, without forced construction, well enough be so understood, still that they may as reasonably and fairly be understood the same as 'put fire to,' or 'place fire upon,' or 'against,' or 'put fire in connection with,' and that, especially when those words are used in connection with other words clearly showing that they are used in this latter sense, they may bear such meaning without the least violence to their natural import."

However, in State v. Babcock (1879) 51 Vt. 570, it was held, in a prosecution under the same statute, that the use of "burn" instead of "set fire to" in an instruction was harmless.

The fact that the statute denominates the offense "arson" has been referred to as a circumstance showing an intention to continue in effect the common-law rule that some part of a building must be burned. Graham v. State (1867) 40 Ala. 659.

The term "burn," as used in the Georgia Arson Statute, is defined by another statute as meaning "to consume or generally injure." See Jenkins v. State (1874) 53 Ga. 33, 21 Am. Rep. 255, wherein it was held that the burning of a hole through a jail door was not an attempt to commit arson, because there was no intention of destroying the whole building.

II. What constitutes burning.

a. Generally.

To constitute the burning which is essential to the crime of arson, it is not necessary that the building should be consumed or materially injured. It is sufficient if fire is actually communicated to any part thereof, however small.

England.—Rex v. Stallion (1834) 1 Moody, C. C. 398; Reg. v. Russell (1842) 1 Car. & M. 541; Reg v. Parker (1839) 9 Car. & P. 45.

Alabama.—Luke v. State (1873) 49 Ala. 30, 20 Am. Rep. 269; Benbow v. State (1900) 128 Ala. 1, 29 So. 553.

Arkansas.—Mary v. State (1862) 24 Ark. 44, 81 Am. Dec. 60.

California. — People v. Haggerty (1873) 46 Cal. 354; People v. Simpson (1875) 50 Cal. 304.

Iowa.—State v. Spiegel (1900) 111 Iowa, 705, 83 N. W. 722.

Kentucky.—Kehoe v. Com. (1912) 149 Ky. 400, 149 S. W. 818.

Maine.—State v. Taylor (1858) 45 Me. 322.

Massachusetts. — Com. v. Betton (1849) 5 Cush. 427; Com. v. Francis (1830) Thacher, C. C. 240; Com. v. Van Schaack (1819) 16 Mass. 105; Com. v. Tucker (1872) 110 Mass. 403.

Missouri.—State v. McCoy (1901) 162 Mo. 383, 62 S. W. 991; State v. McCaffrey (1910) 225 Mo. 617, 125 S. W. 468; State v. Bobbitt (1912) 242 Mo. 273, 146 S. W. 799.

New York.—People v. Butler (1819) 16 Johns. 203. See Butler's Case (1818) 4 N. Y. City Hall Rec. 77.

North Carolina.—State v. Sandy (1843) 25 N. C. (3 Ired. L.) 570; State v. Hall (1885) 93 N. C. 571; State v. Rogers (1914) 168 N. C. 112, 83 S. E. 161.

Philippine.—See United States v. Po Cheng Co. (1912) 23 Philippine, 487; United States v. Go Foo Suy (1913) 25 Philippine, 187.

Tennessee.—See the reported case (CROW v. STATE, ante, 1160).

Texas.—Delany v. State (1874) 41 Tex. 601, 1 Am. Crim. Rep. 86; Blanchette v. State (1893) — Tex. Crim. Rep. —, 24 S. W. 507; Smith v. State (1887) 23 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219; Woolsey v. State (1891) 30 Tex. App. 346, 17 S. W. 546.

"The burning is complete when the fire has actually communicated to a house, though it may neither be destroyed nor seriously injured." Smith v. State (1887) 23 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219, wherein it appeared that several shingles on a roof were burned.

"The house need not be consumed with fire to constitute the offense. It will be sufficient to show that a person set fire to the house to the extent that some part of the house was on fire." Delany v. State (1874) 41 Tex. 601, 1 Am. Crim. Rep. 86.

It was said by way of dictum in Graham v. State (1867) 40 Ala. 659, that the burning of any part, however small, of a building, completes the offense.

The offense is complete when there is an actual burning of any part of the building, though the fire thereafter is put out, or goes out of itself. Mary v. State (1862) 24 Ark. 44, 81 Am. Dec. 60.

In People v. Haggerty (1873) 46 Cal. 354, the court quoted and applied the rule laid down by Mr. Bishop that "if the wood is blackened, but no fibers are wasted, there is no burning; yet the wood need not be in a blaze. And the burning of any part, however small, completes the offense." In the subsequent decision of People v. Simpson (1875) 50 Cal. 304, the Haggerty Case was referred to as establishing the rule thus stated.

"It is not necessary, to constitute arson, that any part of the building should be consumed. If there is actual ignition of any part, however small, though the fire immediately go out of itself, the offense is committed." State v. Taylor (1858) 45 Me. 322.

In State v. McCoy (1901) 162 Mo. 383, 62 S. W. 991, it was held to be unnecessary to allege that the building was "consumed."

In State v. Hall (1885) 93 N. C. 571, on an indictment for burning a stock of fodder, it was said obiter: "The crime of arson is consummated by the burning of any the smallest part of the house; and it is burned, within

the common-law definition of the offense, when it is charred, that is, when the wood is reduced to coal, and its identity changed, but not when merely scorched or discolored by heat."

In holding that the building set on fire need not be entirely consumed to constitute arson, the court in State v. Babcock (1879) 51 Vt. 570, said: "The building insured was partially destroyed; and the respondent claimed payment for the damage caused by such fire. His criminal purpose had become so far executed that the mischief against which the statute is aimed was perpetrated, but to less extent than he purposed, by reason of the extinguishment of the fire, and the discovery of his crime."

"The slightest intentional ignition of the building, in whatever part of it, and however slight," is sufficient to constitute arson. Dictum, in Mead v. Boston (1849) 3 Cush. (Mass.) 404.

In Com. v. Francis (1830) Thacher, C. C. (Mass.) 240, it was said in charging the jury that the offense was consummated "if the fire took effect on the building, although it was immediately extinguished."

In State v. Spiegel (1900) 111 Iowa, 701, 83 N. W. 722, it appeared that the flames "charred and injured some of the window frames, casings, and doors, so that they had to be repaired, and in some cases wholly replaced." It was held that this amounted to a burning of the building.

In State v. McCaffrey (1910) 225 Mo. 617, 125 S. W. 468, it was held that the completed offense of arson was shown by evidence that oil-soaked rags were set on fire, and a large hole burned in the floor of a building, the court saying that "there was no evidence upon which to predicate the instruction on attempted arson."

In Reg. v. Parker (1839) 9 Car. & P. (Eng.) 45, the only witness to the extent of the fire, testified that "the floor near the hearth had been scorched; it was charred in a trifling way; it had been at a red heat, but not in a blaze." It was said by Baron Parke, in the course of the examination, that this was sufficient to constitute arson; but an acquittal was later advised, for want of better evidence "that the house was on fire at the time in question."

In Blanchette v. State (1893) — Tex. Crim. Rep. —, 24 S. W. 507, wherein it appeared that fire set to the steps of a house communicated to the door, "and up the door to the top," it was held that a refusal to charge an attempt to commit arson was proper.

In People v. Butler (1819) 16 Johns. (N. Y.) 203, it was held that a sufficient burning to constitute arson was shown by proof that combustible materials were placed on the kitchen stairs and set on fire, in consequence of which two or three of the stairs were, in part, consumed. The court said: "It is well settled that, to constitute the crime of arson, it is not necessary that the house should be absolutely consumed or burned. It is enough if the fire is applied with a malicious intent, so as to take effect, though only a part is consumed."

In Rex v. Stallion (1834) 1 Moody, C. C. (Eng.) 398, the building alleged to have been set on fire was a shed with a framework of poles and a straw roof; smoke was seen issuing from the roof, but no flame appeared. In pulling out the straw after the fire had been extinguished, ashes and burned straw were found. No part of the wooden framework was burned. A conviction was sustained.

In Com. v. Van Schaack (1819) 16 Mass. 105, it appeared that the defendant placed a coal of fire on the sill of a dwelling house, by which the sill was burned about 6 inches in length. The fire communicated to a board, part of the exterior covering of the house, and burned that to the extent of 18 inches in length and 6 inches in width. It was held that there was sufficient burning to constitute arson, within a statute providing that it shall be arson to "set fire to the dwelling house . . . and by the kindling of such fire . . . such dwelling house shall be burnt," etc. The court said: "It is impossible to draw the line of distinction between the burning in this case, and that which should consume a greater part, or the whole, of a dwell-

ing house. The statute has left the burning to be defined by the common law; and by that, if any part of a dwelling house, however small, be consumed by the fire, the offense is complete; and so is within the statute."

In Com. v. Tucker (1872) 110 Mass. 403, it was held, under the same statute, that a conviction was sustained by proof that the roof of a dwelling caught fire and the shingles were burned in two places, the court approving an instruction which required the jury to find that "some portion of the dwelling house had been actually on fire and burned."

In Lavelle v. State (1894) 136 Ind. 233, 36 N. E. 135, an indictment charging that the accused set fire to and burned "large parts" of a courthouse was held to be sufficient.

The setting off of an explosive in a house does not constitute arson, unless some part of the house is thereby set on fire. Landers v. State (1898) 39 Tex. Crim. Rep. 671, 47 S. W. 1008.

In Levy v. People (1880) 80 N. Y. 327, it appeared that the building burned was occupied by several persons having separate apartments. It was charged in the indictment to be the dwelling house of one of these. The fire did material damage to the building, but not to the rooms occupied by the person named. It was held that a conviction was proper, the court saying: "There can be no dispute that the building known as No. 11 Ludlow street, within which the fire was set and burned, was an edifice, a single complete edifice of itself, having its own four walls, its own roof, its own outer door, its own halls and stairways through which there was a common way of reaching all the rooms in it. It was under that roof and within those walls, and hence within that edifice, that Koenigsberg and his family usually did lodge, and within which, in the nighttime, they were in fact, when the fire was set and did burn a part of that edifice. It matters not that it did not burn but a part of the edifice; it was a setting fire to the whole of it (People v. Butler (1819) 16 Johns. (N. Y.) 203), and to the part tenanted by Koenigsberg, as well as that tenanted by the prisoner."

In State v. De Bruhl (1856) 10 Rich. L. (S. C.) 23, it was held to constitute a violation of a statute, making it an offense to "burn, or cause to be burnt or destroyed," any building, etc., it is necessary that the damage by fire should amount to a total demolition of the building, or unfit it for the purpose for which it was erected.

The statute under consideration in Kinningham v. People (1889) 120 Ind. 322, 22 N. E. 313, contained a clause, "The property so burned being of the value of $20 or upwards." It was held that the effect of this provision was to make it essential that property of the value of at least $20 should actually be destroyed.

It has been held in several cases that for prisoners confined in a jail to burn a hole in the wall or floor of the jail is a sufficient burning to constitute arson, though the cases so holding are not in accord as to whether an intent to destroy the building, distinct from the intent to escape, is necessary under those circumstances. Luke v. State (1873) 49 Ala. 30, 20 Am. Rep: 269; Kehoe v. Com. (1912) 149 Ky. 400, 149 S. W. 818; State v. McCoy (1901) 162 Mo. 383, 62 S. W. 991; People v. Cotteral (1820) 18 Johns. (N. Y.) 115; State v. Mitchell (1845) 27 N. C. (5 Ired. L.) 350; Delany v. State (1874) 41 Tex. 601, 1 Am. Crim. Rep. 86. See also the reported case (CROW v. STATE, ante, 1160) wherein it is held that the burning of a jail door by prisoners constitutes arson, though every other part of the jail was composed of incombustible materials. Compare Jenkins v. State (1874) 53 Ga. 33, 21 Am. Rep. 255, supra, I. a.

b. Charring or scorching.

Any charring of the wood of a building, whereby the fiber of the wood is destroyed, constitutes a sufficient burning to complete the crime of arson. Benbow v. State (1900) 128 Ala. 1, 29 So. 553; People v. Haggerty (1873) 46 Cal. 354; People v. Simpson (1875) 50 Cal. 304; State v. Spiegel (1900) 111 Iowa, 701, 83 N. W. 722; Kehoe v. Com. (1912) 149 Ky. 400, 149 S. W. 818; State v. Bobbitt (1912) 242

Mo. 273, 146 S. W. 799; State v. Sandy (1843) 25 N. C. (3 Ired. L.) 570; State v. Hall (1885) 93 N. C. 571; State v. Rogers (1914) 168 N. C. 112, 83 S. E. 161; Moore v. State (1907) 51 Tex. Crim. Rep. 468, 103 S. W. 188.

It is not necessary that the wood should be in a blaze. Reg. v. Parker (1839) 9 Car. & P. (Eng.) 45; Graham v. State (1867) 40 Ala. 659; People v. Haggerty (1873) 46 Cal. 354.

"The crime of arson is consummated by the burning of any the smallest part of the house; and it is burned, within the common-law definition of the offense, when it is charred; that is, when the wood is reduced to coal, and its identity changed." Woolsey v. State (1891) 30 Tex. App. 346, 17 S. W. 546.

It was said in Com. v. Betton (1849) 5 Cush. (Mass.) 427, wherein it appeared that chips and sticks were piled against a wall and ignited, that the test was "whether the fire took effect on the fiber of the wood."

In State v. Rogers (1914) 168 N. C. 112, 83 S. E. 161, wherein the facts do not appear in the report, it was said that charring is sufficient proof of a burning, even in a charge of arson.

In State v. Sandy (1843) 25 N. C. (3 Ired. L.) 570, it was said: "The next objection is nothing at all, being no more than a question whether burning is burning. It is stated in the case that the floor of the building was charred to the depth of half an inch. The definition of 'char' is, to reduce wood to a coal by burning. Therefore, the crime was complete here, for although, to constitute arson, there must be a burning of the house, and not merely something that is in it, yet the least burning of the building is sufficient. The opinion of the court, therefore, is that the conviction was right."

In State v. Bobbitt (1912) 242 Mo. 273, 146 S. W. 799, it was held that it was not error to refuse to submit the question of an attempt to commit arson, where it appeared that burning rags were put on a roof, and that the roof caught fire therefrom, the shingles being charred, though the roof was not burned through.

In Kehoe v. Com. (1912) 149 Ky. 400, 149 S. W. 818, it appeared that a prisoner ignited a mattress and thrust it through the bars of his cell against the wooden wall of the jail, which was charred and to some extent injured before the fire could be extinguished. It was held that there was a sufficient burning to constitute arson.

In People v. Haggerty (1873) 46 Cal. 354, it appeared that a fire was set in rags saturated with coal oil, which were lying on the floor of a house. The fire was quickly discovered and put out. There was evidence tending to show that a spot on the floor was charred, so as to destroy the fibers of the wood. To some of the witnesses the spot appeared to be merely blackened, and not charred. A conviction was sustained.

In People v. Simpson (1875) 50 Cal. 304, wherein it appeared that a wooden partition in a house was charred, and in one place burned through, it was held that there was sufficient burning to constitute arson.

It seems that if a building is not burned or charred, but is merely scorched or discolored by heat, there is not such a burning as will constitute arson. See dictum in the following cases: Graham v. State (1867) 40 Ala. 659; People v. Haggerty (Cal.) supra; State v. Hall (1885) 93 N. C. 571; Smith v. State (1887) 23 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219; Woolsey v. State (1891) 30 Tex. App. 346, 17 S. W. 546; Moore v. State (1907) 51 Tex. Crim. Rep. 468, 103 S. W. 188.

In Reg. v. Russell (1842) Car. & M. (Eng.) 541, the prosecuting witness testified: "I found a small fagot lighted and burning on the boarded floor of the kitchen, about 4 feet from the hearthstone. I took up the burning wood and put it into the grate. A part of the boards of the kitchen floor were scorched black, but not burnt. The fagot was nearly consumed, but no part of the wood of the floor was consumed." The court held that the indictment could not be sustained, but added that "it is not essential to this offense that the wood should be in a blaze."

In Woolsey v. State (1891) 30 Tex.

App. 346, 17 S. W. 546, the court said: "Three of the witnesses for the state testified that the wall of the house was scorched and smoked, but that they could not say that the wall or ceiling had caught fire. They also say that the floor was burned or charred in one place—a burnt place on the floor, where the fire burned partly through the floor. Two other witnesses testified that the wall of the house was scorched or smoked, but was not burnt, and did not catch on fire. They say that coal oil had been poured on the bed, and had been set on fire, and that it was burning up by the wall to the ceiling, but that they did not put out any fire in the house, but simply carried out the bed and bed clothing into the yard, and extinguished the fire, which was confined to the bed clothing, which was almost entirely destroyed. Under our statute with regard to arson, it is declared that the burning necessary to constitute the offense is complete when the fire has actually communicated to the house, though it may be neither destroyed nor seriously injured (Penal Code, art. 653); and the court so instructed the jury in its general charge. The court refused to give the defendant's special instruction number 2, to the effect that 'if they found that the house was simply scorched or smoked, then this would not be sufficient, and they should acquit the defendant.' If the house was simply scorched or smoked, and the fire was not communicated to the building, then the offense was not complete under our statute. If the fire had burnt a hole in the floor, as testified to by some of the witnesses, then the offense was complete. The conflict as to whether the fire had actually communicated to the house was one which arose on the testimony of the state's witnesses."

III. Method or means of applying fire.

The fire need not be applied directly to the property whose burning is the basis of the charge. Com. v. Andrews (1891) 155 **Mass.** 68, 28 N. E. 1124, wherein it was said: "A wilful burning of property may as well be accomplished by setting fire to kindlings or to other inflammable materials, in such a position that the flames will naturally pass to the property intended to be burned, as by applying the fire in the first place to the property itself which one desires to burn."

"It matters not whether the method be by the direct application of a match, or by the indirect use of something which will ignite from its own nature." State v. Lockwood (1909) 1 Boyce (**Del.**) 28, 74 Atl. 2 (charge to jury).

The putting of matches in unginned cotton, which are ignited in the process of ginning, whereby the gin house is burned, constitutes setting fire to and burning the gin house. Overstreet v. State (1871) 46 **Ala.** 30.

It is arson if, by the setting off of an explosive in a house, fire is communicated to any part thereof. Landers v. State (1898) 39 **Tex.** Crim. Rep. 671, 47 S. W. 1008.

If fire is set to certain buildings, or other property, with the intent that another adjacent building shall be burned, and the fire is actually communicated to the latter building, it is arson of the building thus secondarily set on fire. Graham v. State (1867) 40 **Ala.** 659; Grimes v. State (1879) 63 **Ala.** 166; People v. Hiltel (1901) 131 **Cal.** 577, 63 Pac. 919; Combs v. Com. (1892) 93 **Ky.** 313, 20 S. W. 221; State v. Hill (1868) 55 **Me.** 365; People v. Fairchild (1882) 48 **Mich.** 31, 11 N. W. 773; Hennessey v. People (1861) 21 How. Pr. (**N. Y.**) 239; State v. Laughlin (1861) 53 **N. C.** (8 Jones, L.) 354; State v. Roberts (1887) 15 **Or.** 187, 13 Pac. 896. And see State v. Grimes (1892) 50 **Minn.** 123, 52 N. W. 275, arising under a statute penalizing the burning of an uninhabited building, by the burning of which an inhabited building is endangered.

The rule is based on the idea that there is but a single criminal act, which results in the burning of both buildings. Woodford v. People (1875) 62 **N. Y.** 117, 20 Am. Rep. 464, wherein it was said: "The fire was not set in any one of the houses specified, but the charge is that the fire was kindled in the shed for the purpose of burning the houses, and there can be no question that an indictment for burn-

ing one house will be sustained by proof of the firing of another, with the criminal intent of burning the house specified. Otherwise, a criminal liability for a higher offense could be avoided in most cases. The several houses could not burn at the same instant, nor could they occupy precisely the same place, but the criminal act was single, and the consequences ensued according to the nature of the act."

In Rex v. Cooper (1833) 5 Car. & P. (Eng.) 535, it was held that "if a person sets fire to a stack, the fire from which is likely to, and which does, communicate to a barn, he is, in point of law, indictable for setting fire to the barn."

In Reg. v. Price (1841) 9 Car. & P. (Eng.) 729, it appeared that a summerhouse was situated in a wood. The summerhouse was set on fire, whereby the branches of overhanging trees were burned. It was held that a conviction of setting fire to the wood was proper.

In People v. Hiltel (1901) 131 Cal. 577, 63 Pac. 919, the court sustained an instruction to the effect that, "while they could not find the defendant guilty of arson for burning the wine cellar, in as much as he was not charged with having caused the burning of this particular building, still, if they should find from the evidence, beyond any reasonable doubt, that he set fire to the wine cellar wilfully and maliciously, and that it 'was situate so close to the building alleged in the information as having been burned by defendant as that the burning of said wine cellar necessarily caused, and did then and there cause, the flames from said wine cellar to be communicated to said house charged . . . as having been burned by defendant, and that said fire was thus communicated from said wine cellar to said alleged house alleged to have been burned, and then and there caused said house to take fire and be consumed, this would constitute a burning, within the meaning of the law of the crime of arson.'"

In Graham v. State (1867) 40 Ala. 659, it was said, obiter, that if fire set to cotton in a building is communicated to the building, it constitutes a setting fire to the building.

In Grimes v. State (1879) 63 Ala. 166, it appeared that fire was set to a house used for storing corn and fodder, situated about ten or twelve steps from a dwelling house. The fire was communicated to the dwelling house, which was burned. A conviction for burning the dwelling house was sustained.

In State v. Roberts (1887) 15 Or. 187, 13 Pac. 896, setting fire to a stack of hay, whereby a barn close by was burned, was held to be arson of the barn.

In People v. Fairchild (1882) 48 Mich. 31, 11 N. W. 773, it was held that where a building is occupied on the lower floor as a store, and on the upper floor as a dwelling, a fire set to the lower floor, and communicated to the upper, constitutes a burning of a dwelling.

In Combs v. Com. (1892) 93 Ky. 313, 20 S. W. 221, the court sustained a conviction of burning a dwelling house, on proof that it caught fire from a near-by schoolhouse, which was set on fire by the accused.

In Woodford v. People (1875) 62 N. Y. 117, 20 Am. Rep. 464, it was held that in order that the igniting of a shed, from which fire was communicated to a dwelling house, should constitute the burning of a house, "in which there shall be at the time some human being," it must appear that there was some person in the dwelling house when it caught fire. The court said: "It is claimed that a case of arson in the first degree was not established as to the house of Mrs. Parker, upon the ground that she had ample warning and opportunity to leave the house before it took fire. She testified that she was awakened by the alarm, and before she could dress herself the house caught, and in five minutes she was driven out by the flames, and the falling in of the roof, and that she was in the house when the fire caught. The judge charged that if they found this to be true, it was sufficient, and I think he was right. The statute defines arson in the first degree to be the

setting fire to or burning a dwelling house in the nighttime, 'in which there shall be at the time some human being.' 2 Rev. Stat. 657. Whether the person is asleep or awake, in bed or out, or whether escape is practicable before the building actually kindles, is not made material by the terms of the statute. A human being must be in the building at the time it takes fire; and if this fact exists it is sufficient."

In Mackesey v. People (1867) 6 Park. Crim. Rep. (N. Y.) 114, it was held that an indictment charging a setting of fire to a building, with intent to burn certain goods therein, was a sufficient charge of attempting to burn the goods.

In order that the communication of fire to a building other than that to which fire was applied by the accused shall constitute arson, there must exist an intent that the fire shall be communicated to such other building. State v. Hill (1868) 55 Me. 365, wherein it said: "He must have set the fire with intent to burn the particular dwelling house, which is, in fact, by the burning of the first building, set fire to and burnt. A man may set fire to a detached and apparently isolated barn or outbuilding, with a felonious intent to burn that building, and that only. And for this act he may be punished, but not capitally. And yet a dwelling house may be burned by reason of the kindling of the fire, although not anticipated by anyone, and clearly not intended by the incendiary. When a person is charged with having directly set fire to the dwelling house of another, it is enough to charge that he did set fire to the house itself, and that it was thereby burned, feloniously, wilfully, and maliciously. The intent to burn is necessarily indicated and included in the charge so made. But if he did not set fire directly to the house itself, but did cause its destruction, by setting fire to it by means of kindling another fire, then the intent to do more than burn the first building must be set out, for the reasons before stated." See to the same effect, dictum in State v. Watson (1873) 63 Me. 128. W. A. S.

E. T. LAMB, Receiver of the Atlanta, Birmingham, & Atlantic Railroad Company, Plff. in Certiorari,

v.

A. B. FLOYD et al.

Georgia Supreme Court—September 13, 1918.

(— Ga. —, 96 S. E. 877.)

Evidence — presumption of negligence — receiver.

In an action against a receiver operating a railroad under order of court, brought by a person other than an employee of the railroad, upon proof of injury by the running of the cars or other machinery, the same presumption of negligence arises as in cases where the railroad company itself is operating such cars or other machinery.

[See note on this question beginning on page 1180.]

Headnote by HILL, J.

CERTIORARI to the Court of Appeals to review a judgment affirming a judgment of the Superior Court for Ben Hill County in favor of plaintiffs in an action brought to recover damages for the alleged negligent killing of their intestate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Bolling Whitfield, Wall, & Grantham,** and **Brandon & Hynds,** for plaintiff in certiorari:

The presumption of negligence, made applicable by § 2780 of the Code to railroad companies exclusively, does not apply to a receiver.

United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Nixon, 235 U. S. 233, 59 L. ed. 208, 35 Sup. Ct. Rep. 49; Henderson v. Walker, 55 Ga. 481; Thurman v. Cherokee R. Co. 56 Ga. 376; Youngblood v. Comer, 97 Ga. 152, 23 S. E. 509, 25 S. E. 838; Brown v. Comer, 97 Ga. 801, 25 S. E. 176; Robinson v. Huidekoper, 98 Ga. 306, 25 S. E. 440; Barry v. McGhee, 100 Ga. 759, 28 S. E. 455, 3 Am. Neg. Rep. 367; Louisville & N. R. Co. v. Hames, 135 Ga. 67, 68 S. E. 805; Southern R. Co. v. Cash, 131 Ga. 539, 62 S. E. 823; Campbell v. Cook, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 488; State v. Texas & P. R. Co. — Tex. Civ. App. —, 143 S. W. 223; Central Trust Co. v. East Tennessee, V. & G. R. Co. 69 Fed. 357.

To charge that there was a presumption of negligence against the receiver was reversible error.

Mitchell v. Western & A. R. Co. 30 Ga. 22; Cordray v. Savannah, T. & I. of H. R. Co. 117 Ga. 465, 43 S. E. 755; Atlanta R. & Power Co. v. Johnson, 120 Ga. 912, 48 S. E. 389; Augusta R. & Electric Co. v. Weekly, 124 Ga. 385, 52 S. E. 444.

All laws of a state where the property is situated that apply to "the owner, or possessor," do not apply to a receiver of a Federal court.

Hollifield v. Wrightsville & T. R. Co. 99 Ga. 365, 27 S. E. 715; Glover v. Thayer, 101 Ga. 828, 29 S. E. 36; Harrell v. Atkinson, 9 Ga. App. 150, 70 S. E. 954; Re Tyler, 149 U. S. 164, 182, 37 L. ed. 689, 695, 13 Sup. Ct. Rep. 785; Morse v. Tackaberry, — Tex. Civ. App. —, 134 S. W. 273; Rogers v. Chippewa Circuit Judge, 135 Mich. 79, 97 N. W. 154, 3 Ann. Cas. 114; J. I. Case Plow Works v. Finks, 26 C. C. A. 46, 52 U. S. App. 253, 81 Fed. 529; Buckhannon & N. R. Co. v. Davis, 68 C. C. A. 345, 135 Fed. 707; Central Trust Co. v. Wheeling & L. E. R. Co. 189 Fed. 82; American Loan & T. Co. v. Central Vermont R. Co. 84 Fed. 917; Royal Trust Co. v. Washburn, B. & I. R. Co. 113 Fed. 538; Love v. Louisville & E. R. Co. 178 Fed. 507; Ocean S. S. Co. v. Wilder, 107 Ga. 220, 33 S. E. 179; Tallulah Falls R. Co. v. Ramey, 137 Ga. 568, 73 S. E. 838; First Nat. Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 193.

Mr. **George F. Gober,** for defendants in certiorari:

It is the duty of a receiver appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the state in which it is situated.

United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609.

And he is liable to suit in a court other than by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing.

McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Erb v. Morasch, 177 U. S. 598, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Eddy v. Lafayette, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1082; 1 Hutchinson, Carr. 3d ed. p. 75; Eddy v. Lafayette, 163 U. S. 456, 464, 41 L. ed. 225, 228, 16 Sup. Ct. Rep. 1082; Lamb v. Whitman, 17 Ga. App. 687, 87 S. E. 1095; Missouri P. R. Co. v. Texas P. R. Co. 30 Fed. 170; United States v. Nixon, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49; Turner v. Cross, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; Parmenter v. Barstow, 22 R. I. 245, 63 L.R.A. 231, 47 Atl. 365; United States v, Ramsey, 42 L.R.A.(N.S.) 1034, 116 C. C. A. 568, 197 Fed. 144.

The receiver operates the railroad under the franchises given to the railroad company under its charter, and the liability is put upon the assets of the company, not upon him personally, and the question of presumption is a common-law presumption.

Central R. Co. v. Freeman, 75 Ga. 338, 11 Am. Neg Cas. 303; Augusta & S. R. Co. v. Randall, 79 Ga. 304, 4 S. E. 674, 2 Am. Neg. Cas. 394; Pattillo v. Alexander, 96 Ga. 60, 29 L.R.A. 616, 22 S. E. 646; Krogg v. Atlanta & W. P. R. Co. 77 Ga. 202, 4 Am. St. Rep. 79; Atlanta & C. Air Line R. Co. v. Tanner, 68 Ga. 384; Anderson v. Walton, 35 Ga. 205; Tanner v. Louisville & N. R. Co. 60 Ala. 621; Savannah, T. & I. of H. R. Co. v. Williams, 117 Ga. 420, 61 L.R.A. 249, 43 S. E. 751.

Messrs. **James H. Dodgen** and **W. I. Heyward** also for defendants in certiorari.

Hill, J., delivered the opinion of the court:

This case is here on certiorari

from the court of appeals. It appears that A. B. Floyd and certain of his children brought suit, under § 4424 of the Civil Code of 1910, against E. T. Lamb, as receiver of the Atlanta & Birmingham Railroad Company, to recover damages for the homicide of Mrs. Ida Floyd, the wife and mother, respectively, of the plaintiffs. The homicide occurred at a crossing on the outskirts of the city of Fitzgerald, where the tracks of the Atlanta & Birmingham Railroad cross a certain road or street. On the trial of the case in the superior court, the judge charged the jury: "Now, I charge that every railroad company, and every receiver duly in charge of a railroad company, a common carrier, chartered or operated under the laws of this state, is liable for any injury done in the operation of its or his locomotive, or by its or his servants or agents in charge of its locomotive, unless he or it makes it appear that the servants in charge thereof exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the company. That is, such receiver, or such railway company, is liable for any injury done to the person of another by the operation of its locomotive or other machinery, unless the railway company or the receiver make it appear that its agents and servants in charge of the locomotive, or other machinery, exercised all ordinary care and diligence; and the presumption, as I have already stated to you, is in all cases against the company, if an injury be done to the person of another through the operation of the locomotive or machinery of the railway company."

Under this charge the jury found a verdict for the plaintiff. A motion for a new trial having been overruled, the defendant excepted, and the case was taken to the court of appeals for review. That court affirmed the judgment of the trial court, and approved, in effect, the excerpt from the charge of the court set out above. The criticism on the opinion of the court of appeals, and on the charge of the trial court, is that it was error for the trial judge to extend § 2780 of the Civil Code of 1910, which raises a presumption of negligence against the railroad company upon proof of damage from the running of its locomotive, etc., to a receiver of such railroad. The section referred to is as follows: "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

It is insisted that this section has application solely to the railroad company and its employees, and deals with such company exclusively, and is not applicable to a receiver in charge of a railroad, who is operating it under the orders of a court. So we have the clear-cut issue of whether the court of appeals, which upheld the charge of the trial court, was right in so holding.

A number of decisions of this court are relied upon by the plaintiff in certiorari as sustaining its contention that the decision of the court of appeals in affirming the charge of the trial court should be reversed. These cases are as follows: Henderson v. Walker, 55 Ga. 481, 484; Thurman v. Cherokee R. Co. 56 Ga. 376; Youngblood v. Comer, 97 Ga. 152, 23 S. E. 509, 25 S. E. 838; Brown v. Comer, 97 Ga. 801, 25 S. E. 176; Robinson v. Huidekoper, 98 Ga. 306, 25 S. E. 440; Barry v. McGhee, 100 Ga. 759, 28 S. E. 455, 3 Am. Neg. Rep. 367. We will examine and discuss those cases.

Henderson v. Walker, 55 Ga. 481, was a case where receivers were in possession of and operating a rail-

road under a court of equity, and using the franchises of the railroad company under the orders of the court. An employee of the receivers, while engaged in work upon a bridge on the railroad, received a personal injury in consequence of the negligence of his coemployees in the same service. He petitioned for leave to bring suit against the receivers, and it was granted. He then brought suit against the receivers in their official capacity. On the trial a motion was made on behalf of the defendants to dismiss the petition. The motion was sustained by the court, and the petition was dismissed, "and the order granting leave to sue was rescinded, on the ground that there was no cause of action." The judgment of the lower court was affirmed by the supreme court. In delivering the opinion of the court, Bleckley J., said: "We find it unnecessary to rule the question whether, if this plaintiff were an employee of a railroad company, he would have a cause of action or not. He shows by his declaration that he is not such an employee. He rests his case on a statutory right, and yet does not put himself into the only class to which the right belongs. The company owning the road was not in possession. It had no employees. There was no privity between it and the plaintiff. He was not its servant; it was not his master. It had nothing to do with selecting his coemployees whose negligence caused the injury. A court of equity, by its officers, the receivers, had possession of the road; and the plaintiff, instead of hiring himself elsewhere to a railroad company or corporation, voluntarily hired himself to these ministers of the law. We think the letter of his situation is the law of it, and that, as he was not in fact in the employment of a railroad company, he is not to be considered in such employment by construction. Unless the contrary appeared, the receivership is to be deemed a compulsory one; there is no presumption that the receivers went in on the application of the company or by its consent. They represent, not the company, but the court. . . . While the receivers represent the court, they are not acting for the benefit of the court, but for that of creditors and owners; and what is made or saved by their operations is mere private property. Still, it is clear that the employees of the receivers are not within the words of the Code, and to extend the words by construction, so as to subject the company's assets to pay damages for the carelessness or misconduct of men whom neither the officers nor agents of the company had any part in selecting, would be attended with difficulties, both technical and practical. Injuries to freight and passengers may come under the head of expenses of administration; but to include under that head the damages caused by one necessary agent of administration to his fellow would be like punishing the body because one hand or foot had wounded the other. Decisions may be found on a somewhat different line from that which we deem the true one, see Murphy v. Holbrook, 20 Ohio St. 137, 150, 5 Am. Rep. 633; Redfield, Carr. § 37. But it is not improbable that even these would square with the principle grounds on which we place our judgment, namely, that the employee of receivers is not to be treated as the employee of a railroad company, so as to entitle him to reap the fruits of a statute which offers nothing to any but the latter class of employees."

It will be seen from a careful reading of the Henderson Case that it is not controlling in a case like the present. There it was a question of the substantive right of the plaintiff to sue the receiver of a railroad, and to subject the assets of the railroad to the judgment of the court. And while the plaintiff in certiorari sought to apply the reasoning in that case to the case at bar, yet we think the two cases are totally different. There the ques-

tion was the right to sue at all. Here it is a question of evidence, whether the presumption which would apply as against a railroad is applicable as against the receiver of a railroad.

Thurman v. Cherokee R. Co. 56 Ga. 376, was a case very similar, and this court held that it was controlled by the decision in the Henderson Case. The headnote was: "An employee of a railroad company cannot maintain an action against said company for a personal injury sustained by him while the road was in the hands of a receiver."

In Youngblood v. Comer, 97 Ga. 152, 23 S. E. 509, 25 S. E. 838, it was held that the case was controlled by the Henderson and Thurman decisions, supra, to the effect that, when a railroad company is in the hands of and being operated by a receiver, neither the company nor the receiver is subject to suit by an employee for personal injuries occasioned by the negligence of a coemployee. Simmons, Ch. J., delivered the opinion of the court in the Youngblood Case, and Atkinson, J., concurred in the judgment on account of being bound by the rulings in the Henderson and Thurman Cases, but dissented from the majority opinion declining to overrule those decisions. To the same effect is the decision in the case of Brown v. Comer, 97 Ga. 801, 25 S. E. 176. In Robinson v. Huidekoper, 98 Ga. 306, 25 S. E. 440, where suit was brought against certain receivers to recover damages for injuries sustained by an employee of the receivers, after restating the rule laid down in the Henderson and Youngblood Cases, the court held further: "This being true, there is, so far as such receivers and their servants are concerned, no law in this state changing the common-law rules of evidence applicable to actions by servants against masters for personal injuries; and therefore, upon the trial of an action against such receivers by one of their employees for injuries of this kind, alleged to have been caused by the defendants' negligence, there is no presumption of law that they were negligent, but it is incumbent upon the plaintiff to prove affirmatively that such was the fact."

In delivering the opinion of the court in this case, Lumpkin, J., said: "At common law a master was not liable to one agent because of injuries arising from the negligence or misconduct of other agents in and about the same business. This general rule is still of force in this state. Code, § 2202. But an exception has been made by statute in the case of employees of railroad companies. Code, §§ 2083, 3033, 3036. The Henderson Case decides that these sections cannot be invoked in favor of the employee of a receiver in charge of . . . a railroad company. Again, at common law there was not, in the trial of an action by a servant against his master for personal injuries, any presumption of negligence against the master; and hence, on the trial of such a case, it was incumbent on the plaintiff to prove affirmatively the negligence alleged. Our law so far varies this rule of evidence in favor of an employee of a railroad company who has received personal injuries through the running of the locomotives, cars, or other machinery of the company that a presumption of negligence is raised against the company, when he shows affirmatively that he himself was without fault. . . . The question in the present case is: Does this modification of the general rule of evidence prevail in favor of an employee of railroad receivers? We think not, and the application of the doctrine of the Henderson Case seems to render this conclusion unanswerable."

Atkinson, J., concurred in the judgment in this case also upon authority of the rulings made in the Henderson Case and others of like import. In 1895, the legislature passed an act (Acts 1895, p. 103) providing that "the liability of re-

ceivers, trustees, assignees, and other like officers operating railroads in this state, or partially in this state, for injuries and damages to persons in their employ, caused by the negligence of coemployees, shall be the same as the liability now fixed by the law governing the operation of railroad corporations in this state for like injuries and damages, and a lien is hereby created on the gross income of any such railroad while in the hands of any such receiver, trustee, assignee, or other person, in favor of such injured employees, superior to all other liens against defendant under the laws of this state."

The act further provides that: "Suits may be brought against either of such officers in the same county, and service may be perfected by serving them or their agents in the same manner, as if the suit had been brought against the corporation whose property or franchise is being operated by them, and that all such suits may be brought without first having obtained leave to sue from any court."

See Civil Code, § 2788, which includes the Act of 1896 (Acts 1896, p. 63), amending the Act of 1895. Then came the case decided by this court in 1897, involving the question now under consideration. Barry v. McGhee, 100 Ga. 759, 28 S. E. 455, 3 Am. Neg. Rep. 367. In that case it was held: "Prior to the passage of the Act of 1895, fixing and defining the liability of receivers and others operating railroads, it was the law, as announced by repeated rulings of this court, that an employee could not recover from such receiver damages for personal injuries when it appeared that the injuries were occasioned by the fault or negligence of a fellow servant; and, consequently, an action for damages resulting from such injuries inflicted at a date antecedent to the passage of this act was properly dismissed on general demurrer."

In delivering the opinion of the court, Little, J., said: "At common law, there could be no recovery against the principal for injuries sustained by an agent from the negligence or misconduct of other agents of the principal, engaged in the same business; and this rule is generally in force in the state of Georgia. Civ. Code, §§ 2610, 3030. This rule of the common law has been changed by the statute in Georgia, in the case of injuries sustained by an employee of a railroad company, when he was without fault or negligence himself and such injury was caused by another employee. Civ. Code, § 2323. It is provided by the last section referred to that the employment by a railroad company of the person so injured shall be no bar to a recovery of damages; and this section has been construed to embrace all injuries, including such as are sustained from the running of cars and engines. In the case of Henderson v. Walker, 55 Ga. 481 [supra], it was held by this court that in a suit against the receivers of a railroad company, filed by an employee of such receivers, to recover damages for injuries sustained through the negligence of a coemployee, the rule fixed by § 2323 of the Civil Code, which excepted from the common-law rule the right of an employee to recover against a railroad company, where the injury was occasioned by the negligence of a coemployee, did not extend to receivers of railroads. It was there held that the receivers did not represent the company, but the court; that the property and franchises of the company had been seized, and the court was for the time being the governing power; that the right of an employee to recover under such circumstances against a railroad company was a statutory right, and in that case there was no privity between the company and the plaintiff; that he was not the servant of the company, nor was the company his master; and that, not coming within the class provided for by the statute, as to him the general common-law rule prevailed, and such

employee could not have a recovery against the receivers, where the injuries were sustained by the negligence of a fellow servant in the same service. That case has been followed by subsequent rulings of this court in the cases [cited supra], and controls the case at bar. The general assembly, by an act approved December 16, 1895 (Acts 1895, p. 103), further changed the common-law rule, and provided that the liability of receivers operating railroads in this state should be the same as the liability fixed by the statute governing the operation of railroad companies in this state for injuries to persons in their employ caused by the negligence of coemployees. So that the provisions of § 2323 apply, since the passage of that act, to receivers operating railroads as well as to railroad companies."

It will be observed that in each of the cases above cited the plaintiff was an employee, working for the receiver. It was held that in such circumstances the plaintiff could not recover from the receiver. But the legislature by the Acts of 1895, supra, changed the rule as to the liability of receivers for injuries and damages sustained by employees, caused by the negligence of coemployees. In the instant case the homicide, which was caused by the running of the cars on the railroad of which the defendant was receiver, was not of an employee of the receiver, but of a third person who was killed while crossing the tracks at a railroad crossing.

The decision in 55 Ga. 481, by Bleckley, J., is based upon the following: At common law the master was not liable for injury to a servant, resulting from the negligence of a fellow servant. He was liable for his own negligent act, resulting in injury to the servant. The statute broadening the liability of the master, so as to make him liable for the negligence of a fellow servant, resulting in injury to another fellow servant, was by its terms confined to railroad companies. This statute, being in derogation of common law, was strictly construed, and the decision in this case is put squarely upon the terms of the statute. At common law, a railroad company was liable for the negligent injuries to passengers or other persons, —other persons including strangers, but excluding employees,—because a railroad company, under the common law, was not liable for the negligent injury of one fellow servant by another. In Augusta & S. R. Co. v. Randall, 79 Ga. 304 (9) 314, 4 S. E. 674, it is clearly stated that the statute, raising a presumption against a railroad company on proof of injury, is declaratory of the common law; that the presumption existed at common law in favor of passengers and other persons. And while our statute, as pointed out by Justice Lamar (Cordray v. Savannah, T. & I. of H. R. Co. 117 Ga. 464, 43 S. E. 755), is somewhat broader than the common-law presumption, it is in effect the same, and the presumption arises at common law wherever liability existed against the railroad company in favor of the injured person. Following the decision in 97 Ga. 152, 23 S. E. 509, 25 S. E. 838, rendered on August 12, 1895 (a decision going back for its basis to 55 Ga. 481), where it was pointed out that for twenty years the legislature had not seen fit to change the rule of liability of a receiver on account of the negligence of one servant, resulting in the injury of another, the legislature, in December of the same year, declared that the liability of receivers, trustees, assignees, and other like officers operating railroads in this state, for injuries and damages to persons in their employment, caused by the negligence of coemployees, should be the same as the liability fixed by law governing the operation of railroad corporations for like injuries and damages, and made such receiver liable, and made the rules of law with ref-

erence to common carriers applicable to receivers, in cases of injury of a servant, resulting from the negligence of a fellow servant. In 1896, this act of the Legislature was further amended, and under the Civil Code (§ 2788) a receiver of a railroad company is now liable for injury to a servant, resulting from the negligence of a fellow servant, and for injury to personal property, the same as the railroad itself, operated by him, would have been in the absence of the receivership. It can hardly be conceived that the legislature would have made a receiver operating a railroad liable to the servant for injury resulting from the negligence of a fellow servant, and liable for injury to personal property, while at the same time exempting him from liability for injury to passengers and other persons, resulting from the negligence of his agents, servants, and employees.

The language of § 2788, when carefully analyzed, bears out the conclusion that the legislature, in the passage of the Act of 1895, as amended by the Act of 1896, acted upon the assumption that, inasmuch as a railroad company was liable at common law for injuries to passengers and all other persons, resulting from the negligence of their agents, servants, and employees, and inasmuch as there was a presumption at common law, arising in favor of passengers and other persons upon proof of injury, the same liability, with the attendant presumption, existed as against the receiver of a railroad company. In other words, our statute making a railroad company liable for the negligence of its servants, where injury results to a passenger or other person, is declaratory of the common law, and is in no sense in derogation thereof, while our statute making a railroad carrier liable for the negligence of one servant, resulting in injury to another, is in derogation of the common law, and therefore requires strict construction. By its terms this latter statute did not extend to receivers, or to any employer except railroad companies. Attention is called to the fact that under the Civil Code, § 2788, a judgment against a receiver, in favor of a passenger, other person, or employee, is not a lien upon the assets of a railroad company, but is a lien only upon the gross income of the company, accruing while in the hands of the receiver. The ultimate question is whether a receiver is liable at all for injury to a passenger or other person; if liable, all rules of evidence created by statute are applicable in a suit against the receiver. The legislature did not intend to make a rule of evidence, or a statutory presumption, applicable to a railroad company, and at the same time inapplicable to the company when operated under order of court and through its chosen officers. The suggestion to be found in certain cases that the statutory presumption is not applicable in a suit against a receiver was made with reference to suits by a servant on account of the negligence of a fellow servant, in which it was held that the servant did not have the right to sue the receiver at all, and has never been applied in cases brought by a passenger or other person against the receiver of a railroad company. While the question was not involved, or at least not discussed, the decision in Ball v. Mabry, 91 Ga. 781, 18 S. E. 64, 9 Am. Neg. Cas. 197, which was a suit by a passenger against the receiver of a railroad company, is illuminating. Some of the same judges who participated in cases following the Henderson Case took part in the decision in the Ball Case, where a recovery by a passenger against the receiver was sustained; and it was there held that the receiver was a common carrier, and that he resided in every county through which the line of railroad was operated.

From what has been said above we conclude that the Court of Appeals was right in holding that the

charge of the trial court set out in the beginning of this opinion was not erroneous. We were induced to grant the writ of certiorari in this case because of the importance of the question above dealt with, which is the controlling point decided by the Court of Appeals. A careful consideration of the other rulings of that court upon which error is assigned, all of which relate to subsidiary questions involved in the trial of the case, discloses no error requiring a reversal of the judgment.

Evidence—presumption of negligence—receiver.

Judgment affirmed.

All the Justices concur, except George, J., disqualified.

ANNOTATION.

Statute creating presumption of negligence against railroad company as applicable to receiver operating road.

The question whether a statute creating a presumption of negligence against a railroad company applies to a receiver operating a railroad is one of which there has been practically no judicial discussion, except in the reported case (LAMB v. FLOYD, ante, 1172), and the case of Robinson v. Huidekoper (1896) 98 Ga. 306, 25 S. E. 440, therein set forth.

In International & G. N. R. Co. v. Bender (1894) 87 Tex. 99, 26 S. W. 1047, the court, in holding a receiver liable under a statute providing that each and every railway company failing to fence its right of way shall be liable to the owner of stock killed or injured by the locomotives or cars of such railway company, said: "The statute, however, in effect makes the failure to fence, when this may be done, conclusive evidence of such negligence as fixes liability. . . . Looking to the leading purpose of such legislation, it is apparent that the same reason exists for enforcing the rule when a railway is operated by a receiver, as exists when a railway company has full control of its own property. The liability of a receiver, unless based on some personal wrong, is solely official, and compensation for injury inflicted while a railway company is controlled by a receiver must be made, if at all, from funds belonging to the corporation; and no reason is perceived why the rule of evidence, applicable in terms to a railway company, should not apply to a receiver when engaged in operating a railway. The reasons for enforcing such a rule are as forcible, when a railway is under the exclusive control of the court and its receiver, as when it is operated by the company to which it belongs; and we see no reason to doubt the priority of applying the same rules of evidence and the same general rules of law, in determining the liability of a receiver, which would be applied in determining the liability of a railway company, in all cases in which the action is not based on a statute which, by its terms, excludes such application."

The applicability of such a statute, in a suit against a receiver of a railway company, is likewise impliedly conceded by the other cases, which hold applicable to receivers statutes of the type involved in the foregoing case, and statutes imposing an absolute liability upon railway companies in respect of fires set by their locomotives. See, for example, Brockport v. Central Iowa R. Co. (1891) 82 Iowa, 369, 47 N. W. 1026; Rouse v. Redinger (1895) 1 Kan. App. 355, 41 Pac. 433; Wall v. Platt (1897) 169 Mass. 398, 48 N. E. 270.

For instances in which the applicability, in the case of a receiver, of statutes shifting the burden of proof to the railway company, was conceded without discussion, see Kerr v. Bush (1918) 198 Mo. App. 607, 200 S. W. 672 and Baker v. Schroeder (1917) — Tex. Civ. App. —, 198 S. W. 394.

The limitation by the Georgia decisions of the doctrine that a statute creating a presumption of negligence

against a railroad company is applicable to a receiver operating a railroad, to cases in which the action is brought by other than an employee, is due to the fact that, in Georgia, receivers operating railroads have been held immune from liability under statutes abrogating the fellow-servant rule in the case of railroads, in the absence of special legislation expressly extending the operation of such statutes. A similar view has prevailed in Texas. As the construction placed upon such statutes in these states is opposed to the view elsewhere entertained, it is not likely that the qualification of the decision in the reported case (LAMB v. FLOYD) would be admitted elsewhere, with the possible exception of Texas. E. S. O.

CLEVELAND FARLEY et al.

v.

JANE STACEY et al.

Kentucky Court of Appeals—October 12, 1917.

(177 Ky. 109, 197 S. W. 636.)

Partition — allowance for improvement.

1. One who knowingly enters upon real estate under a void deed from his mother cannot complain that he is not allowed, in a partition among her heirs, a lien upon all the land for the increased value created by his improvement, if he is allotted the portion of the land containing the improvement, and there is nothing to show that the value of the portion allotted the other heirs was enhanced.

[See note on this question beginning on page 1189.]

Deed — married woman — validity.

2. A conveyance of the land of a married woman by deed in which the husband does not join is void, where the statute provides that the conveyance may be by joint deed of husband and wife, although he joins in the signature and acknowledgment.

Parent and child — lien for maintaining parents.

3. A son receiving a void deed from his mother for her real estate is not, in the absence of an express contract for compensation, entitled to a lien on it for the value of services rendered in maintaining and caring for his father and mother, where he lived in the same household with them.

Advancement — valuation.

4. Advancements are to be estimated at their value when made, unless they are given to be enjoyed at a future time.

Partition — equalization of advancement.

5. An heir cannot complain that his advancements were not equalized before partition of land conveyed to him by his mother, if the attempted advancement by her in the conveyance of the land, perfected by conveyances from a portion of his coheirs, renders his advancement equal to that received by the other heirs, to whom an allotment is made in the partition proceeding.

Same — lien for taxes.

6. An heir in possession under a void deed from his mother is not entitled to a lien for taxes paid by him, upon partition of the land among his mother's heirs, if the rental value of the land, and money received by him from sales of timber, more than equal the taxes paid.

Same — allowance for right of way.

7. Heirs to whom a portion of their ancestors' real estate is allotted in partition, subject to a railroad right of way sold by a coheir in possession, are entitled to their share of the price received for the right of way, proportioned to its length upon their property.

CROSS APPEAL from a judgment of the Circuit Court for Pike County in favor of plaintiffs in an action brought to have a certain deed declared void, for a division of the lands, and the recovery from the defendant railway of one tenth of the value of the right of way for each of the plaintiffs; defendants appealing from so much of the judgment as denied their claims, and from the judgment in favor of plaintiffs; and plaintiffs appealing from so much as denied them one tenth each of the price of the railway right of way. *Affirmed* on defendants' appeal. *Reversed* on plaintiffs' appeal.

The facts are stated in the opinion of the court.

Messrs. **W. K. Steele** and **J. S. Cline** for appellants.

Messrs. **W. G. W. Riddle** and **Roscoe Vanover** for appellees.

Hurt, J., delivered the opinion of the court:

G. T. Farley and his wife, Lucy Farley, were the parents of ten children, who survived them. The names of these children were Jane Stacey, Della Runyon, Vicey Farley, Mary Edwards, Anderson Farley, Cleveland Farley, Lewis Farley, Harrison Farley, Sarah Ann Alley, and Boyd Farley. Lucy Farley died intestate on the 27th day of March, 1906. The husband and father, G. T. Farley, died on the 14th day of September, 1912, testate. The latter, after the death of his wife Lucy Farley, married a second time, in 1909. Previous to his death, he made advancements to all of his children, except to Jane Stacey, Cleveland Farley, and Mary Edwards. To Vicey, Anderson, Lewis, Boyd, and Harrison he conveyed lands, the titles to which were in him, and, as a part of the consideration for these conveyances, the sons were required to pay to Della Runyon and Sarah Ann Alley, each, the sum of $300. By his last will and testament, he devised all of his property of every kind to his surviving widow, except $100, which Vicey owed him for lands conveyed to her, and which he devised to Jane Stacey. He then devised $1 each, to his other nine surviving children. Lucy Farley, the mother, was the owner in her own right of a farm consisting of about 182 acres, which had been conveyed to her by her father, and upon this farm she and her husband had lived for many years, and where they had reared all their children. G. T. Farley and Lucy Farley were married long prior to the year 1894, and it seems that Lucy was the owner of this farm prior to that time. Prior to the 24th day of February, 1906, all of the children had married and had moved from the family domicil, except Vicey, Mary, and Cleveland. Cleveland was then twenty years of age, but had become married. On that day Lucy Farley executed a deed, by which she attempted to convey the farm owned by her to Cleveland Farley, in consideration of his payment to his sister, Mary Edwards, the sum of $300, $50 of which was to be paid on February 24, 1908, and the same amount in each year thereafter until the whole amount was paid. By the terms of the deed, she also reserved a maintenance for her lifetime from the farm, and a home upon the farm for her unmarried daughters Vicey and Mary, so long as they should remain unmarried, and a home upon the land for her husband G. T. Farley, during his lifetime. Lucy was at that time sixty-five years of age and in a feeble state of health. G. T. Farley was about the same age. Lucy died thereafter on the 27th day of March. About two years thereafter, Mary married and moved away from the property, and never returned to it. Shortly after Mary's marriage Vicey went away of her own accord, and did not return. While Mary and Vicey were living there after the death of their mother, they and Cleveland and the father, all together, worked the farm, and, together with Cleve-

land's wife, lived as a family, as they had always done theretofore. Presumably these girls did their share of the work in the housekeeping, as well as working in the crops. When his daughters were gone, G. T. Farley married a second time. This seems to have caused an estrangement between him and his son Cleveland, which resulted in the son suing the father for a flock of sheep, which he claimed his father and mother had given him, and a rupture between them as to their respective rights in the farm. For about one year the father and son occupied different portions of the dwelling house, and ceased to live as one family. As a settlement of their dispute as to their respective rights in the farm, they entered into an agreement by which the farm was divided, and the father held one portion of it as his curtesy in the land, and Cleveland had undisputed possession and control of the other portion until the death of the father, on September 14, 1916, when Cleveland took possession and control of the entire farm, and so held it, until he sold and conveyed to George Stanley a portion of it, to Boyd Farley a portion of it, and the remaining portions to Dr. J. B. Maynard, and to his sister Mary Edwards, née Farley. The portion sold to Mary Edwards was about 2 or 2½ acres, and before the sale was made, Cleveland paid to her the $300, which was a part of the consideration for the conveyance of the land to him by his mother. Although Lucy Farley was a married woman at the time she made the deed to Cleveland, by which she attempted to convey the land to him, her husband did not join in the deed with her, as one of those executing the conveyance, and had not theretofore by a separate deed conveyed his interest in the land. About the time that Cleveland and his father made the division of the lands between them, Cleveland procured the advice of a lawyer as to the validity of the deed under which he claimed the land, and was advised that the deed was not valid. In spite of this information, however, he erected three dwelling houses upon the land, the erection of one of which, he states, cost him the sum of $900, and which, together with about ¾ of an acre of land, he sold and conveyed to Dr. J. B. Maynard for a sum between eleven hundred and twelve hundred dollars. For the portion of the land sold and conveyed by him to Mary Edwards he received $175, and she has since sold this piece of land for $350 to one of her brothers. A portion of the land he sold and conveyed to George Stanley for a consideration of $2,000, and the remainder to Boyd Farley for $1,200. It also appears that Cleveland sold timber trees from the land, which, after payment of the expenses, netted him the sum of $376, and he paid the taxes upon the land from 1906 until he sold the property, amounting in all to $186. He also sold a right of way over the lands to the Williamson & Pond Creek Railway Company for a consideration of $800, and it seems that the railway company had, before the institution of this suit, placed its road over the right of way.

This suit was instituted by Jane Stacey, Della Runyon, Vicey Farley, Mary Edwards, and Anderson Farley against Cleveland Farley, Lewis Farley, Boyd Farley, Harrison Farley, Sarah Ann Alley, George Stanley, and the Williamson & Pond Creek Railway Company, and by which the plaintiffs sought a judgment of the court declaring the deed from Lucy Farley to Cleveland Farley to be void, and a division of the lands, and an allotment to each of the plaintiffs, in severalty, one tenth of the land, and the recovery from the railway company of one tenth of the value of the right of way for each of the plaintiffs.

The railroad company answered and alleged that it had purchased a right of way over the lands from Cleveland Farley, who was claim-

ing to be the owner of the land, for the consideration of $800, but, having learned that the title to the land was in controversy, it had refused to pay the consideration or to accept a deed from him, but was ready to pay the consideration to whoever the court should adjudge was entitled to it, upon the making of a proper conveyance to it of the right of way.

Cleveland Farley, George Stanley, and Boyd Farley each filed separate answers, in which they denied that the deed from Lucy Farley to Cleveland Farley was invalid. They further affirmatively plead that it was agreed between Lucy Farley and her husband G. T. Farley that the father should make advancements out of his estate to the seven older children, and that Lucy should make advancements out of her estate to the three younger, one of whom died, leaving but two unprovided for, Cleveland and Mary Edwards, and that the lands owned by G. T. Farley were purchased by the proceeds of the sale of timber trees and mineral rights upon the lands owned by Lucy Farley, and that they were the joint owners of the land to which the husband held title, and that, in consideration of this agreement, they advanced to Della Runyon $300 in money; to Vicey Farley, lands of the value of $3,300; to Anderson Farley, lands of the value of $2,000; to Mary Edwards, $300 in money; to Lewis Farley, lands of the value of $2,000; to Harrison Farley, lands of the value of $1,500; to Sarah Ann Alley, $300 in money; and to Jane Stacey, $275 in money; and that the sum advanced to each of them was in excess of the value of the advancement to Cleveland; that Cleveland, believing in good faith that he had a good title to the land under the deed from his mother, had in good faith put lasting improvements upon the land in the way of buildings, clearing of lands, fencing, and digging a well, which had increased the vendible value of the lands to the amount of $2,000; that Cleveland, under the terms of the deed, had supported and maintained his father and mother, and performed services for them of the value of $5,000 and prayed that in the event the deed from his mother should be held invalid, to equalize the advancements; and to adjudge him a lien upon the land for the value of the improvements placed upon it by him, and for the value of his services in supporting and maintaining his father and mother. They also denied that the lands could be divided without materially impairing the value of each portion. Issue was joined upon all of the averments of the answers. Pending the litigation all of the heirs of Lucy Farley, except Della Runyon and Jane Stacey, for a nominal consideration expressed in the deed, quit claimed all their respective interests in the lands in controversy to Cleveland Farley. The cause having been submitted upon the pleadings and proof, the court adjudged that the deed from Lucy Farley to Cleveland Farley was void, and did not pass title to him, and that, by inheritance from his mother and the conveyances to him by his brothers and sisters, his vendees were the owners of eight tenths of the lands, and that Jane Stacey and Della Runyon were each the owners of one tenth of the lands and that the lands should be divided between them in accordance with their interests; that the portions of the lands upon which Cleveland Farley or his vendees had placed improvements should be allotted to Cleveland and his vendees, without taking into consideration the value of the improvements, or the value which the improvements added to the vendible value of the lands; but otherwise the lands should be divided, giving to Cleveland eight tenths thereof, and to Della Runyon and Jane Stacey each one tenth thereof, according to quantity, quality, and value of the lands. The other claims of the defendants, and the claim of Jane Stacey and Della Runyon to one tenth each of the

purchase price of the railroad right of way, were denied.

From the judgment Cleveland Farley, Boyd Farley and his wife Rosetta Farley, George Stanley and his wife Martha Stanley have appealed, and from that portion of the judgment which denied to Jane Stacey and Della Runyon one tenth each of the price of the railroad right of way they have appealed.

(a) At the time Lucy Farley made the deed under which appellants claim title, she was a married woman. The name of her husband G. T. Farley does not appear in the caption, granting clause, nor in any other place in the deed. He, however, subscribed the deed after it had been signed by Lucy Farley, and acknowledged it. The land was such property as was formerly denominated the general estate of the wife. To make a conveyance by a feme covert of her lands, valid, it is necessary that it shall be done in the manner provided by § 506, Kentucky Statutes, which provides that the conveyance may be by the joint deed of husband and wife, or by separate deeds, but in the latter event the "husband must first convey or have theretofore conveyed." It has been held that the deed of a married woman in which the husband does not join is void, and the fact that the husband signs and acknowledges a deed, in the body of which his name does not appear, is not sufficient. Brady v. Gray, 17 Ky. L. Rep. 512, 31 S. W. 734; Weber v. Tanner, 23 Ky. L. Rep. 1107, 64 S. W. 741; Simpson v. Smith, 142 Ky. 608, 134 S. W. 1166; Mays v. Pelly, — Ky. —, 125 S. W. 713; Elliott v. Scoville, 144 Ky. 584, 139 S. W. 806; Kentucky Stave Co. v. Page, — Ky. —, 125 S. W. 172; Hellard v. Rockcastle Min. Lumber & Oil Co. 153 Ky. 259, 154 S. W. 401; Hatcher v. Andrews, 5 Bush, 561; Beverly v. Waller, 115 Ky. 600, 103 Am. St. Rep. 342, 74 S. W. 264; Newby v. Cox, 81 Ky. 58; Daniels v. France, 168 Ky. 749, 182 S. W. 919. The deed, being absolutely void, is the same as if the deed had not been made, and did not pass any title to the appellant Cleveland Farley, and the court did not err in so adjudging.

Deed—married woman—validity.

(b) Touching the contention of appellants that the vendee in the void deed is entitled to have a lien upon the land to secure the payment of $5,000, or any other amount claimed for services rendered in maintaining and caring for his father and mother, it is not tenable. He occupied the position of a son in the same household with his father and mother, and the evidence does not disclose any express contract by which he was to be compensated for anything done for his father, and no implied contract is raised from the circumstances. Bishop v. Newman, 168 Ky. 238, 182 S. W. 165; Price v. Price, 101 Ky. 28, 39 S. W. 429; Newton v. Field, 98 Ky. 186, 32 S. W. 623; Perry v. Perry, 2 Duv. 312; Frailey v. Thompson, 20 Ky. L. Rep. 1179, 49 S. W. 13; Heck v. Heck, 10 Ky. L. Rep. 281; Reynolds v. Reynolds, 92 Ky. 556, 18 S. W. 517; Conway v. Conway, 130 Ky. 221, 113 S. W. 94; Bolling v. Bolling, 146 Ky. 316, 142 S. W. 387, Ann. Cas. 1913C, 306; Turner v. Young, 155 Ky. 607, 159 S. W. 1165. While the deed reserves a home upon the land for the father during his lifetime, it does not contain any stipulation requiring the appellant to maintain the father, and, if a claim could be made for the maintenance of the father, it would necessarily be against the father's estate, and not that of the mother. Cleveland was a minor son at the time of his mother's death, and the parents were entitled to his services until his majority. By a reservation in the deed the mother retained a right to a maintenance from the lands during her life, and, if this is construed to be a requirement that the appellant should maintain her as a part of the consideration to be paid for the land,

Parent and child—lien for maintaining parents.

the burden imposed by it upon the land ceased at the end of one month, as she then died, and there is no evidence that Cleveland rendered her any services, after the making of the deed and before her death. After the death of the mother, the father and appellant Cleveland lived as members of the same family until the father's second marriage, after which time the proof shows abundantly that the appellant did not render him any kind of assistance. The claim that he furnished his father a portion of the land to live upon, and where he maintained himself, is not tenable, because the father had the right to have held all the land, from the death of the mother until his death, as a tenant by the curtesy.

(c) It is insisted that the judgment ought to be reversed, because the court did not adjudge that appellant Cleveland Farley had a lien upon all the land to secure the payment to him of the amount of the increased vendible value of the land, created by the lasting improvements put upon the land by him. It is insisted that the rule that a married woman who makes a deed in which her husband does not join, and for that reason the deed is void, and she can recover the land conveyed away by her, that she will not be permitted to do so, except upon terms which will be equitable to both parties, should be applied to this case, as the appellees who seek to annul the deed and recover the land are the successors of the maker of the deed, and should not be in a more advantageous position than the vendor from whom they inherited the land. There are several limitations upon this rule, and one is, that the vendee must be in good faith, and believe that the property upon which he makes the improvements are his own. Barlow v. Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731. Another limitation is, that the vendee can only recover to the extent that the improvements enhance the vendible value of the property, not in excess of the value of the improvements, and if the improvements do not add to the vendible value of the property, he cannot recover anything for them, but may remove them, if he can do so practically. Another limitation is, that he must perform his contract, if the performance of a contract is the consideration. Pulliam v. Jennings, 5 Bush, 433; Robards v. Robards, 27 Ky. L. Rep. 494, 85 S. W. 718; Poole v. Johnson, 31 Ky. L. Rep. 168, 101 S. W. 955; Bell v. Bair, 28 Ky. L. Rep. 614, 89 S. W. 732; Thomas v. Thomas, 16 B. Mon. 421. It appears from the evidence that appellant Cleveland Farley, before he made any improvements upon the lands which could add to the vendible value of the property, had information that the deed under which he claimed was invalid, and he thus could not in good faith have had a conviction that the land was his own, and not that of the heirs of his mother. Aside from this consideration, however, the judgment of the court of which he complains directs that the lands be so divided as to allot to his vendees all the lands upon which either he or they have placed any valuable improvements, and in doing so will value the land, for the purposes of the allotment, as though the improvements had never been made; and under this judgment he will receive the entire benefits of the improvements. While the appellees might complain of that portion of the judgment they are not doing so. It does not appear that the improvements will add anything to the vendible value of the lands which will be allotted to the appellees. The appellant did not seek to recover the part of the consideration which he paid to his sister Mary Edwards, and she abandoned her attempt to recover any part of the land by quitclaiming her interest therein to him.

Partition—allowance for improvement.

(d) The appellants complain that the court was in error in failing to charge the appellees with advancements in the sum of $300 and

$275, respectively, and adjudging that they were not entitled to any interest in the land until appellant Cleveland Farley was made equal to them out of the proceeds of a sale of the lands. The proof is not satisfactory that Jane Stacey received anything from her mother's estate, in the way of an advancement, and with which she should be charged, other than two small calves, the value of which is not shown by the evidence, and could not have been more than a few dollars. Della Runyon received nothing in the way of an advancement from her mother's estate. As a part of the consideration for the lands which their father conveyed to them, two of the sons were required to pay to Della Runyon $100 and $200, respectively. By his will, the father devised $100 to Jane Stacey, which was a part of the consideration which Vicey Farley was to pay her father for the lands conveyed to her. The father did not have any estate undevised to be distributed among his heirs, out of which the children to whom he gave nothing could be equalized with the others. The excess of advancements received by one heir is not a debt which he owes to the other heirs. Eckler v. Galbraith, 12 Bush, 71. The lands in controversy and sought to be divided were not the estate of the father, but that of the mother. It seems to be conceded that the conveyances of lands by the father to his older sons and daughters were advancements made to them out of his estate, but the evidence is very unsatisfactory as to their value, and the values stated seem to be those at the institution of the suit, instead of their value at the time they were made. Section 1407, Kentucky Statutes. The rule is that advancements are to be estimated at their value when made, unless they are given to be enjoyed at a future time, when the value is to be estimated as of the time when the gift is made complete by the possession and enjoyment of the property. Hook v. Hook, 13 B. Mon. 528; Stevenson v. Martin, 11 Bush, 485; Ward v. Johnson, 124 Ky. 1, 97 S. W. 1110. The advancements to Della Runyon were $300 to be paid to her in money, and the devise to Jane Stacey with which she would be charged in the settlement of her father's estate was $100. Without deciding whether, under the facts of this case, the appellees are to be charged with these advancements before enjoying any part of their mother's estate, it appears that the action of seven of the mother's heirs, in quitclaiming their interests in their mother's land to appellant Cleveland, had the effect of perfecting the attempted advancement made by the mother to seven tenths of the land at the date of the void deed of the mother. The only evidence as to the value of the land at that time is the statement that the father listed it for taxation at from $700 to $750, which all know, from common experience, to be a very unsatisfactory criterion by which to estimate values. There is evidence to the effect that lands have doubled in value in that vicinity since 1906. The increase in vendible value, added by the improvements put upon the lands by appellant, is estimated from $500 to $2,000, but may be safely fixed at $1,500. The value of the lands, as appears from prices realized at the present time, is $3,525. Without considering the reduction in value caused by appellant's cutting and selling timber from the lands, the above estimates would fix a value for the lands in 1906 at more than $1,000, which would make the advancement to Cleveland, at that time, of the value of over $700, burdened with the payment of $300 to Mary Edwards. Estimating the value of the lands at the time of the termination of the father's curtesy in it, the value of the advancement would be very much greater. Hence, it appears that the value of the attempted advancement made to

Advancement—valuation.

Cleveland by his mother, and perfected by his brothers and sisters, is equal to that received by Della Runyon from her father, and in excess of that received by Jane Stacey, and he inherits the same estate from his mother as each of them do, and it seems that he abandoned his claim for relief against his brothers and sisters, other than appellees, on account of alleged advancements, as they were not seeking to recover any of the lands in controversy.

Partition—equalization of advancement.

(e) There are no facts in evidence which tend to show that the land cannot be divided, as ordered by the court, without materially impairing the value of it or any of the portions.

(f) The complaint of the appellants that the court erred in refusing, when the deed was adjudged to be void, to adjudge that Cleveland Farley should have a lien upon the land to secure the payment of the taxes which he had paid upon it, amounting, since 1906, to the sum of $186, is not meritorious. The proof shows that the rent of the lands was of the value of at least $50 a year, and that appellant Cleveland Farley had had unrestricted control of a large part of the lands since 1909, and all of it since the death of his father in September, 1912, and, in addition, had cut and sold timber from the lands, for which he received, after the payment of the expenses, $376, and the judgment does not charge him with either the rents or the value of the timber.

Same—lien for taxes.

(g) The appellees complain that they are denied any portion of the purchase money due from the railroad company for the right of way, and it seems that this complaint is just, if, when a division of the lands is had in accordance with the judgment of the court, any portion of the right of way shall be situated on the portion of the lands allotted to the appellees. The judgment should have directed the commissioners, in estimating the value of the lands for division, that it should be done without considering the fact of the burden placed upon it by the right of way, but to ascertain the entire length of the right of way upon the lands as a whole, and the length of that portion of the right of way which may be upon the portions allotted to the appellees, respectively, and then, upon confirmation of the report, the appellees should be adjudged to receive the proportional part of the purchase money of the right of way due each of them, and require them to vest the railroad company with a proper title to the right of way upon each of their portions, and for the sole reason that the court failed to so adjudge in regard to the purchase money of the right of way, the judgment is reversed upon the cross appeal.

Same—allowance for right of way.

It is therefore ordered that the judgment be affirmed upon the original appeal and reversed upon the cross appeal, and remanded for proceedings consistent with this opinion.

ANNOTATION.

Adjustment on partition of improvements made by tenant in common.

I. Right to allowance for improvements:
a. Generally, 1189.
b. Effect of relation of husband and wife, 1190.
c. Effect of relation of landlord and tenant, 1191.
d. Improvements during previous life estate, 1192.
II. Method of making allowance or compensation to improving tenant:
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(a) Rule stated, 1193.
(b) Allotment to grantee of tenant, 1198.
2. Necessity of title and good faith, 1199.
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4. Extent of compensation, 1219.
5. Setting off improvements against rents and profits, 1221.
6. Setting off rents and profits against improvements, 1224.

I. Right to allowance for improvements.

a. Generally.

The partition of lands between tenants in common is an established head of equity jurisdiction; and though there may be doubt as to its origin, it is now generally rested on the inadequacy of remedies at law, and the peculiar capacity of equity to grant more complete relief, adjust the equities of the parties, and meet the exigencies of each particular case. See 20 R. C. L. title Partition, p. 723.

While at common law a tenant in common could not claim contribution in an action at law for necessary improvements made on the common property, without the consent of his cotenant, nevertheless, inasmuch as an action for partition was essentially equitable in its nature, a court of equity was required to take improvements into account when decreeing partition, and to award to the cotenant in possession, who had necessarily and in good faith improved the common property and enhanced its value at his own cost, such equitable compensation as would leave only the value of the estate, without the improvements, to be divided among the tenants in common. This relief was granted in actions in partition, in keeping with the familiar principle of equity jurisprudence, which requires that one who seeks equity must do equity. The rule in this behalf has been adopted and applied, with but rare exceptions, in every jurisdiction where the action for partition is considered as one calling for equitable interposition and relief. Therefore, it may be safely said that the rule of to-day is that a cotenant, seeking partition of the common property at the hands of a court of equity, will be granted relief only on the condition that the equitable rights of his cotenant shall be respected and protected. Accordingly, it has been uniformly held that where it is shown that one cotenant in common has, in

good faith, with or without the consent of his cotenant, expended money in making permanent improvements which were necessary to the preservation of the common property, partition should not be decreed without first counting the cost of such improvements, and making a suitable allowance for the same. Ventre v. Tiscornia (1913) 23 Cal. App. 598, 138 Pac. 954. And see the cases cited throughout this note.

The reason of the rule allowing compensation to the improving tenant in common is that when his improvements enhance the value of the common estate, and his cotenants are not injured in any way or hindered from having partition, they should not be permitted to take advantage of improvements which enrich the common property, and to which they have contributed nothing. The original cost of the improvement is not to be allowed, because it might result in the other owners being improved out of their property by an extravagant or unbusinesslike cotenant, and the improvement may have depreciated at the time of the partition sale. The extent of the improving tenant's right to compensation is the enhanced value of the property, due to the improvement. There can be no difference in principle between allowing the equitable claim of a part owner for his improvement in cases where a partition may be had in kind, and in cases where a partition can only be accomplished by a sale of the common property. The right of the improving tenant to compensation is not dependent on the divisibility of the land in kind, but on the broad principle of equity "that a cotenant acting in good faith, and for the purpose of honestly bettering the property, and not for the purpose of embarrassing his cotenants, or encumbering the estate, or hindering partition, will be entitled to compensation to the extent that the substantial and useful improvements have added to the value of the common property." In determining whether an improving cotenant should be recompensed for his improvements, as reflected in the increased value of the common premises, all the circumstances attending their erection, their nature, and their relation to the estate improved and to the other cotenants are to be considered. And where it appears that the improvements are permanent and useful to the common estate, and the cotenants are not excluded from the enjoyment of their property, and that their interest in the property has not been diminished in value, there is no reason why the improving cotenant should not be equitably entitled to the increased value of the estate, caused by the improvements. Helmken v. Meyer (1912) 138 Ga. 457, 45 L.R.A. (N.S.) 738, 75 S. E. 586.

There is no rule or precedent by which one cotenant can be brought into court to answer to the judgment creditor of the other, for improvements made by the latter on the premises which are the subject of such cotenancy, in advance of a suit for partition wherein all the equities growing out of such cotenancy, up to the time of its severance, may be adjusted. Beam v. Scroggin (1883) 12 Ill. App. 321.

b. Effect of relation of husband and wife.

A tenant by curtesy initiate of the premises is not to be considered as a stranger or volunteer in the making of permanent improvements on the property, as he presumably acted for himself and his wife, and is entitled, on partition, to have compensation for the valuable improvements made by him in good faith, without objection by his cotenants, and with the purpose of permanently benefiting the property, either by allotment (Jevons v. Kline (1899) 9 Kulp (Pa.) 305; Kelsey's Appeal (1886) 113 Pa. 119, 57 Am. Rep. 444, 5 Atl. 447), or by pecuniary award (Jevons v. Kline (Pa.) supra).

When a husband performs labor and erects improvements on land in which his wife is a tenant in common, he stands in the position of a party who has voluntarily and knowingly improved another's property without request, and may claim nothing by way of direct compensation, as he had no interest or title in the premises so

improved. Heath v. Bostock (1835) 5 L. J. Exch. in Eq. N. S. (Eng.) 20; Leake v. Hayes (1895) 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48. But where he and his wife believed that he was meliorating the wife's property, and what he did was done with her consent and for her benefit, as well as his own, on partition of the property the wife is entitled to receive the benefit of all that was done on her account, to the same extent as if she had, by her own hands, improved the common estate. Leake v. Hayes (Wash.) supra. To the same effect, see Legg v. Legg (1904) 34 Wash. 132, 75 Pac. 130.

With respect to the contention that the rule in equity, which gives to the tenant who has made the improvements compensation therefor, does not prevail as between husband and wife, the court, in Beam v. Scroggin (1883) 12 Ill. App. 321, held that the intent with which, and the circumstances under which, the improvements were made, were always fair subjects of inquiry by a court of equity. "And should it appear," the court said, "that, in the absence of either actual or constructive fraud, the husband had made such improvements with the intent of conferring a benefit on the wife in the nature of a gift, without hope, expectation, or promise from her that either he or his heirs should, in case of partition, receive any compensation therefor, the court would refuse to devest her of her legal title thereto, for the benefit of her husband's creditors." The court further held that this right to compensation for improvements was one which could not be asserted by the husband, during the continuance of the tenancy in common; but when that tenancy was severed, it was optional with him whether he would assert it.

c. Effect of relation of landlord and tenant.

Where, in addition to being tenants in common, the relation of the parties to partition is, in fact, that of landlord and tenant, no improvement of all or any part of the common property, made by the tenant in possession in the character of an ordinary tenant, can, in the absence of a covenant covering the construction and cost of such improvement, constitute the basis of an enforceable claim for contribution on partition. Schmidt v. Constans (1901) 82 Minn. 347, 83 Am. St. Rep. 437, 85 N. W. 173; Cosgriff v. Foss (1897) 152 N. Y. 104, 36 L.R.A. 753, 57 Am. St. Rep. 500, 46 N. E. 307, affirming (1892) 65 Hun, 184, 19 N. Y. Supp. 941; see also Ventre v. Tiscornia (1913) 23 Cal. App. 598, 138 Pac. 954. And see the reported case (FARLEY v. STACEY) ante, 1181.

So, a tenant in common, who is also a lessee of his cotenant, cannot be allowed in partition for improvements made on the common property in the course of his tenancy, which enhanced its value and were made with the knowledge, but without the consent, of the cotenant, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on a business then prosecuted by him on the premises, the increased income from which was not shared with the cotenant. Cosgriff v. Foss (1897) 152 N. Y. 104, 36 L.R.A. 753, 57 Am. St. Rep. 500, 46 N. E. 307, wherein the court said: "In the case before us we find no . . . equitable strength in the claim of the appellant. He sustained the double relation to his cotenants of tenant by lease and tenant in common. Under the former relation he was entitled to no repairs, but was bound by a covenant in the lease to make such as would keep the premises in their normal condition, except depreciation by use and damages by the elements. The improvements were made mainly for the purpose of extending his business and increasing his sales, in which his cotenants had no interest. He had the right, by express contract, to remove all his structures during the term of his lease. The nature of the property did not permit decay, and there was no controlling necessity for making the changes and additions. If they had not been made, the premises would not have depreciated in value. Some of the work was done after this action was commenced, and a part even after the trial was in progress. It does not appear that the appellant offered any

share of the profits to his cotenants, or to what extent the value of the premises was increased, or, unless inferentially, that they would sell for any more on account of the improvements. His erections were in the nature of new and independent construction to enable him to quarry more rock and sell it, and thus, pro tanto, he consumed the property. They were not 'in the line of restoration,' but of a business venture. We know of no well-considered case in this state that would authorize an allowance for improvements under these circumstances. It would be a dangerous extension of the rule governing the subject, which is always applied with caution, to permit one cotenant to run the other in debt, against his will, for unnecessary improvements. Equity requires contribution from tenants in common only to prevent injustice, and, unless the rule is kept well in hand, it is liable to cause more injustice than it prevents."

In Ventre v. Tiscornia (Cal.) supra, the foregoing rule was stated, but the case was not tried, either in whole or in part, on the theory that the relation of landlord and tenant existed, but was heard and determined solely on the issue of the relative rights of the parties as tenants in common, the court saying: "That this is so is manifested by the findings and judgment allowing Tiscornia $100 for leveling a portion of the common property. Clearly, the finding in this particular, when read and construed in conjunction with the pleadings and the evidence, was based solely upon the theory that Tiscornia, as the cotenant in possession, had made a necessary improvement of the common property, which inured to the joint benefit of both parties as tenants in common. It is equally clear, from a consideration of the pleadings and proof, that the superior court found against Tiscornia upon the issue relating to the bulkheading of the common property, not because it was done by Tiscornia as an ordinary tenant from month to month, for his individual use and benefit, but solely upon the theory that such improvement was not necessary to the preservation of the common property, and was made without the consent of the plaintiff. The evidence, however, as has been previously pointed out, shows, we think, without conflict, that such improvements were not only necessary to the preservation of the common property, but enhanced its rental value, and that the resulting profits were shared equally with the plaintiff. To permit the plaintiff to participate in the benefits which must have resulted from improvements necessary to the preservation of the entire property, and at the same time share equally in the increased rentals which followed the making of a part of the improvements, would manifestly be inequitable unless provision be also made, upon partition, for suitable compensation to Tiscornia for the cost of such improvements."

d. Improvements during previous life estate.

The fact that the improvements were made by a tenant in common in reversion, during the previous life estate, has been held to be no bar to an allowance therefor in some instances (Smith v. Smith (1909) 133 **Ga.** 170, 65 S. E. 414; Brookfield v. Williams (1839) 2 **N. J.** Eq. 341; Hall v. Piddock (1871) 21 **N. J.** Eq. 311; Shipman v. Shipman (1903) 65 **N. J.** Eq. 556, 56 Atl. 694; Killmer v. Wuchner (1890) 79 **Iowa,** 722, 8 L.R.A. 289, 18 Am. St. Rep. 392, 45 N. W. 299; Berry v. Donald (1915) 168 **Iowa,** 744, 150 N. W. 1048; Broyles v. Waddel (1872) 11 Heisk. (**Tenn.**) 32), and denied in others (Pulse v. Osborn (1902) 30 **Ind.** App. 631, 64 N. E. 59; Pulse v. Osborn (1901) — **Ind.** App. —, 60 N. E. 374; Porter v. Osmun (1904) 135 **Mich.** 361, 97 N. W. 756, 98 N. W. 859, 3 Ann. Cas. 687; Scott v. Guernsey (1871) 48 **N. Y.** 106, affirming (1871) 60 Barb. 163; Lasby v. Crewson (1891) 21 **Ont.** Rep. 255). See also McClaskey v. Barr (1894) 62 **Fed.** 209, modifying (1891) 48 Fed. 130.

In Smith v. Smith (1909) 133 **Ga.** 170, 65 S. E. 414, wherein it appeared that one remainderman, as such, made the improvements, acting not for the life tenant, but for the improvement of

the property, with his own funds and in reliance on a parol agreement for partition, the court held that, if the improvements were permanent in character and benefited the remainder estate, they would be taken into consideration in making the partition by a division of the tract of land, and determining which part to assign to him, after the termination of the life estate, if so doing would not injuriously affect the cotenant. But the court held that if the improvements were not placed on the property to improve it permanently, but only for the benefit of the life estate, under some arrangement between the life tenant and this remainderman by which he enjoyed in part the life use, the rule just stated would not apply.

II. Method of making allowance or compensation to improving tenant.

a. Allotment of improved portion of property.

1. In general.

(a) Rule stated.

In a partition suit, where it is practicable to make a division of the property, the generally if not universally recognized rule is that a court of equity, on ascertaining that one of two or more tenants in common has made permanent and valuable improvements on the property involved, will allot to him that portion on which the improvements are located, or so much thereof as represents his share of the whole tract. In so partitioning the property in kind, the court will not take into account the value of the improvements, but will make its division on the basis of the unimproved value of the land, where its nature and the improvements permit, and where this can be done without injury or injustice to the other tenants.

England.—See Story v. Johnson (1835) 1 Younge & C. Exch. 538, 160 Eng. Reprint, 220, 5 L. J. Exch. in Eq. N. S. 9.

Canada.—Wood v. Wood (1869) 16 Grant, Ch. (U. C.) 471; Biehn v. Biehn (1871) 18 Grant, Ch. (U. C.) 497; Hovey v. Ferguson (1871) 18 Grant, Ch. (U. C.) 498; Pride v. Rodger (1896) 27 Ont. Rep. 320.

United States.—See Cochran v. Schoenberger (1887) 33 Fed. 397.

Alabama.—Sanders v. Robertson (1876) 57 Ala. 465; Wilkinson v. Stuart (1883) 74 Ala. 198; Donnor v. Quartermas (1890) 90 Ala. 164, 24 Am. St. Rep. 778, 8 So. 715; Ferris v. Montgomery Land & Improv. Co. (1891) 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607; Hollis v. Watkins (1914) 189 Ala. 292, 66 So. 29. See also McDaniel v. Louisville & N. R. Co. (1908) 155 Ala. 553, 46 So. 981.

Arizona.—Pesqueira v. Kellogg (1903) 8 Ariz. 266, 71 Pac. 915.

Arkansas.—Drennen v. Walker (1860) 21 Ark. 539; Dunavant v. Fields (1900) 68 Ark. 534, 60 S. W. 420.

California.—Seale v. Soto (1868) 35 Cal. 102; Emeric v. Alvarado (1891) 90 Cal. 444, 27 Pac. 356 (Code Civ. Proc. § 764); East Shore Co. v. Richmond Belt R. Co. (1916) 172 Cal. 174, 155 Pac. 999 (Code Civ. Proc. § 764).

Florida.—Boley v. Skinner (1896) 38 Fla. 291, 20 So. 1017.

Georgia.—Smith v. Smith (1909) 133 Ga. 170, 65 S. E. 414; Helmken v. Meyer (1912) 138 Ga. 457, 45 L.R.A. (N.S.) 738, 75 S. E. 586; Walton v. Ward (1914) 142 Ga. 385, 82 S. E. 1067.

Hawaii.—Hawaiian Commercial & Sugar Co. v. Waikapu Sugar Co. (1894) 9 Haw. 417; Brown v. Holmes (1908) 19 Haw. 268.

Illinois.—Louvalle v. Menard (1844) 6 Ill. 39, 41 Am. Dec. 161; Howey v. Goings (1851) 13 Ill. 95, 54 Am. Dec. 427; Dean v. D'Meara (1868) 47 Ill. 120; Kurtz v. Hibner (1870) 55 Ill. 514, 8 Am. Rep. 665; Mahoney v. Mahoney (1872) 65 Ill. 406; Noble v. Tipton (1905) 219 Ill. 182, 3 L.R.A.(N.S.) 645, 76 N. E. 151; Manternach v. Studt (1909) 240 Ill. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Maciejewska v. Jarzombek (1909) 243 Ill. 136, 90 N. E. 231, affirming (1909) 148 Ill. App. 161; Bayley v. Nichols (1914) 263 Ill. 116, 104 N. E. 1054; Beam v. Scroggin (1883) 12 Ill. App. 321; Glos v. Clark (1901) 97 Ill. App. 609, appeal dismissed in (1902) 199 Ill. 147, 65 N. E. 135. See also Wilton v. Tazwell (1877) 86 Ill. 29; Cooter v. Dearborn (1886) 115 Ill. 509, 4 N. E. 388.

Indiana.—Martindale v. Alexander (1866) 26 Ind. 104, 89 Am. Dec. 458; Elrod v. Keller (1882) 89 Ind. 382; Carver v. Coffman (1887) 109 Ind. 547, 10 N. E. 567. See also Quick v. Brenner (1885) 101 Ind. 230; Alleman v. Hawley (1889) 117 Ind. 532, 20 N. E. 441.

Iowa.—Shelangowski v. Schrack (1913) 162 Iowa, 176, 143 N. W. 1081.

Kansas.—Sarbach v. Newell (1882) 28 Kan. 642, s. c. subsequent appeals in (1883) 30 Kan. 102, 1 Pac. 30, (1886) 35 Kan. 180, 10 Pac. 529.

Kentucky.—Patrick v. Marshall (1810) 2 Bibb, 40, 4 Am. Dec. 670; Hart v. Hawkins (1814) 3 Bibb, 502, 6 Am. Dec. 666; Haskins v. Spiller (1833) 1 Dana, 170; Sneed v. Atherton (1838) 6 Dana, 278, 32 Am. Dec. 70; Borah v. Archers (1838) 7 Dana, 176; Nelson v. Clay (1832) 7 J. J. Marsh. 138, 23 Am. Dec. 387; Withers v. Thompson (1827) 4 T. B. Mon. 323; Kirk v. Crutcher (1911) 145 Ky. 52, 139 S. W. 1076; Ratterman v. Apperson (1911) 145 Ky. 117, 140 S. W. 51, denying rehearing (1911) 141 Ky. 821, 133 S. W. 1005; FARLEY v. STACEY (reported herewith) ante, 1181; Ward v. Ward (1894) 15 Ky. L. Rep. 706, 25 S. W. 112; Dehoney v. Bell (1895) 17 Ky. L. Rep. 76, 30 S. W. 400; Hixon v. Bridges (1897) 18 Ky. L. Rep. 1068, 38 S. W. 1046; Bridwell v. Bridwell (1899) 21 Ky. L. Rep. 1025, 53 S. W. 1050; Milligan v. Masden (1903) 25 Ky. L. Rep. 144, 74 S. W. 1049. See also Respass v. Breckenridge (1820) 2 A. K. Marsh. 581; Kenton Ins. Co. v. Wigginton (1889) 89 Ky. 330, 7 L.R.A. 81, 12 S. W. 668; Stith v. Carter (1901) 22 Ky. L. Rep. 1488, 60 S. W. 725.

Louisiana.—Timberlake v. Sorrell (1910) 125 La. 554, 51 So. 586. See also Downes v. Scott (1842) 3 Rob. 84.

Maine.—Parsons v. Copeland (1854) 38 Me. 537 (distinguished in Allen v. Hall (1863) 50 Me. 253); Williams v. Coombs (1895) 88 Me. 183, 33 Atl. 1073.

Maryland.—Gittings v. Worthington (1887) 67 Md. 139, 9 Atl. 228; Dugan v. Baltimore (1889) 70 Md. 1, 16 Atl. 501. See also Young v. Frost (1851) 1 Md. 377.

Massachusetts.—Crafts v. Crafts (1859) 13 Gray, 360. See also Fair v. Fair (1877) 121 Mass. 559.

Michigan.—Fenton v. Miller (1898) 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384.

Minnesota.—Hunt v. Meeker County Abstract & Loan Co. 135 Minn. 134, 160 N. W. 496.

Mississippi.—Paddock v. Shields (1879) 57 Miss. 340; Bennett v. Bennett (1904) 84 Miss. 493, 36 So. 452.

Missouri.—Burford v. Aldridge (1901) 165 Mo. 419, 63 S. W. 109, 65 S. W. 720. See also Spitts v. Wells (1853) 18 Mo. 468.

Nebraska.—Carson v. Broady (1898) 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80.

New Hampshire.—Leavitt v. Locke (1894) 68 N. H. 17, 40 Atl. 395.

New Jersey.—Brookfield v. Williams (1840) 2 N. J. Eq. 341; Obert v. Obert (1846) 5 N. J. Eq. 397; Hall v. Piddock (1871) 21 N. J. Eq. 311; Atha v. Jewell (1881) 33 N. J. Eq. 417; Keneaster v. Erb (1914) 83 N. J. Eq. 625, 92 Atl. 377, reversing (1914) 83 N. J. Eq. 206, 89 Atl. 995. See also Booraem v. Wells (1868) 19 N. J. Eq. 87.

New York.—Green v. Putnam (1847) 1 Barb. 500; St. Felix v. Rankin (1839) 3 Edw. Ch. 323; Granville v. Needham (1832) 3 Paige, 545, 24 Am. Dec. 246; Ford v. Knapp (1886) 102 N. Y. 135, 55 Am. Rep. 782, 6 N. E. 283, reversing (1884) 31 Hun, 522; Cosgriff v. Foss (1897) 152 N. Y. 104, 36 L.R.A. 753, 57 Am. St. Rep. 500, 46 N. E. 307, affirming (1892) 65 Hun, 184, 19 N. Y. Supp. 941; Stephenson v. Cotter (1889) 5 N. Y. Supp. 749.

North Carolina.—Pope v. Whitehead (1873) 68 N. C. 191; Collett v. Henderson (1879) 80 N. C. 337; Cox v. Ward (1890) 107 N. C. 507, 12 S. E. 379; Holt v. Couch (1899) 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703. See also Pipkin v. Pipkin (1897) 120 N. C. 161, 26 S. E. 697; Daniel v. Dixon (1913) 163 N. C. 137, 79 S. E. 425; Fisher v. Toxaway Co. (1916) 171 N. C. 547, 88 S. E. 887.

Pennsylvania.—Jevons v. Kline (1899) 9 Kulp, 305; Kelsey's Appeal (1886) 113 Pa. 119, 57 Am. Rep. 444, 5 Atl. 447. See also Fulton v. Miller (1899) 192 Pa. 60, 43 Atl. 309.

Rhode Island.—Moore v. Thorp (1889) 16 R. I. 657, 7 L.R.A. 731, 19 Atl. 321.

South Carolina.—Williman v. Holmes (1850) 4 Rich. Eq. 475; Scaife v. Thomson (1881) 15 S. C. 337; Annely v. De Saussure (1882) 17 S. C. 389; Buck v. Martin (1884) 21 S. C. 590, 53 Am. Rep. 702; **Johnson v. Pelot** (1886) 24 S. C. 255, 58 **Am. Rep. 253**; Sutton v. Sutton (1886) 26 S. C. 33, 1 S. E. 19; Hall v. Boatwright (1900) 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001; Tedder v. Tedder (1918) — S. C. —, 96 S. E. 157. See also Young v. Edwards (1890) 33 S. C. 404, 10 L.R.A. 55, 26 Am. St. Rep. 689, 11 S. E. 1066.

Tennessee.—Reeves v. Reeves (1872) 11 Heisk. 669; Tyner v. Fenner (1880) 4 Lea, 469; Simpson v. Sparkman (1883) 12 Lea, 360; Estell v. University of the South (1883) 12 Lea, 476; Polk v. Gunther (1901) 107 Tenn. 16, 64 S. W. 25. See also Broyles v. Waddel (1872) 11 Heisk. 32.

Texas.—Robinson v. McDonald (1853) 11 Tex. 385, 62 Am. Dec. 480; Williams v. Wethered (1872) 37 Tex. 130; Yancy v. Batte (1877) 48 Tex. 46; Arnold v. Cauble (1878) 49 Tex. 527; Clements v. Lacy (1879) 51 Tex. 150; Jenkins v. Volz (1881) 54 Tex. 636; Osborn v. Osborn (1884) 62 Tex. 495; Johnson v. Bryan (1884) 62 Tex. 623; Duke v. Reed (1885) 64 Tex. 705; Curtis v. Poland (1886) 66 Tex. 511, 2 S. W. 39; Lewis v. Sellick (1887) 69 Tex. 379, 7 S. W. 673; Thompson v. Jones (1890) 77 Tex. 629, 14 S. W. 222; Boone v. Knox (1891) 80 Tex. 642, 26 Am. St. Rep. 767, 16 S. W. 448; Tevis v. Collier (1892) 84 Tex. 638, 19 S. W. 801; Summerville v. King (1904) 98 Tex. 332, 83 S. W. 680, reversing (1904) — Tex. Civ. App. —, 80 S. W. 1050; Whitmire v. Powell (1910) 103 Tex. 232, 125 S. W. 889, reversing (1909) — Tex. Civ. App. —, 117 S. W. 433; Calhoun v. Stark (1896) 13 Tex. Civ. App. 60, 35 S. W. 410; Olschewske v. Summerville (1906) 43 Tex. Civ. App. 361, 95 S. W. 1; Baker v. Hamblen (1908) 48 Tex. Civ. App. 529, 107 S. W. 577; Rosamond v. Rosamond (1909) 56 Tex. Civ. App. 173, 120 S. W. 520; McLane v. Canales (1894) — Tex. Civ. App. —, 25 S. W. 29; Taylor v. Taylor (1894) — Tex. Civ. App. —, 26 S. W. 889; Spicer v. Henderson (1897) — Tex. Civ. App. —, 43 S. W. 27; Mahon v. Barnett (1897) — Tex. Civ. App. —, 45 S. W. 24; Ord v. Waller (1908) — Tex. Civ. App. —, 107 S. W. 1166; Higgins v. Higgins (1910) 61 Tex. Civ. App. 41, 129 S. W. 162; Lynch v. Lynch (1910) — Tex. Civ. App. —, 130 S. W. 461; Burns v. Parker (1911) — Tex. Civ. App. —, 137 S. W. 705; Wentworth v. Wentworth (1911) — Tex. Civ. App. —, 142 S. W. 141; Holloway v. Hall (1912) — Tex. Civ. App. —, 151 S. W. 895; Johnson v. Johnson (1916) — Tex. Civ. App. —, 191 S. W. 366; Broom v. Pearson (1917) — Tex. Civ. App. —, 200 S. W. 191. See also Camoron v. Thurmond (1881) 56 Tex. 22; Griffie v. Maxey (1882) 58 Tex. 210; Kesterson v. Bailey (1904) 35 Tex. Civ. App. 235, 80 S. W. 97; Bowen v. Hart Land & Improv. Co. (1910) — Tex. Civ. App. —, 132 S. W. 835; Broom v. Pearson (1915) — Tex. Civ. App. —, 180 S. W. 895; Tompkins v. Hooker (1917) — Tex. Civ. App. —, 200 S. W. 193.

Virginia.—Dennis v. Dennis (1914) 116 Va. 619, 82 S. E. 696.

Washington.—Leake v. Hayes (1895) 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48; Hamlin v. Hamlin (1916) 90 Wash. 467, 156 Pac. 393.

West Virginia.—Boggess v. Meredith (1879) 16 W. Va. 1; Worthington v. Staunton (1879) 16 W. Va. 208; Dodson v. Hays (1887) 29 W. Va. 577, 2 S. E. 415; Ward v. Ward (1895) 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746; Alderson v. Horse Creek Coal Land Co. (1917) — W. Va. —, 94 S. E. 716. See also Smith v. Smith (1915) 77 W. Va. 260, 87 S. E. 355.

This relief is not administered on the ground that the improving tenant, who acts without the agreement or assent of the others, gains a lien on the property for his advances, but stands on the proposition that one who seeks equity must do equity, and that the tenant out of the actual occupation, who asks a court of equity to award him partition, is entitled to relief only on the condition that the equitable rights of his cotenants shall be re-

spected, and any equities thereby arising shall be taken into account. Ford v. Knapp (1886) 102 N. Y. 135, 55 Am. Rep. 782, 6 N. E. 283, reversing (1884) 31 Hun, 522.

The only qualification of the rule is that there must be no impairment of the rights of the cotenants. McDaniel v. Louisville & N. R. Co. (1908) 155 Ala. 553, 46 So. 981.

It has been held that where one tenant in common occupied and improved a portion of the common property, with his cotenant's consent, as his homestead, this gave him a preference thereto in partition. Lewis v. Sellick (1887) 69 Tex. 383, 7 S. W. 673; Wentworth v. Wentworth (1911) — Tex. Civ. App. —, 142 S. W. 141.

In Maine, in order to entitle a tenant in common who has occupied any part of the premises, and made any improvements thereon, to have his share set off so as to include his improvements, without considering their value, the burden of proof is on him to show "that, by mutual consent, he had the exclusive possession of a part of the estate, and made improvements thereon." If he has done this without the consent of his cotenants, he cannot claim to have his share so set off as to embrace the improvements, but he is entitled to have the improvements made by him "considered," and the assignment made "in conformity therewith." In other words, if not assigned to him specifically, he shall have their value over and above his share of the common property, though in the division some other part shall fall to him; thus giving the maker the benefit of them, irrespective of possession or consent. But, if he has had exclusive possession of any part of the premises "by the mutual consent" of the cotenants, and has made improvements thereon, he is entitled to have such part assigned to him, unless, exclusive of the improvements, it exceeds his share. Allen v. Hall (1863) 50 Me. 253; Reed v. Reed (1878) 68 Me. 568.

And see Thornton v. York Bank (1858) 45 Me. 158, wherein it was held that a respondent in partition has no right to compensation for improvements.

In Massachusetts, the early rule was that a respondent in partition, who entered under a title which he believed to be good, had no remedy for his improvements. Marshall v. Crehore (1847) 13 Met. (Mass.) 462; Liscomb v. Root (1829) 8 Pick. (Mass.) 376. Soon after the decision in Marshall v. Crehore (Mass.) supra, the legislature enacted a statute (Stat. 1850, chap. 278, subsequently re-enacted in Gen. Stat. chap. 136, § 46), providing that when, "in any writ or other process of partition," the respondent or defendant denies the right of the petitioner, or plaintiff, and claims the estate to himself, and holds it under a title which he believes to be good, he shall be entitled to compensation for buildings or improvements. But a respondent who has not denied the petitioner's title to the land, nor held it under a title which he believed to be good, can have no allowance for improvements. Chandler v. Simmons (1870) 105 Mass. 412; Aldrich v. Husband (1881) 131 Mass. 480; Husband v. Aldrich (1883) 135 Mass. 317.

So, improvements erected by one tenant in common without the consent or knowledge of his cotenant must be treated as part of the land, in a partition at common law, or under the statute; and the claim of a cotenant that she has a right to have partition made of the land without the improvement, and to have the part of the land on which the improvement stands set off to her; and that as, in partition at law, the improvement must be treated as part of the land and no allowance can be made to her for it, her remedy at law is imperfect, and she has a right to relief in equity, is also excluded by the statute. Its plain intendment is, that partition shall be made of land without regard to the state of the account between the cotenants for improvements or erections on it, and that a part owner may have his part of the land set off to him, although he may not have paid as much for it in proportion as his cotenant paid, and although he may be indebted to his cotenant for improvements on the land. Any right to a partition, not according to the interests of

the tenants in the land, but according to the improvements made on the common property by them, is excluded. Aldrich v. Husband and Husband v. Aldrich (Mass.) supra. But where, under this statute, a cotenant has made improvements, holding under a title which he believes to be good, he is not only entitled to receive compensation for his improvements, but he is liable for the petitioner's share of the rents and profits. Re Butrick (1904) 185 Mass. 107, 69 N. E. 1044.

Where the property is divisible in kind, improvements made by one tenant in common at his own expense, and for his own benefit, cannot be allowed to stand in the way of partition in kind, because a co-owner cannot deprive his co-owner of the right which he has to a partition in kind, by putting improvements on the common property. He has no right to put the improvements on the property, and does so at his peril. Timberlake v. Sorrell (1910) 125 La. 554, 51 So. 586.

In Seale v. Soto (1868) 35 Cal. 102, an action for partition by one of several tenants in common against the others, it appeared that, by the interlocutory decree, it was ordered "that there be set off to the said several parties such portions of said premises as will include their respective improvements; provided, always, that the rights or interests of neither of the other parties be prejudiced thereby." It was held that the order was equitable, just, and proper.

In Hollis v. Watkins (1914) 189 Ala. 292, 66 So. 29, the court said: "J. K. P. Hollis and T. C. Hollis were tenants of a tract of land containing something less than 1,000 acres. They were brothers, and each was married. J. K. P. Hollis was without children, but T. C. Hollis was the father of seven. . . . There were two residences and separate settlements on the land. One of these residences was occupied by J. K. P. Hollis and his wife Mattie Hollis. The other residence was occupied by said T. C. Hollis and his wife Susie Hollis, and their children. The two families cultivated separate fields upon the property, but the two brothers remained tenants in common of the property until T. C. Hollis died. After the death of T. C. Hollis, which occurred several years before the filing of the bill, his widow and children remained upon the property and continued to reside upon and cultivate parts of it, just as T. C. Hollis had done prior to his death. J. K. P. Hollis then died, leaving the said Mattie Hollis as his widow, and the said seven children of his deceased brother T. C. Hollis, as his only heirs. Upon the death of their father, T. C. Hollis, his said seven children—the said T. C. Hollis left no will—became, as his heirs, tenants in common of his undivided half interest in the said lands, subject, of course, to the dower and homestead rights of their mother, Susie Hollis. Upon the death of their uncle J. K. P. Hollis—who also died without a will—these seven children became the owners as tenants in common, as his only heirs, of his undivided one-half interest in said lands, subject to the homestead and dower rights of the said widow of J. K. P. Hollis. . . . We are . . . satisfied that if, upon the death of T. C. Hollis, a partition of the lands had been had between said J. K. P. Hollis and the widow and heirs of T. C. Hollis, the court, in dividing the lands, would have set apart to J. K. P. Hollis, in severalty, that half of the land in acreage and value upon which his residence is situated, and to the widow and heirs of T. C. Hollis that half of the land in acreage and value upon which their residence—the residence of T. C. Hollis—is situated. As already stated, T. C. Hollis and J. K. P. Hollis each had a residence upon these lands, which residences are three quarters of a mile apart. While there had never been an actual partition of the property by these brothers, nevertheless the residences and their appurtenances had been, by both of the occupants, occupied and used separately for such periods of time as to indicate that each, as against himself and his heirs, had so dedicated to the other for residential purposes the residence which he occupied as, upon a partition of the lands, would justify

the courts, in recognition of a situation created by the mutual long-continued assent and course of dealing of the parties with reference to the land, to so divide the land into two equal parts in acreage and value as to give to each, in severalty, that part of the land upon which is situated his residence. While the evidence does not shed any light upon the question as to who built the residences, and for that reason this case is not, by positive evidence, brought directly within the operation of Ferris v. Montgomery Land & Improv. Co. (1891) 94 **Ala.** 565, 33 Am. St. Rep. 146, 10 So. 607, it is nevertheless difficult to conceive that a farmer, who is a tenant in common with another, can exclusively occupy for a period of twenty years a residence and appurtenances upon a farm, without during that period, out of necessity, placing such fences, outbuildings, and other improvments at or near such residence as to bring the place of actual occupancy as a residence directly within the influence of the above-cited case. The evidence shows, however, that each of these brothers, with the full knowledge of the other, had for so great a period of time exclusively occupied his residence and exclusively used for his own individual purposes the farming lands situated conveniently near his residence as to give rise to the claim, supported by some but not the weight of the evidence, that there had, in fact—before the death of J. K. P. Hollis—been an actual parol partition of these lands. While respondents failed to establish by their evidence an actual partition of the property, their evidence does disclose such a course of dealing by these brothers with each other, with reference to the lands, as indicates that, upon partition of the lands, each had acquired as against his brother such a status with reference to the land upon which he resided as would have impelled the courts to set apart to him, in acreage and value, that land upon which his residence is situated. In making this statement we do not, however, mean to say that, on such a partition, the value of the residences, under the evidence as it exists in this record, would not have been considered; and herein we differentiate this case from the case of Ferris v. Montgomery Land & Improv. Co. (Ala.) supra. We do say, however, that such a situation, with reference to these lands, is shown that upon a partition each tenant in common was entitled to have set apart to him, as against the other tenant in common or his heirs, the lands upon which is situated his home."

While it is settled that, on partition, improvements made in good faith by one cotenant should be taken into account by the court, and either a suitable compensation made therefor to such cotenant, or, if it can be done without prejudice to the interests of the other parties, the improvements assigned to the cotenant making them, in any division made in the partition suit, the rule does not apply, when it appears from the defendants' own showing that the improvements which were made on the property were made by their stepfather, and there is no proof that they had paid for or were obligated to pay for the same. Pesqueira v. Kellogg (1903) 8 **Ariz.** 266, 71 Pac. 915.

In Dangerfield v. Caldwell (1907) 81 C. C. A. 400, 151 **Fed.** 554, it was held that oil wells, bored under leases from part of the tenants in common, were not improvements on the property which should be set off to the owners, of the interests under whose auspices they were put down; since, under the West Virginia decisions, their sinking and operation constitute waste, for which a tenant in common is liable to his cotenants in damages, under the statute. Code 1899, chap. 92, § 2; Code 1906, § 3390.

(b) Allotment to grantee of tenant.

If improvements are made not by the original tenant in common, but by his grantee, there is no good reason why the latter should not have the same measure of protection which a court of equity would have afforded to his grantor, if no conveyance had been made. In making partition in such a case, if the part sold and conveyed by one tenant in common can

be assigned to the purchaser as a part of the whole of the share of his grantor, without prejudice to the grantor's cotenants in the original tract, it will be so assigned. Ferris v. Montgomery Land & Improv. Co. (1891) 94 **Ala.** 557, 33 Am. St. Rep. 146, 10 So. 607; Carver v. Coffman (1887) 109 **Ind.** 547, 10 N. E. 567; Gittings v. Worthington (1887) 67 **Md.** 139, 9 Atl. 228; St. Felix v. Rankin (1839) 3 Edw. Ch. (N. Y.) 323; Camoron v. Thurmond (1881) 56 **Tex.** 22; Boggess v. Meredith (1879) 16 W. Va. 1; Worthington v. Staunton (1880) 16 **W. Va.** 208. See also Hopkins v. Medley (1881) 97 **Ill.** 402; Rougeau v. Sicotte (1891) 3 **Quebec** Pr. Rep. 376.

In Highland Park Mfg. Co. v. Steele (1916) 146 C. C. A. 202, 232 **Fed.** 10, affirming (1914) 212 Fed. 972, modified on rehearing in (1916) 149 C. C. A. 11, 235 Fed. 465, it was held that if a grantee of a tenant in common, under a deed executed by the latter conveying the entire tract, in the bona fide belief that he had, by his deed, acquired a good and valid title to the entire tract of land conveyed, placed improvements on it, the court, in its decree directing partition, while preserving the rights of the cotenant, would direct that the partition should be so made as to conserve the equities of all parties, "both by providing for compensation for the betterments, and, if practicable, and without prejudicing the rights of the other cotenants, directing the allotment of the part upon which the improvements have been made to the tenant who made them."

2. Necessity of title and good faith.

The authorities generally, in cases where the improved portion of the estate is allotted to the cotenant who has expended his labor and capital thereon, treat the fact that the improvements were made by one who supposed himself to be equitably entitled to the whole premises, as an equitable consideration in his favor. Ferris v. Montgomery Land & Improv. Co. (1891) 94 **Ala.** 557, 33 Am. St. Rep. 146, 10 So. 607; Mahoney v. Mahoney (1872) 65 **Ill.** 406; Carver v. Coffman (1887) 109 **Ind.** 547, 10 N. E. 567; Patrick v. Marshall (1810) 2 Bibb (**Ky.**) 40, 4 Am. Dec. 670; Granville v. Needham (1832) 3 Paige (**N. Y.**) 545, 24 Am. Dec. 246.

In Ferris v. Montgomery Land & Improv. Co. (**Ala.**) supra, the court said: "Where it is practicable, without injury to the other cotenants, to allot the improved portion to the one who made the improvements, the reason for making such allotment depends upon the existence of the fact that he believed himself to be the sole owner of the entire tract does not apply, as in cases where compensation for improvements is charged against the other cotenant, for the allowance of compensation, though it is not permitted to go beyond the amount of the shares of the rents to which the other cotenants would be entitled, is still a charge upon them to that extent; while, if they get their shares in full out of the unimproved portion, and are not required to make compensation in any way, the fact that improvements have been made does not affect their rights in the partition. The recognition in this way of the equitable claim of the tenant who has made improvements in no way impairs the rights of his cotenants, on a partition. A court of equity will not allow one man to deprive another of the fruits of his labors and expenditures, if such an unconscionable result may be avoided consistently with the security to each of them of the full measure of all that he is entitled to claim. . . . The cotenant, whether he supposes himself to be the sole owner, or knows that there are others who are owners in common with him, is entitled to occupy and use the property, though his cotenants fail or refuse to share with him in the enjoyment thereof; and if, in the course of his use and occupation, he makes improvements on a part of the common property in good faith, and without any intention of embarrassing or obstructing a partition, or gaining an advantage therein, there is no good reason why he should not be allowed to retain the part improved by him, if his improvements in fact do not constitute a hindrance or obstacle in the way of

the other cotenants getting their full shares, on the division of the property. A court of equity will simply so order the partition as to secure the rights of all parties, without visiting an unnecessary hardship upon any of them."

The rule was stated in Hall v. Piddock (1871) 21 N. J. Eq. 311, as follows: "The only good faith required in such improvements is that they should be made honestly, for the purpose of improving the property, and not for embarrassing his cotenants, or encumbering their estate, or hindering partition." To the same effect see Ferris v. Montgomery Land & Improv. Co. (Ala.) supra; Boley v. Skinner (1896) 38 Fla. 291, 20 So. 1017; Smith v. Smith (1909) 133 Ga. 170, 65 S. E. 414; Spicer v. Henderson (1897) — Tex. Civ. App. —, 43 S. W. 27; Burns v. Parker (1911) — Tex. Civ. App. —, 137 S. W. 705; Holloway v. Hall (1912) — Tex. Civ. App. —, 151 S. W. 895.

So, a tenant in common of a tract of land, having a right reasonably to improve it and to be reimbursed for the expense, is entitled to have his improvements, made during the pendency of a suit for the recovery of the land, set apart to him on partition; provided it can be done in justice to his cotenants, and provided the improvements were not placed on the common property for the purpose of embarrassing his cotenants in the assertion of their rights. Whitmore v. Powell (1910) 103 Tex. 232, 125 S. W. 889, reversing (1909) — Tex. Civ. App. —, 117 S. W. 433; Broom v. Pearson (1918) — Tex. Civ. App. —, 200 S. W. 191. See also Lynch v. Lynch (1910) — Tex. Civ. App. —, 130 S. W. 461.

In Mahoney v. Mahoney (1872) 65 Ill. 406, it was held that if, in the supposition that he is entitled to the whole of the premises, a tenant in common in possession makes valuable improvements, he should have the benefit thereof, on making a partition, and, if that cannot be done, he should be allowed compensation; and that, if the value of the farm has been enhanced by the ordinary repairs and improvements necessary for its use and preservation, he should have remuneration therefor. To the same effect, see Hopkins v. Medley (1881) 97 Ill. 402.

In Carver v. Coffman (1887) 109 Ind. 547, 10 N. E. 567, it was held that where a tenant in common held continued possession of all the common estate under a claim of right of such a character as gave him and his grantors "color of title" thereto, and the absolute "good faith" of the tenant and his grantors in making lasting and valuable improvements, though without the knowledge or consent of the cotenant, was in no manner questioned or controverted by the latter, the tenant making the improvements acquired a valid, legal and equitable claim for the value of such improvements, and a right to have them taken into account in the further partition of the estate between him and his cotenant.

It has been held, however, that a tenant in common, by reason of his cotenancy, is entitled to his improvements so far as they can be allotted to him, in a division of the property, without injury to his cotenants, without reference to good faith. McLane v. Canales (1894) — Tex. Civ. App. —, 25 S. W. 29; Mahon v. Barnett (1897) — Tex. Civ. App. —, 45 S. W. 24. See also Tevis v. Collier (1892) 84 Tex. 638, 19 S. W. 801; Kesterson v. Bailey (1904) 35 Tex. Civ. App. 235, 80 S. W. 97. Compare Thompson v. Jones (1890) 77 Tex. 629, 14 S. W. 222.

3. Consent of cotenant.

The equity of a cotenant to have the part of the common property which he has improved allotted to him on a partition is not founded on the idea that he made the improvements with the consent, express or implied, of his cotenants. Wilkinson v. Stuart (1883) 74 Ala. 198; Ferris v. Montgomery Land & Improv. Co. (1891) 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607; Martindale v. Alexander (1866) 26 Ind. 104, 89 Am. Dec. 458. But, having a right, as a tenant in common, to improve the property without the consent and against the will of his cotenant, and not having a lien on it for his improvements, he can be in-

demnified therefor, only in a partition in equity. Drennen v. Walker (1860) 21 Ark. 539; Dunavant v. Fields (1901) 68 Ark. 534, 60 S. W. 420.

The reason of the rule is that the common estate is permanently benefited and enhanced in value, and all should contribute toward it, at least when the tenants in common are sui juris. Dunavant v. Fields (Ark.) supra. So, although a tenant makes improvements on a common estate without the authority of his cotenant, yet, on partition under the decree of a court of equity, the court will so order the division that he may have the benefit of the improvements, by an assignment to him of that portion of the estate on which they are situated. Wilkinson v. Stuart (1883) 74 Ala. 198. In that case, it appeared that the complainant had entered on part of the common estate, reduced it from a wild or waste condition to cultivation, and had made valuable improvements thereon. The court held that his labor and money were expended with the knowledge and the implied consent, if not the express authorization, of his cotenant, who had not improved any part of the estate, but had left it, so far as he was concerned, in the condition it was when acquired.

4. Extent of allowance.

Where partition in kind can be made, an improving tenant in common who receives the improvements in his allotment is not entitled also to a money recovery for the value of his improvements, as against his cotenant. Rosamond v. Rosamond (1909) 56 Tex. Civ. App. 173, 120 S. W. 520; Taylor v. Taylor (1894) — Tex. Civ. App. —, 26 S. W. 889. But where the property cannot be so divided as to assign improvements to the improving tenant, he to whom the improvement falls does not have to pay for it. Ward v. Ward (1895) 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746.

When the equitable claim of the improving tenant can be fully recognized and protected by awarding him the part which he has improved, the question of requiring the other cotenants to make compensation is not involved. They get their full shares of the property, without any charge or burden on them because of the improvements. Ferris v. Montgomery Land & Improv. Co. (1891) 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607; McDaniel v. Louisville & N. R. Co. (1908) 155 Ala. 553, 46 So. 981.

It has been said that, in partitioning land among tenants in common, it would be a manifest violation of the clearest principles of equity to permit a tenant to appropriate the adventitious value added to the property by improvements made by the enterprise and industry of his cotenants; and, therefore, the equality of the division ought to be ascertained with reference to the average value per acre of the whole tract in its natural and unimproved state at the time of making the estimate, and not the improved value of the land. Patrick v. Marshall (1810) 2 Bibb (Ky.) 40, 4 Am. Dec. 670.

A tenant in common who files his bill for partition in specie, or for a sale of the common property for distribution, may also have an accounting for rents, improvements, or the like, if the subject of the accounting relates to or is connected with the use of the common property, and the accounting is necessary in order to avoid two or more suits. Ford v. Borders (1917) — Ala. —, 75 So. 398.

But where the land is divided, on partition, so as to give a tenant in common in possession his interest, including his improvements, he should not account for the rents on his own improvements, but should pay a fair and reasonable rent for the land, without reference to the improvements which he put on it. Kirk v. Crutcher (1911) 145 Ky. 52, 139 S. W. 1076.

Where one tenant in common rightfully enters on the common estate, which yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by means of his improvements, without making any allowance against him for the increase in value occasioned by his improvements; especially where he has not excluded his cotenants from a like possession. Nor, if he is entitled to anything at all for improve-

ments, should the amount be limited to the value of the rents and profits. Leake v. Hayes (1895) 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48.

5. Removal of improvements.

Where a part of the improvements made by a tenant in common, who supposed that he owned the property absolutely, are inexpensive buildings, neither party can complain of a decree in partition which permits the improving tenant to remove them, if he so elects. Parkhill v. Doggett (1909) 142 Iowa, 534, 119 N. W. 689.

In Timberlake v. Sorrell (1910) 125 La. 554, 51 So. 586, it was held that where the defendant, a tenant in common with the plaintiffs in certain lots, had put improvements on some of them at his own expense, if any of the improved lots fell to the plaintiffs on partition in kind, they would have the right as a necessary result of the absence of right on the part of the defendant to put the improvements on the common property to require him to remove them at his own expense; and the defendant would have the equal right to remove the improvements, even though the plaintiffs should desire to keep and pay for them.

b. Assignment of increased quantity of land.

It has been held that if, on partition, the lands on which improvements are placed cannot be assigned to the cotenant making them, without injustice to another cotenant, then he should be compensated by the allotment of an increased quantity of land. Sanders v. Robertson (1876) 57 Ala. 465. See also Patrick v. Marshall (1810) 2 Bibb (Ky.) 40, 4 Am. Dec. 670.

So, it has been said that a tenant in common should be compensated, on partition, for expenditures and improvements beneficial to the estate, in land out of the shares which would otherwise be set aside to his cotenants; or that such an order should be made as would secure to him the money due him, before those from whom it is due can obtain their shares of the land. And, since the law favors an actual division rather than a sale, it was held that the course first indicated should be resorted to; and that a sale should not be ordered until it appears in the course of partition that satisfaction of the claim cannot be secured by aparting to that cotenant a larger share of the land. Hanrick v. Gurley (1900) 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, modifying (1899) — Tex. Civ. App. —, 48 S. W. 994; Johnson v. Johnson (1917) — Tex. Civ. App. —, 191 S. W. 366. And in a later appeal from a judgment executing the judgment for partition in the case first cited (Gurley v. Hanrick (1911) — Tex. Civ. App. —, 139 S. W. 721), it was held that if any of the land allotted to the improving cotenant should be set apart to one of his cotenants, the value of the improvements thereon at the time the trial court entered its judgment should be ascertained, and judgment entered in favor of the improving tenant for that amount; but that, should his cotenant be found entitled to any part of the tract so set apart, he should not be charged with the value of any improvements placed thereon since the date of the judgment of partition.

c. Compensation out of proceeds of sale.

1. Rule stated.

It is well settled that, in a suit for partition, a court of equity has the power to decree a sale of the whole property and the division of the proceeds between the tenants in common whenever, in its judgment, a partition of the property in kind cannot be made without great prejudice or injury to the parties, and without greatly impairing its value. 20 R. C. L. title, Partition, p. 773.

And the authorities are practically unanimous that, in a partition suit, where a division in kind of the property cannot be made without great prejudice to the parties, and, in consequence, a sale of the property and a division of the proceeds has been ordered, the court, on ascertaining that one cotenant has made permanent and valuable improvements on the property involved, will determine the amount in which the premises then stand enhanced in value, because of

the improvements, and direct that out of the proceeds of the sale there shall be paid to the cotenant who made the improvements the amount so determined, and that the remainder shall be divided among all the cotenants in proportion to the undivided interest held by each in the property. In other words, if the improvements made by one cotenant add to the amount which the property will bring on the partition sale ordered, the amount so added is to be paid to him out of the proceeds of the sale, in addition to his pro rata share of the proceeds, according to his undivided interest in the property.

England.—Re Jones [1893] 2 Ch. 461, 62 L. J. Ch. N. S. 996, 69 L. T. N. S. 45, 3 Reports, 498. See also Leigh v. Dickeson (1884) L. R. 15 Q. B. Div. 60, 54 L. J. Q. B. N. S. 18, 52 L. T. N. S. 791, 33 Week. Rep. 539; Watson v. Gass (1880) 51 L. J. Ch. N. S. 480, 45 L. T. N. S. 582, 30 Week. Rep. 286.

Alabama.—McDaniel v. Louisville & N. R. Co. (1908) 155 Ala. 553, 46 So. 981.

Georgia.—Helmken v. Meyer (1912) 138 Ga. 457, 45 L.R.A.(N.S.) 738, 75 S. E. 586.

Hawaii.—Nahaolelua v. Kaaahu (1897) 10 Haw. 662; Brown v. Holmes (1909) 19 Haw. 268.

Illinois.—Louvalle v. Menard (1844) 6 Ill. 39, 41 Am. Dec. 161; Gardner v. Diederichs (1866) 41 Ill. 158; Dean v. O'Meara (1868) 47 Ill. 120; Heppe v. Szczepanski (1904) 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737; Manternach v. Studt (1909) 240 Ill. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Bayley v. Nichols (1914) 263 Ill. 116, 104 N. E. 1054; Beam v. Scroggin (1883) 12 Ill. App. 321; Eury v. Merrill (1891) 42 Ill. App. 193; Glos v. Clark (1901) 97 Ill. App. 609, appeal dismissed in (1902) 199 Ill. 147, 65 N. E. 135; Bartholomew v. Bartholomew (1916) 203 Ill. App. 510. See also Howey v. Goings (1851) 13 Ill. 95, 54 Am. Dec. 427.

Indiana.—Alleman v. Hawley (1889) 117 Ind. 532, 20 N. E. 441. Compare Elrod v. Keller (1882) 89 Ind. 382.

Iowa.—Killmer v. Wuchner (1890) 79 Iowa, 722, 8 L.R.A. 289, 18 Am. St. Rep. 392, 45 N. W. 299; Berry v. McDonald (1915) 168 Iowa, 744, 150 N. W. 1048. See also Truth Lodge, A. F. & A. M. v. Barton (1903) 119 Iowa, 230, 97 Am. St. Rep. 303, 93 N. W. 106.

Kansas.—Sarbach v. Newell (1882) 28 Kan. 642, s. c. subsequent appeal (1883) 30 Kan. 102, 1 Pac. 30, (1886) 35 Kan. 180, 10 Pac. 529.

Kentucky.—Ratterman v. Apperson (1911) 141 Ky. 821, 133 S. W. 1005, rehearing denied in (1911) 145 Ky. 117, 140 S. W. 51; Hixon v. Bridges (1897) 18 Ky. L. Rep. 1068, 38 S. W. 1046.

Louisiana. — Walker v. Barrow (1891) 43 La. Ann. 863, 9 So. 479; Faure v. Faure (1906) 117 La. 204, 41 So. 494; Anderson v. Shaw (1912) 131 La. 662, 60 So. 50.

Maine.—See Wilson v. European & N. A. R. Co. (1873) 62 Me. 112; Williams v. Coombs (1895) 88 Me. 183, 33 Atl. 1073.

Maryland. — Hogan v. McMahon (1911) 115 Md. 195, 80 Atl. 695, Ann. Cas. 1912C, 1260. Compare Gittings v. Worthington (1887) 67 Md. 139, 9 Atl. 228.

Michigan.—Fenton v. Miller (1898) 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384.

Minnesota.—Hunt v. Meeker County Abstract & Loan Co. 135 Minn. 134, 160 N. W. 496.

Mississippi.—See Wilson v. Duncan (1870) 44 Miss. 642; Paddock v. Shields (1879) 57 Miss. 340.

Missouri. — Burford v. Aldridge (1901) 165 Mo. 419, 63 S. W. 109, 65 S. W. 720.

Nebraska.—Carson v. Broady (1898) 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80.

New Jersey.—Hall v. Piddock (1870) 21 N. J. Eq. 311; White v. Smith (1905) 70 N. J. Eq. 418, 62 Atl. 560.

New York.—Green v. Putnam (1847) 1 Barb. 500; Clapp v. Nichols (1898) 31 App. Div. 531, 52 N. Y. Supp. 128; Adams v. Bristol (1908) 126 App. Div. 660, 111 N. Y. Supp. 231, affirmed in (1909) 196 N. Y. 510, 89 N. E. 1095.

North Carolina.—See Holt v. Couch (1899) 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703.

Pennsylvania.—Weiskircher v. Connelly (1915) 248 Pa. 327, 93 Atl. 1068.

Rhode Island. — Moore v. Thorp (1889) 16 R. I. 655, 7 L.R.A. 731, 19 Atl. 331.

South Carolina.—Moore v. Williamson (1858) 10 Rich. Eq. 323, 73 Am. Dec. 93; Scaife v. Thomson (1881) 15 S. C. 337; Annely v. De Saussure (1882) 17 S. C. 389; Jacobs v. Bush (1882) 17 S. C. 594; Buck v. Martin (1884) 21 S. C. 590, 53 Am. Rep. 702; Johnson v. Pelot (1886) 24 S. C. 255, 58 Am. Rep. 253; Sutton v. Sutton (1886) 26 S. C. 33, 1 S. E. 19; Annely v. De Saussure (1887) 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490; Hall v. Boatwright (1900) 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001; Vaughan v. Langford (1908) 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 Ann. Cas. 91; Folk v. Brooks (1912) 91 S. C. 7, 74 S. E. 46; Tedder v. Tedder (1918) — S. C. —, 96 S. E. 157.

Tennessee.—Broyles v. Waddel (1872) 11 Heisk. 32.

Texas.—Clift v. Clift (1888) 72 Tex. 144, 10 S. W. 338; Summerville v. King (1904) 98 Tex. 332, 83 S. W. 680, reversing (1904) — Tex. Civ. App. —, 80 S. W. 1050; Olschewski v. Summerville (1906) 43 Tex. Civ. App. 361, 95 S. W. 1; McLane v. Canales (1894) — Tex. Civ. App. —, 25 S. W. 29.

Washington.—Leake v. Hayes (1895) 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48.

West Virginia.—Dodson v. Hays (1887) 29 W. Va. 577, 2 S. E. 415; Ward v. Ward (1895) 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746.

If the property cannot be divided without prejudice to the rights of the parties, "but must be sold, there should be deducted from the gross proceeds of the sale such sum as, in the opinion of the court, the salable value has been enhanced by such improvements and the balance should be divided between the litigants according to their respective interests. This is the general rule, and is sustained by the great weight of the authorities; but exceptional cases may arise in which it would be inequitable to permit it to govern." Carson v. Broady (1898) 56 **Neb.** 648, 71 Am. St. Rep. 691, 77 N. W. 80.

The difference between the value of the property without the improvements and the value of the property as improved is the amount which the improvements add to the value of the premises; or, in other words, is the enhanced value of the property, resulting from the improvements erected thereon. Sarbach v. Newell (1883) 30 **Kan.** 102, 1 Pac. 30.

If the property has to be sold and the proceeds divided, the court will allow the tenant who has made the improvements the increase of value thereof, to be taken out of the proceeds of sale before division. Beam v. Scroggin (1883) 12 **Ill.** App. 321.

In McDaniel v. Louisville & N. R. Co. (1908) 155 **Ala.** 553, 46 So. 981, it appeared that a railroad company obtained a deed to certain land from persons who were living on the premises, entered into possession of the land, and made improvements thereon, in the bona fide belief that it held and owned the land exclusively and in fee simple. After the death of one of the grantors, it appeared that he had previously conveyed the land to the defendants, by a deed on record at the time of the subsequent conveyance, so that, instead of getting a title to the entire interest in the land, the company acquired only an undivided one-fourth interest. Thereupon, the company filed a bill as tenant in common, praying for a sale of the land, and that, on the distribution of the proceeds, it be allowed the value of the lands as enhanced by the improvements, over and above their value as unimproved, in addition to one fourth of the value as unimproved, allowing the defendants their proportion of the rental value as unimproved, if any. In granting the relief prayed for, the court said: "The demurrants, while recognizing the established principle that, in suits for partition, 'equity will take into consideration the fact that one tenant in common has occupied a portion of the common property, and has enhanced its value by making useful improvements thereon, and will, so far as it can do so consistently with an equitable allotment, assign to the tenant making such improvements the

land on which they stand, or so much thereof as represents his proportion,' contend and argue that this principle does not apply and cannot be extended to cases in chancery, in which a sale of the land and division of the proceeds are prayed for. The foundation upon which the contention and argument seem in the main to be based is that, the jurisdiction of the chancery court to make a sale of lands for division being statutory, that court is limited in its exercise to a division of the proceeds of sale according to the interests of the several parties, and possesses no power to adjust any equities claimed in respect to improvements. The jurisdiction to order the sale is statutory, but notwithstanding this, even on bills for partition, such as that court had original jurisdiction of when exact or fair division in kind was impracticable, 'the court could compensate for an inequality by a pecuniary compensation charged on the land by way of rent or servitude, could direct an account of rents and profits received by one of the joint owners, and award compensation to a joint owner for improvements made by him, either by assigning to him that part of the land on which the improvements were located, or by setting off their value against rents and profits.' . . . The court having jurisdiction to make the sale, the equity sought to be worked out by the bill in the present case is that, the improvements having been made at a time when the complainant's agent really and in good faith believed it to be the true owner of the land, 'a court of equity will not allow respondents to deprive complainant of the fruits of its labor and expenditures, if such an unconscionable result may be avoided consistently with the security to each of them of the full measure of all that he is entitled to claim.' . . . It is said by counsel that there is no precedent in Alabama for the enforcement of the right here set up by the complainant; but this is not a sufficient argument for holding that such right may not be enforced. Though the jurisdiction was conferred by statute on the chancery court to decree a sale of land for division, yet it is true that the statute did not, in words, provide that the court should have jurisdiction to so mold its decrees as to adjust inequalities which might exist among the parties in respect to the land; but, the jurisdiction being conferred to order the sale, if it should be shown that the land cannot be equitably partitioned without the sale, we have no doubt that the court, by its inherent and original jurisdiction, may adjust all incidental matters so as to bring about and secure an equitable division of the proceeds arising from the sale. To hold otherwise would be, it seems to us, to make the statute inefficient, and to thwart the obvious purposes of the enactment. In partition suits, this court has recognized and enforced the equitable rule that the court, if it is practicable, should so order the partition as to give the benefit of any improvements made on the premises to him who may have erected or made them; and this is done by assigning to such part owner the portion of the estate on which such improvements are located. The only qualification of the rule is that there must be no impairment of the rights of the cotenants. In Ferris v. Montgomery Land & Improv. Co. (1891) 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607, will be found an admirable review of our cases on the different phases of the subject as well as a restatement of the principles which govern. There we find this statement: 'When the equitable claim of the improving tenant can be fully recognized and protected by awarding him the part which he has improved, the question of requiring the other cotenants to make compensation for the improvements is not involved. They get their full shares out of the property, without any charge or burden upon them because of the improvements.' In this case the purchase price paid by complainant for the land was $80, and it is averred that this was the fair and reasonable value before the improvements were made. It is true the respondents' deed was of record when the complainant made its purchase, and that this was constructive notice of their title; but

it does not prevent the complainant from asserting that the improvements were made while complainant, in good faith, believed it was the exclusive owner. It is not a question of superiority of title, but purely one of good faith, in the claim of ownership and in the erection of improvements. It cannot be denied that the improvements enhanced the value of the property; and if it is shown that the property cannot be equitably divided without a sale, and a sale is had, then, under the circumstances, to hold that the respondents should have (of the proceeds) three fourths of an amount which would represent the real value of the land without the enhanced value arising from the improvements, and of their reasonable rental value, would, we think, do them no injustice, but would give them what in equity and good conscience they are entitled to. On the other hand, if the complainant, in good faith and believing it was the exclusive owner of the land, made the improvements, then to allow the respondents to share the proceeds of the sale according to their several interests in the land, irrespective of the enhanced value thereof at the time of the sale by any reason of the improvements, would be taking from the complainant something for nothing, and bestowing it upon the respondents. This would be inequitable and unjust. If the court, in a partition proceeding, may adjust such inequalities by allotting to the improving tenant the part of the land on which the improvements rest, we see no sound reason for withholding such a power in a sale for division proceeding. It may certainly be as easily and accurately accomplished in the latter as in the former proceeding, and that, too, without any prejudice to the rights of the co-owners. 'It would be doing harm to none and justice to all.' In the latter case the others get just what they would have received, without the improvements, and the one making them is reimbursed without injury to anyone. While we may have no case in which the principle involved has been applied in a proceeding to sell for division, there are decisions by respectable courts in other jurisdictions in which it has been so applied; and we think they are rested on sound reasoning and equity."

Where improvements are made on the common property by one tenant in common without the consent of his cotenants, and the land is not susceptible of division, and the improvements are not found to have been necessary to the enjoyment of the estate, their value cannot be allowed to the party making them, from the proceeds arising from a sale of the land. Elrod v. Keller (1882) 89 **Ind.** 382.

2. Reason of rule.

The reason of the rule for allowing compensation to the improving tenant in common is that, when his improvements enhance the value of the common estate, and his cotenants are not injured in any way, or hindered from having partition, they should not be permitted to take advantage of improvements which have enriched the common property, and to which they have contributed nothing. Helmken v. Meyer (1912) 138 Ga. 457, 45 L.R.A. (N.S.) 738, 75 S. E. 586.

The rule does justice to the one cotenant by giving him the benefit of the improvements made in good faith and solely through his own efforts, and no injustice to the other cotenant by not permitting him to share the increased value due to the improvements to which he has contributed nothing. Equity allows the value of such improvements as against a part owner of the legal title, on the principle that he who seeks equity must do equity. Nahaolelua v. Kaaahu (1897) 10 **Haw.** 662.

The right of the improving tenant to compensation is not dependent on the divisibility of the land in kind, but on that broad principle of equity "that a cotenant, acting with good faith and for the purpose of honestly bettering the property, and not for the purpose of embarrassing his cotenants, or encumbering the estate, or hindering partition, will be entitled to compensation to the extent that his substantial and useful improvements have added to the value of the common property." Helmken v. Meyer (**Ga.**) supra.

Hence, there can be no difference in principle between allowing the equitable claim of a part owner for his improvement in cases where partition may be had in kind, and in cases where a partition can only be accomplished by a sale of the common property. Helmken v. Meyer (Ga.) supra; Ratterman v. Apperson (1911) 141 Ky. 821, 133 S. W. 1005, rehearing denied in (1911) 145 Ky. 117, 140 S. W. 51; Moore v. Thorpe (1889) 16 R. I. 655, 7 L.R.A. 731, 19 Atl. 321.

In Moore v. Thorp (R. I.) supra, the court said: "It seems to us that this course, in which all courts agree, is decisive of the question before us. If the tenant has an equitable claim upon improvements in case of division, he has an equally equitable claim upon their value in case of sale. If the other tenants are entitled to their share of the value of the whole estate upon sale, why are they not also entitled to the same share in division? Or, further, if a tenant is entitled to compensation for improvements out of rents, why should he not as well be entitled to receive the excess in value which the improvements have produced, upon sale? We see no difference in principle in these cases. When it is conceded that a tenant in common, improving the land he may rightfully occupy, has an equitable claim to that part or to its rental value in order to secure the fruit of his labor or expenditure, we fail to see how he loses such claim when the land is sold, because it cannot be divided. Of course, he cannot, at his pleasure, charge cotenants for improvements which they may neither agree to nor desire; nor can he ordinarily claim for that which he has done solely for his own advantage, and for which he has reaped the benefit; but, on the other hand, when such improvements enhance the value and proceeds of the estate, the cotenants should not be enabled to take advantage, to his injury, of improvements for which they have contributed nothing. Controversies may arise as to the reasonableness and extent of an allowance, but the tribunal which is trusted to fairly apportion the estate itself can also be trusted to fairly settle an incidental matter of this sort. In the case before us, the legal obligation to pay the value of the barn rests only upon the three parties who signed the lease. Doubtless the agreement was made for the benefit of the estate; at any rate, all the heirs have shared equally in the rents. It is not now asked that the other heirs be compelled to pay for anything put upon the estate, but that they receive their full and fair share of the estate sold, less the salable value of the barn, for which they have paid nothing; which presumably has aided the rental value of the estate for the years they have received rent for it, and for which it would be manifestly unjust to require others to pay, for their benefit. We think it is right that the value of the improvements, so far as they are represented by an enhanced price, should be ascertained and allowed on account thereof, and the balance, representing the body of the common estate, should be divided according to the respective interests of the parties."

In determining whether an improving cotenant should be recompensed for his improvements, as reflected in the increased value of the common premises, all the circumstances attending their erection, their nature, and their relation to the estate improved, and to the other cotenants, are to be considered. Helmken v. Meyer (Ga.) supra.

3. Necessity of title and good faith.

Good faith is required on the part of a cotenant making improvements, to entitle him to compensation therefor, since it must appear that they were made honestly, for the purpose of improving the property, and not to embarrass his cotenants, or encumber their estate, or hinder partition. Sarbach v. Newell (1882) 28 Kan. 642, s. c. subsequent appeals in (1883) 30 Kan. 102, 1 Pac. 30, (1886) 35 Kan. 180, 10 Pac. 529; McKelvey v. McKelvey (1910) 83 Kan. 246, 111 Pac. 180; Hall v. Piddock (1871) 21 N. J. Eq. 311.

The fact that a tenant making improvements knows that an undivided share in the land is held by another

person is no bar to an allowance for improvements in equalizing the partition. Sarbach v. Newell (Kan.) supra; Carson v. Broady (1898) 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; Hall v. Piddock (N. J.) supra. Compare Scaife v. Thomson (1881) 15 S. C. 337. A tenant in common has a right to make improvements, if made in good faith and for the betterment of the property, although he had notice of the title or claim of a cotenant. Alleman v. Hawley (1889) 117 Ind. 532, 20 N. E. 441.

But where it appeared that improvements placed on the land by two cotenants were not made in good faith, but were part of a fraudulent scheme to defeat the third cotenant from obtaining a share in the estate to which she was entitled, it was held that there was no equitable consideration which required an allowance for compensation for improvements made with such a wrong purpose, and with full knowledge of the facts. McKelvey v. McKelvey (1910) 83 Kan. 246, 111 Pac. 180. And in one jurisdiction it has been held that an improving tenant in common must have reason to believe, and must honestly believe, that he has the fee-simple title in severalty to the land so improved, in order to obtain compensation for his improvements, on partition. Williamson v. Holmes (1850) 4 Rich. Eq. (S. C.) 475; Scaife v. Thomson (1881) 15 S. C. 37; Annely v. De Saussure (1882) 17 S. C. 389; Johnson v. Harrelson (1883) 18 S. C. 604; Buck v. Martin (1884) 21 S. C. 590, 53 Am. Rep. 702; Johnson v. Pelot (1886) 24 S. C. 255, 58 Am. Rep. 253.

In Elrod v. Keller (1882) 89 Ind. 382, the court said: "It is . . . well settled that, if improvements are made under the mistaken belief that the tenant owns the land, an allowance will be made, in proceedings for partition, for the amount that the land is enhanced in value. . . . No such fact appears in this case; and, in the absence of a finding that they were made with notice, and without objection from the cotenants, or were necessary to the enjoyment of the estate, or were made under such circumstances as create an equitable claim for them, no allowance can be made for them. It may seem that if the improvements enhance the value of the estate, and this fact can be ascertained, the appellee is equitably entitled to the enhanced value of the property; but a determination of this question, which is nearly if not always a disputed question of fact, imposes upon cotenants, without their consent and to their prejudice, a burthen from which they derive no benefit, and which they are compelled to assume to protect their interests. Aside from the fact that a tenant has no legal right to the benefits of improvements thus made, this is a sufficient reason why the claim should not be ascertained. This view does no injustice to the tenant who desires to make improvements. If he desires to do so, he may notify his cotenants, and if they fail to object, or if the improvements are necessary to the enjoyment of the estate, they may be made without risk. If unnecessary, and the consent of the cotenant cannot be obtained, the estate may be severed. The mere fact, therefore, that improvements enhance the value of the common property, does not entitle the tenant making them to an allowance for the difference in value; and if this fact were found it would not warrant the allowance. It is not found in this case that the improvements were necessary, and this cannot be inferred from the fact that they were valuable, nor can this fact be inferred from the nature of them, though they, or some of them, are such as may have been necessary; and this fact should be found, in order to do substantial justice between the parties."

In at least two instances, however, it has been held that an improving tenant in common was entitled to compensation for his improvements, without regard to whether they were made in good faith. Anderson v. Shaw (1912) 131 La. 662, 60 So. 50; McLane v. Canales (1894) — Tex. Civ. App. —, 25 S. W. 29. In the case first cited, it was held that a cotenant, possessor in bad faith of the common property, was, on partition by a sale thereof, entitled to the amount of her improve-

ments, in so far as they were for the preservation of the property. In so far as they were not for the preservation of the property, and were not removable, she was entitled to compensation only to the extent that, by these improvements, the value of the property in its then present condition had been enhanced, less, of course, any profit or benefit which she might have derived.

4. Consent of cotenant.

To entitle a tenant in common to an allowance, on a partition in equity, for improvements made on the premises, it does not appear to be necessary to show the assent of his cotenants to the improvements, or a promise on their part to contribute their share of the expense; nor is it necessary for him to show a previous request to join in the improvements, and a refusal. Green v. Putnam (1847) 1 Barb. (N. Y.) 500.

While the rule that a cotenant may, in partition, recover compensation for improvements made by him without the assent of his cotenants, is not of universal application, yet where one tenant in common lays out money in improvements on the estate, and thereby enhances its value, although the money so paid does not, in strictness, constitute a lien on the estate, a court of equity will not grant a partition without first directing an accounting and suitable compensation. Williams v. Williams (1899) 81 L. T. N. S. (Eng.) 163, 68 L. J. Ch. N. S. 528; Kenrick v. Mountsteven (1899) 48 Week. Rep. (Eng.) 141; Sarbach v. Newell (1882) 28 Kan. 642, s. c. subsequent appeals in (1883) 30 Kan. 102, 1 Pac. 30, (1886) 35 Kan. 180, 10 Pac. 529; McKelvey v. McKelvey (1910) 83 Kan. 246, 111 Pac. 180; Carson v. Broady (1898) 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; Green v. Putnam (N. Y.) supra; Kalteyer v. Wipff (1899) 92 Tex. 673, 52 S. W. 63. See also Dall v. Confidence Silver Min. Co. (1867) 3 Nev. 531, 93 Am. Dec. 419, 11 Mor. Min. Rep. 214. In South Carolina, however, the rule is that if one of several tenants in common, not a bona fide occupant, supposing himself to be the rightful proprietor of the land, makes improvements without the consent of his cotenants, on the common property, neither the property nor his cotenants may be charged with their value or the expenses incurred in making them, on partition of the premises. Dellet v. Whitner (1839) Cheves, Eq. (S. C.) 213; Thurston v. Dickinson (1846) 2 Rich. Eq. (S. C.) 317, 46 Am. Dec. 56; Corbett v. Laurens (1851) 5 Rich. Eq. (S. C.) 301; Johnson v. Harrelson (1883) 18 S. C. 604; Johnson v. Pelot (1886) 24 S. C. 255, 58 Am. Rep. 253; Sutton v. Sutton (1886) 26 S. C. 33, 1 S. E. 19.

Where improvements are made with the consent of the cotenants they are personally bound, and the demand is a lien on their shares. Houston v. McCluney (1874) 8 W. Va. 135; Ward v. Ward (1895) 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. W. 746.

In Prather v. Prather (1894) 139 Ind. 570, 39 N. E. 310, a suit for partition, and to charge the real estate with the value of certain improvements made by the plaintiff thereon, the decree directed the sale of the lands, as not susceptible of division, and gave the plaintiff a lien thereon on account of the improvements.

5. Extent of compensation.

It is only such lasting and valuable improvements as enhance the value of the property that can be taken into account, in awarding compensation to a cotenant, on partition. Phipps v. Phipps (1891) 47 Kan. 328, 27 Pac. 972; McKelvey v. McKelvey (1910) 83 Kan. 246, 111 Pac. 180. And where improvements which affect the entire property are made on the common property by one tenant in common, without the consent of his cotenants, compensation will not be made on partition, unless the improvements were necessary or useful; as this would be but another mode of compelling contribution. Elrod v. Keller (1882) 89 Ind. 382.

Improvements which contribute to the comfort and convenience of the party in possession, and those necessary to protect his stock and preserve his crops, such as the repair of the dwelling house, the repair of fences,

the cleaning out of the spring that furnishes water, and acts of a similar character, pertaining to the present use and enjoyment and contributing to the comfort and profit of the occupant, are not such lasting and valuable improvements as enhance the value of the property, and become the subject of equitable recognition and protection. Phipps v. Phipps (1891) 47 Kan. 328, 27 Pac. 972. While the expenditure of money in making ditches, and in clearing and plowing and planting, might entitle a tenant in common to have the improved portion set aside for or on account of his share if a partition were made, it would be impossible, on a sale of the premises as a whole, to say how much higher price was obtained, by reason of this expenditure. Brown v. Holmes (1909) 19 Haw. 268.

The original cost of the improvement is not the amount to be allowed, because it might result in the other owners being improved out of their property by an extravagant or unbusinesslike cotenant, and the improvement may have depreciated at the time of the partition sale. Helmken v. Meyer (1912) 138 Ga. 457, 45 L.R.A.(N.S.) 738, 75 S. E. 586; Nahaolelua v. Kaaahu (1897) 10 Haw. 662; Heppe v. Szczepanski (1904) 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737; Manternach v. Studt (1909) 240 Ill. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Beam v. Scroggin (1883) 12 Ill. App. 321; Killmer v. Wuchner (1890) 79 Iowa, 722, 8 L.R.A. 289, 18 Am. St. Rep. 392, 45 N. W. 299; Moore v. Williamson (1858) 10 Rich. Eq. (S. C.) 323, 73 Am. Dec. 93; Scaife v. Thomson (1881) 15 S. C. 337; Annely v. De Saussure (1882) 17 S. C. 389, later appeal in (1887) 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490; Buck v. Martin (1884) 21 S. C. 590, 53 Am. Rep. 702.

The extent of the improving tenant's right to compensation is the extent to which his improvements have enhanced the value of the property, at the time of the sale. Helmken v. Meyer (1912) 138 Ga. 457, 45 L.R.A. (N.S.) 738, 75 S. E. 586; Nahaolelua v. Kaaahu (1897) 10 Haw. 662; Heppe v. Szczepanski (1904) 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737; Manternach v. Studt (1909) 240 Ill. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Beam v. Scroggin (1883) 12 Ill. App. 321; Killmer v. Wuchner (1890) 79 Iowa, 722, 8 L.R.A. 289, 18 Am. St. Rep. 392, 45 N. W. 299; Ratterman v. Apperson (1911) 141 Ky. 821, 133 S. W. 1005, rehearing denied in (1911) 145 Ky. 117, 140 S. W. 51; Moore v. Williamson (1858) 10 Rich. Eq. (S. C.) 323, 73 Am. Dec. 93; Scaife v. Thomson (1881) 15 S. C. 337; Annely v. De Saussure (1882) 17 S. C. 389, later appeal in (1887) 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490; Buck v. Martin (1884) 21 S. C. 590, 53 Am. Rep. 702.

Where one joint owner, believing himself the owner of the whole property, has improved it, the court will, in dividing it, set off to him his improvements, if this can be done without injustice to his cotenant. There is no reason why the same principle should not be applied, where the property is indivisible and is sold for division of the proceeds, by ascertaining what part of the price represents the enhancement of the value of the property by reason of the improvements. This takes nothing from the cotenant that is his, and he cannot complain. Ratterman v. Apperson (1911) 141 Ky. 821, 133 S. W. 1005, rehearing denied in (1911) 145 Ky. 117, 140 S. W. 51.

In giving the tenant improving the property the amount added to its value by the improvements, out of the proceeds of sale, the amount added to the value by the improvements should be ascertained after the sale by fixing the ratable proportions of their value to that of the entire tract, considered only with reference to the purchase money of the whole. Buck v. Martin (1884) 21 S. C. 590, 53 Am. Rep. 702.

In Bartholomew v. Bartholomew (1916) 203 Ill. App. 510, the court below, in making the partition decree, followed the rule prevailing in that state that, where a sale is had, those who have lawfully made improvements on the premises are allowed, by way of compensation, the actual increase of the price received at the sale, in consequence of the improvement. The court below found that before the im-

provements were made the premises were worth $44,000; that the improvements increased the value of the premises $5,000; and that, after the improvements were made, the premises were worth $49,000. But at the sale the farm brought $45,500. It was the contention of one of the tenants in common that this showed that the improvements only added $1,500 to the value of the farm, and that the entire depreciation should be placed on the improvements. The court below distributed the depreciation, pro rata, between the value of the farm before the improvements were made and the value of the farm afterwards, and held that the sale was for $^{455}/_{490}$ of the value, as improved, and allowed the other cotenant to be credited with that fraction of the sum by which it was found the premises were enhanced in value by the improvements. In affirming the decree, the court held that, as the proof showed very clearly that the improvements had added to the actual value of the farm, at least as much as the court found, and as there was nothing to indicate that the shrinkage at the sale from the values which the court had found was only in the improvements, and not in the land itself, it was properly assumed that the depreciation was in the same proportion on the land and the improvements. But in Severy v. McDougall (1914) 190 **Ill.** App. 193, it was held that, while a tenant in common should have been allowed for improvements on the basis of the difference in the market value of the premises with and without the improvements, yet, where there was no evidence on which such an estimate could be based, it was not error to base the account on the cost of the improvements.

In Fenton v. Miller (1898) 116 **Mich.** 45, 72 Am. St. Rep. 502, 74 N. W. 384, it was held that where, in partition between two tenants in common, one of whom had excluded the other from possession for a number of years, the tenant in possession was to have credit for his expenditures in betterments and improvements, and his cotenant was to have a charge for the rental value during the same period, as against the charge for rental, the improvements would have to be charged at cost, as the expenditure was a disbursement in order to make the premises rentable at the price charged in the accountancy. Either the excluded cotenant should be limited, in his charge for rent, to the value of the premises in the original state, or, if he is to have the benefit of the increased rents, the cotenant in possession should have credit for the expenditures which made it possible to receive those rents.

Where, however, there is no evidence, at the time of the partition, of the value of the land separate from the improvements, or of the extent to which the improvements have enhanced its value, the court is unable, of course, to charge a cotenant with his proportion of the amount which the improvements have added to the value of the land. Heppe v. Szczepanski (1904) 209 **Ill.** 88, 101 Am. St. Rep. 221, 70 N. E. 737; Manternach v. Studt (1909) 240 **Ill.** 464, 130 Am. St. Rep. 282, 88 N. E. 1000; McKelvey v. McKelvey (1910) 83 **Kan.** 246, 111 Pac. 180. In Elrod v. Keller (1882) 89 **Ind.** 382, the court said: "There is a line of cases holding that, where a tenant makes improvements upon common property which is indivisible, a court of equity, upon a sale of the property, will allow such tenant the amount such property is enhanced in value by such improvement at the time of sale. . . . The facts found do not bring this case within the rule announced in the above cases. It is not found how much the property was enhanced in value by the improvements made. The value of the improvements is found, but it does not follow that the property was enhanced in value such sum as at the time of sale or at the time they were made. Indeed, the nature of some of the improvements forbids any such conclusion, if made any considerable length of time before the sale. The value of the property as improved is not found, and, for aught that appears, the allowance made may exhaust the entire proceeds of the sale."

Any increment of value occasioned by third persons, such as an improve-

ment made by third persons of their own volition, should be shared by the cotenants in proportion to their respective interests; and the mere fact that one of the cotenants was in possession at the time will not entitle her to the sole benefit, although she supplemented it by other improvements at her own expense. Nahaolelua v. Kaaahu (1897) 10 Haw. 662.

6. Setting off improvements against rents and profits.

It is well settled that the value of necessary, proper, and permanent improvements, made by a tenant in common in possession of the common estate, may be set off in an action of partition against the demand of his cotenants for the rents and profits received by him from the common property during his occupancy. Scantlin v. Allison (1884) 32 Kan. 376, 4 Pac. 618; Anderson v. Shaw (1912) 131 La. 662, 60 So. 50; Williams v. Coombs (1895) 88 Me. 183, 33 Atl. 1073; Johnson v. Pelot (1886) 24 S. C. 255, 58 Am. Rep. 253; Sutton v. Sutton (1886) 26 S. C. 33, 1 S. E. 19; Annely v. De Saussure (1887) 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490; McGee v. Hall (1888) 28 S. C. 562, 6 S. E. 566; Cain v. Cain (1898) 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278; Hall v. Boatwright (1900) 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001; Turner v. Poole (1915) 102 S. C. 465, 86 S. E. 956; Broyles v. Waddel (1872) 11 Heisk. (Tenn.) 32.

It is eminently proper for the court, in giving compensation in partition to one tenant in common, for rents and profits received by another tenant in common, to deduct the value of any necessary and proper improvements made by the cotenant in possession. Scantlin v. Allison (1884) 32 Kan. 376, 4 Pac. 618; Anderson v. Shaw (1912) 131 La. 662, 60 So. 50.

It has been held that, while a tenant in common in possession is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, he is not liable for the rents and profits due to improvements put on the property by him. Hancock v. Day (1840) McMull. Eq. (S. C.) 72, 36 Am. Dec. 293; Scaife v. Thomson (1881) 15 S. C. 337; Annely v. De Saussure (1882) 17 S. C. 389; Jacobs v. Bush (1882) 17 S. C. 594; Johnson v. Pelot (1886) 24 S. C. 255, 58 Am. Rep. 253. It will be observed that this rule was established in cases wherein the improving tenant was held not to be entitled to compensation individually, for improvements made without the consent of his cotenants, and, since he could not make a charge for the improvements, it was manifestly equitable that he should not be charged rent for those improvements. See Annely v. De Saussure (1887) 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490; Cain v. Cain (1898) 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278. But the rule is now established in South Carolina that, in an equitable accounting for rents and profits on partition, the occupying tenant may be allowed as a set-off against rents and profits received, not the cost of the improvements made by him, but the increased value of the premises resulting from such improvements, provided the circumstances are such as to render it an obvious hardship to deprive him of it, and provided the allowance for such improvements may be made consistently with the equity of the cotenant. Johnson v. Pelot (S. C.) supra; Sutton v. Sutton (1886) 26 S. C. 33, 1 S. E. 19; Annely v. De Saussure (1887) 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490; McGee v. Hall (1888) 28 S. C. 562, 6 S. E. 566; Cain v. Cain (S. C.) supra; Hall v. Boatwright (1900) 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001; Turner v. Poole (1915) 102 S. C. 465, 86 S. E. 956. See also Tedder v. Tedder (1918) — S. C. —, 96 S. E. 157. So, where, on a sale of the property on partition, the improving tenant is limited, in respect to reimbursement for his improvements, to the increased value which they have imparted to the property, and not their cost, it would not on that account be equitable to make him account for all the rents of the improved property; but he should account for at least so much of the rents as his cotenant's ownership of an undivided share of the property might be found, on a fair

accounting, to have contributed, along with the improvements, to the production of the rents. Annely v. De Saussure (1887) 26 S. C. 497, 4 Am. St. Rep. 725, 2 S. E. 490. And where one of several tenants in common has made improvements which add to the value of the common property, and at the same time is chargeable with rents and profits, equity requires that the rents and profits shall be regarded as paid and discharged, pro tanto, by the increased value which may have been imparted to the premises by the improvements. Sutton v. Sutton (1886) 26 S. C. 33, 1 S. E. 19; McGee v. Hall (1888) 28 S. C. 562, 6 S. E. 566; Cain v. Cain (1898) 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278; Hall v. Boatwright (1900) 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001; Vaughan v. Langford (1908) 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 Ann. Cas. 91; Turner v. Poole (1915) 102 S. C. 465, 86 S. E. 956. See also Tedder v. Tedder (S. C.) supra.

Where the common property is of a nature to admit of its use by several, and less than his just share is used by one tenant in common, in a manner not hindering or excluding the others from the use of their shares, he is not accountable for the profits of that portion used by him; and the value of that use cannot be set off against his improvements. Dodson v. Hays (1887) 29 W. Va. 577, 2 S. E. 415; Ward v. Ward (1895) 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746.

In Bergman v. Kammlade (1899) 109 Iowa, 305, 80 N. W. 418, a sale of the land in controversy was ordered, including the improvements, since it was not practicable to divide it equitably among its owners; and the court denied the claim of the defendant, who was in possession, for improvements. The evidence showed that the value of the improvements reasonably necessary for the successful carrying on of the premises for ordinary farming purposes was small, that the defendant arbitrarily fixed the sum of $100 as rent for the premises for two years, and would allow nothing more, and that the rent which he wrongfully withheld exceeded the value of the improvements for which he could justly claim an allowance. Under these circumstances, the court held that he should not be allowed anything for improvements.

Where one tenant in common rightfully enters on the common estate, which yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by means of such improvements, and without making any allowance against him for the increase in value occasioned by his improvements, especially when he has not excluded his cotenants from a like possession. Leake v. Hayes (1895) 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48. Nor, if he is entitled to anything at all for improvements, should the amount thereof be limited to the value of the rents and profits. Ibid.

So, in an action for partition, the complainants should not be required to account for rents and profits, though receiving an allowance on the sale for the value of permanent improvements placed by them on the property, where it does not appear that they received any rents or profits from the letting of the premises in question, nor that they excluded their cotenants from the enjoyment of the premises in common with themselves, nor that they actually made any profit from their occupancy and the conduct of the property at their own expense. White v. Smith (1905) 70 N. J. Eq. 418, 62 Atl. 560.

7. Setting off rents and profits against improvements.

Where one tenant in common claims compensation for improvements made by him, the way is open for an accounting between him and his cotenants in respect to all moneys paid, laid out, and expended for the common benefit of the property, such as taxes, assessments, and repairs, and also for the use and occupation by the tenant making the claims, of the moieties owned by the others. And compensation will be allowed or denied in each case, according to the equities thereof. Beam v. Scroggin (1883) 12 Ill. App. 321.

Where, in a proceeding for partition

and sale of land, the cotenants ask an equitable accounting against the occupying tenant, by reason of rents and profits received by him, the occupying tenant is entitled to an allowance based on encumbrances paid and discharged by him, and advances made for proper and reasonable repairs and improvements. Porter v. Mooney (1917) — Ind. App. —, 116 N. E. 60.

A cotenant out of possession will be charged with his proportion only of the amount which, at the time of the partition, the improvements of the occupying tenant add to the value of the premises; and from this amount he is entitled to deduct any sum to which he may have a just claim, for the use and occupation of his moiety enjoyed by the cotenant making the improvements. Sarbach v. Newell (1882) 28 Kan. 642, s. c. subsequent appeals (1883) 30 Kan. 102, 1 Pac. 30, (1886) 35 Kan. 180, 10 Pac. 529.

8. Removal of improvements.

On partition by sale against a tenant in common in possession of the common premises in bad faith, her cotenants are not bound to keep the improvements put on the property by her, which are removable; but may require her to demolish them or take them away. Anderson v. Shaw (1912) 131 La. 662, 60 So. 52, wherein it was, however, said that, should they elect to keep the improvements, they should have the choice, either to pay the value of the materials and the price of the workmanship, or to pay a sum equal to the enhanced value of the soil.

d. Compensation by cotenant.

1. Rule stated.

Where it appears that an allotment of the improved portion to the improving tenant, on a partition in kind, is not equitable or practicable, it has been held that a tenant in common who has made necessary, valuable, and lasting improvements is entitled to compensation therefor from his other cotenants, for whatever amount it may be found that the value of the property has been enhanced by his improvements, in proportion to the pro rata undivided interest which each of his cotenants has in the property.

England.—Swan v. Swan (1820) 8 Price, 518, 146 Eng. Reprint, 1281, 22 Revised Rep. 770.

United States.—McClaskey v. Barr (1894) 62 Fed. 209, modifying (1891) 48 Fed. 130 (following Ohio Decisions). See also Cochran v. Shoenberger (1887) 33 Fed. 397.

Alabama.—Ormond v. Martin (1861) 37 Ala. 598; Ferris v. Montgomery Land & Improv. Co. (1891) 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607. See also Horton v. Sledge (1856) 29 Ala. 478.

Arizona.—Pesqueira v. Kellogg (1903) 8 Ariz. 266, 71 Pac. 915.

Arkansas.—Drennen v. Walker (1860) 21 Ark. 539; Shepherd v. Jernigan (1888) 51 Ark. 275, 14 Am. St. Rep. 50, 10 S. W. 765; Dunavant v. Fields (1901) 68 Ark. 534, 60 S. W. 420. See also Cocke v. Clausen (1900) 67 Ark. 455, 55 S. W. 846.

California.—Ventre v. Tiscornia (1913) 23 Cal. App. 598, 138 Pac. 954.

Georgia.—Bazemore v. Davis (1875) 55 Ga. 504; Turnbull v. Foster (1902) 116 Ga. 765, 43 S. E. 42.

Hawaii.—Hawaiian Commercial & Sugar Co. v. Waikapu Sugar Co. (1894) 9 Haw. 417.

Illinois.—Louvalle v. Menard (1844) 6 Ill. 39, 41 Am. Dec. 161; Howey v. Goings (1851) 13 Ill. 95, 54 Am. Dec. 427; Kurtz v. Hibner (1870) 55 Ill. 514, 8 Am. Rep. 665; Mahoney v. Mahoney (1872) 65 Ill. 406; Baird v. Jackson (1880) 98 Ill. 78; Cooter v. Dearborn (1886) 115 Ill. 509, 4 N. E. 388; Heppe v. Szczepanski (1904) 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737; Noble v. Tipton (1905) 219 Ill. 182, 3 L.R.A. (N.S.) 645, 76 N. E. 151; Manternach v. Studt (1909) 240 Ill. 464, 130 Am. St. Rep. 282, 88 N. E. 1000; Maciejewska v. Jarzombek (1909) 243 Ill. 136, 90 N. E. 231, affirming (1909) 148 Ill. App. 161; Beam v. Scroggin (1883) 12 Ill. App. 321. See also Chambers v. Jones (1874) 72 Ill. 275; Wilton v. Tazwell (1877) 86 Ill. 29; Field v. Leiter (1886) 117 Ill. 341, 7 N. E. 279; McParland v. Larkin (1895) 155 Ill. 84, 39 N. E. 609.

Indiana.—Martindale v. Alexander (1866) 26 Ind. 104, 89 Am. Dec. 458; Carver v. Coffman (1887) 109 Ind. 547,

10 N. E. 567; Parish v. Camplin (1894) 139 Ind. 1, 37 N. E. 607.

Iowa.—Van Ormer v. Harley (1897) 102 Iowa, 150, 71 N. W. 241.

Kentucky.—Repass v. Breckenridge (1820) 2 A. K. Marsh. 581; Arterburn v. Gwathmey (1814) 3 Bibb, 306; Haskins v. Spiller (1833) 1 Dana, 170; Sneed v. Atherton (1838) 6 Dana, 278, 32 Am. Dec. 70; Borah v. Archers (1838) 7 Dana, 176.

Louisiana. — Davis v. Wilcoxon (1855) 10 La. Ann. 640; Litton v. Litton (1884) 36 La. Ann. 348. See also Jones v. Crocker (1849) 4 La. Ann. 8.

Maine.—Tilton v. Palmer (1850) 31 Me. 486; Allen v. Hall (1861) 50 Me. 253; Reed v. Reed (1878) 68 Me. 568. Compare Thornton v. York Bank (1858) 45 Me. 158.

Maryland. — Worthington v. Hiss (1889) 70 Md. 172, 16 Atl. 534, 17 Atl. 1026.

Massachusetts.—Rice v. Freeland (1853) 12 Cush. 170.

Michigan.—See Pierson v. Conley (1893) 95 Mich. 619, 55 N. W. 387; Patrick v. Y. M. C. A. (1899) 120 Mich. 185, 79 N. W. 208.

Mississippi.—Nelson v. Leake (1852) 25 Miss. 199; Paddock v. Shields (1879) 57 Miss. 340; Bennett v. Bennett (1904) 84 Miss. 493, 36 So. 452.

Missouri.—Armor v. Frey (1913) 253 Mo. 447, 161 S. W. 829; Armor v. Jester (1913) 253 Mo. 480, 161 S. W. 839; Armor v. Cooper (1913) 253 Mo. 483, 161 S. W. 841; Armor v. Kearney (1913) 253 Mo. 485, 161 S. W. 840; Funk v. Seehorn (1903) 99 Mo. App. 587, 74 S. W. 445; Grogan v. Grogan (1915) — Mo. —, 177 S. W. 649. See also Spitts v. Wells (1853) 18 Mo. 468.

New Jersey.—Brookfield v. Williams (1840) 2 N. J. Eq. 341; Hall v. Piddock (1871) 21 N. J. Eq. 311; Atha v. Jewell (1881) 33 N. J. Eq. 417; Shipman v. Shipman (1903) 65 N. J. Eq. 556, 56 Atl. 694; Keneaster v. Erb (1914) 83 N. J. Eq. 625, 92 Atl. 377, reversing (1914) 83 N. J. Eq. 206, 89 Atl. 995; Jenkins v. Jenkins (1886) — N. J. Eq. —, 5 Atl. 134. See also Doughaday v. Crowell (1856) 11 N. J. Eq. 201.

New York.—Green v. Putnam (1847) 1 Barb. 500; Hitchcock v. Skinner (1839) Hoffm. Ch. 21; Conklin v. Conklin (1845) 3 Sandf. Ch. 64; Jones v. Duerk (1898) 25 App. Div. 551, 49 N. Y. Supp. 987; Lyons Nat. Bank v. Shuler (1906) 115 App. Div. 859, 101 N. Y. Supp. 62; Yung v. Blake (1913) 156 App. Div. 211, 141 N. Y. Supp. 300; Barker v. Barker (1916) 172 App. Div. 244, 158 N. Y. Supp. 413, modifying (1915) 92 Misc. 390, 156 N. Y. Supp. 194; Eakin v. Knabe (1900) 31 Misc. 221, 64 N. Y. Supp. 103. See also Satterlee v. Kobbe (1903) 173 N. Y. 91, 65 N. E. 952. Compare Jackson ex dem. Van Denberg v. Bradt (1805) 2 Caines, 303.

North Carolina.—Tucker v. Markland (1888) 101 N. C. 422, 8 S. E. 169; Holt v. Couch (1899) 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703.

Ohio.—Youngs v. Heffner (1880) 36 Ohio St. 232.

Pennsylvania. — Jevons v. Kline (1899) 9 Kulp, 305. See also Fulton v. Miller (1899) 192 Pa. 60, 43 Atl. 409.

Tennessee. — Broyles v. Waddel (1872) 11 Heisk. 32.

Texas. — Robinson v. McDonald (1853) 11 Tex. 385, 62 Am. Dec. 480; Yancy v. Batte (1877) 48 Tex. 46; Arnold v. Cauble (1878) 49 Tex. 527; Jenkins v. Volz (1881) 54 Tex. 636; Curtis v. Poland (1886) 66 Tex. 511, 2 S. W. 39; Lewis v. Sellick (1887) 69 Tex. 379, 7 S. W. 673; Cardwell v. Rogers (1890) 76 Tex. 37, 12 S. W. 1006; Whitmire v. Powell (1910) 103 Tex. 232, 125 S. W. 889, reversing (1909) —Tex. Civ. App. —, 117 S. W. 433; Robinson v. Moore (1892) 1 Tex. Civ. App. 93, 20 S. W. 994; McLane v. Canales (1894) — Tex. Civ. App. —, 25 S. W. 29; Spicer v. Henderson (1897) — Tex. Civ. App. —, 43 S. W. 27; Lynch v. Lynch (1910) — Tex. Civ. App. —, 130 S. W. 461; Burns v. Parker (1911) — Tex. Civ. App. —, 137 S. W. 705; Holloway v. Hall (1912) — Tex. Civ. App. —, 151 S. W. 895; Johnson v. Johnson (1916) — Tex. Civ. App. —, 191 S. W. 366.

Vermont.—Strong v. Hunt (1848) 20 Vt. 614.

Virginia.—Chinn v. Murray (1847) 4 Gratt. 348; Ballou v. Ballou (1897) 94 Va. 350, 64 Am. St. Rep. 733, 26 S. E. 840; Martin v. Martin (1897) 95

Va. 26, 27 S. E. 810. See also Ruffner v. Lewis (1836) 7 Leigh, 720, 30 Am. Dec. 513; Graham v. Pierce (1869) 19 Gratt. 28, 100 Am. Dec. 658, 14 Mor. Min. Rep. 308.

It has been held, in one instance, that payment of the ratable proportion of the improvements should be made before division. Hitchcock v. Skinner (1839) Hoffm. Ch. (N. Y.) 21.

But when the property is so situated that actual partition is out of the question, the courts of equity in New York do not require contribution, on partition, for improvements as distinguished from repairs, except in the case of mills, houses, and the like, under circumstances of special necessity. The erection of a new and independent building, the improvement of farming lands by fencing or drainage, the opening of mines or quarries, or the making of changes that are in no sense designed to protect or preserve the property, but simply to improve it and increase its value, do not warrant the court in requiring a cotenant, who has not consented, to contribute to the expense. This is just, as an extension of the rule from repairs to general improvements in the nature of new erections might enable one cotenant to "improve" the other out of his share of the property. Cosgriff v. Foss (1897) 152 N. Y. 104, 36 L.R.A. 753, 57 Am. St. Rep. 500, 46 N. E. 307, affirming (1892) 65 Hun, 184, 19 N. Y. Supp. 941.

2. Necessity of title and good faith.

A tenant in common of a tract of land, having a right reasonably to improve it and to be reimbursed for the expense, is entitled to have compensation for his improvements made during the pendency of a suit for the recovery of the land in partition, when they cannot, injustice to his cotenants, be set apart to him, provided the improvements were not placed on the common property for the purpose of embarrassing his cotenants in the assertion of their rights. Whitmire v. Powell (1910) 103 Tex. 232, 125 S. W. 889, reversing (1909) — Tex. Civ. App. —, 117 S. W. 433. Compare, however, McClaskey v. Barr (1894) 62 Fed. 209, modifying (1891) 48 Fed. 130, wherein it was held that, while tenants in common were entitled to compensation for improvements made between the date of the death of the previous life tenant and the commencement of the suit for partition, when they had, as they supposed, bought in all the outstanding interests in the land, and become the sole owners, no compensation would be allowed for improvements made subsequently to the bringing of the suit.

The authorities generally, both in cases where compensation for improvements is allowed, and in cases where the improved portion of the estate is alloted to the cotenant who has expended his labor and capital thereon, treat the fact that the improvements were made by one who supposed himself to be equitably entitled to the whole premises, as an equitable consideration in his favor. Ferris v. Montgomery Land & Improv. Co. (1891) 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607. So, it has been held that a tenant in common is entitled to compensation for improvements made by him in good faith, for the purpose of improving the estate, and not for the purpose of embarrassing his cotenants, or encumbering the estate, or hindering partition. Mahoney v. Mahoney (1872) 65 Ill. 406; Carver v. Coffman (1887) 109 Ind. 547, 10 N. E. 567; Parish v. Camplin (1894) 139 Ind. 1, 37 N. E. 607; Moy v. Moy (1900) 111 Iowa, 161, 82 N. W. 481; Armor v. Frey (1913) 253 Mo. 447, 161 S. W. 829; Armor v. Jester (1913) 253 Mo. 480, 161 S. W. 839; Armor v. Cooper (1913) 253 Mo. 483, 161 S. W. 841; Armor v. Kearney (1913) 253 Mo. 485, 161 S. W. 840; Shipman v. Shipman (1904) 65 N. J. Eq. 556, 56 Atl. 694; Conklin v. Conklin (1845) 3 Sandf. Ch. (N. Y.) 64. And the fact that the tenant making the improvements knows that an undivided share in the land is held by another is no bar to equitable partition. Hall v. Piddock (1870) 21 N. J. Eq. 311.

However, it has been held that a tenant in common is not entitled to compensation for permanent and valuable improvements, unless they were made at a time when he believed

himself to be the true owner of the land, and before he was apprised that his title was disputed. Horton v. Sledge (1856) 29 Ala. 478.

Where a tenant in common has improved the land in good faith, under the belief that he was the sole owner, he is entitled to pay for his improvements, by the terms of the Betterment Act; as constructive notice of title, such as is implied from the registry of a deed, is not in itself sufficient to preclude an occupant from its benefits. Shepherd v. Jernigan (1888) 51 Ark. 275, 14 Am. St. Rep. 50, 10 S. W. 765.

In Mahoney v. Mahoney (1872) 65 Ill. 406, it was held that if, on the supposition that he is entitled to the whole of the premises, a tenant in common in possession makes valuable improvements, he should have the benefit thereof in making equitable partition, and if that cannot be done, he should be allowed compensation. To the same effect, see Hopkins v. Medley (1880) 97 Ill. 402.

In Carver v. Coffman (1887) 109 Ind. 547, 10 N. E. 567, it was held that where a tenant in common held continued possession of all the common estate under a claim of right of such a character as gave him and his grantors "color of title" thereto, and the absolute "good faith" of the tenant and his grantors in making lasting and valuable improvements, though not with the knowledge or consent of the cotenant, was in no manner questioned or controverted by the latter, the tenant making the improvements acquired a valid, legal, and equitable claim for the value of such improvements, and to compensation therefor in the partition of the estate between him and his cotenant.

In Ventre v. Tiscornia (1913) 23 Cal. App. 598, 138 Pac. 954, it appeared that a tenant in common in possession leveled a portion of the common property, this being necessary in order to prevent small streams of flood waters, having their sources in a creek which ran through the property, from carrying away the soil, and also built a bulkhead, which was necessary in order to protect the greater part of the entire tract from being inundated and partially washed away by the storm waters in wet winters. These improvements increased the rental value of the entire tract. The court held that the cotenant of the tenant making the improvements, having admittedly shared in the increased rentals therefrom, was therefore chargeable with his share of the cost of the improvements, on partition, even though it was assumed that the evidence showed that they were made without his consent, express or implied.

In Highland Park Mfg. Co. v. Steele (1916) 146 C. C. A. 202, 232 Fed. 10, affirming (1914) 212 Fed. 972, modified on rehearing in (1916) 149 C. C. A. 11, 235 Fed. 465, it was held that if a grantee of a tenant in common, under a deed executed by the latter conveying the entire tract, in the bona fide belief that he has, by his deed, acquired a good and valid title to the entire tract of land conveyed, places improvements on it, the court in its decree directing partition, while preserving the right of the cotenant would direct that the partition be so made as to conserve the equities of all parties, "both providing for compensation for the betterments, and, if practicable, and without prejudicing the rights of the other cotenants, directing the allotment of the part upon which the improvements have been made to the tenant who made them."

But a tenant in common who does not hold or improve in good faith cannot recover compensation for improvements put on the property. German Sav. & L. Soc. v. Tull (1905) 69 C. C. A. 1, 136 Fed. 1; Rowan v. Reed (1857) 19 Ill. 21; Nelson v. Clay (1831) 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; Dellet v. Whitner (1840) Cheves, Eq. (S. C.) 213; Corbett v. Laurens (1851) 5 Rich. Eq. (S. C.) 301; Taylor v. Taylor (1894) — Tex. Civ. App. —, 26 S. W. 889; Freeman v. Preston (1895) —, Tex. Civ. App. —, 29 S. W. 495. See also McParland v. Larkin (1895) 155 Ill. 84, 39 N. E. 609. In McLane v. Canales (1894) — Tex. Civ. App. —, 25 S. W. 29, it was held that an improving tenant in common was entitled to compen-

sation for his improvements, on partition, without regard to whether they were made in good faith.

If a tenant in common covers the whole of the estate with valuable improvements, so that it is impossible for his cotenant to obtain his share of the estate without including a part of the improvements so made, the tenant making them will not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it was his own folly to extend the improvements over the whole estate, and because it would be unjust to permit a cotenant, at his pleasure, to charge another cotenant with improvements which he may not have desired. In such a case, the improver stands as a mere volunteer, and cannot, without the consent of his cotenant, lay the foundation for charging him for improvements. Nelson v. Clay (1832) 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

While it is settled that, on partition, improvements made in good faith by one cotenant should be taken into account by the court, and either a suitable compensation be made therefor to such cotenant, or, if it can be done without prejudice to the interests of the other parties, such improvements should be assigned to the cotenant making them, in any division made in the partition suit, the rule does not apply, when it appears from the defendants' own showing that the improvements which were made on the property were made by their stepfather, and there was no proof that they had paid for or were obligated to pay for the same. Pesqueira v. Kellogg (1903) 8 Ariz. 266, 71 Pac. 915.

A tenant in common is not entitled to an allowance for improvements erected on the property pending litigation on partition, as there can be no bona fide improvements under such circumstances. Mayer v. Haggerty (1894) 138 Ind. 628, 38 N. E. 42. So, in Hall v. Collier (1917) 146 Ga. 815, 92 S. E. 536, it was held that it was not error to charge the jury, in an action for partition, that "a party cannot make improvements on land pending litigation over the same, and get credit for the amounts expended in such improvements pending litigation." Compare, however, Whitmire v. Powell, 103 Tex. 232, 125 S. W. 889, reversing (1909) — Tex. Civ. App. —, 117 S. W. 433.

3. Consent of cotenant.

It is the general rule that a tenant in common cannot make his cotenant liable for compensation for improvements made on the land, without the consent of the latter. Van Ormer v. Harley (1897) 102 Iowa, 150, 71 N. W. 241.

To entitle a tenant in common to compensation, on a partition in equity, for improvements made on the premises, it does not appear to be necessary for him to show the assent of his cotenants to such improvements, or a promise on their part to contribute their share of the expense; nor is it necessary for him to show a previous request to join in the improvements, and a refusal. Martindale v. Alexander (1866) 26 Ind. 104, 89 Am. Dec. 458; Armor v. Frey (1913) 253 Mo. 447, 161 S. W. 829; Green v. Putnam (1847) 1 Barb. (N. Y.) 500; Ballou v. Ballou (1897) 94 Va. 356, 64 Am. St. Rep. 733, 26 S. E. 840. So, in many jurisdictions, it is held that one of several tenants in common may, in a proceeding for a partition, recover compensation for improvements made by him without the consent of his cotenants. Rowan v. Reed (1857) 19 Ill. 21; Heppe v. Szczepanski (1904) 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737; Martindale v. Alexander (1866) 26 Ind. 104, 89 Am. Dec. 458; Carver v. Coffman (1887) 109 Ind. 547, 10 N. E. 567; Green v. Putnam (1847) 1 Barb. (N. Y.) 500. Compare Calhoun v. Stark (1896) 13 Tex. Civ. App. 60, 35 S. W. 410.

But where consent has been given and an agreement entered into between the cotenants, in consequence of which improvements have been made, on a partition of the land equity will decree an accounting between the cotenants, and will charge to each share of the land its pro rata part of the burdens borne, after deducting from

it the value of the benefits received. Turnbull v. Foster (1902) 116 Ga. 765, 43 S. E. 42; Baird v. Jackson (1880) 98 Ill. 78.

So, where the amount of money expended in improving the common property by two tenants in common, under an agreement with their two cotenants, was largely in excess of the amount of the rents realized from it, on partition, they are entitled to an accounting from their cotenants, and to be reimbursed for the expenditures made by them. Turnbull v. Foster (Ga.) supra.

A tenant in common, placing improvements on the common estate with the express assent of his cotenant, acquires a lien on his cotenant's interest for a proportionate share of the cost of the improvements. Baird v. Jackson (Ill.) supra; Hogan v. McMahon (1911) 115 Md. 195, 80 Atl. 695, Ann. Cas. 1912C, 1260. See also Williams v. Harlan (1898) 88 Md. 1, 71 Am. St. Rep. 394, 41 Atl. 51.

In Hayne v. Gould (1893) 54 Fed. 951, it appeared that the defendant, one of two tenants in common of a ranch, agreed to bear half the cost of a house to be constructed on the property by his cotenant, at an estimated cost of from $200 to $450, but, owing to the mistaken estimates of the materialman and the damage done by a storm, its actual cost amounted to $700. After holding that the real property should be partitioned equally between the plaintiff and the defendant, quality and quantity relatively considered, the court said: "I think it inequitable, however, to grant the prayer of the complaint that the portion of the land upon which the house is built be awarded to plaintiff, because of the improvements. The defendant should be decreed to pay one half of the cost of the house, less the $150 already paid by him therefor, with legal interest from the date when such payment should have been made, and the house regarded as equally the property of both of the parties."

But where a tenant in common in possession makes improvements of considerable value, increasing the rental value thereof, without any agreement or understanding with his cotenant, and without his consent, though it does not appear that he objected to what was done, it is inequitable, on partition, to allow him to share in the rent which the improvements made possible, without requiring him to pay a share of their cost. Van Ormer v. Harley (1897) 102 Iowa, 150, 71 N. W. 241.

Where, on the death of the wife, an undivided one-half interest in the entire community estate is, by statute, vested in the surviving children, the husband is not entitled, on partition, to an allowance for improvements placed on the estate after her death, as he and the children were joint tenants, and one joint tenant has no right, save by the consent of his cotenants, to place permanent and valuable improvements on the common property, except when necessary for its preservation. Higgins v. Higgins (1910) 61 Tex. Civ. App. 41, 129 S. W. 162.

4. Extent of compensation.

Where one tenant in common lays out money in improvements on the estate, although the money so expended does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition, without first directing an accounting, and a suitable compensation. Swan v. Swan (1820) 8 Price, 518, 146 Eng. Reprint, 1281, 22 Revised Rep. 770; Williams v. Williams (1899) 81 L. T. N. S. (Eng.) 163, 68 L. J. Ch. N. S. 528; Kenrick v. Mountsteven (1899) 48 Week. Rep. (Eng.) 141; Drennen v. Walker (1860) 21 Ark. 539; Martindale v. Alexander (1866) 26 Ind. 104, 89 Am. Dec. 458; Green v. Putnam (1847) 1 Barb. (N. Y.) 500; Ballou v. Ballou (1897) 94 Va. 350, 64 Am. St. Rep. 733, 26 S. E. 840. The claim of a tenant in common to compensation for improvements is rather an equitable charge on the land improved than a right, title, or interest in or to it; and it has sometimes been declared that a cotenant has a lien to secure compensation to himself for necessary or proper improvements made by him on the common property. Curtis v. Poland (1886) 66 Tex. 511, 2 S. W. 39.

As the allowance or compensation for improvements is, in all cases, made not as a matter of legal right, but purely from the desire of the court to do justice, the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged. He will, therefore, be charged, not with the price of the improvements, but only with his proportion of the amount or value which, at the time of the partition, they add to the value of the premises. Cooter v. Dearborn (1886) 115 **Ill.** 509, 4 N. E. 388; Heppe v. Szczepanski (1904) 209 **Ill.** 88, 101 Am. St. Rep. 221, 70 N. E. 737; Armor v. Frey (1913) 253 **Mo.** 447, 161 S. W. 829; Armor v. Jester (1913) 253 **Mo.** 480, 161 S. W. 839; Armor v. Cooper (1913) 253 **Mo.** 483, 161 S. W. 841; Armor v. Kearney (1913) 253 **Mo.** 485, 161 S. W. 840; Herndon v. Reed (1891) 82 **Tex.** 653, 18 S. W. 665; Spicer v. Henderson (1897) — **Tex.** Civ. App. —, 43 S. W. 27; Lynch v. Lynch (1910) — **Tex.** Civ. App. —, 130 S. W. 461; Ballou v. Ballou (1897) 94 **Va.** 350, 64 Am. St. Rep. 733, 26 S. E. 840; Blackwell v. McLean (1894) 9 **Wash.** 301, 37 Pac. 317,

The right of one tenant in common to claim the value of improvements is founded on his right in the land, and the extent of the allowance is measured in the partition by the extent of benefit derived therefrom by his cotenant. To the extent only that the value of the land received in partition by such cotenant is enhanced by the improvements placed thereon is he bound to reimburse the tenant making the improvements. Spicer v. Henderson (1897) — **Tex.** Civ. App. —, 43 S. W. 27. When permitted in cases of partition, the claim for improvements is confined to their value as part of the land, without regard to their cost or the amount expended therefor; and if the value of the land is not enhanced thereby, nothing will be allowed on account thereof. Blackwell v. McLean (**Wash.**) supra. The allowance for improvements will be measured by determining to what extent, up to but not beyond their cost, they have enhanced the present value of the premises. McClaskey v. Barr (1894) 62 **Fed.** 209, modifying decree in (1891) 48 Fed. 130.

It has been held that the claim of one tenant in common in possession, to compensation for permanent and valuable improvements made by him on the common property, may be asserted by him only by way of set-off, or counterclaim, to, and the amount of the compensation is not permitted to go beyond, the amount of the rents charged against him. Horton v. Sledge (1856) 29 **Ala.** 478; Ormond v. Martin (1861) 37 **Ala.** 598; Marshall v. Marshall (1888) 86 **Ala.** 383, 5 So. 475; Ferris v. Montgomery Land & Improv. Co. (1891) 94 **Ala.** 557, 33 Am. St. Rep. 146, 10 So. 607. To the same effect, with respect to the amount of compensation allowed, see Bazemore v. Davis (1875) 55 **Ga.** 504; Dellet v. Whitner (1839) Cheves, Eq. (**S. C.**) 213; Corbett v. Laurens (1851) 5 Rich. Eq. (**S. C.**) 301; Broyles v. Waddel (1872) 11 Heisk. (**Tenn.**) 32.

Where improvements have been made by one tenant in common, his cotenant has a right, on partition, to pay his share of the value of the improvements in money, and retain his full share of the common property. Stafford v. Nutt (1870) 35 **Ind.** 93.

No allowance will be made for trivial improvements, on partition of the common land, nor for an addition to a house, which building subsequently, but prior to the suit, was burned. St. Martin v. Hendershott (1916) 82 **Or.** 58, 151 Pac. 706, 160 Pac. 373.

Where there is no evidence, at the time of the partition, of the value of the land separate from the improvements, or of the extent to which they have enhanced the value of the premises, the court is unable to charge a cotenant with his proportion of the amount which the improvements have added to the value of the land. Heppe v. Szczepanski (1904) 209 **Ill.** 88, 101 Am. St. Rep. 221, 70 N. E. 737; Mantenach v. Studt (1909) 240 **Ill.** 464, 130 Am. St. Rep. 282, 88 N. E. 1000. And where, in an action for partition and an accounting, it was not shown that the improvements placed on the property by the tenant in common in pos-

session increased the rental value of the premises, or added to its permanent value, no allowance therefor should be made. Armijo v. Neher (1902) 11 N. M. 645, 72 Pac. 12.

The relationship of parties to each other may render general rules inapplicable as between them. Thus, whether an improvement on a lot owned by a mother and daughter, as tenants in common, was paid for by the husband of the mother so that the law would presume it to be a gift to the wife, or was paid for by the mother herself so that the law would presume it to be a gift to her daughter, in either case the claim must come through the mother, and be established against her daughter's interest in the lot. And where there is no direct evidence as to who furnished the means for the improvement a decree in her favor in a partition suit by the daughter will be affirmed. Maciejewska v. Jarzombek (1909) 243 Ill. 136, 90 N. E. 231, affirming (1909) 148 Ill. App. 161.

5. Setting off improvements against rents and profits.

It has been held that, in an action for partition, a tenant in common in possession may set off the value of the improvements made by him against the amount of the rents and profits due from him to his cotenants by reason of his occupancy of the common estate. Pascoe v. Swan (1859) 27 Beav. 508, 54 Eng. Reprint, 201, 29 L. J. Ch. N. S. 159, 5 Jur. N. S. 1235, 1 L. T. N. S. 17, 8 Week. Rep. 130; Jones v. Johnson (1873) 28 Ark. 211; Roberts v. Beckwith (1875) 79 Ill. 246; Gunn v. Thurston (1895) 130 Mo. 339, 32 S. W. 654; Funk v. Seehorn (1903) 99 Mo. App. 587, 74 S. W. 445; Hanson v. Hanson (1903) 4 Neb. (Unof.) 880, 97 N. W. 23; Tyner v. Fenner, 4 Lea (Tenn.) 469; Broyles v. Waddel (1872) 11 Heisk. (Tenn.) 32; Ruffner v. Lewis (1836) 7 Leigh (Va.) 720, 30 Am. Dec. 513; Graham v. Pierce (1869) 19 Gratt. (Va.) 28, 100 Am. Dec. 658, 14 Mor. Min. Rep. 308; Blackwell v. McLean (1894) 9 Wash. 301, 37 Pac. 317; Ogle v. Adams (1877) 12 W. Va. 213. See also Burks v. Vaughan (1892) — Ark. —, 19 S. W. 754; Booth v. Booth (1901) 114 Iowa, 78, 86 N. W. 51. In Blackaby v. Blackaby (1900) 185 Ill. 94, 56 N. E. 1053, it was held that a tenant in common who had spent his money in making valuable improvements in the property, having had entire control and exclusive possession thereof for a number of years, might rightfully claim against his cotenant, or his heirs, in an accounting in partition compensation, for such taxes and improvements, himself accounting for rents and profits.

In Roberts v. Beckwith (1875) 79 Ill. 246, a decree in partition against tenants in common in possession, for the full amount of the rent due, was held to be erroneous and unjust, where no deduction was made for permanent improvements.

In Burks v. Vaughan (1892) — Ark. —, 19 S. W. 754, an action to set aside an administrator's sale and to recover the rents and profits derived from the land sold, wherein it was adjudged that the defendant in possession was the owner of a half interest therein, and that she should pay to the owners of the other half interest one half of the rent of the premises, it was held that the defendant should have been charged with one half of the rent per annum and credited with one half of the value of the improvements built by her.

In some jurisdictions, while the claim of one tenant in common in possession to compensation for permanent and valuable improvements made by him in the common property is not denied, it may be asserted by him only by way of set-off or counterclaim to, and the amount of the compensation is not permitted to go beyond, the amount of the rents charged against him. Horton v. Sledge (1856) 29 Ala. 478; Ormond v. Martin (1861) 37 Ala. 598; Marshall v. Marshall (1888) 86 Ala. 383, 5 So. 475; Ferris v. Montgomery Land & Improv. Co. (1891) 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607. To the same effect, with respect to the amount of compensation allowed, see Bazemore v. Davis (1875) 55 Ga. 504; Dellet v. Whitner (1839) Cheves, Eq. (S. C.) 213; Corbett v. Laurens (1852) 5 Rich. Eq. (S. C.)

301; Broyles v. Waddel (1872) 11 Heisk. (Tenn.) 32.

As between tenants in common, where one has excluded the other, believing himself sole owner, and, pending such exclusion, has made permanent improvements, the cotenant, unless he resorts to equity himself, cannot be compelled to contribute anything beyond such portion of the rents as may be chargeable to the party erecting them. Bazemore v. Davis (1875) 55 Ga. 504.

In Graham v. Graham (1828) 6 T. B. Mon. (Ky.) 562, 17 Am. Dec. 166, the court said that it was not disposed to award to a parcener occupying the land, in partition, compensation for improvements and ameliorations so as to make his coparceners his debtors. But it was held that he ought to be charged with the rents of his new improvements from the time that they were made, and that they might be lessened by the cost of improvements, so as to sink those rents, if sufficient.

In order to render a tenant in common, who has occupied the property, liable for an occupation rent, it must be distinctly shown that he has made a profit over and above the mere use, and beyond his share. It is the actual receipt of such excess which creates the liability; and, as the claim is not a strict legal right, if he is charged with an occupation rent, he should be allowed for permanent improvements, as an offset to the rent. Tyner v. Fenner (1880) 4 Lea (Tenn.) 469.

So, where a tenant in common clears, improves, and cultivates an excess over his proportionate share of the common estate, he may be required to account for its reasonable rental value, on partition, but may offset this with the reasonable cost of the improvements put by him in that part; and, if there is a balance in his favor, he is entitled to a lien for it on the shares of the tract allotted to his cotenants; but if the balance be in their favor, they should be given a lien for it on the share allotted to him. Bennett v. Bennett (1904) 84 Miss. 493, 36 So. 452.

And while a tenant in common, who receives more than his just share of the annual returns from the common property, must render compensation to his associate in title, who is denied his just and equal portion thereof, nevertheless such compensation must necessarily be based on the condition of the property and its rental value at the time the title devolved on the cotenants, or on the actual returns therefrom received by one of them, and not on its condition or value due to improvements made thereon after such devolution. Where one joint tenant, or tenant in common, uses the common land exclusively, though not ousting or excluding his co-owners, he is chargeable to them for such use and occupation, on the benefits thereof. Smith v. Smith (1915) 77 W. Va. 260, 87 S. E. 355. In that case it appeared that, at the time the title to the property devolved on the plaintiff and the two defendants as tenants in common, both tracts of land were virtually uninclosed, the buildings thereon dilapidated and out of repair, the fencing burned or decayed, and both tracts covered with briars and other hurtful growths, common to fallen or neglected lands. The buildings the defendants repaired, remodeled, and enlarged in the main at their own cost and expense, the plaintiff contributing thereto only a small amount; they also inclosed the lands by wire fencing, removed the growths, and ditched the swampy and sour lands, thereby rendering them more productive and enhancing their rental and actual values. None of the parties received or derived any compensation, profit, or advantage from the estate, in excess of that required for their maintenance and support, and the plaintiff received an equal proportion of such returns so long as she remained on the lands and, in the partition, her due share of the expenditures for their rehabilitation. Hence, it was held that under no theory, having participated equally with the defendants, was the plaintiff entitled to a decree in partition for compensation from the defendants for benefits derived from the property.

In Timberlake v. Sorrell (1910) 125 La. 554, 51 So. 586, it appeared that the defendant, a tenant in common with the plaintiffs in certain lots, consulted

his cotenants about putting improvements on the lots. On their refusal, he proceeded to build a number of small houses at his own expense, and to collect the rents thereof for his own benefit. The court held that as the defendant had the right to occupy and enjoy his proportionate share of the common property without thereby incurring any obligation to his co-owners for the use of it, so long as he did not interfere with their equal right to occupy and enjoy their proportionate shares, and the rents in question being the result of his separate efforts and expenditures, he did not, therefore, on partition, have to account to his co-owners for any part of the rents he had received.

Where the evidence shows without conflict that the improvements to the common property, made by a tenant in common in possession, were necessary to its preservation and enhanced its rental value, his cotenant should be put to his election, on partition, either to contribute equally to the undisputed cost of the improvements, or to relinquish all claim to a share of the increased rentals resulting therefrom. Ventre v. Tiscornia (1913) 23 Cal. App. 598, 138 Pac. 954.

A tenant in common, who made permanent improvements valuable to the estate, believing with good reason that his title was good, may not only set off the value of such improvements against rents and profits, but may recover any balance by which the value may exceed rents and profits; but if, when the improvements were made, there was not reason to believe his title was good, he cannot set them off even against rents and profits; and notice, either actual or constructive, of the defect of the improver's title and of the rights of others, will preclude allowance for such improvements. Williamson v. Jones (1897) 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411, 19 Mor. Min. Rep. 19.

So, a tenant in common who is a disseisor is not, for that reason alone, entitled to contribution for improvements on partition, and he is also chargeable with the rental value of his cotenant's share of the property, whether the rent is actually received by him or not. Rippe v. Badger (1904) 125 Iowa, 725, 106 Am. St. Rep. 336, 101 N. W. 642. But when he supposes that he has acquired title devested of any other interest, and enters into possession, and makes valuable improvements, a court of equity will modify the rule, under the circumstances, and hold him entitled to contribution from his cotenant. And when the improvements cost more than the rental value of the land, he will not be required to pay over any of the rent received to his cotenant. Parkhill v. Doggett (1909) 142 Iowa, 534, 119 N. W. 689.

In Hixon v. Bridges (1897) 18 Ky. L. Rep. 1068, 38 S. W. 1046, it was held that a tenant in common, who occupied the land with the acquiescence of his cotenants, should not be allowed for improvements put on the land, which added little, if anything, to its salable value, and were put there for his benefit alone; nor should he be charged for the rents.

In Nelson v. Clay (1831) 7 J. J. Marsh. (Ky.) 138, 23 Am. Rep. 387, it was held that when a tenant in common, as a volunteer, and without the consent of his cotenant, covered the whole of the estate with improvements, he could not recover compensation for them from his cotenant, nor could he be required to repay the rents and profits arising from his labor and money.

In Gjerstadengen v. Hartzell (1900) 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230, an action for partition, it appeared that the improvements for which compensation was sought were not made by the defendant, but by his grantee some ten years previously, and that they were made for the exclusive benefit of the cotenant making them, though incidentally they enhanced the value of the premises. It further appeared that the improving cotenant had the possession and use of the land and the benefit of the improvements for more than seven years. Under these circumstances, it was held that the value of these improvements, even if they were such as could be charged to his cotenants, was more than offset by the value of the use and occupa-

tion which he had enjoyed during that period; and further, that if they were not necessary for the preservation of the estate, the mere fact that they enhanced the value of the common property did not entitle the tenant making them to an allowance for that value.

In Jolliffe v. Maxwell (1902) 3 **Neb.** (Unof.) 244, 91 N. W. 563, it was held that when a tenant in possesion voluntarily placed improvements on the property, their value would properly balance the value of the rents and profits for the period of the possession, it is proper to make no allowance either way.

In Davis v. Chapman (1888) 36 **Fed.** 42, it was held that in an action for partition and an accounting, the cotenancy of a purchaser of the interest of a tenant in common on a foreclosure sale should be regarded as beginning with the execution of the deed, and the accounting should not embrace repairs and improvements made, or taxes paid by either tenant, prior thereto.

6. Setting off rents and profits against improvements.

It has been held that when a tenant in common in possession makes a claim for the value of the improvements made by him on the common property, in a suit for the partition thereof, his cotenants are entitled to set off against his claim the amount of the rents and profits due from him to them, arising from his use and occupancy of the common premises. Teasdale v. Sanderson (1864) 33 Beav. 534, 55 **Eng.** Reprint, 476; Cocke v. Clausen (1900) 67 **Ark.** 455, 55 S. W. 846; Rowan v. Reed (1857) 19 **Ill.** 21; Cooter v. Dearborn (1886) 115 **Ill.** 509, 4 N. E. 388; Hyatt v. Cochran (1882) 85 **Ind.** 231; Peden v. Cavins (1893) 134 **Ind.** 494, 39 Am. St. Rep. 276, 34 N. E. 7; Respass v. Breckenridge (1820) 2 A. K. Marsh. (Ky.) 581; Haskins v. Spiller (1833) 1 Dana (Ky.) 170; Eakin v. Knabe (1900) 31 Misc. 221, 64 **N. Y.** Supp. 103; Branch v. Makeig (1895) 9 **Tex.** Civ. App. 399, 28 S. W. 1050. See also Walton v. Walton (1873) 70 **Ill.** 142; Quick v. Brenner (1885) 101 **Ind.** 230; Carver v. Coffman (1887) 109 **Ind.** 547, 10 N. E. 567; Talbot v. Todd (1832) 7 J. J. Marsh. (**Ky.**) 456.

It would be inequitable to hold, when a cotenant in possession of the whole land has received the rent for a number of years, and, while he so holds the shares of rents due his cotenants, makes improvements, that, when partition is sought, the tenant in possession can recover the full value of the improvements made, without deduction for the rents received by him due his cotenants. Peden v. Cavins (1893) 134 **Ind.** 494, 39 Am. St. Rep. 276, 34 N. E. 7, wherein the court said: "We think that, when a tenant asks an allowance for improvements made while in possession, an answer setting up the facts as to the receipt of the rents due the cotenant, showing, as in this case, that he had received the rents prior to the making of the improvements, it states a good defense as a counterclaim or set-off to the action to authorize the court to take into account the rents in making the adjustment. The cross complaint alleges a state of facts in relation to the possession of the land and the making of improvements, which, in equity, entitles the occupying tenant to compensation for the improvements, and the answer sets up additional facts, showing that, while so occupying the land the tenant received rents belonging to his cotenants, from which he seeks to recover compensation for the improvements made, which in equity and good conscience should be taken into account in determining what amount, if any, should be charged against the other tenant for improvements. It would be manifestly unjust and inequitable to allow the occupying tenant to retain the share of the rents received by him belonging to the other joint owners, and permit him to collect from them the full amount and value of the improvements made."

As the allowance or compensation for improvements is, in all cases, made not as a matter of legal right, but purely from the desire of the court to do justice, the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged. He will, therefore, be charged, not with the cost of the improvements, but only

with his proportion of the amount which, at the time of the partition, they add to the value of the premises. From this amount he will also be entitled to deduct any sum to which he may have a just claim, for use and occupancy of his moiety enjoyed by the cotenant making the improvements. Cooter v. Dearborn (1886) 115 Ill. 509, 4 N. E. 388; Branch v. Makeig (1895) 9 Tex. Civ. App. 399, 28 S. W. 1050.

It has been held that a tenant in common in possession is entitled to have improvements made by him taken into account, only when he accounts, on the other hand, for the profits derived from his personal occupation of the premises. Rice v. George (1873) 20 Grant, Ch. (U. C.) 221. See also Teasdale v. Sanderson (1864) 33 Beav. 534, 55 Eng. Reprint, 476.

The grantees of a tenant in common who had received the rent of the property in controversy, and had placed improvements thereon, have no right, in a suit for partition, to have the land partitioned so as to give them their proportionate interest therein, exclusive of the improvements, and then have compensation for the improvements also; but their cotenants have the right to have their share of the value of the improvements paid or set off by their share of the rents, which the grantor of their cotenants had received. Cocke v. Clausen (1900) 67 Ark. 455, 55 S. W. 846; Neher v. Armijo (1901) 11 N. M. 67, 66 Pac. 517.

In Cocke v. Clausen (Ark.) supra, it was held that where tenants in common assumed to act as landlords of the premises, and collected the rents thereof, in a suit in partition by them to have compensation for improvements put on the land their cotenants might offset the value of the improvements against the amount of the rents received.

In Campbell v. Campbell (1870) 21 Mich. 438, a suit for the partition of land, it appeared that, during their occupancy of the property, some of the parties in interest had made various improvements thereon; but, by reason of the loose arrangement made by them with respect to the accounts for advances and services, there was no basis of calculation, and it also appeared that each party improving had the benefit of the land and their improvements. It was held that no allowances for the improvements would be made. H. D. B.

CLARA F. BRINKLEY et al., Appts.,
v.
WESLEY HALLIBURTON et al.

Arkansas Supreme Court—June 4, 1917.

(129 Ark. 334, 196 S. W. 118.)

Tax — abbreviation — sufficiency.

1. One hundred and twenty-five of the one hundred and fifty acres of a quarter section of land north of a railroad are not sufficiently described in a tax proceeding by referring to them as "N. of R. R. frl. S. W. ¼" of said section.

[See note on this question beginning on page 1228.]

Same — proceeding to sell — description.

2. A proceeding to sell land for taxes, being a special proceeding in rem on warning order, must correctly describe the land in order to confer jurisdiction on the court.

APPEAL by plaintiffs from a judgment of the Circuit Court for Crittenden County sustaining a demurrer to and dismissing the complaint in a

proceeding to oust defendants from the possession of certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **B. J. Semmes,** for appellants:

Correct description of land is jurisdictional.

Beck v. Anderson-Tully Co. 113 Ark. 316, 169 S. W. 246; Van Fleet, Collateral Attack, chap. 370, p. 252; Foohs v. Bilby, 83 Ark. 234, 103 S. W. 386; Vaughan v. Daniels, 98 Mo. 230, 11 S. W. 573; Millner v. Shipley, 94 Mo. 106, 7 S. W. 175; Smith v. Kipp, 49 Minn. 119, 51 N. W. 656; Gibney v. Crawford, 51 Ark. 35, 9 S. W. 309; Morris v. Dooley, 59 Ark. 487, 28 S. W. 30; 37 Cyc. 1304, 1305.

The abbreviated description was insufficient to confer validity on a ministerial tax sale.

Cooper v. Lee, 59 Ark. 460, 27 S. W. 970; Guy v. Stanfield, 122 Ark. 376, 183 S. W. 966; Woodall v. Edwards, 83 Ark. 334, 104 S. W. 128; Covington v. Berry, 76 Ark. 460, 88 S. W. 1005; Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 335, 44 Am. St. Rep. 511, 54 N. W. 404.

Mr. **W. R. Satterfield** for appellees.

Humphreys, J., delivered the opinion of the court:

A demurrer was sustained to the complaint in this case, and, appellants refusing to plead further, the complaint was dismissed. From the judgment dismissing the suit, an appeal has been prosecuted to this court. The proceeding is one in ejectment to oust appellees from the possession of a part of the southwest quarter, section 26, township 6 north, range 7 east, in Crittenden county, Arkansas. The complaint alleged that appellants were the owners of the S. W. ¼ of section 26, township 6 north, range 7 east, in said county and state; that they deraigned title from the government through mesne conveyances; that appellees were in possession of part of said real estate by purchase from W. M. Rooks and wife, who had obtained a tax deed under a tax sale in the chancery court of Crittenden county, wherein the board of directors of the St. Francis levee district was plaintiff, and Ruth Ellis et al. were defendants; that the tax sale was void for the reason that the land was indefinitely described; that the description in the tax proceedings and tax deed was as follows: "N. of R. R. frl. S. W. ¼ section 26, T. 6, N. R. 7 E., 125 acres;" that the S. W. ¼ section 26, township 6 N., range 7 E., is a regular quarter section.

The question presented by the appeal is whether the description was sufficient to validate the tax proceedings and support the tax deed. The tax proceedings were instituted and the tax deed was executed under Act 262 of Acts of the General Assembly of 1909. Being a special proceeding in rem on warning order, it was necessary to correctly describe the land in order to confer jurisdiction on the court decreeing the sale. In construing said act, this court said, in Beck v. Anderson-Tully Co. 113 Ark. 316, 169 S. W. 246, that: "A complaint correctly describing the lands, under the act, is the primal step in the proceeding. It is the basis upon which the clerk must act in giving the notice provided for. No presumptions can be indulged in favor of a decree grounded upon a complaint that does not contain a correct description of the particular tracts of land ordered to be sold. The notice must be given by the clerk of the lands described in the complaint. Unless the lands are correctly described, the notice will necessarily be insufficient. Neither the complaint nor the notice are susceptible of amendment, and therefore no presumptions can be indulged contrary to what they show on their face. They are preliminary and prerequisite to a seizure and control by the court of the land sought to be condemned for the delinquent taxes."

Tax—proceeding to sell—description.

In determining the sufficiency of the description, the abbreviation "frl." must be treated as surplusage under the rule laid down in the recent case of Rucker v. Arkansas Land & Timber Co. 128 Ark. 180,

194 S. W. 21. Omitting the abbreviation "frl." the description will then read: "N. R. R. S. W. ¼ section 26, T. 6 N., R. 7 E., 125 acres." The rule, and reasons therefor, by which the sufficiency of this description must be tested, was laid down in Buckner v. Sugg, 79 Ark. 442, 96 S. W. 184, in the following language: "It is well settled, not only by the decisions of this court, but by the adjudged cases in the courts of other states, as far as we can discover, that, in order to make a valid assessment and sale of land for taxes, the land must be described with certainty upon the assessment rolls and in all subsequent proceedings for the enforcement of payment of the tax. The chief reason for this requirement is that the owner may have information of the charge upon his property. It has sometimes been said that a description that would be sufficient in a conveyance between individuals would generally be sufficient in assessments for taxation. We do not, however, consider that a safe test. The description in tax proceedings must be such as will fully apprise the owner, without recourse to the superior knowledge peculiar to him as owner, that the particular tract of his land is sought to be charged with a tax lien. It must be such as will notify the public what lands are to be offered for sale, in case the tax be not paid."

This rule was reiterated and approved in Woodall v. Edwards, 83 Ark. 334, 104 S. W. 128; King v. Booth, 94 Ark. 306, 126 S. W. 830; Beck v. Anderson-Tully Company, 113 Ark. 316, 169 S. W. 246; and Guy v. Stanfield, 122 Ark. 376, 183 S. W. 966. In discussing the sufficiency of descriptions in tax sales and deeds, Mr. Justice Riddick said in the case of Cooper v. Lee, 59 Ark. 460, 27 S. W. 970, that: "A description which is intelligible only to persons possessing more than the average intelligence, or the use and understanding of which is confined to the locality in which the land lies, is not sufficient."

In reference to a description by abbreviations, the same learned justice in the same case said: "A description of the land by the abbreviations commonly used to designate government subdivisions sufficiently identifies it; but the use of abbreviations in a tax assessment or notice must be confined to those commonly used and understood."

In special statutory proceedings to enforce tax charges against lands, the abbreviations employed must have been in such general use and knowledge in reference to government surveys that the meaning thereof will be intelligible, not only to experts, but also to persons with only ordinary knowledge of such matters.

Appellees contend that the abbreviations employed sufficiently describe all that part of the S. W. ¼ of section 26, township 6 north, range 7 east. By the allegations of the complaint, there are 150 acres north of the Chicago, Rock Island, & Pacific Railroad in said quarter section, whereas the supposed description covers only 125 acres. Under the well-known rule that quantity yields to course and distance, the difference in acreage would not render the description indefinite. The abbreviation "R. R." is not an abbreviation commonly used to designate government subdivisions. Government surveys were not made with reference to railroads. The abbreviation "R. R." does not necessarily convey the meaning of railroad to one of only ordinary experience in land titles. As suggested by appellants, the letters could have reference to Ridge road or River road. It might refer to any natural or artificial monument where such letters were used in spelling the monument in mind. If by general usage the letters have become so definite in meaning that the ordinary man would know that they meant railroad, the question might

well arise, What railroad? Testing the description before us by the rule laid down by this court, we have concluded that the description is fatally defective.

Same—abbreviation—sufficiency.

For the error indicated, the judgment is reversed, and the cause is remanded, with instructions to overrule the demurrer to the complaint.

ANNOTATION.

Use of abbreviations in description of land in tax proceedings.

I. General rules, 1228.
II. Illustrations:
  a. Abbreviations referring to government survey, 1228.
  b. Other abbreviations, 1232.

I. General rules.

Abbreviations which are commonly known and generally understood are permissible in the description of land in tax proceedings. Kelly v. Herrall (1884) 10 Sawy. 161, 20 **Fed.** 364; Baird v. Monroe (1907) 150 **Cal.** 560, 89 Pac. 352; Buck v. People (1875) 78 **Ill.** 560; Jefferson County v. Johnson (1880) 23 **Kan.** 717; Auditor General v. Sparrow (1898) 116 **Mich.** 574, 74 N. W. 881; Doherty v. Real Estate Title Ins. & T. Co. (1902) 85 **Minn.** 518, 89 N. W. 853; State ex rel. Wyatt v. Vaile (1894) 122 **Mo.** 33, 26 S. W. 672; Skillman v. Clardy (1914) 256 **Mo.** 297, 165 S. W. 1050; State Alden, Prosecutor v. Newark (1873) 36 **N. J. L.** 288; Smith v. Dwight (1916) 80 **Or.** 1, 148 Pac. 477, 156 Pac. 573, Ann. Cas. 1918D, 563; Re Gordon, 7 Terr. L. Rep. (**Can.**) 134. "The use of abbreviations in assessments appears to be permissible, if thereby the property may easily be known." Baird v. Monroe (1907) 150 **Cal.** 560, 89 Pac. 352.

But where abbreviations which are not commonly used by conveyancers nor generally understood by the public at large are used in describing land, in tax proceedings, the description is insufficient, and, therefore, any and all steps taken thereunder are invalid. Cooper v. Lee (1894) 59 **Ark.** 460, 27 S. W. 979; Guy v. Stanfield (1916) 122 **Ark.** 376, 183 S. W. 966; Wilson v. Jarron (1913) 23 **Idaho,** 563, 131 Pac. 12; Keith v. Hayden (1879) 26 **Minn.** 212, 2 N. W. 495; Knudson v. Curley (1883) 30 **Minn.** 433, 14 N. W. 873; Ventriniglia v. Eichner (1913) 155 App. Div. 236, 140 **N. Y.** Supp. 395; Power v. Larabee (1891) 2 **N. D.** 141, 49 N. W. 724; Power v. Bowdle (1893) 3 **N. D.** 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Sheets v. Paine (1901) 10 **N. D.** 103, 86 N. W. 117; State Finance Co. v. Trimble (1907) 16 **N. D.** 199, 112 N. W. 984; Noble v. Watrous (1917) 84 **Or.** 418, 163 Pac. 310, 165 Pac. 349; Matteson v. Warwick & C. Water Co. (1908) 28 **R. I.** 570, 68 Atl. 577; Stokes v. Allen (1902) 15 **S. D.** 421, 89 N. W. 1023. And see the reported case (BRINKLEY v. HALLIBURTON, ante, 1225).

The description must be intelligible "not only to the expert, but to one who is only ordinarily versed in such matters." Guy v. Stanfield (1916) 122 **Ark.** 376, 183 S. W. 966. Compare, Buck v. People (1875) 78 **Ill.** 560, wherein it was intimated that any description which will enable a surveyor to locate the land is sufficient.

II. Illustrations.

a. Abbreviations referring to government survey.

The use in the description of land, in tax proceedings, of the initial letters of points of the compass, together with fractions to designate the fractional parts of sections according to the government survey, is ordinarily held to be permissible. Jenkins v. McTigue (1884) 22 **Fed.** 148; Chestnut v. Harris (1897) 64 **Ark.** 580, 62 Am. St. Rep. 213, 43 S. W. 977; Boles v. McNeil (1899) 66 **Ark.** 422, 51 S. W. 71; Law v. People (1875) 80 **Ill.** 268; Fowler v. People (1879) 93 **Ill.** 116; Taylor v. Wright (1887) 121 **Ill.** 455, 13 N. E. 529; Kile v. Yellowhead (1875) 80 **Ill.** 208; Jordan Ditching & D. Asso. v. Wagoner (1870) 33 **Ind.** 50; Sibley v. Smith (1853) 2 **Mich.**

487; Auditor General v. Sparrow (1898) 116 **Mich.** 574, 74 N. W. 881; Hildie v. Eckhart (1918) — **Mich.** —, 169 N. W. 14; Strauss v. McAllister (1889) — **Miss.** —, 5 So. 625; Bowers v. Chambers (1876) 53 **Miss.** 259; McCready v. Lansdale (1881) 58 **Miss.** 877; Moores v. Thomas (1909) 95 **Miss.** 644, 48 So. 1025; Beggs v. Paine (1905) 15 **N. D.** 436, 109 N. W. 322; Washington Timber & Loan Co. v. Smith (1904) 34 **Wash.** 625, 76 Pac. 267. See also dictum in Rollins v. Woodman (1897) 117 **Cal.** 516, 49 Pac. 455.

In Boles v. McNeil (1899) 66 **Ark.** 422, 51 S. W. 71; it was held that the symbols "E ½ SE.," used in describing a certain piece of land for assessment of taxes, were sufficient to indicate that they meant the "east half of the southeast quarter section," and that "E² SE." conveyed the same idea, in an advertisement of the property on a tax sale.

But in Cooper v. Lee (1894) 59 **Ark.** 460, 27 S. W. 970, it appeared that a certain tract of land was described as follows in a tax proceeding: "N., N. E. section 3, township 15, range 6, 87.19 acres." The court held that the description was insufficient, for the reason that the first symbol, "N," was not a commonly used and understood abbreviation. The court said: "A description of the land by the abbreviations commonly used to designate government subdivisions sufficiently identifies it; but the use of abbreviations in a tax assessment, or notice, must be confined to those commonly used and understood. Had the description of the land been 'N. ½ of N. E.,' followed by section, township, and range, we should have felt no doubt in saying that it correctly designated the land in controversy by abbreviations commonly used and understood; but the letters N. N. E., do not, to our minds, have such well-defined and accepted meaning. For this reason we feel compelled to hold that the description of the land in controversy as the 'N., N. E. sec. 3, town. 15, range 6, 87.19 acres,' was not a description by abbreviations, the knowledge and use of which are so general as to warrant the court in holding that they sufficiently identify the land to be sold. On the contrary, we hold that it was not a sufficient description, and that the sale of the land must be treated as a sale without notice, and therefore void."

In Taylor v. Wright (1887) 121 **Ill.** 455, 13 N. E. 529, it was held that in describing property in an assessment as "W. side N. ½ S. E. N. W. 10 acres, sec. 8, T. 23, R. 10,—quantity sold, 10 acres," the first initial "W." meant "West."

In Beggs v. Paine (1905) 15 **N. D.** 436, 109 N. W. 322, the court said that "N. W. is the abbreviation which means 'northwest,' wherever the English is written."

By a statute of Missouri (2 Wagner's Stat. § 240), land may be described in tax proceedings by using the initial capital letters of the points of the compass, and also the following letters: T. for township, R. for range, L. for lot, and B. for block. See Lowe v. Ekey (1884) 82 **Mo.** 286. But in that case it was held that the use of the letters N. W. N. E. N. U. R. in describing land in a tax deed were objectionable. The court said that, while the first four letters might be taken to designate the points of the compass, the remaining three letters were meaningless.

In Chestnut v. Harris (1897) 64 **Ark.** 580, 62 Am. St. Rep. 213, 43 S. W. 977, the description of land as "NE. SE.," followed by the numbers of the section, township, and range wherein the land was situated, was held to indicate clearly the northeast quarter of the southeast quarter of the designated section.

In Auditor General v. Sparrow (1898) 116 **Mich.** 574, 74 N. W. 881, the abbreviations "N. E.–N. E." were held to mean northeast quarter of the northeast quarter. In that case it appeared that the description, including the headings under which it was placed, was as follows: "Description: —N. E.–N. E., sec. 1, town. 45, range 44, 40 acres." The court said: "It is common knowledge that these terms would be thus understood by the general public, and that this method has been pursued in describing property

in this state for many years. No court would hesitate to declare such meaning in an action between private parties, and we see no reason for thinking that it could mislead anyone."

In Smith v. Dwight (1916) 80 **Or.** 1, 156 Pac. 573, Ann. Cas. 1918D, 563, the court sustained an assessment roll wherein an 80-acre tract was described as follows: "Northeast of southeast quarter and the southeast of the northeast quarter of section 2, tp. 1 north range 10 west, Willamette meridian," the word "quarter" being twice omitted. The court said: "This is practically an abbreviation which is permitted by § 3598, L. O. L."

But in a number of cases tax proceedings have been held to be invalidated by the use therein of abbreviations referring to a government survey. Thus, in Keith v. Hayden (1879) 26 **Minn.** 212, 2 N. W. 495, it appeared that the plaintiffs claimed title to certain property, under a tax judgment. The property was described in the judgment as follows: "S.^{2} N. E.^{4} & N. W.^{4} S. E.^{4}" The court held that these letters and figures did not possess a fixed and generally understood meaning throughout that state, and that, therefore, the description of the property was insufficient. The court said: "We are of opinion that the attempted description in the second column is fatally defective. As is found in this case by the court below, there may be a local usage in that part of the state where the judgment was entered, according to which this description would be understood to mean the south half of the northeast quarter and the northwest quarter of the south-east quarter; but there is no general usage of this kind. Neither is this the import of the letters and figures employed, according to the common and ordinary usages of the English language, as the same is spoken and written in this state, or in general, nor as it is used in the judgments of courts."

In Power v. Larabee (1891) 2 **N. D.** 141, 49 N. W. 724, it was held that the sale of a certain piece of land for delinquent taxes was void, as the land had been assessed under an insufficient description, to wit: "W. 2 of W 2; E. 2 of E. 2; W. 2 of S. E., N. 2 N. W."

The use of the following letters and figures in describing land assessed for taxes was held, in Power v. Bowdle (1893) 3 **N. D.** 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404, to be meaningless: "NW.^{4}; NW.^{4} of NE.^{4}; NE. SW.; W^2 SW." In that case the court said: "It is elementary that courts will take judicial notice of the vernacular language of the people and of its mutations, and hence will take notice whether given words, letters, and figures which are brought to the notice of the court are or are not couched in the ordinary language in use by the court and people. In the cases cited the holding was, in effect, that the arbitrary combinations of letters and figures, as used in the respective assessment rolls, is not the language of the court or country, i. e., is not the English language as commonly used. An inspection of the symbol writing will at once show the correctness of this view. The figure 2, according to its established meaning, represents two units or whole numbers, and the figure 4 represents four units or whole numbers. As employed in the assessment rolls, 2 is made to signify one half of one whole number, and 4 one fourth of a whole number. Thus, it appears that the symbols in question consist of a combination of letters and figures whereby such letters and figures are perverted from their established signification and use among the people, and made to signify something radically different, when used to describe land. It is a matter of which this court will take notice, because a matter of common knowledge, that the government system of surveying land has been quite generally adopted in the western states, and that the system prevails in the states of North Dakota and Minnesota; and yet, as has been shown, the courts of last resort in the two states mentioned have taken judicial cognizance of the fact, and so held, that the symbol writing in question, as a mode of describing land, has not the sanction of general usage in either of the said states. In view of

these adjudications—that of Powers v. Larabee, being very recent, and made after mature deliberation,—we think it would be unwise to hold that evidence is admissible to prove only such facts as the court would be bound to judicially note without proof, if such facts really exist. If it be true that the symbol writing is, as alleged by the answer, used in describing the land, and 'generally understood' by the taxpayers and the people of North Dakota and throughout the western states, the judges and courts of such states are bound to judicially note the existence of such usage. To borrow the words of Chief Justice Caton; 'Courts will not pretend to be more ignorant than the rest of mankind.' . . . In conclusion, we feel like saying that every member of this court has given to this case his very best and most faithful consideration. We appreciate the importance of the questions involved, relating as they do to the public revenues, and bearing vitally also upon the stability of land titles in this state. We readily concede that views differing from ours may be and are honestly entertained; but we have concluded that stability in a rule of property, when once deliberately adjudged, is of prime importance, and hence have adhered to the views laid down in the previous decisions. Moreover, we believe that comparatively a small number of the whole population have any degree of familiarity with the symbol writing in question. Those who have close relations with the local land offices, and with such of the county officers as have copied and adopted the symbol writing from the land officers, are indeed strongly impressed with the idea that all of the people understand and use this mode of describing the land. We cannot come to the same conclusion. We think symbol writing in tax records has already disappeared, and is no longer employed in county offices in this state, and our belief is strong that when the public land has been disposed of, and the local land offices have performed their limited and temporary functions and have been removed further west, it will be found that symbol writing in describing realty will have failed to become ingrafted upon the vernacular language. We feel justified in this conclusion from our observations and experience in the older states of the West. If we are mistaken, the remedy can be readily found in the legislative branch of the government, where a statute can be passed to govern future asessments."

In Sheets v. Paine (1901) 10 **N. D.** 103, 86 N. W. 117, a tax deed to land, which had been assessed as the property of "Andrew Lewis," and described as "S. E. 4 S. W. 4 W. 2 S. W. 4," without stating the "range" and "township," was held to be void.

In State Finance Co. v. Mulberger (1907) 16 **N. D.** 214, 125 Am. St. Rep. 650, 112 N. W. 986, the same holding was made with reference to the following description: "S. W. ¼ E.^{2} and S. W.^{4} N. E.^{4} sec. 7, twp. 139, R. 63."

In State Finance Co. v. Trimble (1907) 16 **N. D.** 199, 112 N. W. 984, the following description was held to be "meaningless:" "N. ½ and S. E. ¼, N. E.^{4} and N. E. ¼ S. E.^{4} sec. 12, twp. 140, R. 63—166 acres."

In Wright v. Jones (1912) 23 **N. D.** 191, 135 N. W. 1120, it was held that "N. W. 4, sec. 35, twp. 149, range 56, 160 acres" was not a sufficient description of land assessed for taxes.

In Noble v. Watrous (1917) 84 **Or.** 418, 163 Pac. 310, 165 Pac. 349, the action was to quiet title to certain land. The defendant claimed ownership under a tax deed. It appeared that prior to the tax sale the property was twice assessed, and described, the first time as "W.^{2} of N. E.^{4}," and the second time as "W. ½ of N. E.^{4}," giving the section, township, and range. It was held that both assessments were void for uncertainty.

The following description of land assessed for taxes has been held to be void: "S. W. 4 N. E. 4 & W. 2 S. E. 4, Less. R. W. D. C. Ry." Stokes v. Allen (1902) 15 **S. D.** 421, 89 N. W. 1023.

In Turner v. Hand County (1898) 11 **S. D.** 348, 77 N. W. 589, it was held that the following abbreviations were unintelligible, to wit: "S 2 s e & s 2 s w, sec. or lot 30, twp. or blk. 113, rng. 69." The court said: "The combina-

tion . . . is an idealess jumble of letters and figures, confusing in the extreme, and intolerable when employed as a means by which to devest title to real estate without the consent of the owner. That a tax sale of property not described in the assessment roll is void, and passes no title to the purchaser, is a proposition in perfect consonance with reason, conclusively established by authority."

A similar holding was made in Moran v. Thomas (1905) 19 S. D. 469, 104 N. W. 212, wherein it appeared that a certain piece of land was described, in assessing it, as follows: "S. 2, N. E. 4, and S. E. 4 N. W. 4 sec. 29, township 118, range 54.

In Miller v. Daniels (1907) 47 Wash. 411, 92 Pac. 268, a tax deed to certain property, which had been assessed as "25 A. in sec. 14, twp. 20, range 3, acres 25, year, 1894," was held void.

In Guy v. Stanfield (1916) 122 Ark. 376, 183 S. W. 966, the following abbreviated description was held to be insufficient: "Ex. 10 A. Sq. NE. cor. S. ½ SE. 26–11–11, containing 70 acres."

In Wilson v. Jarron (1913) 23 Idaho, 563, 131 Pac. 12, the court held to be insufficient the following description in a tax certificate: "S. ½ N. W. 4, sec. 1, twp. 4, range 2." The ruling was, however, based not on the use of abbreviations, but on the failure to state whether the township was south or north, and whether the range was east or west, of the meridian.

b. Other abbreviations.

In Baird v. Monroe (1907) 150 Cal. 560, 89 Pac. 352, the action was to quiet title to a certain tract of land. The plaintiff contended that the property belonged to one of his ancestors, from whom it was taken by the state of California, for delinquent taxes, and sold to the defendant. The plaintiff further contended that the sale was void, for the reason that the property was not sufficiently described when assessed for taxes. It appeared that the tax collector described the property as follows: "In Los Angeles county, in Pellister tr." It was held that "tr." stood for tract, and that, therefore, the abbreviation was not fatal. The court said: "Although we are not prepared to commend the abbreviation of the word 'tract' to 'tr.,' we think that such abbreviation, used in the connection in which it here appears, could not be reasonably supposed to indicate, as suggested by plaintiff, either 'trustee,' 'transcript,' or 'treasurer,' or anything else than the word 'tract.'"

It was held in Kelly v. Herrall (1884) 10 Sawy. 161, 20 Fed. 364, that the abbreviation of "Portland homestead to Port. homstd.," in a tax assessment of a piece of land, did not invalidate a subsequent tax deed of the land. The court said: "Of course, the abbreviation 'Port.' does not necessarily signify 'Portland.' Indeed, it may be admitted that, abstracted from its surroundings, it is likely as not to stand for something else. But the letters 'homstd.' come so near representing the word 'homestead,' both to the eye and ear, that it may well be regarded as a case of misspelling, by the omission of the silent or obscure letters, rather than an abbreviation. The description may then be read, to begin with, as 'Port. homestead.' And now take into consideration the fact that there is a 'Portland homestead' in this county, and only one, and that in the year 1876 Mary Kelly owned lot 3, in block B therein, which was then liable to assessment and taxation, and it is apparent that 'Portland homestead,' was meant and understood by the description used. Had the plaintiff examined the assessment roll, it is difficult to see how she could have been misled by this description, or failed to learn from it that her lot 3 in block B in Portland homestead was assessed for taxation."

The abbreviation of the word "fractional" to "frl.," in the assessment of certain land, was held in Rucker v. Arkansas Land & Timber Co. (1917) 128 Ark. 180, 194 S. W. 21, not to vitiate the subsequent tax sale. See to the same effect Selden v. Coffee (1877) 55 Miss. 41. So, in Little Rock & Ft. S. R. Co. v. Evins (1905) 76 Ark. 261, 88 S. W. 992, the abbreviation of the word "fractional" to "fr." was held permissible.

In Jefferson County v. Johnson

(1880) 23 **Kan.** 717, the supreme court of Kansas held that in that state the letters "K. H. B. I. L.," in describing land in tax proceedings, were generally understood to mean, "Kansas Half-breed Indian Lands." The use, therefore, of those letters in describing an otherwise certain piece of land for assessment of taxes, was held not to invalidate its sale for delinquent taxes.

In Hodgdon v. Burleigh (1880) 4 **Fed.** 111, the court stated the facts and its conclusions as follows: "The objection is strongly pressed by the tenants that no tax was laid on 'township No. 8, in the third range,' as it is said all the Tax Acts describe the estate taxed simply as 'No. 8, R. 3,' which is unintelligible. This is hardly a correct description of what appears in the Tax Acts, as, in the first place, the estate is always located in the county of Aroostook; and, secondly, the whole entry is 'No. 8, R. 3, do. do. do,' these words 'do.' being placed directly under the entry 'W. of E. line of state,' thereby clearly declaring that 'No. 8, R. 3, was situated in the county of Aroostook and west of the east line of the state. On reference to the Tax Acts, as far back as 1821, it will clearly appear that these 'cabalistic letters and terms,' to use the language of the learned counsel for the tenant, were then employed by the legislature in describing townships to be taxed; as, for instance, in fixing the taxes that year for Washington county, which then included the present county of Aroostook, there will be found the following entry: 'County of Washington, No. 1, first range 9, 55–100;' 'No. 6, 5, 72–100;' and the same course, it is believed, has been adopted in every Tax Act since that year. These 'signs and cabalistic letters,' from a usage of more than fifty years, have acquired a well-known signification, and there is not an individual in this state who has ever had an interest in an acre of wild land, who for an instant could entertain a doubt that 'No. 8, R. 3,' in the Tax Act, was intended to describe a township of that number in that range; and the letters and figures there found would be as intelligible to him, as easily understood by him, as if the entry had been written out at full length, instead of being abbreviated."

A description of land in an assessment as "Newell's E. & C. platt" was held, in Auditor General v. Fleming (1905) 142 **Mich.** 12, 105 N. W. 71, to be sufficient, the abbreviation being shown to be well known, by property owners in Michigan, to mean "Newell's enlarged and corrected" plat.

The abbreviations of the words "except," "acres," and "corner," to "ex.," "a." and "cor.," respectively, were held in State ex rel. Wyatt v. Vaile (1894) 122 **Mo.** 33, 26 S. W. 672, to be well understood generally, in describing land in tax proceedings, and therefore permissible.

In Skillman v. Clardy (1914) 256 **Mo.** 297, 165 S. W. 1050, it appeared that the clerk of a court, in publishing an order in a tax suit, stated that the publication was inserted in "The Bloomfield Vindicator," a newspaper, when in fact the notice of publication described the newspaper as "The Vindicator." It was held that this abbreviation of the name was not fatally defective. The court said: "Abbreviations in land descriptions in customary use are part of the statutory scheme of a tax levy, assessment, and collection by suit, and such was the fact at the time of this tax suit. Rev. Stat. 1889, § 7707. That statute, as preserved and brought down to us in subsequent revisions as live law, has always been liberally construed to further its beneficent life and purpose. The authorities are canvassed on that question in a case just handed down at this delivery. Atkins v. Adams (1914) 256 **Mo.** 2, 164 S. W. 603. We can add nothing to what is there said. The abbreviations here were the customary ones, and followed the statute."

In State, Alden, Prosecutor, v. Newark (1873) 36 **N. J. L.** 288, it appeared that a tax assessor described a certain property as "H. L. and stable." He also gave the name of the owner, and the number and street on which the property was situated. The court held that the letters "H. L.," as used in this

description, meant "house and lot." In this case it was said: "Abbreviations may be used as long as they are intelligible and leave no uncertainty as to the property upon which the imposition is intended to be placed. In this case, the real estate consisted of H. L. and stable, No. 16 Font street, evidently meaning house, lot, and stable. There can certainly be no difficulty in locating this lot, and it would burden the assessor with unnecessary labor to require a more extended description."

But in Ventimilia v. Eichner (1913) 155 App. Div. 236, 140 N. Y. Supp. 395, it was held that a tax assessment which described certain premises as "H. & L." was void, and could not be understood to mean "house and lot." The court said: "We know of no law recognizing the use of such abbreviations to describe a house and lot, and certainly they fall far short of describing a three-story frame house of a specified length and width. A proper description of this property requires that the proceedings by which a tax is levied and enforced by sale show whether and how the premises are improved."

In Griffin v. Creppin (1872) 60 Me. 270, it was held that the letters "S. D.," in describing a piece of property, in an advertisement for its sale for taxes, as "Tract No. 8, S. D.," were meaningless, and that, therefore, the purchaser at the tax sale acquired no title.

In Campbell v. Packard (1884) 61 Wis. 88, 20 N. W. 672, it appeared that a certificate on which a tax deed was issued to certain land described the land as follows: "Lot commencing 88 ft. E. from the N. E. corner of lot 1, block 1, S. B. & P. addition." It was held that the tax deed was void.

A description of land in an assessment as "N. E. part lot 2 on A. K. Barnes plot 1/26," has been held to be insufficient. Matteson v. Warwick & C. & Water Co. (1908) 28 R. I. 570, 68 Atl. 577. In that case the court said: "The object of the description is not only to inform the taxpayer what property is taxed as his, but also to inform the public, if sold for nonpayment of the tax, just what is liable for the tax, and what is being conveyed for the nonpayment of it. If it be conceded that the letters 'N. E.,' as applied to a description of land, are the usual and ordinary abbreviations of the words 'north east,' it still remains true that there is no means of identifying how much of "lot 2" a "part" of it includes, or whether the area be rods or acres. . . . So too, the fraction '1/26' would naturally suggest to a stranger that the interest of the taxpayer was one-twenty-sixth part of some estate. Here it was sought to be established that '1/26' meant Plat Book 1, page 26, to the assessors. Certainly such an expression would not be generally so understood."

In Grank Forks County v. Frederick (1907) 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, a description of land, assessed for taxes, as "N. 23x200 ft. deep," was held to be insufficient.

In Knudson v. Curley (1883) 30 Minn. 433, 15 N. W. 873, it appeared that the published "delinquent list," so far as it related to the property in question,was as follows: "Ole Knudson, 1873 to 1880 inclusive, /16/7/231 20." There were no headings to show to what the figures referred. It was held that there was no sufficient description of the property. C. M.

NEILS JOHNSON et al., Appts.,
v.
LEROY T. PETERSEN et al.

Nebraska Supreme Court—July 10, 1917.

(101 Neb. 504, 163 N. W. 869.)

Evidence — declarations against title.

1. Declarations derogatory to the title of an ancestor, made by him after he transferred title, are not admissible as an exception to the hearsay rule merely because the grantee acquired the property without a monetary consideration.

[See note on this question beginning on page 1240.]

Same — declarations against interest.

2. Declarations against the pecuniary interest of the declarant, when made, may be admissible after his death as an exception to the hearsay rule.

Same — entire statement.

3. While the entire statement made in connection with a declaration against the interest of the declarant may be admissible as an exception to the hearsay rule, such parts as are not against his pecuniary interest may be entitled to little credit, where the evidence shows that in those respects he had strong motives for misrepresentation.

Trust — following trust property.

4. Trust property conveyed by a trustee ex maleficio to his prospective wife, in consideration of marriage, cannot be followed by the cestui que trust, where the grantee acquired title in good faith, without knowledge or notice that the property was purchased by her grantor with trust funds.

Headnotes by CORNISH, J.

(Morrissey, Ch. J., and Hamer and Dean, JJ., dissent.)

APPEAL by plaintiffs from a judgment of the District Court for Douglas County in favor of defendants in an action brought to enforce a trust in certain property, purchased with the proceeds of a converted draft. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Weaver & Giller** and **L. W. Housel** for appellants.

Mr. **J. O. Detweiler**, for appellees:

The declarations of a former owner of land, made after he has conveyed away his title thereto and parted with all interest in the land, are not admissible against those claiming under him, to disparage their title obtained in good faith by his deed.

Consolidated Tank Line Co. v. Pien, 44 Neb. 887, 62 N. W. 1112; Zobel v. Bauersachs, 55 Neb. 20, 75 N. W. 43; Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Sloan v. Coburn, 26 Neb. 607, 4 L.R.A. 470, 42 N. W. 726; Williams v. Eikenberry, 25 Neb. 721, 13 Am. St. Rep. 517, 41 N. W. 770; Kyd v. Cook, 56 Neb. 71, 71 Am. St. Rep. 661, 76 N. W. 524; Benton v. Sikyta, 84 Neb. 808, 24 L.R.A.(N.S.) 1057, 122 N. W. 61; Robbins v. Spencer, 140 Ind. 484, 38 N. E. 522, 40 N. E. 263; Pentico v. Hays, 75 Kan. 76, 9 L.R.A. (N.S.) 224, 88 Pac. 738; Northrop v. Columbia Lumber Co. 108 C. C. A. 640, 186 Fed. 770; Ferguson v. Basin Consol. Mines, 152 Cal. 714, 93 Pac. 867; Dixon v. Dixon, 123 Md. 44, 90 Atl. 846, Ann. Cas. 1915D, 616; Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Lang v. Metzger, 206 Ill. 489, 69 N. E. 493; Doe ex dem. Maxwell v. Moore, 4 Blackf. 445, 30 Am. Dec. 666; Dickson v. Miller, 124 Minn. 346, 145 N. W. 112; Ratliff v. Soward, 152 Ky. 103, 153 S. W. 25; Rix v. Smith, 145 Mich. 203, 108 N. W. 691; Mutual

F. Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673; 16 Cyc. 987; Ryder v. Ryder, 244 Ill. 297, 91 N. E. 451; Bowman v. Baker, 147 Ky. 437, 144 S. W. 383; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Francoeur v. Beatty, 170 Cal. 740, 151 Pac. 123; Leary v. Corvin, 63 App. Div. 151, 71 N. Y. Supp. 335; Scheps v. Bowery Sav. Bank, 97 App. Div. 434, 90 N. Y. Supp. 26; Moore v. Fingar, 131 App. Div. 399, 115 N. Y. Supp. 1035; Jonas v. Hirschberg, 40 Ind. App. 88, 96, 79 N. E. 1058; Elliot v. Western Coal & Min. Co. 243 Ill. 618, 134 Am. St. Rep. 398, 90 N. E. 1104, 17 Ann. Cas. 884; Baldwin v. Stier, 191 Pa. 432, 43 Atl. 326; Adair v. Craig, 135 Ala. 332, 33 So. 902.

The court erred in holding that the deed to Maren M. Thomsen on September 25, 1876, was not made in consideration of marriage, and that marriage is not a valuable consideration for these lots, equivalent to a monetary consideration therefor.

J. P. Leininger Lumber Co. v. Dewey, 86 Neb. 659, 126 N. W. 87, 21 Ann. Cas. 471; Tolman v. Ward, 86 Me. 303, 45 Am. St. Rep. 556, 29 Atl. 1081; Boggess v. Richards, 39 W. Va. 567, 26 L.R.A. 537, 45 Am. St. Rep. 938, 20 S. E. 599; Prignon v. Daussat, 4 Wash. 199, 31 Am. St. Rep. 914, 29 Pac. 1046; Bunnel v. Witherow, 29 Ind. 123; Prewit v. Wilson, 103 U. S. 22, 26 L. ed. 360; Jackson v. Jackson, 222 Ill. 46, 6 L.R.A.(N.S.) 785, 78 N. E. 19; Ryder v. Ryder, 244 Ill. 297, 91 N. E. 451; Miles v. Monroe, 96 Ark. 531, 132 S. W. 643; National Exch. Bank v. Watson, 13 R. I. 91, 43 Am. Rep. 132; Otis v. Spencer, 102 Ill. 624, 40 Am. Rep. 617; Nance v. Nance, 84 Ala. 375, 5 Am. St. Rep. 378, 4 So. 699.

The deed to defendants on December 20, 1892, was for a monetary consideration.

39 Cyc. 561; Pottenger v. Bailey, 8 Ohio Dec. Reprint, 106.

Cornish, J., delivered the opinion of the court:

This action was begun by the heirs of Lena Petersen, first wife of Soren T. Petersen, deceased, and who died in 1875 without issue, to enforce a trust in the property in controversy, because it was purchased with the proceeds of a converted draft, Lena Petersen's share in a legacy. The defendants are the children of the deceased and his second wife, Maren, now Mrs. Hansen. Defendants contend that the beneficiaries of the trust cannot follow the property, even though so purchased, because it had been conveyed by Petersen to his second wife (their mother), in 1876, in consideration of marriage, and because in divorce proceedings, in 1892, between their mother and Petersen the property was ordered conveyed to their children, the defendants. The trial court dismissed the action, and plaintiffs appealed. In this court the judgment was reversed and title to the property quieted in plaintiffs. Johnson v. Petersen, 100 Neb. 255, 159 N. W. 414.

Upon motion for rehearing, the defendants contend that this court erred in its consideration of the declarations of Petersen, made after he had conveyed the property, and in the rule announced in the second paragraph of the syllabus as follows: "In a suit to declare a trust in lands, the declarations of the ancestor through whom the defendants acquired title, without the payment of a monetary consideration, may be received in evidence against the defendants who stand in the place of the ancestor."

The declaration referred to is evidenced by oral testimony and by a letter written by the declarant just before he died, as follows:

Omaha, Nebr., June 6, 1912.

Nels Johnson, Hombolt, Iowa:—

I thought best to write you a letter, as I don't tink my time is long for this world. If I know that time you was her I would had a talk with you. I anderstant you was here to investigat the mony which Lena got from her ant.

As I haven't long to live I will tell you about it. I got the money to week after Lena was dead in 1875. I tout it was all right, so I bought lot 13–20 Nelson's addition on which I built 3 houses, No. 975, 979, 971 North 27 street, Omaha, Nebr. I got the money in a draft to which I had to sign Lena name. The Duth (Dutch) Concil said it would be all right so long as she was dead

she could not do it. I did not write you that time as I did not know your address. I did not want to part with it, but the law say I must. That dam bich of a woman beat me out of it so I had to sumit.

The property is now in possession of four children, namely Leroy Petersen, Leona McCutchen, Lillian Deitrick, and one what goes by name of Emilie. She don't be long to me. I will send this to my Brother to send to you after my death, so you will know when you get this I will be with Lena.

Now I think I am square with the world and hope for rest.

(Signed) S. T. Petersen.

Under our system of jurisprudence, hearsay testimony is not generally admissible in evidence. An exception to this rule, based upon the principle of experience, is that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false, or heedlessly incorrect, and, being thus sufficiently guaranteed, is admissible in evidence, though oath and cross-examination are wanting; the witness being unavailable because of death.

One of the applications of this exception to the general rule is that which permits declarations derogatory to his title, of one who at the time holds the title. Or, as stated in negative form in Consolidated Tank Line Co. v. Pien, 44 Neb. 887, 62 N. W. 1112: "The declarations of a former owner of land are not admissible as against those claiming under him, when made after he has conveyed the land."

The owner of real estate is not likely to make untrue statements in derogation of his title. Declarations derogatory to title, made after parting with title, have not that guaranty of their truth which the law requires; nor does the law recognize that the declaration is more likely to be true if the title has been parted with without consideration, than if the conveyance was for valuable consideration paid. In either case, the declaration is ordinarily inadmissible.

Evidence—declaration against title.

The declarations of an ancestor, from whom those claiming title derived their title as heirs, are within the exception to the hearsay rule, and are admissible in evidence. The second paragraph of our syllabus, above quoted, is inaccurate in two respects: First, it appears to make the rule depend upon whether the defendants acquired title without payment of a monetary consideration, when, in fact, the character of the consideration does not affect the rule, as a rule of evidence. Second, the rule announced is not applicable to the case in hand. Here, the children did not acquire title as heirs through an ancestor, but through deeds made long before Petersen's death, and the declarations were made after parting with title. Considered merely as declarations derogatory to title, they are inadmissible. The rule announced in the second paragraph of the syllabus, in so far as it is contrary to the law as herein stated, should be overruled.

We are of opinion, however, that the particular declaration under consideration was admissible, by virtue of another application of the general exception to the hearsay rule above stated. A declaration, which, when made, is directly contrary to the pecuniary interest of the person making it, is admissible in evidence. An admission that one has converted to his own use the money of another is within this class.

Same—declarations against interest.

It follows that the declarations of Petersen, stating that he converted the money of his first wife, which, if true, would constitute him a trustee ex maleficio of a constructive trust, and render his estate liable therefor, are admissible in evidence for what they are worth. For a discussion of the rules of evidence applicable, see 2 Wigmore, Ev. §§ 1082–1086, and 1457–1461; also, 4 Chamberlayne, Ev. §§ 2769–2774.

Upon further consideration, we are of opinion that the judgment of the trial court must be affirmed for other reasons of law and of fact. Defendants contend that the second wife was a purchaser for value without notice of the trust, and that therefore plaintiffs are not entitled to follow the trust property into defendants' hands. Petersen married his second wife, mother of defendants, September 29, 1876. He executed the deed which conveyed to her the property in controversy, September 25, 1876. She testifies that it was conveyed to her in consideration of the intended marriage; that she did not know how Peterson acquired the property. On behalf of plaintiffs, besides Petersen's letter, there was testimony by his third wife that she heard Petersen say that the property was conveyed to the second wife to protect it from possible creditors of Petersen, and that the second wife knew how he had acquired the property. Nowhere does she testify distinctly as to statements made either by Petersen or his second wife, showing when the wife first knew how Petersen had acquired the property; nor does Petersen, in either his letter to Johnson or in the one to his third wife, state that his second wife knew of the conversion of the money at the time she accepted the deed. A belief that she did know would rest mainly upon inference, and be directly contrary to her sworn testimony. Petersen's declarations, when admitted in evidence, are not of much value for determining the real point in controversy. While his statement as to what he did with the money is probably admissible, as part of his entire statement, yet, considered by itself, that part of it telling what he did with the money is not a statement against interest, but the contrary. Petersen was in the money-lending business, and the evidence would indicate that he was at all times a man of some means. It would be to his interest to have the property, which he had parted with and which finally went to the children, appropriated for what he owed his wife's heirs, instead of being taken out of his own estate. The record, not his statements, shows that the property in dispute was not purchased until nearly a year after he received the money. It is hard to be sure that this particular money went into the particular property in dispute. In his love letter, written to his third wife at about the time he was divorced from his second wife, he speaks of the children (the defendants) as bastards. Afterwards, he seems to have been on friendly terms with one of the boys; but in his last letter, written just before his death, he speaks of Emilie as not his child. His malice, and the malice of his third wife, towards his second wife and the children, are apparent from the testimony. His declarations, in the light of all the testimony, while against pecuniary interest, as above stated, show generally an unfriendly feeling towards his second wife and family. We are of opinion that they are not sufficient to overcome the testimony of the second wife that she was the bona fide purchaser of the property in dispute, without knowledge or notice of any fraud upon her husband's part.

Same—entire statement.

It is suggested as something extraordinary for Petersen to deed the property to his second wife just before marriage. We do not think so. It is entirely within the proprieties for a man about to marry a woman to give, and for her to take, in consideration of marriage, the property which is to be their home. If fairly offered in the right spirit, most women would be glad to take it as a proof of affection. Besides, this was Petersen's manner of wooing. In his letter to his third wife, he tells her that if she will come and live with him he will give her the old piano, or, if she wishes, buy her a new one. This last letter, written at about the time he was di-

vorced from his second wife, indicates that previous thereto there had existed an improper, if not illicit, relation between his third wife and himself. She did come to live with him, and they sustained illicit relations with each other for several years before their marriage. She afterwards commenced divorce proceedings against him. Neither her testimony nor his statements are entitled to the highest credit. His conscience draws too fine a line. Any friend could have told him that to his wife's people, whose property he had converted, there would be nothing sacred in the particular property in controversy, unless it would be its value. How easy it would have been for him to have taken the other property, which the evidence shows he owned, and was worth more than this, converted it into cash, or given it to his wife's heirs. They would have been entirely happy and his conscience quieted. Instead of that, his conscience drives him to go elsewhere for property to pay his wife's relatives what he owes them, even though it forces him to violate the solemn decree of the court in a suit where he was a party, and two solemn deeds of conveyance executed by him.

When Petersen's second wife obtained a divorce from him, the parties agreed to the terms of alimony. The decree awarded to the wife $5,000, and provided that the property now in dispute should be conveyed to the children; the wife to have the custody of the children and the use of the property until the youngest child should become of age, provided that she supported them. One of the grounds alleged by her for divorce was that he insisted on appropriating the rents received from the property in dispute, although he was worth $40,000. Both of the parties, in conformance with the decree, joined in the deed to the defendants. It is contended by defendants that, the property being awarded in lieu of payments in money, they are in the same position as if they had been awarded money, and with the money had purchased the property.

If, at the time the property was deeded to the second wife, she took it in consideration of marriage, and we find that she did, then she would be a bona fide holder for value, unless she took it with notice that it was trust property. We find that she did not then know it was trust property. We are of opinion, also, that the deed made by the husband and wife, pursuant to the decree of the court in the divorce suit, constituted the children innocent purchasers for value of the property in dispute. For decided cases, bearing upon these questions, see J. P. Leininger Lumber Co. v. Dewey, 86 Neb. 659, 126 N. W. 87, 21 Ann. Cas. 471; National Exch. Bank v. Watson, 13 R. I. 91, 43 Am. Rep. 13; Bowman v. Baker, 147 Ky. 437, 144 S. W. 383; Sloan v. Coburn, 26 Neb. 607, 4 L.R.A. 470, 42 N. W. 726; McClatchey v. Anderson, 84 Neb. 783, 122 N. W. 67; Pottenger v. Bailey, 8 Ohio Dec. Reprint, 106; Ryder v. Ryder, 244 Ill. 297, 91 N. E. 451; Scheps v. Bowery Sav. Bank, 97 App. Div. 434, 90 N. Y. Supp. 26.

Trust—following trust property.

For the reasons given herein, the statement of law announced in the second paragraph of the syllabus of our previous opinion is overruled, and the judgment of the trial court is affirmed.

Morrissey, Ch. J., and **Hamer** and **Dean, JJ.**, dissent.

ANNOTATION.

Admissibility of statements derogatory to title made after parting with title without monetary consideration.

The well-settled rule of law is that the declarations against his own title of a former owner of property, either real or personal, made while in the possession thereof, are admissible not only against himself, but also against those claiming under him, but that a derogatory statement of a grantor made after parting with title, being hearsay, and not having the required guaranty of truth, is not competent evidence against the transferee, or those claiming under him, at least, in the absence of fraud or collusion. The question then arises, in cases where the title was passed without a monetary consideration, whether an exception to the hearsay rule can be based upon such lack of consideration. Few cases have expressly discussed this specific question, but it seems clear that the character of the consideration does not affect the rule as a rule of evidence. This was the rule laid down in the reported case (JOHNSON v. PETERSEN, ante, 1235), the court having maintained that the law does not recognize that derogatory declarations, made after parting with title, are more likely to be true where the transfer was without consideration, than where the conveyance was based upon a valuable consideration.

And in Rector v. Danley (1853) 14 **Ark.** 304, it was held that declarations made after parting with title were inadmissible in a suit respecting such title, irrespective of whether the transfer was a gift or a sale. And again in Moore v. Fingar (1909) 131 App. Div. 399, 115 **N. Y.** Supp. 1035, the court, in stating the rule, placed donees and vendees on an equal footing.

So, it has been held, generally, and without specific discussion of the effect of a lack of consideration, that the declarations of a donor in disparagement of title, made subsequent to the full execution of a deed of gift, being mere hearsay, and neither a part of the res gestæ nor declarations against a present interest, are not admissible to defeat the completed gift, either against the donee or his privies, or in favor of the grantor or others claiming under him, it being held incompetent for him to affect, or make evidence in reference to, the title conferred. See Julian v. Reynolds (1845) 8 **Ala.** 680; Powell v. Olds (1846) 9 **Ala.** 861; Strong v. Brewer (1850) 17 **Ala.** 706; Rumbly v. Stainton (1854) 24 **Ala.** 712; Stallings v. Finch (1854) 25 **Ala.** 518; Gillespie v. Burleson (1856) 28 **Ala.** 551; Adair v. Craig (1902) 135 **Ala.** 332, 33 So. 902; Bain v. Bain (1907) 150 **Ala.** 453, 43 So. 562; Prater v. Frazier (1850) 11 **Ark.** 249; Rector v. Danley (1853) 14 **Ark.** 304; Peters v. Priest (1918) — **Ark.** —, 203 S. W. 1042; Ogden v. Dodge County (1895) 97 **Ga.** 461, 25 S. E. 321; Manning v. Manning (1910) 135 **Ga.** 597, 69 S. E. 1126; Banks v. Bradwell (1913) 140 **Ga.** 640, 79 S. E. 572; Elliott v. Western Coal & Min. Co. (1910) 243 **Ill.** 614, 134 Am. St. Rep. 398, 90 N. E. 1104, 17 Ann. Cas. 884; Butler v. Garrett (1916) 274 **Ill.** 178, 113 N. E. 32; Miller v. Smith (1907) 137 **Ill.** App. 467; Paine v. Doe (1845) 7 Blackf. (**Ind.**) 485; Pentico v. Hayes (1907) 75 **Kan.** 76, 9 L.R.A.(N.S.) 224, 88 Pac. 738; Bowman v. Baker (1912) 147 **Ky.** 437, 144 S. W. 383; Aylor v. Aylor (1914) 158 **Ky.** 713, 166 S. W. 216; Mutual F. Ins. Co. v. Deale (1861) 18 **Md.** 26, 79 Am. Dec. 673; Duff v. Leary (1888) 146 **Mass.** 533, 16 N. E. 417; Dickson v. Miller (1914) 124 **Minn.** 346, 145 N. W. 112; Dunlap v. Griffith (1898) 146 **Mo.** 283, 47 S. W. 917; Sanford v. Sanford (1871) 5 Lans. (**N. Y.**) 486; Leary v. Corvin (1901) 63 App. Div. 151, 71 **N. Y.** Supp. 335; Hall v. Geyer (1896) 14 **Ohio,** C. C. 229, 7 **Ohio** C. D. 436; Baldwin v. Stier (1899) 191 **Pa.** 432, 43 Atl. 326; Hunter v. Parsons (1830) 2 Bail. L. (**S. C.**) 59; Sumner v. Murphy (1834) 2 Hill, L. (**S. C.**) 488, 27 Am. Dec. 397; Grooms v. Rust (1863) 27 **Tex.** 231; Smith v. McElyea (1887) 68 **Tex.** 70,

3 S. W. 258; Parks v. Worthington (1908) 101 Tex. 505, 109 S. W. 909; Henry v. Phillips (1912) 105 Tex. 459, 151 S. W. 533; Pardue v. Whitfield (1908) 53 Tex. Civ. App. 63, 115 S. W. 306; Smith v. Betty (1854) 11 Gratt. (Va.) 752; and Crawford v. Workman (1908) 64 W. Va. 19, 61 S. E. 322. At least, that is the rule when the declarations are made to a third person, and not in the presence or the hearing of the donee, and not sanctioned by him. Rumbly v. Stainton (1854) 24 Ala. 712; Gillespie v. Burleson (1856) 28 Ala. 551; Prater v. Frazier (1850) 11 Ark. 249; Robbins v. Spencer (1894) 140 Ind. 483, 38 N. E. 522, 40 N. E. 263; Chase v. Horton (1886) 143 Mass. 118, 9 N. E. 31; Sanford v. Sanford (1871) 5 Lans. (N. Y.) 486. And especially where it is not insisted that the grantee stood in any relation of confidence with or possessed any peculiar influence over the grantor. Bain v. Bain (1907) 150 Ala. 453, 43 So. 562. And this, even though declarations admitting the gift are in evidence for the donee. Ogden v. Dodge County (1895) 97 Ga. 461, 25 S. E. 321. However, it also has been said that there is no hard and fast rule that the declarations of a grantor, offered to show his purpose in making a deed, may never be received after its execution. See Plowman v. Nicholson (1909) 81 Kan. 215, 105 Pac. 692, 106 Pac. 279, and Martin v. Shumway (1913) 89 Kan. 892, 132 Pac. 993. And see also Mumford v. Mumford (1917) — Mo. App. —, 194 S. W. 898. And in Wormouth v. Johnson (1881) 58 Cal. 621, it was held that declarations made by a person after he had caused a deed of gift to be executed were admissible against the donee.

And in keeping with the general rule above stated, it has been held that declarations impugning the validity of a voluntary deed of trust, which the declarant had previously executed, are not admissible against one claiming title under such deed. Weaver v. Yeatmans (1849) 15 Ala. 539; Bollinger v. Bollinger (1908) 154 Cal. 695, 99 Pac. 196; Ryder v. Ryder (1910) 244 Ill. 297, 91 N. E. 451; Dixon v. Dixon (1914) 123 Md. 44, 90 Atl. 846, Ann. Cas. 1915D, 616; Warren v. Carey (1887) 145 Mass. 78, 12 N. E. 999; Ferriday v. Selser (1840) 4 How. (Miss.) 506; Whiteley v. Babcock (1917) — Mo. —, 202 S. W. 1091 (especially, when such admisisons or declarations are not made in the presence of the grantor); Braswell v. Gay (1876) 75 N. C. 515. At least, this is true in the absence of the establishment of a fair inference of a combination between the immediate parties, to defraud the creditors of the grantor. Weaver v. Yeatmans (1849) 15 Ala. 539; Dixon v. Dixon (1914) 123 Md. 44, 90 Atl. 846, Ann. Cas. 1915D, 616 (holding that an exception arises, where evidence is offered tending to show a prima facie case of combination or conspiracy between the grantor and the grantee, to defraud the creditors, and that the declarations of the grantor made after the deed may be admitted in such a case). And it has been held that such declarations are not admissible, even as tending to prove that the deed of gift was fraudulent as against the grantor's creditors (Strong v. Brewer (1850) 17 Ala. 706; Massey v. Huntington (1886) 118 Ill. 80, 7 N. E. 269), or that undue influence was exercised (Massey v. Huntington (Ill.) supra).

Nor can subsequent declarations of a grantor, which are derogatory to the title of his grantee, be imputed to the latter to the detriment of his title. McCrory v. Donald (1915) 192 Ala. 312, 68 So. 306.

And similar rules have been laid down in cases of gifts of personal property. Thus, it has been held that statements derogatory of title, made subsequent to a complete gift of personal property, are inadmissible as against the donee. Echols v. Barrett (1849) 6 Ga. 443; Cornett v. Fain (1862) 33 Ga. 219; Strelow v. Vonderhide (1881) 3 Ky. L. Rep. 472; Dixon v. Labry (1895) 16 Ky. L. Rep. 522, 29 S. W. 21; Tierney v. Fitzpatrick (1909) 195 N. Y. 433, 88 N. E. 750, reversing (1907) 122 App. Div. 623, 107 N. Y. Supp. 527; Graves v. King (1878) 15 Hun (N. Y.) 367; Scheps v. Bowery Sav. Bank (1904) 97 App. Div. 434, 90 N. Y. Supp. 26; Kelly v. Home Sav.

Bank (1905) 103 App. Div. 141, 92 N. Y. Supp. 578; Moore v. Fingar (1909) 131 App. Div. 399, 115 N. Y. Supp. 1035; Woodruff v. Cook (1857) 25 Barb. (N. Y.) 505; Schmidt v. Schweitzer (1912) 137 N. Y. Supp. 807; Re Beaman (1916) 163 N. Y. Supp. 800; Eelbank v. Burt (1804) 3 N. C. (2 Hayw.) 330; Cowan v. Tucker (1848) 30 N. C. (8 Ired. L.) 426; Hicks v. Forrest (1850) 41 N. C. (6 Ired. Eq.) 528; Parker v. Fenwick (1908) 147 N. C. 525, 61 S. E. 378; First Nat. Bank v. Yoeman (1907) 17 Okla. 613, 90 Pac. 412; M'Kane v. Bonner (1828) 1 Bail. L. (S. C.) 113; Newman v. Wilbourne (1833) 1 Hill, Eq. (S. C.) 10; Snowden v. Pope (1839) Rice, Eq. (S. C.) 174; Bennett v. Cook (1887) 28 S. C. 353, 6 S. E. 28; Earhart v. Agnew (1916) — Tex. Civ. App. —, 190 S. W. 1140; Brock v. Brock (1895) 92 Va. 173, 23 S. E. 224; Hilton v. Rahr (1915) 161 Wis. 619, 155 N. W. 116. At least, when not made in the presence of the donee. Dixon v. Labry (1895) 16 Ky. L. Rep. 522, 29 S. W. 21; Kelly v. Home Sav. Bank (1905) 103 App. Div. 141, 92 N. Y. Supp. 578; Moore v. Fingar (1909) 131 App. Div. 399, 115 N. Y. Supp. 1035; Hicks v. Forrest (1850) 41 N. C. (6 Ired. Eq.) 528; Snowden v. Pope (1839) Rice, Eq. (S. C.) 174. Or for the purpose of showing fraud and conspiracy in a suit by creditor. Earhart v. Agnew (1916) — Tex. Civ. App. —, 190 S. W. 1140. And it has been held that the fact that the donor still retains possession of personal property, after having effected a complete gift thereof, does not render declarations by the donor, made after parting with title, admissible to impair the title of the donee. Francoeur v. Beatty (1915) 170 Cal. 740, 151 Pac. 123. So, it has been held that declarations made by a donor of personal property, after he had parted with the property, are inadmissible in evidence against the donee, either to prove fraud or any other fact in avoidance of the gift. Walden v. Purvis (1887) 73 Cal. 518, 15 Pac. 91. G. J. C.

RE ESTATE OF WILLIAM McMURRAY, Deceased.

JOSEPH McMURRAY, Appt.

Pennsylvania Supreme Court—January 8, 1917.

(256 Pa. 233, 100 Atl. 798.)

Executor and administrator — selection from class.

1. The appointment by the register of wills, to whom the authority is committed by statute, as administrator of a decedent's estate, of one from a class from which he is required to select, who is admittedly a fit person to administer, will not be disturbed on appeal because of testimony that decedent had expressed a desire that another of the class should settle the estate.

[See note on this question beginning on page 1245.]

Same — appointment — appeal — reversal.

2. The discretion of the register of wills in appointing an administrator for an estate cannot be disturbed on appeal, except for abuse, although the statute allows an appeal.

APPEAL by the appointee from a decree of the Orphans' Court for Allegheny County reversing a decree of the register of wills granting letters of administration to him on the estate of William McMurray, deceased. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Frank H. Kennedy** and **Charles K. Kobinson**, for appellant:

Where the register of wills appoints a person of the proper class, and where his appointee is in every respect qualified and competent, the orphans' court cannot review his discretion and set aside his appointee on their own judgment as to the relative merits of the appointment.

Brubaker's Appeal, 98 Pa. 21; Levan's Appeal, 112 Pa. 294, 3 Atl. 804; Shomo's Appeal, 57 Pa. 356; Elliott's Estate, 2 Pa. Dist. R. 382; Woods's Appeal, 55 Pa. 332; Wilkey's Appeal, 108 Pa. 567; Able's Estate, 1 Campb. (Pa.) 420; Bowersox's Appeal, 100 Pa. 434, 45 Am. Rep. 387; Gunton's Estate, 3 Kulp, 34; Groves's Estate, 2 Del. Co. Rep. 64; Laukhuff's Estate, 218 Pa. 585, 67 Atl. 874; Padelford's Estate, 189 Pa. 634, 42 Atl. 287; Failor's Estate, 10 Pa. Super. Ct. 253; Stoner's Estate, 21 Pa. Dist. R. 841; Kuntz's Estate, 230 Pa. 566, 79 Atl. 755; Re Wittmer, 233 Pa. 599, 82 Atl. 1023; McCalmont's Estate, 242 Pa. 578, 89 Atl. 687.

Mr. **John Rebman, Jr.**, for appellee Reis:

The register of wills is a judicial officer, and his final decisions, under the statute investing him with official functions, are subject to appeal.

Laukhuff's Estate, 32 Pa. Super. Ct. 538, 218 Pa. 585, 67 Atl. 874.

On appeal from a grant of letters by the register, the orphans' court may, in its discretion, either direct to whom the letters shall be granted, or remit the matter to the register.

Re Neidig, 183 Pa. 492, 38 Atl. 1033; Able's Estate, 1 Campb. (Pa.) 420; Gause's Estate, 1 Chester Co. Rep. 105; Re Ward, 13 Pittsb. L. J. N. S. 394.

The proceedings on an appeal from the register to the orphans' court are de novo, and the court acts upon an agreed statement of facts, or upon evidence adduced at the hearing in the usual way.

Wickersham's Appeal, 75 Pa. 334; Padelford's Estate, 189 Pa. 634, 42 Atl. 287; Failor's Estate, 10 Pa. Super. Ct. 253.

Brown, Ch. J., delivered the opinion of the court:

William McMurray died January 22, 1916, intestate, unmarried, and without issue, leaving to survive him as his next of kin and heirs at law seventeen nephews and nieces, and five grandnieces, representing three deceased nephews or nieces. Joseph McMurray, a nephew, applied for letters of administration on his estate. This was opposed by Edward M. Reis, another nephew, who asked that letters be issued to him. After hearing each of them and their witnesses, the register granted letters to McMurray. On appeal to the orphans' court, the decree of the register was reversed, and it was ordered that letters be issued to Reis. Subsequently, on the application of McMurray, the matter was reargued before the court, but it declined to disturb its decree.

To the register of wills is committed, in the first instance, the duty of granting letters of administration, and he acts judicially in the performance of that duty. From a decree granting or refusing letters an appeal lies to the orphans' court, under § 31 of the Act of March 15, 1832 (P. L. 135, 144). While such an appeal, in a certain sense, brings the matter complained of before the orphans' court de novo, that court does not, strictly speaking, act originally, but is confined to a review of the discretion exercised by an inferior judicial officer, in whom it is vested by § 22 of the Act of March 15, 1832; and if the legal discretion of that officer has not been abused in his appointment of an administrator, his selection cannot be disturbed. Wilkey's Appeal, 108 Pa. 567; Levan's Appeal, 112 Pa. 294, 3 Atl. 804. In Brubaker's Appeal, 98 Pa. 21, Jacob Sheaffer died intestate, leaving as his only heirs at law two married daughters, Elizabeth Brubaker and Lavina Wolf. Letters of administration on his estate were granted by the register to Mrs. Brubaker, the elder daughter. Subsequently the petition of the younger was presented, praying that she be joined with her sister in the administration of their father's estate. This was refused by the register, and thereupon Mrs.

Executor and administrator—appointment—appeal—reversal.

Wolf appealed from his decision to the orphans' court, which sustained her appeal and ordered letters of administration to be issued to her on her father's estate. In reversing this action by the court and affirming what the register did, we said: "When the class primarily entitled to administration consists of several persons, it is the duty of the register to grant letters to such one or more of them as he shall judge will best administer the estate. He may thus grant letters to them all jointly, if they so desire; or, in his discretion, he may select one of them and commit the administration to him alone, to the exclusion of the others; and, when properly exercised, his discretion is not the subject of review, either in the orphans' court or here. He is not bound to select the oldest in preference to the youngest of the class entitled to administration. Primogeniture gives no right of preference, so as to weigh against the wish of the majority of interest, yet, if things are precisely equal—if the scale is exactly poised—being the elder brother would incline the balance. Hood, Exrs. 64; 1 Williams, Exrs. 427. And the same principle applies to the elder of two sisters. . . . 'When administration has been committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant.' Hood, Exrs. 64. In the case before us the two daughters of the intestate were equally competent to administer, and the register might have granted letters to both jointly, if they had so desired; but he was not bound to do so. In the exercise of his discretion he selected Mrs. Brubaker, who requested that letters should be issued to herself alone. Having done so, it was not in his power to revoke the letters thus granted, or to join the younger sister in the administration against the will of the other."

In the case before us it was the duty of the register to grant letters of administration to a nephew of the intestate, if qualified to administer the estate. Did he make an improper selection from the class from which he was required to appoint? This must be determined from what was developed at the hearing before him, for the lower court acted upon it alone, under an agreement of counsel that the appeal was to be heard on the petition for it and answer thereto, if any should be filed, and upon the testimony which had been taken before the register; and no testimony, facts, or pleadings which were not part of the record when the case was originally before the court were taken into consideration by it on the reargument.

Three nephews and one niece testified before the register that they wished letters to be issued to Joseph McMurray, the appellant. Two nephews and one niece testified that they preferred Edward M. Reis, the appellee. Three nephews, one niece, and three grandnieces requested, in writing, that letters be issued to McMurray, but the court below refused to consider these requests, for the reason that they had not been offered in evidence; but it nevertheless took into account similar requests in favor of Reis, made by two nieces and two grandnieces, though they had not been offered in evidence, so far as appears from the record. In view of this, the learned president judge of the court below inadvertently erred in saying that a majority in interest in the estate of the deceased, who had signified a preference as to whom the register should appoint, requested him to appoint Edward M. Reis.

Seven witnesses testified before the register as to the good business habits of Joseph McMurray, and to his fitness to administer the estate of his deceased uncle, and no one was called to contradict them. His competency to administer the estate is admitted by the learned court below, in its opinion refusing to sustain the register. That of-

ficer, who had original jurisdiction in the matter, selected from the members of the proper class one admittedly competent to administer the estate; and against whom no objection was made by a majority of those interested in it. But, notwithstanding all this, the learned court below reversed the register and directed that letters be issued to Reis, because sufficient weight had not been given to the testimony that the decedent had consulted him in business transactions and had expressed a desire that he should settle his estate. In exercising the discretion given to him the register was not required to give controlling weight to this alleged declaration of the intestate. If his real desire had been that the appellee should administer his estate, he could have expressed such desire in a single written line, and that nephew would have become his personal representative after his death. This expressed desire may have been taken into consideration by the register in connection with all the other testimony before him; but, be this as it may, he granted letters to one from a class from which the statute required him to select; his appointee was admittedly a fit person to administer the estate, and, with no superior legal right in the appellee, or anyone else, to administer, the letters granted to the appellant ought not to have been vacated.

Same—selection from class.

The assignments of error are sustained, the decree of the Orphans' Court is reversed and set aside, and the decision of the register is affirmed, all costs below and on this appeal to be paid by the appellee.

A petition for rehearing having been granted, the following **Per Curiam** response was handed down on March 23, 1917 (257 Pa. 321, 101 Atl. 646):

After the reargument of this appeal, ordered upon the application of the appellee, we are still quite clear that the learned court below erred in substituting its discretion for that of the register, which had not been improperly exercised.

Our decree of January 8, 1917 (McMurray's Estate, 256 Pa. 233, ante, 1242, 100 Atl. 798), will therefore, not be disturbed.

ANNOTATION.

Selection of administrator from among members of class equally entitled.

I. Introductory, 1245.
II. Widow or next of kin, 1247.
III. Amount of interest, 1248.
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I. Introductory.

As the title implies, preferences depending upon specific statutory provisions are beyond the scope of the note.

It is not intended to include cases which merely hold that the court below had a discretion which does not appear to have been abused, and which indicate no special reason for the preferment of the appointee.

The theory of administration is that it ought to follow the right to the property, unless there is some particular objection. This note is in narrow compass, as it relates to selection among the members of classes, and does not include the passing over of

one class for another; so that the strongest cases of selection are not to be looked for here. For if one member of a class will be preferred to persons in a preceding class, a fortiori he will be preferred to those in his own class. It is not intended to include cases where the preference is statutory. The English cases here cited are illustrative rather than exhaustive. In that country so much is left to the court that the matter is largely discretionary, and yet there are rules which have nearly the force of law.

Generally speaking, by statute or practice, administration seeks out the widow, next of kin, and creditors; prefers the larger interests, males to females, relatives of the whole blood to those of the half blood, and residents to nonresidents.

Discretion in general.

Between equality of relationship and interest the court has discretion. Brubaker's Appeal (1881) 98 Pa. 21.

As between the appointee of a sister and one of the children of a deceased sister, the court has discretion whom to appoint. Atkins v. McCormick (1857) 49 N. C. (4 Jones, L.) 274.

In a case where the next of kin were two brothers, a sister, and a son of a deceased sister, the court said: "None have a legal preference; the selection rests with the discretion of the court; that discretion, however, is not to be arbitrarily or capriciously assumed, but to be a legal discretion, governed by principle and sanctioned by practice; in exercising it, the court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the court, then, is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution; the primary object is the interest of the property." Warwick v. Greville (1809) 1 Phillim. Eccl. Rep. (Eng.) 123.

In Jackson v. Jackson (1897) 101 Ga. 132, 28 S. E. 608, it was said: "The two contestants being each next of kin to the intestate, neither had any advantage of the other by reason of the nearness of his relationship by blood to the decedent; and each having been selected for administrator by the same number of the distributees of the estate, the case was one where no person had been 'selected, in writing, by a majority of those interested as distributees of the estate.' In such a case 'the ordinary may exercise his discretion in selecting the one best qualified for the office.' Civ. Code, § 3367, ¶ 4. The case being tried on appeal from the court of ordinary, it was the right of the jury to exercise this discretion, and to select from these two applicants the one whom they, under the evidence submitted, deemed best qualified for the office."

Where the statute provides that, "if there be two or more beneficiary heirs of age and present in this state, the judge shall select one or two, whom he shall consider the most solid, for the administration of the succession," the court said: "This article leaves the two questions whether he shall appoint one or two of the heirs, and as to the solidity of the applicants, largely to the discretion of the judge. The judge in determining this question of solidity should look to the business capacity, experience, property, integrity, and everything else that goes to make up the personal fitness for the appointment, of the respective parties." Chaler's Succession (1887) 39 La. Ann. 308, 1 So. 820.

In Garrison v. Cox (1886) 95 N. C. 353, the court said that the statute expressly provides that, where the next of kin are of equal degree, the clerk may appoint one or more of them, in his discretion. "He ought, of course, to appoint the one best qualified, but if he selects one fit and competent, his exercise of discretion is not reviewable."

In Nebraska the whole matter seems largely one of discretion in the court. Thus, where the statute provided that administration should be granted to "the widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or

next of kin may request to have appointed, if suitable and competent to discharge the trust," the appellate court refused to interfere, where the lower court appointed a stranger, on the application of one of the next of kin, although a majority of the next of kin asked for the appointment of one of themselves. Re Scott (1906) 76 Neb. 28, 106 N. W. 1003, 107 N. W. 1004.

And where two of the next of kin asked for the appointment of a third person, and the third next of kin objected that the nominee was opposed to a claim of hers, and asked for the appointment of some other person, making suggestions, or any other good and reliable citizen of the county, the action of the court in appointing a trust company not nominated was not disturbed. Re Anderson (1918) — Neb. —, 166 N. W. 261.

II. Widow or next of kin.

In England and some other jurisdictions, where there is no statutory preference between the widow and the next of kin, the courts prefer the widow. Thus, for example, in Webb v. Needham (1823) 1 Addams, Eccl. Rep. (Eng.) 494, the court preferred a widow over a brother claiming to be a creditor.

So, the court preferred the widow over the next of kin and heir, although he alleged that a portion of the real estate would have to be sold to pay the debts. Peat v. Peat (1871) 19 Week. Rep. (Eng.) 856, 25 L. T. N. S. 108, where the court said: "There ought to be a very strong case to justify the exclusion of the widow from the administration."

In Ihler's Goods (1873) L. R. 3 Prob. & Div. (Eng.) 50, Hannen, J., said: "In this case I was asked to pass over the widow, and to grant administration to one of the children, on the ground that during the husband's lifetime a decree of judicial separation, by reason of cruelty, had been pronounced against the wife. It is sufficient for me to say that I cannot pass her over on that ground without giving her an opportunity of showing cause against the application. At the present moment I am disposed to think that there is no sufficient reason why the widow should be passed over, inasmuch as she has not done anything by which her honesty can be called in question."

In Lynch v. Lively (1861) 32 Ga. 575, it was held, where the alleged creditor was a brother, that in a contest for the administration between the widow who was the sole heir at law, and a creditor of the intestate, whose debt is disputed, or who sets up a claim to property of which the intestate died seised, and a fortiori, where he claims in both characters, the widow will be preferred, notwithstanding the alleged insolvency of the estate.

Where there were no descendants, and there was no statute preferring the widow, the court appointed her as entitled to the whole estate. Swan v. Swan (1859) 3 Head (Tenn.) 163.

The preference of the widow is emphasized by the strength of the reasons in some of the cases excluding her. Thus, missing widows have been passed over where they had deserted their husbands, or eloped. Fleming v. Pelham (1830) 3 Hagg. Eccl. Rep. (Eng.) 217, note; Anderson's Goods (1864) 3 Swabey & T. 489, 33 L. J. Prob. N. S. 149, 11 L. T. N. S. 21; Stevens's Goods, L. R. [1898] P. (Eng.) 126; Boddan's Goods (1873) 28 L. T. N. S. (Eng.) 368.

Of course a wife divorced for her own fault will be passed over; she has no interest. Nares's Goods (1888) L. R. 13 Prob. Div. (Eng.) 35.

A widow was passed over where she had, by marriage settlement, barred herself of all interest. Walker v. Carless (1758) 2 Lee, Eccl. Rep. (Eng.) 560.

A son has been preferred to a nonresident widow. Radford v. Radford (1837) 5 Dana (Ky.) 157.

Where the widow had opposed an intestacy, and had adverse claims to the estate, she was passed over for a daughter. Paine Estate (1916) 33 Times L. R. (Eng.) 98, 61 Sol. Jo. 116.

It has been held that the widow was not entitled to a preference over the husband of a minor daughter, where the statute provided for administration by the husband, or wife, or the

distributees of the estate. Grantham v. Williams (1838) 1 Ark. 270.

See also infra, XVI. and XVII.

III. Amount of interest.

Among the members of a class the strongest ground for preference is the preponderance of interest, either in person or by recommendation. Cartright's Case (1678) 1 Freem. C. L. Rep. 258, 89 Eng. Reprint, 185; Warwick v. Greville (1809) 1 Phillim. Eccl. Rep. (Eng.) 123; Williams v. Wilkins (1812) 2 Phillim. Eccl. Rep. (Eng.) 100; Budd v. Silver (1813) 2 Phillim. Eccl. Rep. (Eng.) 115; Iredale v. Ford (1859) 5 Jur. N. S. (Eng.) 474; Ellison v. McCormick (1866) 14 Week. Rep. (Eng.) 742; Langan v. Bowman (1849) 12 Smedes & M. (Miss.) 715; Cramer v. Sharp (1892) 49 N. J. Eq. 558, 24 Atl. 962; Taylor v. Delancy (1805) 2 Cai. Cas. (N. Y.) 143; Sargent v. Corbley (1905) 28 Ohio C. C. 125; Re Bieber (1849) 11 Pa. 157; Shomo's Appeal (1868) 57 Pa. 356; RE MCMURRAY (reported herewith) ante, 1242.

Thus, in Cartright's Case (Eng.) supra, where there were four children, one of age, administration was granted to the mother and guardian of the other three on the ground that she represented the preponderating interests under the Statute of Distributions.

So, the guardian of the children of one brother was preferred over the guardian of three of the five children of another brother, in Langan v. Bowman (1849) 12 Smedes & M. (Miss.) 715.

So, the preponderance of interests will be preferred over age. Warwick v. Greville (1809) 1 Phillim. Eccl. Rep. (Eng.) 123; Shomo's Appeal (1868) 57 Pa. 356.

It will be seen that in RE MCMURRAY it was held not to be an improper exercise of discretion to appoint the candidate of the larger interests.

The court's appointment of a son, instead of a grandson whose interest was small, was not disturbed in Martin's Succession (1858) 13 La. Ann. 557.

But the rule is not absolute. Thus, the court appointed the oldest son of his mother in preference to another son nominated by five sixths of the children, where the oldest son was already trustee of the father's will, under which the mother had had a life interest. Stainton's Goods (1871) L. R. 2 Prob. & Div. (Eng.) 212, 40 L. J. Prob. N. S. 25, 24 L. T. N. S. 320, 19 Week. Rep. 567.

And it has been held that there is no reason to remove the appointee of the elder brother and appoint that of the younger brother and the two sisters, when all four renounced, as there was discretion to make such an appointment. Re Saville (1911) 156 N. C. 172, 72 S. E. 220.

IV. Degree.

The nearest of kin is preferred.

The daughter should be preferred to the eldest son of the eldest son. Lee v. Sedgwick (1772) 1 Root (Conn.) 52.

A niece is preferred to a grandnephew, as of nearer kin to the intestate. Re Hawley (1902) 37 Misc. 667, 76 N. Y. Supp. 461.

V. Males.

Males should be preferred to females. Re Hill (1897) 55 N. J. Eq. 764, 37 Atl. 952.

In Chittenden v. Knight (1758) 2 Lee, Eccl. Rep. (Eng.) 559, a son was preferred to a married daughter, although it was claimed that he had intermeddled with the estate.

The elder brother favored by a younger brother was appointed over their sister, though accused of intemperance, which he denied. Ellison v. McCormick (1866) 14 Week. Rep. (Eng.) 742.

But the rule is not absolute. Thus, the court preferred a niece as the first applicant, over a nephew. Cordeux v. Trasler (1865) 11 Jur. N. S. (Eng.) 587, 4 Swabey & T. 48, 34 L. J. Prob. N. S. 127.

The majority-of-interests rule will overcome the preference of a male over a female. Iredale v. Ford (1859) 5 Jur. N. S. (Eng.) 474, 1 Swabey & T. 305, 7 Week. Rep. 462.

VI. The whole blood.

The whole blood is preferred over the half blood. Thus, administration

was granted to a brother of the whole blood of the intestate, against the wish of two brothers of the half blood, asking the appointment of one of them, all being equal distributees. Mercer v. Morland (1758) 2 Lee, Eccl. Rep. (Eng.) 499.

But in Brown v. Wood (1647) Aleyn, 36, 82 Eng. Reprint, 902, it seems to have been considered that the half blood was equally entitled with the whole blood.

VII. Residents.

The question whether nonresidence disqualifies one as administrator is, of course, beyond the scope of the note.

Residents are preferred to nonresidents. Thus, where the statute did not exclude nonresidents, but it was provided that if an executor removed his residence from the state a vacancy would be deemed to have occurred, it was held proper to appoint a resident mother instead of a nonresident widow. O'Brien's Estate (1884) 63 Iowa, 622, 19 N. W. 797.

And under a statute declaring that the court may vacate the letters upon removal from the state, the court took the view that a nonresident was incompetent. Sarkie's Appeal (1844) 2 Pa. St. 157.

It was held in Frick's Appeal (1886) 114 Pa. 29, 6 Atl. 363, that, though the letters may not be void, no nonresident has a right to the administration.

In Radford v. Radford (1837) 5 Dana (Ky.) 157, a son was preferred to a nonresident widow.

It was held in Heron's Estate (1865) 6 Phila. (Pa.) 87, that two nonresident sisters may not nominate a stranger, against a resident sister.

But nonresidence is not, as a rule, a bar to the grant of letters. Pickering v. Pendexter (1865) 46 N. H. 69; Re Selling (1888) 17 N. Y. S. R. 833, 2 N. Y. Supp. 634; Chicago, B. & Q. R. Co. v. Gould (1884) 64 Iowa, 343, 20 N. W. 464.

In Pickering v. Pendexter (N. H.) supra, the court affirmed a decree of the judge of probate, granting administration to a nonresident sister, against a resident brother, who claimed rights adverse to the heirs and creditors, where the statute provided that administration may be granted to any of the next of kin, although it also provided that "no person not an inhabitant of this state shall be so appointed, by reason of any right, to such trust, unless other circumstances in the opinion of said judge render the same proper."

VIII. Age.

The elder should be preferred to the younger. Re Hill (1897) 55 N. J. Eq. 764, 37 Atl. 952.

The register is not compelled to prefer the elder son, but age may incline the balance, and the selection of the elder will not be disturbed unless personal disqualification is shown. Levan's Appeal (1886) 112 Pa. 294, 3 Atl. 804.

IX. Adults and minors.

In Cartright's Case (1678) 1 Freem. C. L. Rep. 258, 89 Eng. Reprint, 185, where there were four children, one of age, administration was granted to the mother and guardian of the other three, on the ground that she represented the preponderating interests under the Statute of Distributions.

Adult relatives are preferred to guardians of minor relatives, where the statute provides that, if any of the persons entitled are minors, administration shall be granted to their guardians, and also provides that, if one of the persons who would be otherwise entitled shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons. Wickwire v. Chapman (1853) 15 Barb. (N. Y.) 302; Cottle v. Vanderheyden (1870) 11 Abb. Pr. N. S. (N. Y.) 17.

But it was held that, as between a brother and the guardian of a minor brother, it was no error to appoint the guardian administrator, where the statute provided that "if any person entitled to administration is a minor, . . . letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court;" and that where there are several persons equally entitled "the court may grant letters to one or more of them." In Re

Turner (1904) 143 Cal. 438, 77 Pac. 144.

Where the next of kin was an infant, in a contest between her guardian, who was a cousin of decedent, and her maternal uncle, who was a brother-in-law of decedent, it was held that there was no error in charging the jury that neither party had a legal right, that the appointment was very much in the discretion of the jury, and that they might consider the fact of guardianship. Watson v. Warnock (1861) 31 Ga. 694, where the jury found in favor of the guardian.

Where the court appointed as administrator de bonis non the decedent's brother-in-law, who was the brother of the former administratrix and guardian of decedent's minor children, the appellate court declined to interfere, although the decedent's sister renounced in favor of her son, as the matter was peculiarly discretionary. Byrd v. Gibson (1837) 1 How. (Miss.) 568.

There is a discretion in choosing between the guardians of two minor heirs. Boudreaux's Succession (1890) 42 La. Ann. 296, 7 So. 453.

It may be noted that in Magrath's Goods [1896] 1 Ir. R. 203, an insolvent decedent left children of three deceased sisters, A, B, and C., the children of C being adult married women residing abroad, and the others being minors, the two children of A being remaindermen of real property in which the decedent had a life estate, and who therefore were interested in having the back taxes and charges on it paid. The court granted administration to the guardian of the children of A, on behalf of the elder minor.

X. Interests conflicting with duty.

That one of the applicants has interests which might conflict with his duty is a reason against his appointment. Pickering v. Pendexter (1865) 46 N. H. 69; Moore v. Moore (1827) 12 N. C. (1 Dev. L.) 352; Spencer's Estate (1897) 7 Pa. Dist. R. 216; Stines v. Brock (1913) 185 Ill. App. 22; Davis v. Swearingen (1876) 56 Ala. 539.

The possible conflict between the duties of the position and interest may also have had some weight in Budd v. Silver (1813) 2 Phillim. Eccl. Rep. (Eng.) 115; Taylor v. Delancy (1805) 2 Cai. Cas. (N. Y.) 143; Bieber's Appeal (1849) 11 Pa. 157; Paine's Estate (1916) 33 Times L. R. (Eng.) 98, 61 Sol. Jo. 116.

In Justice v. Wilkins (1911) 251 Ill. 13, 95 N. E. 1025, the court said, obiter: "In passing upon the application of two or more persons equally entitled to administer, a large discretion must necessarily be left to the court appointing. The office of administrator is one of trust and confidence, and should not ordinarily be committed to one, if any choice is permitted by the statute, who has a special interest, opposed to the interests of the other heirs."

But the court will not set aside the appointment of a son of which another son approved, at the request of a third, merely because there might have been a loan or advancement by the decedent to the person appointed. Groves's Estate (1884) 2 Del. Co. Rep. (Pa.) 64.

On a contest between two brothers it was held to be error to refuse to admit evidence that one had already received his full share of the estate by way of advancement, and was setting up an adverse claim to the larger part of the property of which the father died possessed. The court observed, without deciding the point, that there were strong reasons for saying that the absence of interest amounted to a legal disqualification. Moody v. Moody (1859) 29 Ga. 519.

XI. Successful contestant of will.

A daughter who had successfully opposed a will was granted letters instead of the widow. Dew v. Clark (1828) 1 Hagg. Eccl. Rep. (Eng.) 311; Paine's Estate (1916) 33 Times L. R. (Eng.) 98, 61 Sol. Jo. 116. (In the latter case the widow had claims adverse to those of the daughter.)

But in Coppin v. Dillon (1833) 4 Hagg. Eccl. Rep. (Eng.) 361, the court granted administration to the younger daughter, whose application was joined by the children of a deceased daughter, against the application of the elder daughter who had success-

fully opposed an alleged will, the court being moved principally by the confidence shown by the deceased in the husband of the appointee.

XII. Personal character.

A man of wicked and worthless character will not be appointed over his sister. Re Selling (1888) 17 N. Y. S. R. 833, 2 N. Y. Supp. 634.

XIII. Applicants—first applicant.

The court has no discretion to ignore the applicant and appoint a nonapplicant of equal standing, when the statute prefers first the husband or wife, and then such others as are next entitled to distribution, or one or more of them, as the court shall judge will best manage and improve the estate. Halley v. Haney (1826) 3 T. B. Mon. (Ky.) 141.

In Barrett v. Barrett (1913) 22 Wyo. 281, 138 Pac. 865, 141 Pac. 95, it was held to be error where there were three sons and a daughter, and two competent sons applied, to refuse to appoint them and to suggest that their sister apply, and then to appoint her.

In Cordeux v. Trasler (1865) 11 Jur. N. S. (Eng.) 587, 4 Swabey & T. 48, 34 L. J. Prob. N. S. 127, the court preferred a niece, as the first applicant, over a nephew.

XIV. Debtors and bankrupts.

Between those of equal right the court should not appoint a debtor, even though he deposits the amount of his alleged debt in court. Lindler v. Goldenbow (1832) 4 La. 143.

The nominee of most of the interests was appointed against the eldest son, who was claimed to be indebted to the estate to an amount equal to 75 per cent thereof. Bieber's Appeal (1849) 11 Pa. 157. See also Ellmaker's Estate (1835) 4 Watts (Pa.) 34, infra, XIII.

Between two of equal degree of relationship, one having been twice a bankrupt, it being said that the second time there was no dividend, the court appointed the other. Bell v. Timiswood (1812) 2 Phillim. Eccl. Rep. (Eng.) 22. In Iredale v. Ford (1859) 5 Jur. N. S. (Eng.) 474, between a brother twice a bankrupt, the last time paying no dividend, and three sisters desiring that two of them be appointed, the court appointed the two sisters, chiefly as supported by the majority interests.

XV. Creditors.

The greater creditor is preferred. Kearney v. Whitaker (1756) 2 Lee, Eccl. Rep. (Eng.) 324; Smith's Goods (1892) 67 L. T. N. S. (Eng.) 503.

In Re Wooten (1904) 114 Tenn. 289, 85 S. W. 1105, the appellate court sent the case back with these instructions: "In making said appointment, the next of kin will have preference, unless unfit for the office; next, the appointee of the next of kin, unless unfit; next, the largest creditor; and, in default of these, such person as the county judge may deem most suitable and proper, in accord with the rules herein laid down."

The administrator of the largest creditor of A should receive letters on A's estate, instead of the nominee of the widow, although he was a creditor and his appointment was asked by a preponderance of creditors, where the statute provides that, in default of the previous classes, the greatest creditor or creditors shall receive the appointment. Re Ostendorff (1882) 17 S. C. 22.

But under the Louisiana statute, between creditors, the first applicant is appointed, irrespective of amount of claims. Béraud's Succession (1869) 21 La. Ann. 666. Or, under an earlier statute, the first two applying. Turner v. Kirkman (1837) 11 La. 289.

A judgment creditor was preferred over other creditors in granting administration with the will annexed, in Carpenter v. Shelford (1758) 2 Lee, Eccl. Rep. (Eng.) 502.

As between two nephews and a widow, the court declined to disturb the ruling of the trial court in favor of one of the nephews, which said: "The applicant . . . is a creditor of the estate. He is fully capable and able, morally, socially, financially, and otherwise, to administer the estate. He is well acquainted with the affairs of the deceased, who resided with him for over ten years, and up to the time of his death, and he stood closer to

the deceased, both as to affection and protection, than any other heir, and for these reasons, coupled with others, he is entitled to the appointment." Theriot's Succession (1906) 116 La. 26, 40 So. 519. (In Louisiana the widow is ordinarily not entitled to administer, but she claimed her rights in community and otherwise.)

But it has been considered in at least one case that it is a detriment to a next of kin that he is also a creditor. Webb v. Needham (1823) 1 Addams, Eccl. Rep. (Eng.) 494.

A statutory power to "grant administration to one or more of his creditors, or to any other person," enables the court to appoint one not a creditor. Butcher v. Kenst (1909) 65 W. Va. 384, 64 S. E. 967. So, where the statute provides that, in a certain case, "the court may grant administration to a creditor, or to any other person, in the discretion of the court," the court is not required to appoint a creditor. Thompson v. Archie (1914) 158 Ky. 590, 165 S. W. 977.

In Bennett v. Bennett (1909) 134 Ky. 444, 120 S. W. 372, it was observed that it was not necessary to the appointment that the appointee should have been a creditor, but the fact that he was added to his right.

The creditor petitioning has not the right to dictate the appointment, where the statute provides that in a certain case the administration may be granted to one or more of the principal creditors, if any such are competent and willing to take it. McMeekin v. Saginaw Probate Judge (1907) 150 Mich. 354, 114 N. W. 241.

XVI. Joint administration.

The court never forces a joint administration. Bell v. Tiniswood (1812) 2 Phillim. Eccl. Rep. (Eng.) 22; Warwick v. Greville (1809) 1 Phillim. Eccl. Rep. (Eng.) 123.

The court may not compel the widow to have a stranger joined with her. Williams v. Williams (1904) 24 App. D. C. 214. The court should not compel the widow to be joined with the father of decedent. M'Gooch v. M'Gooch (1808) 4 Mass. 347.

The courts are opposed to forcing joint administrations. Brubaker's Appeal (1881) 98 Pa. 21.

In Browning's Goods (1861) 2 Swabey & T. (Eng.) 634, 31 L. J. Prob. N. S. 161, 7 L. T. N. S. 217, 10 Week. Rep. 96, where the decedent left a widow, a sister, and nephews and nieces entitled to distribution, the court held that it could not join the widow with a nephew (but only with the sister, as she was next of kin), although all parties consented.

So, the court declined, though the widow requested it, to join with her a brother of decedent and guardian of his five minor children who had assisted the decedent in his business. Richards's Goods (1871) L. R. 2 Prob. & Div. (Eng.) 216.

It is error to force upon the daughter the son of a deceased son, when the statute gives a preference to those of the next of kin entitled to the residue of the personal estate, or to a share, or shares, therein after payment of debts, "who are in the nearest degree of consanguinity with the decedent." Gyger's Estate (1870) 65 Pa. 311.

Where there were a widow, a son, and three daughters, and the widow renounced in favor of a daughter, it was error to appoint the three daughters, as only the one nominated by the widow should have been appointed. Whether the son renounced or objected does not appear, though possibly it may be intended to suggest that he joined the widow. Swart's Estate (1899) 189 Pa. 71, 41 Atl. 1000.

The court affirmed a decree of the judge of probates, granting administration to the eldest daughter alone, on the application of the two other daughters, there being three sons, W. G. and C., of whom W. desired to be joined as administrator, and, pending the appeal, asked that he be joined with whoever should be appointed. The petitioning daughter, and G. and C., objected to W., alleging that he was at variance with the rest of the family, that it would be to his interest to delay the settlement of the estate, that he had not time, and was difficult of access. Taylor v. Delancy (1805) 2 Cai. Cas. (N. Y.) 143.

But in Re Able (1869) 1 Campb. (Pa.) 420, the court joined two opposing sisters, saying, inter alia: "They are of the same class and equally competent, so far as education and business habits enter into competency. All things else being equal, it is a proper exercise of discretion to prefer the eldest. In this instance the youngest had lived for many years with the decedent, and was still living with him at the time of his death. She has also partially administered the estate, and presents the recommendation of a majority of the interest in her favor; . . . but the eldest should not, for slight reasons, be excluded."

Where a stranger had taken out letters, it was held he could not complain that later the widow was joined with him. Read v. Howe (1862) 13 Iowa, 50.

XVII. Administration with the will annexed.

In administration with the will annexed, as in ordinary administration, the rule is that the right should follow the right to the property. Consequently, when there is a will, the law in general looks to the residuary legatees or the principal legatees. Thus, where other things are equal, the beneficiary having or favored by the greater interest should be preferred. Elwes v. Elwes (1728) 2 Lee, Eccl. Rep. (Eng.) 573; Tucker v. Westgarth (1824) 2 Addams, Eccl. Rep. (Eng.) 352; Sawbridge v. Hill (1871) L. R. 2 Prob. & Div. (Eng.) 219; Quintard v. Morgan (1885) 4 Dem. (N. Y.) 168; Horskins v. Morel (1806) T. U. P. Charlt. (Ga.) 69.

In Horskins v. Morel (Ga.) supra, the court, in granting administration with the will annexed, preferred the woman, between a man and woman of equal affinity, as she had a greater interest under the will saying: "It is laid down that administration must be granted where the estate ought legally to go. Ognel's Case (1587) 4 Coke, 51, 76 Eng. Reprint, 1005, cited in Palmer v. Allicock (1683) 3 Mod. 63, 87 Eng. Reprint, 40; Toller, Exrs. 85–87. And, farther, the reason why administration is granted to the next of kin is the presumption that the deceased intended to prefer him; and this presumption is destroyed where there is a residuary legatee. 11 Vin. Abr. 92, 182, note; Wood, Inst. 349. If the executor refuse or die intestate, administration is to be granted to the residuary legatee, in exclusion of the next of kin. Pierce v. Perks (1767) 1 Sid. 280, 82 Eng. Reprint, 1105; Thomas v. Butler (1672) 1 Ventr. 219, 86 Eng. Reprint, 147, cited in 4 Bacon, Abr. 68 et vid. Godolph. 230."

The court preferred the son as administrator with the will annexed over the guardian of the three illegitimate daughters where the son had a larger interest under the will than they, although he had unsuccessfully opposed the will. Sawbridge v. Hill (1871) L. R. 2 Prob. & Div. (Eng.) 219, 40 L. J. Prob. N. S. 27, 24 L. T. N. S. 320, 19 Week. Rep. 705.

The court appointed a stranger on the request of five daughters, against the request of the other daughter that her husband be appointed, he being largely indebted to the estate, as temporary administrator pendente lite over the will. Ellmaker's Estate (1835) 4 Watts (Pa.) 34.

In Job's Estate (1903) 23 Pa. Super. Ct. 611, the court reversed the appointment of a daughter against whom the testator had been carrying on a law suit, and directed the appointment of the nominee of other next of kin.

So, letters were granted to the guardian of one of the residuary legatees, one other of such legatees consenting thereto (Re Lasak (1890) 30 N. Y. S. R. 356, 8 N. Y. Supp. 740); to the sole party interested, against the executor of the deceased executrix who had had a life interest (Wetdrill v. Wright (1814) 2 Phillim. Eccl. Rep. (Eng.) 243); to a sister legatee over a brother, although there was intestacy as to the residue (Dobson v. Cracherode (1756) 2 Lee, Eccl. Rep. (Eng.) 326), and to an executrix of a deceased executor and trustee with a possible interest, instead of the widow of the first testator. Thomas v. Baker (1753) 1 Lee, Eccl. Rep. (Eng.) 373.

When a nominated executor refuses or fails to qualify, and no relation of the testator applies for administration

within the time prescribed by the statute, it is in the discretion of the county judge as to who should receive letters of administration, and an appointment upon the motion of the nominated executor, who is the principal devisee, is a proper exercise of the discretion reposed in the county judge. Womack v. Watson (1883) 4 Ky. L. Rep. 907.

The beneficiary of a trust is preferred over his trustee. Doddicott v. Dalzeel (1756) 2 Lee, Eccl. Rep. (Eng.) 294; Fawkener v. Jordan (1756) 2 Lee, Eccl. Rep. (Eng.) 327; Re Roux (1887) 5 Dem. (N. Y.) 523. Thus, where the testator gave his residuary estate, one eighth to each of seven of his children, and the other one eighth in trust for the other child, the latter was equally entitled to letters with his brothers and sisters, and it was no error to appoint him alone. Re Treadwell (1902) 37 Misc. 584, 75 N. Y. Supp. 1058. This case cites and is apparently sustained by the briefly reported case of Re Thompson (1861) 33 Barb. (N. Y.) 334, affirmed in (1864) 28 How. Pr. 581.

So, in Re Wood (1891) 27 Abb. N. C. 329, 17 N. Y. Supp. 354, it was held that, in case of administration with the will annexed, the preference of males over females in ordinary administration did not apply, and that cestuis que trustent were legatees, and as such entitled to letters.

The court considered that it was not departing from the general rule in Hutchinson v. Lambert (1825) 3 Addams, Eccl. Rep. (Eng.) 27, where a testator gave his property to his executor, one fifth for his son absolutely, and four fifths in trust for his daughters for life, his executors being the trustees, and one of them his son, who was the surviving executor. On the son's death, it was held that his widow ought to be preferred as administratrix of his father's estate, over two of the daughters.

But where the residuary estate was given in trust for the widow, and after her death was given absolutely to the brothers and sisters, and the statute provided for granting administration to one or more of the residuary legatees, the court, in appointing a brother on the application of the brothers and sisters, considered that the widow was not a residuary legatee, but if so, that, as she was a female and cestui que trust, the preference should go to the son. Re Drowne (1888) 1 Connoly, 163, 3 N. Y. Supp. 279.

In Dampier v. Colson (1812) 2 Phillim. Eccl. Rep. (Eng.) 54, the court refused to join a daughter to the two sons, all having residuary interests, particularly as her share was in trust to the sons.

Between those of a class, in case of administration with the will annexed, the court has discretion to select. McCaughy v. Byrne (1911) 115 Md. 85, 80 Atl. 653.

When the statute is silent as between those of a class, the court in its discretion must select, and no appeal will lie against its decision. Kailer v. Kailer (1900) 92 Md. 147, 48 Atl. 712; Bowie v. Bowie (1890) 73 Md. 232, 20 Atl. 916, holding that the court's selection of a younger son before an older son should not be disturbed.

Between two principal legatees, the court preferred one whom the testator had declared she desired to act, and who was a niece and a resident over a nonresident not of testatrix's blood. Re Powell (1886) 5 Dem. (N. Y.) 281.

Between a niece and a great-nephew, both belonging to the same class of those entitled to administration with the will annexed, the court appointed the great-nephew on account, apparently, of his greater business experience, and of the facts that the niece would have to account to the decedent's estate as administratrix of another estate, and that she had acted as attorney in fact of the decedent. Re Davis (1905) 48 Misc. 489, 96 N. Y. Supp. 1106.

In Shirley's Goods (1892) 66 L. T. N. S. (Eng.) 590, the widow was passed over, where she was hostile to the next of kin, and was about to go abroad.

Where there was an infant daughter, the court declined to pass over the widow of the deceased for his mother, on general allegations of looseness

and indebtedness. Cory's Goods (1901) 84 L. T. N. S. (Eng.) 270.

A judgment creditor was preferred over other creditors, in Carpenter v. Shelford (1758) 2 Lee, Eccl. Rep. (Eng.) 502.

XVIII. Miscellaneous.

The view has been taken in a case in Maryland that the renunciation of a party makes the son of that party next of kin, where the statute provided that, on a declination, "the court shall proceed as if such person were not entitled." Thus, where, pending a contest over a will, administration was asked for by the son of a deceased sister, two other sisters renounced and asked for the appointment of their two respective sons, it was held that the three applicants were all equally next of kin after the renunciation aforesaid, and that the court in its discretion had a right to appoint the sons of the living sisters, the court considering that the renunciation had the same effect as the death of the persons renouncing. Lewis v. Logan (1913) 120 Md. 329, 87 Atl. 750.

In Thompson v. Hucket (1834) 2 Hill, L. (S. C.) 347, the court revoked the appointment of a stranger, and appointed the nominee of the nonresident widow.

Where the mother was directly interested equally with the father, her right to administer was sustained, on objection by a third party. Rajnowski v. Detroit, B. C. & A. R. Co. (1889) 74 Mich. 20, 41 N. W. 847.

In Re Brown (1917) 204 Ill. App. 596, the facts are not sufficiently reported. B. B. B.

GRATTAN WALKER, Appt.,

v.

STATE OF INDIANA.

Indiana Supreme Court—October 13, 1916.

(185 Ind. 240, 113 N. E. 753.)

Appeal — exceeding time limit for argument as error.

It is not reversible error, as a denial of the constitutional right to be heard by counsel, to permit the prosecuting attorney to exceed the allotted time in his closing argument without according the same privilege to counsel for accused, if the jury would not have been reasonably warranted by the evidence in reaching a conclusion other than that of defendant's guilt so that the only question open was the penalty to be affixed, and it does not appear that the prosecuting attorney discussed that question in his closing argument.

[See note on this question beginning on page 1257.]

APPEAL by defendant from a judgment of the Criminal Court for Marion County convicting him of keeping a gaming house. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Charles C. Pettijohn** and **Clyde E. Baker**, for appellant:

In this denial or argument there was manifest harmful error, and the denial to the appellant of a substantial right guaranteed him by state and Federal Constitutions.

Reed v. State, 141 Ind. 116, 40 N. E. 525; Stalcup v. State, 146 Ind. 270, 45 N. E. 334.

Messrs. **Evan B. Stotsenburg**, Attorney General, **Omer S. Jackson** and **Wilbur T. Gruber**, for the State:

Limiting the time of argument of counsel to the jury is within the sound discretion of the trial court.

Priddy v. Dodd, 4 Ind. 84; Cory v. Silcox, 5 Ind. 370; Baldwin v. Burrows, 95 Ind. 81; Cromer v. State, 21 Ind. App. 502, 52 N. E. 239.

The discretion of the trial court as to how the argument shall be conducted by counsel in a criminal case will not be disturbed on appeal, unless clearly abused.

Combs v. State, 75 Ind. 215; Adams v. State, 179 Ind. 47, 99 N. E. 483, and cases cited.

No showing is made by the record that defendant was harmed by the failure of his counsel to address the jury for the same length of time as the prosecuting attorney, and a reversal or a motion for a new trial cannot be predicated on harmless error.

Campbell v. State, 150 Ind. 74, 49 N. E. 905; Stalcup v. State, 146 Ind. 270, 45 N. E. 334; Reed v. State, 141 Ind. 116, 40 N. E. 525.

Errors in the conduct of the argument by counsel to the jury, in a criminal case, which could not have influenced the jury, are not grounds for reversal.

Boyle v. State, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; Heyl v. State, 109 Ind. 589, 10 N. E. 916; Schondel v. State, 174 Ind. 734, 93 N. E. 67; White v. State, 37 Ind. App. 95, 76 N. E. 554.

Morris, J., delivered the opinion of the court:

Appellant, on a trial by jury, was convicted of keeping a gaming house. The verdict and judgment fixed a fine of $50, and imprisonment at the state penal farm for thirty days.

It is shown by a bill of exceptions that at the conclusion of the evidence the court suggested that fifteen minutes on each side be allowed for argument, and that the prosecuting attorney and defendant assented; that thereupon the prosecuting attorney addressed the jury for a period of twelve minutes; that defendant's counsel then spoke for fourteen minutes; that the prosecuting attorney proceeded with his closing argument, and spoke for five minutes, when defendant's counsel notified the court that the allotted time was more than exhausted, and objected to further argument by the prosecuting attorney, unless appellant's counsel should be permitted to use a like amount of additional time; that the objection was overruled, the judge saying at the time that, because engaged in the preparation of instructions, he did not know how much time had been consumed in the argument, and the prosecuting attorney was directed to close his argument in five minutes; that the prosecuting attorney proceeded, and used a further period of eight minutes; that defendant's counsel then requested the privilege of using as much additional time for argument as had been used by the prosecuting attorney; that the request was refused; that appellant then moved to set aside the submission, and discharge the jury, which motion was overruled.

Appellant contends that such action of the court denied to him his right to be heard by counsel, as guaranteed by § 13 of art. 1 of the Constitution of Indiana, and violated that portion of § 2136, Burns's Anno. Stat. 1914, Acts 1905, p. 641, which provides that if the prosecuting attorney, in his closing argument, refers to any new point or fact not disclosed in the opening argument, the defendant's counsel, shall have the right of reply thereto.

The attorney general contends: (1) That the record discloses no error; but (2) if error be conceded, that it must be harmless, when considered in relation to the evidence.

We are of the opinion that there was no reversible error. The jury was not reasonably warranted by the evidence in reaching a conclusion other than that of appellant's guilt, and consequently the only controverted question presented to it related to the punishment, which might have been fixed at a fine ranging from $10 to $500, and, in addition, an authorized imprisonment for a period of not less than ten days, and not more than six months. Burns's Anno. Stat. 1914, Acts 1905, p. 716, § 2466.

Appeal—exceeding time limit for argument as error.

We are not informed by the bill of exceptions that the prosecuting

attorney, in his closing argument, discussed the subject of the amount of punishment to be inflicted; nor are we informed by the bill that, in closing, the prosecuting attorney referred to any new point or fact not disclosed in his opening argument. The regulation of the argument of counsel is very largely discretionary with the trial court, and an appellate tribunal will not interfere unless the record discloses an abuse of that discretion. Adams v. State, 179 Ind. 44, 99 N. E. 483; Baldwin v. Burrows, 95 Ind. 81.

Where the court suggests a limitation of time for argument which is accepted by counsel, the propriety of adherence by it to the adopted plan is manifest; but we are not warranted in reversing this judgment for an impropriety, or error, that did not prejudice any substantial right of appellant. Burns's Anno. Stat. 1914, § 2221, Acts 1905, p. 657.

Appellant's constitutional right to be heard by counsel was not denied, for he was heard by counsel for a period of fourteen minutes.

Judgment affirmed.

ANNOTATION.

Allowing attorney to exceed allotted time for argument as reversible error.

The few cases in which the question has arisen, whether the fact that an attorney was allowed to exceed the time allotted to him for his argument is reversible error, seem to be in accord in holding that since the limiting of the time for the presentation of the arguments of counsel, in both civil and criminal cases, is a matter entirely within the discretion of the court, with which an appellate court will not interfere unless the time was made so short as to be manifestly prejudicial to the rights of the complaining party (see 2 R. C. L. title, Arguments of Counsel, p. 204), the consumption by an attorney of more than the time so allotted to him is not reversible error, if, in allowing him to continue his argument without interruption, and to exceed his allotted time, the court did not abuse its discretion, and some substantial right of the complaining party was not thereby denied to him.

Thus, in Hamer v. State (1912) 104 Ark. 606, 150 S. W. 142, a prosecution for rape, the court said: "We do not think the statements of the prosecuting attorney, objected to, transcended the bounds of legitimate argument in the presentation of the case to the jury, nor that the court abused its discretion in permitting him to take two minutes more in his concluding argument than the time allotted each side for argument of the case when it began. This was a matter within the discretion of the court; and, unless an abuse of that discretion is shown, or some prejudice resulting to the defendant on account of it, the verdict will not be disturbed on appeal."

In People v. Kelly (1884) 94 N. Y. 526, the appeal was from a conviction of assault with a deadly weapon, with intent to kill. The attorney for the defense was allowed thirty minutes for the presentation of his argument, while the prosecuting attorney was allowed twenty-five minutes. The latter, however, was permitted, without any objection from the opposing attorney or from the court, to exceed his allotted time by five minutes before he was stopped by the court. In holding that the extension of the time was not an improper exercise by the trial court of its discretion, the appellate court said: "The fact that the district attorney exceeded the time allowed him may have arisen from inadvertence, and does not tend in any way to establish that the discretion of the judge was improperly exercised. The counsel for the defendant had the right to ask the judge to stop him when his time had expired, and, not having made that objection, he has no real ground of complaint."

In Pelham & H. R. Co. v. Elliott

(1912) 11 Ga. App. 621, 75 S. E. 1062, an action by an employee of a railroad to recover damages for personal injuries, it was held that allowing an attorney to exceed his allotted time by "several minutes" was not an abuse of the discretion of the court. It was said in that case: "Error is assigned because the court allowed Honorable Hoke Smith, counsel for the plaintiff, in his concluding argument to the jury, over the written protest of defendant's counsel, to speak several minutes beyond the time allowed by the rules of the court for argument, no additional time having been asked for. It is alleged that the court erred in refusing to grant a mistrial because of this additional allowance of time, and that 'it was particularly hurtful to the defendant because of the great personal influence of said counsel, and the position occupied by him as governor elect of the state of Georgia, and because the court room was crowded with the friends, admirers, and political supporters of the counsel, who constantly manifested the greatest interest in and approval of his argument, which could not but be observed by the jury,' and, movant insists, influenced them against the defendant. To this ground the court gives only qualified approval, by certifying that the plaintiff's counsel did speak several minutes longer than counsel for the defendant, and adds that, under the practice in the city court of Cairo, argument of counsel is not limited, and counsel are permitted to argue as long as they please. The court further certifies that, if there was any interest manifested in the argument of counsel or approval thereof, the court's attention was not called to it by movant's counsel. Under this qualifying note, nothing is left for us to pass upon but the fact that counsel for one of the parties spoke longer than the other, and that the court declined to grant a mistrial for this. We certainly could not hold that this was error, or that under the circumstances as they really occurred, and as certified to by the judge, there was any abuse of his discretion. There are occasions where the circumstances require the judge to intervene ex mero motu, and stop conduct or language in the presence of the jury which may be prejudicial to the rights of the litigant or derogatory to the dignity of the court; but such matters as are referred to in the present assignment of error cannot properly be made ground for exception, unless the attention of the court is called to them at the time. We do not think that the mere fact that counsel exceeds the limit of time allowed by law for argument would ordinarily be good ground for mistrial, for if time is the only thing the counsel is consuming, he will be more apt to benefit the opposite party by wearying the jury and thus prejudicing them against his own client, than otherwise."

The holding that it is not ground for a reversal to permit counsel to exceed the time allotted for argument has also been put on the ground that no prejudice resulted therefrom. See the case last cited. So, in the reported case (WALKER v. STATE, ante, 1255), a prosecution for keeping a gaming house in violation of law, the court, at the conclusion of the evidence, suggested that fifteen minutes should be allowed to each side for argument. The prosecuting attorney and the defendant assented, and thereupon the former consumed twelve minutes in his address to the jury and five minutes in his closing argument, while the defendant's counsel spoke for fourteen minutes only. It was held that the propriety of adherence by the trial court to the adopted plan was manifest, but that under § 2221, Burns's Anno. Stat. 1914, the appellate court was not warranted in reversing the judgment appealed from, "for an impropriety or error that did not prejudice any substantial right of appellant."

In Welch v. State (1917) 114 Miss. 708, 75 So. 548, the appellants were convicted of unlawful cohabitation, and the conviction was affirmed because, as stated by the court, "a consideration of the entire record has convinced us that a sensible jury has reached the inevitable verdict in this

case." The court, however, expressed its disapproval of the practice adopted in that case of limiting the argument of counsel to thirty minutes each, and then permitting the prosecuting attorney, after he had finished reading his instructions and argument, which consumed only eight minutes of the allotted time, and the attorney for the defense had made no remarks, but had simply read his instructions to the jury, to address the jury a second time, and in doing so to exceed the time allotted to him. J. V. B.

UNITED STATES ANNUITY & LIFE INSURANCE COMPANY, Appt.,
v.
PEARL S. PEAK.

Arkansas Supreme Court—May 7, 1917.

(129 Ark. 43, 195 S. W. 392.)

Appeal — law of case — erroneous ruling.

1. A ruling on one appeal is, although erroneous, the law of the case on a second appeal, if the issues and evidence are substantially the same in the two records; but the rule is otherwise if the evidence is different at the second trial.

[See note on this question beginning on page 1267.]

Same — change of testimony.

2. A ruling on appeal that the failure of an applicant for life insurance to disclose to the insurer knowledge gained between date of application and issuance of policy, that he had Bright's disease, nullified the policy, does not require an instruction for defendant on the second trial, if new testimony shows that after receiving the information applicant was able to travel 30 or 40 miles a day in a buggy over mountainous roads without undue fatigue, allowed another policy to lapse, and delayed for a week to call for his policy after receiving notice that it was ready for delivery, thus indicating that he did not believe the information given.

APPEAL by defendant from a judgment of the Circuit Court for Chicot County in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **L. A. Stebbins** and **X. O. Pindall**, for appellant:

Upon a second appeal, the law as determined and announced on the prior appeal is the law of the case, and, if the testimony upon the second trial is substantially the same as on the first trial, then the former decision of the court upon all questions of law involved must be followed on this appeal.

Porter v. Doe, 10 Ark. 186; Pulaski County v. Lincoln, 13 Ark. 103; Biscoe v. Tucker, 14 Ark. 523; Perry v. Little Rock & Ft. S. R. Co. 44 Ark. 383; St. Louis, I. M. & S. R. Co. v. York, 92 Ark. 557, 123 S. W. 376; Friedman v. Cornish, 99 Ark. 648, 139 S. W. 543; Lewis v. Jones, 97 Ark. 147, 133 S. W. 596; Taliaferro v. Barnett, 47 Ark. 359, 1 S. W. 702; Vogel v. Little Rock, 55 Ark. 614, 19 S. W. 13; Dyer v. Ambleton, 56 Ark. 171, 19 S. W. 574; Rankin v. Schofield, 81 Ark. 462, 98 S. W. 674; McDonough v. Williams, 86 Ark. 600, 112 S. W. 164; St. Louis & I. M. R. Co. v. Rush, 93 Ark. 631, 123 S. W. 804; Knauff v. National Cooperage & Woodenware Co. 99 Ark. 137, 137 S. W. 823; Southwestern Teleg. & Teleph. Co. v. Danaher, 102 Ark. 547, 144 S. W. 925; Williams v. Fulkes, 103 Ark. 196, 146 S. W. 480; Waters-Pierce Oil Co. v. Bridwell, 107 Ark. 310, 155 S. W. 126; St. Louis, I. M. & S. R. Co. v. Wirbel, 112 Ark. 410, 166 S. W. 573, 6 N. C. C. A. 935; St. Louis, I. M. & S. R. Co. v. De Lambert, 120 Ark. 61, 178 S. W.

926; Norman v. Bertig Bros. 124 Ark. 599, 186 S. W. 289.

It is the duty of an applicant for insurance to disclose to the company facts material to the risk, coming to his knowledge while the application is under consideration by the company, and before its acceptance; and his failure so to do will render the policy void, where it is issued by the company in ignorance of such fact.

1 Elliott, Contr. § 125; 25 Cyc. 797; 1 May, Ins. 3d ed. § 190; Richards, Ins. 3d ed. § 100; Kerr, Ins. § 141, pp. 347, 348; Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 19; Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631; Merriman v. Grand Lodge, D. H. 77 Neb. 544, 8 L.R.A.(N.S.) 983, 124 Am. St. Rep. 867, 110 N. W. 302, 15 Ann. Cas. 126; Carleton v. Patrons' Androscoggin Mut. F. Ins. Co. 109 Me. 79, 39 L.R.A.(N.S.) 951, 82 Atl. 649; Traill v. Baring, 4 DeG. J. & S. 318, 46 Eng. Reprint, 941, 10 Jur. N. S. 377, 33 L. J. Ch. N. S. 521, 12 Week. Rep. 678; British Equitable Ins. Co. v. Great Western R. Co. 38 L. J. Ch. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561; Canning v. Farquhar L. R. 16 Q. B. Div. 727, 55 L. J. Q. B. N. S. 225, 54 L. T. N. S. 350, 34 Week. Rep. 423; Harris v. Security Mut. L. Ins. Co. 130 Tenn. 325, L.R.A.1915C, 153, 170 S. W. 474, Ann. Cas. 1916B, 380.

Mr. **W. B. Scott** also for appellant.

Messrs. **Baldy Vinson** and **W. Garland Streett** for appellee.

Wood, J., delivered the opinion of the court:

This is the second appeal in this case. The opinion on the first appeal is reported in 122 Ark. 58, 182 S. W. 565, where the facts as developed at the former trial are stated as follows:

"Appellee sued appellant to recover on a life insurance policy. The appellant is a life insurance company organized under the laws of the state of Illinois, and is authorized to transact business in the state of Arkansas. On August 14, 1913, Robert F. Peak, of Readland, Arkansas, made application in writing to appellant for a policy of life insurance in the sum of $5,000, payable to his wife Pearl S. Peak, as beneficiary. In his application he represented and agreed that his answers to questions propounded by the company's medical examiner should be true, and should be the basis of and the consideration for the contract of insurance applied for. On the same day Peak submitted to an examination by Dr. J. W. Nichols, the local medical examiner of the company. His medical examination, among other things, contained the following: 'Does the chemical examination of the party's urine show albumen or sugar (even in traces), or any abnormality? No.' Dr. Nichols did not obtain a specimen of the applicant's urine on the 14th. He asked Mr. Peak for a specimen, but Peak, having passed his urine before he went to the doctor's office, could not furnish it at that time. The doctor suggested that he would go to Mr. Peak's house the next day to get a specimen, but Peak said he might be gone. The next morning the doctor received a specimen of urine represented to be the urine of Peak. The specimen was delivered to the doctor by Mrs. Annie Peak, the applicant's mother. Dr. Nichols made a careful examination of the specimen of urine received by him from the applicant's mother on the morning of the 15th of August, 1913, and found it to be normal. He had no reason to suspect, after such examination, that Peak was afflicted with Bright's disease.

"On the 17th day of August, 1913, Peak was examined by Dr. C. P. Meriwether, of Little Rock, Arkansas, for insurance in another company. Dr. Meriwether testified as follows: 'Peak looked to be in good condition. An examination, however, showed that his blood pressure was much higher than that of a normal man, and an examination of his heart showed an injured condition, or hypertrophy. His urine was loaded with albumen, and was of low specific gravity. I found no traces of sugar, but considerable albumen. I told Peak that he might

have acute or chronic Bright's disease, and that he ought to go to his family physician, and that I could not tell much about it unless I should make a microscopic examination. . . . I found all kinds of casts. I then told him I thought he had Bright's disease. He told me that he was going to Roswell, New Mexico, and I told him that he ought to be under medical treatment all of the time. We got a medical directory, and decided upon a physician at Roswell to whom he should go for treatment. It is not a scientific and medical possibility that the urine of Mr. Peak could have been in a normal condition on the 15th day of August, 1913, in view of the condition I found on the 17th, taking into consideration the condition of his heart, coupled with what I discovered on the microscopic and chemical examination'.

"Mr. Peak's application for insurance in appellant company was finally accepted on the 5th day of September, 1913. His policy was signed on the 22d day of August, 1913, and was mailed to the state agent of the company in Arkansas on September 6, 1913. The policy was delivered to Mr. Peak by the local agent of the company on the 17th day of September, 1913. The company first received information of Mr. Peak's physical condition as disclosed by the examination made by Dr. Meriwether on the 16th day of September, 1913. Immediately after it received the information on the 17th day of September, 1913, the company sent a telegram to its state agent to hold the policy for further instructions. The state agent called the local agent over the telephone, and directed him not to deliver the policy. The policy, however, had been delivered a few hours before by the local agent to Mr. Peak.

"The insured died five months and two days after the policy was delivered to him, and Bright's disease of the kidneys caused his death. Mr. Peak executed a note for $151.40, payable to the order of J. L. Carter, the local agent of the company, for the first year's premium. The local agent and the state agent deposited this note as collateral security for money borrowed by them of a local bank. They remitted to the company its share of the proceeds. In other words, they paid to the company that part of the premium which went to it. The note in question provided that it should be paid in monthly instalments, and the monthly instalment due June 14, 1914, was not paid. The company went to the local bank where the note was deposited as security, and paid the note. The note was returned to Peak by registered mail on June 29, 1914. He tried to pay it, but the agents of the company refused payment.

"Peak made no disclosure to the insurance company of what Dr. Meriwether had told him concerning his physical condition. If he had made such disclosure, the company would not have issued the policy and delivered it to him.

"Testimony was introduced on the part of the company tending to show that if Peak's condition on the 17th of August was as testified to by Dr. Meriwether, his urine could not have been normal on the 15th of August, 1913. Several physicians testified to this fact. A physician for appellee testified, however, that his condition might have been normal on the 15th, and that it was possible that there might have been a rise in his blood pressure in forty-eight hours, at the end of which time casts might show.

"Testimony was also adduced in favor of appellee tending to show that the specimen of urine furnished to Dr. Nichols was genuine. Evidence was also introduced tending to show that the reputation of the insured for truth and morality was good."

On the former appeal, among other things, we said:

"In the instant case the policy had not been issued, but the applicant had done all that had been re-

quired of him. We do not think he would be required, as a matter of law, to disclose to the company the result of a medical examination for insurance in any other company, regardless of the fact whether or not he in good faith believed what the medical examiner had told him. For instance, when the applicant went to Dr. Meriwether and was examined by him for life insurance in another company, and Dr. Meriwether told him that he found albumen in his urine and other indications of Bright's disease, the applicant would not be required to state this fact to appellant company unless he believed it to be true; for, if he did not believe the statement made by Dr. Meriwether, he could not be said to conceal a material fact from the company. He might believe that his kidneys were only temporarily affected, and that the physician was mistaken in believing it to be Bright's disease.

"The testimony in the case before us, however, went further than this. After Dr. Meriwether had examined him and told him that the results of the examination indicated that he had Bright's disease, Peak became alarmed. Dr. Meriwether told him that he could not tell much about it until he made a microscopic examination, and as a result of this examination told him he thought he had chronic Bright's disease. The applicant then told him that he intended to go to Roswell, New Mexico, at once, and Dr. Meriwether selected a physician to treat him for Bright's disease while he was out there. Dr. Meriwether is a physician of good reputation, and there is nothing whatever in the record to dispute his testimony.

"So, it may be said that the result of Dr. Meriwether's examination of the applicant was to disclose to him that he had a fatal disease, the presence of which he could not be ignorant of, and the failure to disclose his knowledge that he had chronic Bright's disease was an intentional concealment on his part of a material fact, and his failure to communicate it to the company avoided the policy. Under the undisputed facts, we think there was an element of knowledge on the part of the applicant that he had Bright's disease, and that there was an intentional concealment of this fact from the company."

Having reached the above conclusion, we reversed the judgment and remanded the cause for a new trial.

It thus appears that we held on the former appeal that, under the undisputed facts there developed, "there was an element of knowledge on the part of applicant [Robert F. Peak] that he had Bright's disease, and there was an intentional concealment of this fact from the company," which avoided the policy. The issues presented on the second trial are precisely the same as they were on the first trial, and if the testimony was the same, or substantially the same, then what we said on the former appeal is the law of the present case, and we could not change it on this appeal, even if we were now convinced that the decision on the first appeal was erroneous. In other words, if the facts as developed by the testimony on the second trial of this cause were the same, or substantially the same, as disclosed on the first trial, then the appellant was entitled to have the jury told that the failure on the part of Robert F. Peak to disclose to appellant that he had chronic Bright's disease was an intentional concealment of a material fact, which voided his policy; and appellant was also entitled to a peremptory instruction for a verdict in its favor. Therefore, if the facts are substantially the same on this appeal as they were on the former appeal, the court erred in not granting appellant's prayers for such instructions, under the familiar doctrine of law of the case as above announced, which has been repeatedly declared and followed by this

Appeal—law of case—erroneous ruling.

court, and in some quite recent cases. Carter v. Younger, 123 Ark. 266, 271, 185 S. W. 435; Morgan Engineering Co. v. Cache River Drainage Dist. 122 Ark. 491, 499, 184 S. W. 57. See also numerous cases from our reports cited in appellant's brief.

But, on the other hand, if the facts developed on the second trial are substantially different, then the trial court may apply a different rule of law. In the case of Hartford F. Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393, we announced the familiar rule of law of the case as follows: "When, on an appeal or writ of error, a cause is reversed and remanded for new trial, the cause stands as if no action had been taken by the lower court. . . . If the facts developed on second trial remain the same as they were on the first trial, the lower court must be governed in applying the law to the facts by the principles announced by this court in that case as controlling. If the facts are different, then the lower court may apply a different rule of law."

As already observed, we held on the former appeal that Peak had knowledge that he had chronic Bright's disease, which he intentionally failed to disclose to appellant. Is the testimony in this record on that issue substantially the same as it was in the record on the former appeal? The testimony is exceedingly voluminous, and it could serve no useful purpose to set it out in detail. Suffice it to say that, by agreement of counsel, all the testimony in this record was read in evidence from the record on the former appeal, and in addition to the testimony of John L. Carter and Pearl S. Peak, which was read from the bill of exceptions on the former appeal, they were introduced as witnesses and testified on the last trial, from which this appeal comes.

The testimony of witness Carter on the former appeal, so far as it is material to discuss it here, shows that he, as the agent of appellant, jointly with Mr. Tichenor, who was the state's agent, took the application of Robert F. Peak for an insurance policy on his life with appellant in the sum of $5,000, which application was dated August 14, 1913; that the application was accepted, the policy issued, and delivered by witness to Robert F. Peak on the 17th day of September, 1913. On the last trial Carter testified as to the circumstances under which the application for insurance was made as follows: "I solicited this insurance of Mr. Peak. I went to Mr. Peak's place during the month of August in company with Mr. Tichenor, who was then the state agent for the United States Annuity & Life Insurance Company. We made quiite a few solicitations that day, and among the number was Mr. Peak. I found Mr. Peak at work, and, after talking with him and showing him what I had and that he needed our policy, we finally persuaded him to make application for insurance and took his note therefor. We discussed with Mr. Peak the advantage of our policy over other old-line policies and the value of old-line policies over fraternal insurance."

Concerning the circumstances of the delivery of the policy, Carter testified as follows: "I do not remember that I saw Mr. Peak after his return from New Mexico at any time before I delivered the policy to him in my office in Eudora. When I received the policy from Mr. Tichenor I called him over the phone and advised him that the policy was there, as I knew he came to town once or twice a week. I told him if he would come around to the office the next time he was in town I would give him the policy. Three or four days later, or maybe a week, he came for the policy. In reply to your question as to whether or not he exhibited any great anxiety or made any effort to immediately get possession of the policy, it was three or four days, or probably a week, after I phoned him, before he came to get the policy. He went away immediatly after making the

application, and if he made any demands at all for the policy, I don't remember it. I had to ask him to come to my office to get it. I do not remember whether he made any inquiry for the policy between the time that he returned from New Mexico and the time I notified him to come to my office for it."

On the last trial Mrs. Pearl S. Peak testified as follows: "Robert F. Peak was my husband and died February 9, 1914. I was in New Mexico when my husband applied for the insurance policy upon which I am now bringing suit. My husband came to New Mexico August 19, 1913, and, as far as any of us could tell, he seemed to be feeling in perfect health; he looked well. I had been visiting in New Mexico from April until the latter part of August, and prior to his arrival in New Mexico, I had not seen him since the latter part of April. Mr. Peak and myself stayed in New Mexico a little over two weeks. He was perfectly well. We took several trips, and he never complained of feeling bad. He seemed to be in good spirits, and was very cheerful. The trips to which I referred as being made with my husband while in New Mexico were 30 or 40 mile trips, made in a buggy, to various ranches in the vicinity of Roswell. The country was very rough and mountainous, and these trips always tired me, but I did not see any evidence of unusual fatigue on the part of my husband. The first time I heard Dr. Meriwether's name mentioned was about a month after Mr. Peak returned from New Mexico, when he was notified that he had to have a second examination made. He exp'ained about the examination being made in Little Rock. My husband and I returned from New Mexico about the 5th or 6th of September. I do not remember the exact date that my husband received the insurance policy, but I think Mr. Carter phoned to him at the house just two or three days after he came back, but he did not go after the policy until several days after that, as he was busy getting his work straightened out, and could not go to Eudora after it."

It was shown on the first trial, and also in the last trial, that in January, 1913, Peak made application for insurance in the order of the Knights of Pythias, and was examined by Dr. H. H. Parr, a physician who had been practising for ten years, and who was a graduate of Atlanta College, and was the regular examining officer for the Knights of Pythias. He made a careful examination of Peak's physical condition, and made a chemical test of his urine for the purpose of testing for casts or albumen, and found nothing but a normal condition, and approved his application. Peak at that time obtained insurance in the Knights of Pythias in the sum of $5,000. Peak allowed the policy in the Knights of Pythias to lapse about the 31st of August, 1913.

The testimony tending to show the condition of Peak's health before he was examined by Dr. Meriwether in Little Rock is precisely the same on the last trial as it was at the first. Up to that time two different physicians had examined him for life insurance, and both found him in normal health, and recommended him as a fit subject for insurance. The physician who examined him for the Knights of Pythias in January, 1913, made a chemical test of his urine, and found nothing to indicate at that time that he had Bright's disease. Appellant's examining physician who examined him in August, 1913, also made a chemical test of what purported to be a specimen of Peak's urine, and found the same in normal condition. The last examination was two days before he was informed by Dr. Meriwether that he had chronic Bright's disease.

The other testimony by his wife and mother, who were most intimately associated with him, shows that before and up to the time he was informed by Dr. Meriwether that he had Bright's disease he had

been in good health. His wife testified that from four to six months prior to August 14th his health seemed perfect, and during that year his health was fine. His mother testified that during the year 1913, and up to August, he was in perfect health, and at no time did he complain of any pain or illness; that the last time he was sick before he took out this insurance was in the fall of 1912.

So, it may be said that until Peak was informed by Dr. Meriwether that he had chronic Bright's disease, he had no reason to suspect that he was thus afflicted. The testimony as to Peak's physical condition from the time he was informed by Dr. Meriwether that he had chronic Bright's disease, August 17, 1913, down to the time of the delivery of the policy to him on September 17, 1913, was substantially the same on the last trial as it was on the first, except in one particular hereafter mentioned. The only witness testifying to his condition of health during the above period was his wife, whose testimony on the last trial is as above set out, showing that when her husband arrived in New Mexico, on August 19th, he looked well and seemed to be feeling in perfect health; that he did not complain of his health, and did not consult a physician while he was in New Mexico; that up to the time he was examined by Dr. Parr, about the 18th of September, 1913, he had never shown any uneasiness or worry about his physical condition, and did not seem to realize it.

All of the above testimony on the last trial, showing Peak's physical condition before he was examined by Dr. Meriwether, and also showing his physical condition from the time he was informed by Dr. Meriwether that he had chronic Bright's disease, was directed to the issue as to whether or not Peak believed what Dr. Meriwether had told him, and if this were all the testimony, we would hold that the testimony at the last trial was substantially the same on this issue as at the first trial. But, as throwing light on the issue as to whether or not Peak believed that he had chronic Bright's disease, as he had been informed by Dr. Meriwether, we find that the following facts were developed on the last trial that were not in evidence on the first, to wit: Mrs. Peak, on the last trial, testified: "I do not remember the exact date that my husband received the insurance policy, but I think Mr. Carter phoned to him at the house just two or three days after he came back, but he didn't go after the policy until several days after that, as he was busy getting his work straightened out, and could not go to Eudora after it."

And John L. Carter testified: "When I received the policy from Mr. Tichenor I called him (Peak) over the phone and advised him that the policy was there, as I knew he came to town once or twice a week. I told him that if he would come around to the office the next time he was in town, I would give him the policy. Three or four days later, maybe a week, he came for the policy. His physical condition seemed to be about the same as when Mr. Tichenor and myself saw him during the month of August and took his application. . . . It was three or four days, or probably a week, after I phoned him before he came to get the policy. He went away immediately after making the application, and if he made any demands at all for the policy, I don't remember it. I had to ask him to come to my office to get it."

Carter further testified: "We discussed with Mr. Peak the advantages of our policy over other old-line policies, and the value of old-line insurance over fraternal insurance. We found Mr. Peak at work, and, after talking with him and showing him what I had and that he needed our policy, we finally persuaded him to make application for insurance, and took his note therefor."

Now if Peak had knowledge, and

therefore believed, that he had chronic Bright's disease and concealed the same from the appellant, then his policy, under the law as declared by our decision on the former appeal, was void. Parties to contracts are presumed to know the law governing such contracts. Assuming, therefore, as we must, that Peak knew such to be the law, if he believed that he had chronic Bright's disease and intended to perpetrate a fraud on appellant by concealing such knowledge, it is but reasonable to conclude that he would have been more anxious to secure the delivery of the policy after being informed by Carter that he held the same for delivery. The testimony on both trials discovered that Peak, after he had been informed by Dr. Meriwether that he had chronic Bright's disease, allowed a policy which he held in the Knights of Pythias for $5,000 to be forfeited on the 31st of August, 1913, a little over two weeks before the policy in suit was delivered to him. Having allowed his policy in the Knights of Pythias to forfeit, the evidence warranted the conclusion that he had been convinced by the argument and persuasion of appellant's agents that a policy with appellant had superior advantages to fraternal insurance, and therefore that he had concluded to make application for such policy and to carry this line of insurance rather than his policy with the Knights of Pythias.

Knowing that a short while before he had permitted his policy in the Knights of Pythias to be forfeited, the conclusion is fairly deducible from the new testimony, at least the jury were warranted in finding such to be the fact, in connection with all the other evidence, that Peak did not believe that he had chronic Bright's disease, but, on the contrary, that he did believe that he was a fit subject for insurance, and that his application with appellant company would be accepted, and a policy in that company secured in lieu of the fraternal insurance which he had allowed to lapse. The jury were warranted in finding from this new testimony, in connection with all the other evidence, that the indifference manifested by Peak concerning the earliest possible delivery of the policy, after it had been received by Carter, was wholly incompatible with knowledge and belief on his part that he had chronic Bright's disease, which he intended to conceal from appellant.

Same—change of testimony.

While the testimony on both trials was substantially the same as to Peak's looking and feeling in perfect health and making no complaint while in New Mexico, yet there is an additional fact discovered by the new testimony which the jury might have found furnished a concrete basis for a belief on Peak's part that he did not have Bright's disease. He was able to make 30 to 40 mile trips in a buggy, over rough mountainous country, without any evidence of unusual fatigue. On the last trial the above additional fact was brought out by Mrs. Peak as to what Peak actually did, showing his physical ability to make mountain journeys without evidence of fatigue. The jury might have found from this new testimony that it would have been a reasonable conclusion on Peak's part that he did not have chronic Bright's disease, as informed by Dr. Meriwether. For if he had been so diseased, he would have been entirely unable to make those arduous mountain trips without fatigue, as indicated by this new testimony of Mrs. Peak.

We conclude, therefore, that on the last trial new testimony was introduced, materially and substantially different from that adduced on the former trial, which justified the court in refusing appellant's prayer for a peremptory instruction, and warranted the court in submitting to the jury the only issue that was left for them to determine under our former opinion, that is, as to whether or not Peak

believed that he had chronic Bright's disease as he had been informed by Dr. Meriwether. The testimony developed at the last trial made this an issue of fact for the jury, which the court very fully and correctly submitted for their determination.

The judgment is therefore correct, and it is affirmed.

ANNOTATION.

Erroneous decision as law of the case on a subsequent appeal.

As to whether questions which might have been but were not raised on prior appeal or error can be considered on subsequent appeal or error, see the annotation to State ex rel. Garcia v. Rio Arriba County, ante, 720.

There are almost numberless cases in which the courts have stated and discussed the general rule that a prior decision is conclusive on the same questions between the same parties on a subsequent appeal. There is a line of cases, however, in which it also appears that the courts have become convinced that the former decision was erroneous, and have approached the question of the application of the principle of "the law of the case," proceeding upon that hypothesis. It is this class of stronger cases which forms the basis of the present annotation. Upon this question the application of "the law of the case" rule is more apparent, a former decision being admittedly erroneous, but yet being followed. And while many courts have insisted and still insist that the doctrine or principle of "the law of the case" is good law, and should be applied in all cases, there has been a considerable tendency, and probably a growing one, to make an exception, where it clearly appears that the former decision was erroneous; and, as a consequence, there is respectable authority to the effect that a decision rendered on one appeal, if clearly erroneous, is not conclusive upon the court upon a subsequent appeal of the same case.

As previously stated, there is considerable authority for the narrow rule that a decision upon a prior review by an appellate court is conclusive, upon a second review, where the same questions are presented, although the first decision is at the time regarded as erroneous,[1] especially

[1] The following cases adhere strictly to this rule: Taliaferro v. Barnett (1886) 47 **Ark.** 359, 1 S. W. 702; Vogel v. Little Rock (1892) 55 **Ark.** 609, 19 S. W. 13; UNITED STATES ANNUITY & L. INS. CO. v. PEAK (reported herewith) ante, 1259; Dewey v. Gray (1852) 2 **Cal.** 374 (court said that prior decision was in "abrogation of one of the plainest principles of law," and that if the case was a new one it would not hesitate to overrule it); Gunter v. Laffan (1857) 7 **Cal.** 588 (dictum); Davidson v. Dallas (1860) 15 **Cal.** 75 (court inclined strongly to think that prior decision was erroneous); Haynes v. Meeks (1862) 20 **Cal.** 288 (court declared prior decision to be the law of the case, and expressed its present views upon the questions raised, "in order to obviate the idea of an implied approval of the decision, and to leave us unembarrassed by it if similar questions are presented in other cases for consideration"); Leese v. Clark (1862) 20 **Cal.** 388 (rule and reason therefor stated); Tally v. Ganahl (1907) 151 **Cal.** 418, 90 Pac. 1049, quoted with approval in Westerfeld v. New York L. Ins. Co. (1910) 157 **Cal.** 339, 107 Pac. 699 (former decision held to be the law of the case, although clearly erroneous); McLendon v. McGlaun (1878) 60 **Ga.** 244 (court would have held otherwise if the question had been regarded as an open one); Saulsbury v. Iverson (1884) 73 **Ga.** 733 (court "unanimously" disapproved of the decision on the first appeal); Hall v. Blackman (1904) 9 **Idaho,** 555, 75 Pac. 608 (dictum); Ward v. Johnson (1879) 5 **Ill.** App. 30, affirmed in (1880) 95 Ill. 215; Morgan County v. Pritchett (1882) 85 **Ind.** 68; Pittsburgh, C. & St. L. R. Co. v. Hixon (1886) 110 **Ind.** 225, 11 N. E. 285, (former decision admittedly erroneous, but questions said to be "irreversibly settled between the parties

where to rule otherwise would work great and manifest injustice; as, for instance, where it would leave a party without remedy,[2] the remedy, if any, for a wrong decision by an appellate court of last resort being by application for a rehearing made in apt time.[3] And it has been ruled that a decision on appeal, on points necessary to a determination of the cause, stands, as between the parties, as the law of the case, on a subsequent appeal involving the same facts, even though the principle or principles announced on the first appeal have been disapproved and overruled by the same court in another case, decided subsequent to the first appeal.[4] And this, even though

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in all subsequent stages of the action"); McCormick Harvesting Mach. Co. v. Gray (1887) 114 **Ind.** 340, 16 N. E. 787 (dictum); New Albany v. Lyons (1918) — **Ind. App.** —, 118 N. E. 587; Burlington, C. R. & N. R. Co. v. Dey (1893) 89 **Iowa**, 13, 56 N. W. 267 (court said that, by adhering to the law as laid down in the former appeal, "we are not to be understood as approving of the correctness of the former holding"); Rice v. Wheatly (1840) 9 Dana (**Ky.**) 271 (holding that, where first decision reversed a decree and the former appellee prosecuted a writ of error to reverse the first decree, the former decision was conclusive, even if it "should be deemed ever so erroneous"); Newberry v. Trowbridge (1865) 13 **Mich.** 263 (court did not hold the law as laid down on the former appeal "to be law in other cases"); Davenport v. Kleinschmidt (1889) 8 **Mont.** 467, 20 Pac. 823; Jones v. Charleston & W. C. R. Co. (1902) 65 **S. C.** 410, 43 S. E. 884 (rule of former appeal is law of the case, even if court is convinced that there was error on such appeal); Sherman v. Port Huron Engine & Thresher Co. (1900) 13 **S. D.** 95, 82 N. W. 413 (law as announced on the first appeal should be adhered to by the court, on a second appeal in same case, although, "if convinced it was erroneously stated, we might refuse to follow it in another action"); Herrick v. Belknap (1854) 27 **Vt.** 673 (dictum); Stacy v. Vermont C. R. Co. (1860) 32 **Vt.** 551 (decision on former appeal should be adhered to, whatever views the members of the court entertain as to its soundness); Frazier v. Frazier (1883) 77 **Va.** 775 (former decision irreversible, however erroneous); Stuart v. Preston (1885) 80 **Va.** 625; Alexandria Sav. Inst. v. McVeigh (1887) 84 **Va.** 41, 3 S. E. 885 (former decision irreversible, even though the court were satisfied that it was erroneous and wished to change it); Parker v. Pomeroy (1853) 2 **Wis.** 112 (court regretted that question was not open, and said that, however it might differ with the former conclusion, it must be adhered to); Pautz v. Plankinton Packing Co. (1905) 126 **Wis.** 37, 105 N. W. 482 ("whether the decision was rightly or erroneously pronounced is no longer debatable"); Steele v. Korn (1908) 137 **Wis.** 51, 129 Am. St. Rep. 1051, 118 N. W. 207, 120 N. W. 261 (former decision erroneous).

[2] See Hawley v. Smith (1873) 45 **Ind.** 183.

[3] Hough v. Harvey (1876) 84 **Ill.** 308; Johnson v. Von Kettler (1876) 84 **Ill.** 317; Ward v. Johnson (1880) 5 **Ill. App.** 30, affirmed in (1880) 95 Ill. 215; Ogle v. Turpin (1881) 8 **Ill. App.** 453, affirmed in (1882) 102 Ill. 148; First Nat. Bank v. Asheville Furniture & Lumber Co. (1897) 120 **N. C.** 475, 26 S. E. 927.

[4] Western & A. R. Co. v. Third Nat. Bank (1906) 125 **Ga.** 489, 54 S. E. 621; Tipton County v. Indianapolis, P. & C. R. Co. (1883) 89 **Ind.** 101; Walker v. Heller (1885) 104 **Ind.** 327, 3 N. E. 114; Rushville v. Rushville Natural Gas Co. (1904) 164 **Ind.** 162, 73 N. E. 87, 3 Ann. Cas. 86; Phenix Ins. Co. v. Pickel (1891) 3 **Ind. App.** 333, 29 N. E. 432; Barton v. Thompson (1881) 56 **Iowa**, 572, 41 Am. Rep. 119, 9 N. W. 899 (holding, however, where the trial court had, and correctly so, on the second trial, adhered to "the law of the case" rule, that, as the case had to be reversed on other grounds, "it will be the duty of the court, in the further prosecution of this case, to follow" the later decisions of the supreme court, that being the law of the state); Brown v. Marion Nat. Bank (1896) 18 **Ky. L. Rep.** 186, 35 S. W. 926; Thompson v. Louisville Bkg. Co. (1900) 21 **Ky. L. Rep.** 611, 55 S. W. 1080; Cain v. Union Cent. L. Ins. Co. (1906) 123 **Ky.** 59, 124 Am. St. Rep. 313, 93 S. W. 622; Thomson v. Albert (1859) 15 **Md.** 268; Modern Brotherhood v. Beshara (1916) — **Okla.** —, 158 Pac. 613; Jones v. Charleston & W. C. R. Co. (1902) 65

the decision on the first review was by an equally divided court,[5] and the former decision was not a final determination of the case.[6] And it has been held that the decision of a Federal appellate court is the law of the case, upon a second appeal of the case to that court, although the state court, in another case, has rendered a contrary decision upon the same point.[7] And some courts have gone so far as to hold that the decision on a former appeal is the law of the case on a subsequent appeal, although a higher court has, intermediate the first and second appeals, decided in another case that the decision on such first appeal was erroneous,[8] the theory being that the repudiation by the higher court, when made in another case, leaves the decision exactly where it was, so that the court is bound to follow it, irrespective of what the higher court might decide if its jurisdiction were properly invoked in the case under consideration.[9]

These rulings that the former decision in the same cause is the law of the case, however erroneous it may have been, are generally based upon the theory that, while the former decision may have been destroyed as a precedent between other parties, it is necessary that matters once litigated and determined finally should not be relitigated between the same parties, since if this were not so litigation would be interminable, and a judgment finally settling the rights of the parties would be only a starting point

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S. C. 410, 43 S. E. 884; Herrick v. Belknap (1854) 27 Vt. 673 (dictum); Pennington v. Gillaspie (1810) 66 W. Va. 643, 66 S. E. 1009, holding same as Barton v. Thompson (1881) 56 Iowa, 572, 41 Am. Rep. 119, 9 N. W. 899. And see Bolton v. Hey (1895) 168 Pa. 418, 31 Atl. 1097, wherein a second suit was brought on the same cause of action, after the rule laid down in the first action had been overruled in another action, decided subsequent to the first appeal.

But the rule adopted by these courts is not universally applied, there being considerable authority to the direct contrary. See infra, text and note 34.

[5] Cain v. Union Cent. L. Ins. Co. (1906) 123 Ky. 59, 124 Am. St. Rep. 313, 93 S. W. 622.

[6] Jones v. Charleston & W. C. R. Co. (1902) 65 S. C. 410, 43 S. E. 884, supra.

[7] Haley v. Kilpatrick (1900) 44 C. C. A. 102, 104 Fed. 647.

[8] District of Columbia v. Brewer (1909) 32 App. D. C. 388 (holding that a decision by the Supreme Court of the United States in another action, that the doctrine laid down upon the first appeal to the district court of appeals was erroneous, made it none the less the law of the case, upon a subsequent appeal to it of the same case); Southern Bell Teleph. & Teleg. Co. v. Glawson (1913) 140 Ga. 507, 79 S. E. 136 (holding that a decision by the Georgia court of appeals is binding upon that court, upon a subsequent appeal of the same case, as "the law of the case," notwithstanding that, subsequent to the rendition of the decision on the first appeal, the Georgia supreme court in another case had rendered a decision, the effect of which was to show that the decision of the court of appeals was erroneous, although in other cases it should follow and apply the contrary decision of the supreme court); Ogle v. Turpen (1881) 8 Ill. App. 453, affirmed in (1881) 102 Ill. 148 (wherein the supreme court distinguished the case which had been urged as contrary to the decision on the first appeal). And see Carr v. Quigley (1889) 79 Cal. 130, 21 Pac. 607, reversed in (1893) 149 U. S. 652, 37 L. ed. 885, 13 Sup. Ct. Rep. 961, wherein the decision upon a former appeal was held conclusive, but in which there was a dissent upon the ground that, since the former appeal, the United States Supreme Court had so decided a similar question as to indicate that the ruling on the former appeal was erroneous, and that a former decision is not the law of the case where application of the rule would be useless, because of the probability of an appeal to the Supreme Court of the United States and a reversal by that court. But in connection with the foregoing Illinois case, see the later Illinois case set out infra, note 40, which holds to the direct contrary. And for other cases which lay down the contrary rule, infra, text and note 40.

[9] District of Columbia v. Brewer (1909) 32 App. D. C. 388.

for new litigation.[10] Another reason sometimes advanced is that the court, by its mandate, abandons or loses jurisdiction over the case, so that the decision of the questions involved becomes or constitutes a final adjudication.[11] And in a South Dakota case [12] it has been said that "nothing could be more unjust to litigants than for this court, in remanding a cause for further proceedings, to express its opinion upon any subject likely to arise upon a second trial, and, after parties have accepted and relied upon such opinion, adopt a different view upon a second appeal." It has also been argued that it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important.[13] And it has been said that it is wholly immaterial for what reason or in what way the former ruling was made,[14] or that the court was differently constituted on the second appeal.[15]

While it is conceded by most, if not all, courts that a question considered and determined on the first appeal of a case is, as a general rule, "the law of the case" on a second appeal, and, consequently, not open to re-examination, the courts of a number of jurisdictions have maintained that the rule is not inflexible, but is subject to exception; and have ruled that, if the prior decision is clearly, plainly, manifestly, or palpably erroneous, it is competent for the court to correct it on a second review; [16] especially when no wrong or injustice will, because of

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[10] This reason was adopted in the following cases: Thompson v. Louisville Bkg. Co. (1900) 21 Ky. L. Rep. 1611, 55 S. W. 1080; Herrick v. Belknap (1854) 27 Vt. 673; Stacy v. Vermont C. R. Co. (1860) 32 Vt. 551; Stuart v. Preston (1885) 80 Va. 625; Alexandria Sav. Inst. v. McVeigh (1887) 84 Va. 41, 3 S. E. 885. In Stacy v. Vermont C. R. Co. (1860) 32 Vt. 551, the court said: "It is urged, and there is force in the argument, that if there is error in the decision, and it is ever to be reversed, it should be done in the same court. Although this position may be sound in theory, as applicable to a single case, yet, as a rule to be acted upon in all cases, it would lead to incalculable mischief. If all questions that have ever been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end to their litigation until the ability of the parties or the ingenuity of their counsel were exhausted."

[11] Leese v. Clark (1862) 20 Cal. 388 (holding such to be the reason of the rule, both where the first judgment was affirmed and where it was reversed); Davenport v. Kleinschmidt (1889) 8 Mont. 467, 20 Pac. 823 (holding that the jurisdiction of the Montana supreme court being only appellate, and the time for rehearing having expired, the matter passes beyond the jurisdiction of the court); Jones v. Charleston & W. C. R. Co. (1902) 65 S. C. 410, 43 S. E. 884 (holding such to be the rule, although there was no final determination of the case on the former appeal).

[12] Sherman v. Port Huron Engine & Thresher Co. (1900) 13 S. D. 95, 82 N. W. 413.

[13] Tally v. Ganahal (1907) 151 Cal. 418, 90 Pac. 1049.

[14] See McLendon v. McGlaun (1878) 60 Ga. 244, so holding, where, upon the former review, a writ of error was dismissed for irregularity, and the judgment of the court below which decided the point in question, which was one of law, was affirmed.

[15] Parker v. Pomeroy (1853) 2 Wis. 112.

[16] The following cases have announced and applied this exception to the general rule: Missouri, K. & T. R. Co. v. Merrill (1902) 65 Kan. 436, 59 L.R.A. 711, 93 Am. St. Rep. 287, 70 Pac. 358, 12 Am. Neg. Rep. 275 (former decision regarded as erroneous and expressly overruled); Lorimer v. Fairchild (1904) 68 Kan. 328, 75 Pac. 124 (former decision "clearly erroneous"); Henry v. Atchison, T. & S. F. R. Co. (1910) 83 Kan. 104, 28 L.R.A.(N.S.) 1088, 109 Pac. 1005 (former decision involved culpable error); Brewer v. Browning (1917) 115 Miss. 358, L.R.A.1918F, 1185, 76 So. 267 (former decision manifestly wrong, and adherence to same would lead to unjust results); Hamilton v. Marks (1876) 63 Mo. 167 (former decision erroneous); Kiley v. Kansas City (1885) 87 Mo. 103, 56 Am. Rep. 443 (rule as stated on first former appeal could not be reconciled with true principles); Francis v. Bair (1888) 96

Mo. 515, 9 S. W. 894 (former opinion expressly overruled in part); Wernse v. McPike (1890) 100 **Mo.** 476, 13 S. W. 809 (judgment reversed on second appeal, and trial directed to proceed precisely as if the ruling on the first appeal had not been made); Sprague v. Rooney (1891) 104 **Mo.** 349, 16 S. W. 505 (former opinion declared to be without support in reason or precedent); Bird v. Sellers (1894) 122 **Mo.** 23, 26 S. W. 668 (former decision wrong); Rutledge v. Missouri P. R. Co. (1894) 123 **Mo.** 121, 24 S. W. 1053, 27 S. W. 327 (see infra, text for note 30); Wilson v. Beckwith (1897) 140 **Mo.** 359, 41 S. W. 985 (former opinion expressly overruled); Bealey v. Smith (1900) 158 **Mo.** 515, 81 Am. St. Rep. 317, 59 S. W. 984 (exception to general rule stated); Gracey v. St. Louis (1909) 221 **Mo.** 1, 119 S. W. 949 (see infra, text for note 31); United Shoe Machinery Co. v. Ramlose (1910) 231 **Mo.** 508, 132 S. W. 1133 (exception restated); Mangold v. Bacon (1911) 237 **Mo.** 496, 141 S. W. 650 (see infra, text for note 32); Bagnell Timber Co. v. Missouri, K. & T. R. Co. (1911) 242 **Mo.** 11, 145 S. W. 469 (former decision "clearly erroneous both upon principle and authority"); Wilcox v. Phillips (1914) 260 **Mo.** 664, 169 S. W. 55 (exception restated); DeFord v. Johnson (1915) — **Mo.** —, 177 S. W. 577 (exception restated and questions re-examined); Holmes v. Royal Loan Asso. (1912) 166 **Mo. App.** 719, 150 S. W. 1111 (exception restated); Underwood v. St. Louis, I. M. & S. R. Co. (1915) 190 **Mo. App.** 407, 177 S. W. 724 (exception restated and questions re-examined); Underwood v. Caruthersville (1917) 197 **Mo. App.** 358, 194 S. W. 1090 (exception restated and questions re-examined); Hastings v. Foxworthy (1895) 45 **Neb.** 676, 34 L.R.A. 321, 63 N. W. 955 (former decision manifestly wrong); Eccles v. Walker (1906) 75 **Neb.** 722, 106 N. W. 977 (former decision manifestly erroneous); (Trombley & C. Co. v. Seligman (1909) 133 App. Div. 525, 117 **N. Y.** Supp. 1063; Bynum v. Apperson (1872) 9 Heisk. (**Tenn.**) 632 (court said that it could not and would not assent to the view expressed on the first appeal; that a judgment of reversal on a former appeal is conclusive that the case was reversed, and of nothing more and that it was no more bound by such decision than in any other case between other and different parties); Layton v. Hall (1860) 25 **Tex.** 204 (rule of former opinion unsupportable on principle and overruled); Reeves v. Petty (1875) 44 **Tex.** 249 (former decision overturned established rule of property); Burns v. Ledbetter (1882) 56 **Tex.** 282 (questions regarded as still open, and were re-examined); Galveston, H. & S. A. R. Co. v. Faber (1888) 77 **Tex.** 153, 8 S. W. 64 (dictum); Kempner v. Huddleston (1876) 90 **Tex.** 182, 37 S. W. 1066; Magnolia Park Co. v. Tinsley (1903) 96 **Tex.** 364, 73 S. W. 5; Houston Oil Co. v. Davis (1916) — **Tex.** Civ. App. —, 181 S. W. 851; First Nat. Bank v. Mangum (1917) — **Tex.** Civ. App. —, 194 S. W. 647 (dictum); United States v. Elliot (1895) 12 **Utah,** 119, 41 Pac. 720 (former decision against weight of authority and enforcement would work injustice). And in the following cases it was intimated that an appellate court may, upon a second review, reach a result inconsistent with the decision on the first review of the same case: Messinger v. Anderson (1911) 225 **U. S.** 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 746 (wherein it was said that such practice "is necessary to enable an appellate court to perform its duties satisfactorily and efficiently"); Chesapeake & O. R. Co. v. McKell (1913) 126 C. C. A. 336, 209 **Fed.** 514; Central Branch Union P. R. Co. v. Shoup (1882) 28 **Kan.** 394, 42 Am. Rep. 163 (wherein it was said that the rule that a decision once made becomes the law of the case is not a "cast-iron rule and incapable of re-examination in any event," and that the court did not doubt its power to reconsider and reverse a prior decision of the same case); Hammond v. Inloes (1853) 4 **Md.** 138; Dugan v. Hollins (1859) 13 **Md.** 149; Chambers v. Smith (1860) 30 **Mo.** 156 (decision open to re-examination, where general principle of law manifestly decided incorrectly, or where injustice would be done by adherence to the first opinion); Eaton v. Alger (1872) 47 **N. Y.** 345 (wherein the court said that it did not mean to intimate that no case could arise where the court would not modify or reverse its decision, but that it should not reverse unless there had been some plain mistake); Worrall v. Munn (1873) 53 **N. Y.** 185 (wherein it was said that the court should follow the former decision, "unless there was a plain error committed by the court in declaring or applying the rules of law applicable to the case," etc.); Cluff

changed conditions, result from the correction,[17] as, for instance, where no rights of property have become vested and no change has been made in the status of the parties by reason of the former ruling;[18] or where the adoption of the rule laid down on the former appeal would work an injustice in the particular case, and all cases of like character;[19] or even

v. Day (1894) 141 **N. Y.** 580, 36 N. E. 182 (holding that "the law of the case" rule is not an iron one, to which there are no exceptions); Brennan v. New York City (1874) 1 Hun (**N. Y.**) 315, reversed on other grounds in (1875) 62 N. Y. 365 (wherein it was said that the general rule should not be departed from except in extreme cases, founded upon some change in the law, or when the court is satisfied that an erroneous conclusion has been declared); Pennsylvania Co. v. Platt (1890) 47 **Ohio** St. 366, 25 N. E. 1028 (former decision should be followed unless it is very clearly erroneous"); Bash v. Howald (1916) — **Okla.** —, 157 Pac. 1154 (wherein the court, in its opinion, stated the general rule in absolute terms, but in its headnote said that a decision by the supreme court, upon appeal, becomes the law of the case, and "ordinarily" will not be reconsidered upon a second appeal of the same case); Modern Brotherhood v. Beshara (1916) — **Okla.** —, 158 Pac. 613 (same as next preceding case).

In connection with above-cited Maryland cases, see Thomson v. Albert (1859) 15 **Md.** 268, as set out supra, note 4.

It should be noted in connection with Brewer v. Browning (1917) 115 **Miss.** 358, L.R.A.1918F, 1185, 76 So. 267, that it expressly disapproves of the decision in Johnson v. Success Brick Machinery Co. (1913) 104 **Miss.** 217, 61 So. 178, 62 So. 4, wherein the former decision was adhered to as the law of the case, on a second appeal, although its "wrongness" was "perfectly clear," and the former decision was expressly overruled as to other future cases; and in effect nullifies the force of the language used in other earlier Mississippi cases, such, for instance, as Swan v. Smith (1881) 58 **Miss.** 875, wherein it was said that, "even if our former decision on this point was wrong, it must be accepted as the law of this case," and New York L. Ins. Co. v. McIntosh (1908) — **Miss.** —, 46 So. 401, wherein, it was said that the former decision was the law of the case, whether it was right or wrong."

The above-cited Missouri cases would also seem to at least lessen the force of the decision in Feurt v. Ambrose (1889) 34 **Mo.** App. 360, and Hombs v. Corbin (1889) 34 **Mo.** App. 393, in both of which it was held that errors made on a first appeal were not subject to correction on a second appeal. However, later decisions of the court of appeals indicate that such courts did not, for some time, adopt the liberal rule followed by the supreme court and, except where forced by constitutional provision (see infra text, and note 38), for a time adhered to the rule that the decision on one appeal constitutes the law of the case on subsequent appeals. See cases cited infra, in note 38. And see also B. Roth Tool Co. v. Champ Spring Co. (1909) 146 **Mo.** App. 1, 123 S. W. 513, wherein it was said that a decision on a former appeal, even incorrectly decided, was the law of the case on the then present appeal.

In connection with United States v. Elliot (1895) 12 **Utah,** 119, 41 Pac. 720, supra, see Grand Central Min. Co. v. Mammoth Min. Co. (1909) 36 **Utah,** 364, 104 Pac. 573, Ann. Cas. 1912A, 254, wherein it was said that, "when a case has been once taken to a higher court, and its judgment obtained upon the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a subsequent appeal, be altered or changed;" but in which it does not appear that the court regarded the former decision as erroneous.

[17] Lorimer v. Fairchild (1904) 68 **Kan.** 328, 75 Pac. 124; Brewer v. Browning (1917) 115 **Miss.** 358, L.R.A. 1918F, 1185, 76 So. 267; Chambers v. Smith (1860) 30 **Mo.** 156 (holding that a reversal will not be decreed upon technical grounds where such reversal might result in hardship and a loss of rights); Bird v. Sellers (1894) 122 **Mo.** 23, 26 S. W. 668; Bealey v. Smith (1900) 158 **Mo.** 515, 81 Am. St. Rep. 317, 59 S. W. 984; Mangold v. Bacon (1911) 237 **Mo.** 496, 141 S. W. 650.

[18] School Directors v. Asheville (1905) 137 **N. C.** 503, 50 S. E. 279.

[19] United States v. Elliot (**Utah**) supra.

where the mischiefs to be cured will far outweigh any injury that might be done in the particular case by overruling the prior decision,[20] and the former ruling inadvertently overruled some sound and well-settled principle of law,[21] or rule of property,[22] or a controlling decision of the same court,[23] or inadvertently overlooked and nullified a statute,[24] or misconstrued a decision of a higher appellate court,[25] or involved a construction of the Constitution;[26] at least, where, on the former review, the cause was remanded generally, and no final judgment rendered,[27] it being argued that the practice should be to follow "the law of the land" rather than "the law of the case,"[28] and that, although it is embarrassing to withhold assent from the rule as laid down on the former appeal, it is the duty of the court to declare what it thinks is the true rule, while the case is still within its power.[29] And in a Missouri case,[30] the court said: "There is no immutable fiat of jurisprudence, forbidding a change of rulings on a second appeal. One decision may discard a rule of law announced in another. Courts of last resort occasionally find it proper and just to overrule and thus correct their former declarations of legal principles. It sometimes is a matter of congratulation that justice can be finally done in that manner, in the same cause, on a later appeal, when necessary." And, in a still more recent Missouri case,[31] the court discussed the exception under consideration as follows: "Like all general rules, the one in hand has its exceptions. Where manifest and far-reaching error has been committed, no cast-iron or immutable rule bars a reexamination of a question illy decided. In such case, it goes without saying that this court, as a debt due to justice and as one of the foundation stones of its own dignity, reserves to itself the right to reconsider, re-examine, and redetermine." And the general rule and its exceptions have been aptly stated[32] as follows: "The general rule, nakedly and baldly put, is that legal conclusions announced on a first appeal, whether on the general law or the law as applied to the concrete facts, not only prescribe the duty and limit the power of the trial court to strict obedience and conformity thereto, but they become and remain the law of the case in all after steps, below or above, on subsequent appeal.

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[20] Bealey v. Smith (1900) 158 **Mo.** 515, 81 Am. St. Rep. 317, 59 S. W. 984, supra.

[21] Kiley v. Kansas City (1885) 87 **Mo.** 103, 56 Am. Rep. 443; Bagnell Timber Co. v. Missouri, K. & T. R. Co. (1911) 242 **Mo.** 11, 145 S. W. 469; Underwood v. Caruthersville (1917) 197 **Mo.** App. 358, 194 S. W. 1090; Cluff v. Day (1894) 141 **N. Y.** 580, 36 N. E. 182.

[22] Cluff v. Day (**N. Y.**) supra; Reeves v. Petty (1875) 44 **Tex.** 249.

[23] Eaton v. Alger (1872) 47 **N. Y.** 345.

[24] Bagnell Timber Co. v. Missouri, K. & T. R. Co. (1911) 242 **Mo.** 11, 145 S. W. 469, supra; Underwood v. Caruthersville (1917) 197 **Mo.** App. 358, 194 S. W. 1090, supra; Eaton v. Alger (**N. Y.**) supra.

[25] Underwood v. Caruthersville (**Mo.**) supra.

[26] School Directors v. Asheville (1905) 137 **N. C.** 503, 50 S. E. 279.

[27] Hastings v. Foxworthy (1895) 45 **Neb.** 676, 34 L.R.A. 321, 63 N. W. 955 (wherein the court reviewed the earlier authorities at length); Eccles v. Walker (1906) 75 **Neb.** 722, 106 N. W. 977; School Directors v. Asheville (**N. C.**) supra. The Nebraska and North Carolina theory seems to be that when the cause is remanded generally there is no final adjudication, and that the questions involved are still left open, even as to points of law presented on the first appeal. But, in connection with the Nebraska cases see Smith v. Neufeld (1901) 61 **Neb.** 699, 85 N. W. 898, wherein the general rule seems to have been followed with approval.

[28] Lorimer v. Fairchild (1904) 68 **Kan.** 328, 75 Pac. 124.

[29] Layton v. Hall (1860) 25 **Tex.** 204.

[30] Rutledge v. Missouri P. R. Co. (1894) 123 **Mo.** 121, 24 S. W. 1053, 27 S. W. 327.

[31] Gracey v. St. Louis (1909) 221 **Mo.** 1, 119 S. W. 949.

[32] Mangold v. Bacon (1911) 237 **Mo.** 496, 141 S. W. 650.

The rule is grounded on convenience, experience, and reason. Without the rule, there would be no end to criticism, reagitation, re-examination, and reformulation. In short, there would be endless litigation. It would be intolerable if parties litigant were allowed to speculate on changes in the personnel of a court, or on the chance of our rewriting propositions once gravely ruled on solemn argument, and handed down as the law of a given case. . . . But there are exceptions to the rule, as well-recognized as the rule itself. Those exceptions evidence a flexibility, adjusting the rule to needs of refined justice by the exercise of a high and discriminating judicial power. . . . Whether from grace or right, when cogent and convincing reasons appear, such as lack of harmony with other decisions, and where no injustice or hardship would flow from a change, or where, by inadvertence, principles of law have been incorrectly declared the first time, or mistake of fact has been made, or injustice to the rights of parties would be done by adhering to the first opinion, then the exceptions to the rule have play, and it is our duty to re-examine and correct our own errors on the second appeal in the same case."

And where an appellate court, on separate appeals of the same case, has rendered conflicting opinions, and the case is brought up a third time for review, neither former opinion constitutes the law of the case, and the court should consider it as if presented for the first time.[33]

And it has been ruled that an exception to the general "law of the case" rule is justified and should be made, where, since the decision on former appeal, the same court in other cases has laid down a different rule,[34] especially where the question is such that a settled and stable rule is of great importance,[35] and this, even though such other decisions did not notice or profess to overrule the decision urged as the law of the case,[35] if, on the second appeal, it becomes necessary to reverse a judgment for other errors, and the positions of the parties have not been changed, and no injustice or hardship would result from the overruling of the former decisions,[36] and unless the law, as declared on the former appeal, has entered into a contract creating property rights, so that a change in the rule of law would impair the obligations of the contract.[37] And in Missouri, where, by constitutional provision, "the last previous rulings of the supreme court on any question of law or equity shall, in all cases, be controlling authority" in the court of appeals, it is of course, clear that the decision on an appeal to the court of appeals does not constitute the law of the case, upon a second appeal to that court, where the supreme court has, since the first appeal, laid down a contrary rule; and that it is the duty of the court to recede from its former rule, and to declare the law in conformity with the later decision of the supreme court.[38] Nor is an intermediate appellate court bound by the decision of another intermediate

[33] Moore v. Barclay (1853) 23 Ala. 739.

[34] Hamilton v. Marks (1876) 63 Mo. 167; Kiley v. Kansas City (1885) 87 Mo. 103, 56 Am. Rep. 443; Hastings v. Foxworthy (1895) 45 Neb. 676, 34 L.R.A. 321, 63 N. W. 955; Meyers v. Dittmar (1897) 47 Tex. 373. And see also Matthews v. Matthews (1897) 154 N. Y. 288, 48 N. E. 531.

But there are cases which hold to the direct contrary. See supra, text and note 4.

[35] Hamilton v. Marks (Mo.) supra.

[36] Barton v. Thompson (1881) 56 Iowa, 572, 41 Am. Rep. 119, 9 N. W. 899; Pennington v. Gillaspie (1910) 66 W. Va. 643, 66 S. E. 1009. These decisions proceed upon the assumption that they do not violate the general rule of the law of the case, because of the necessity of reversal upon other grounds, so that a change of decision merely causes a direction to the lower court that the correct rule be followed.

[37] Morris v. Henry (1917) 221 N. Y. 96, 116 N. E. 797.

[38] Hamilton v. Aurora F. & M. Ins. Co. (1889) 35 Mo. App. 263; Buchannan v. Cole (1896) 65 Mo. App. 495; Thompson v. Irwin (1898) 76 Mo. App. 418; Wolf v. Dwelling House Ins. Co. (1901) 86 Mo. App. 580.

appellate court on a prior appeal of the case, at least, where the decision on such prior appeal did not establish any property rights.[39] And, for a better reason, a principle of law laid down by an intermediate appellate court upon an appeal is not binding upon that court, upon a second appeal, where the highest appellate court has, since the first appeal, and in another case, decided the precise question contrary to the rule announced upon the first appeal.[40] And of course a decision of an intermediate appellate court, which has been reversed or modified on appeal, and held for naught, is not binding upon it, upon a subsequent appeal of the same case, as to any point decided upon the first appeal;[41] and this, even though the reversal was upon a single point of law, where the legal effect of such reversal is to set aside and hold for naught the judgment, as erroneous.[42] And where a decision of a state court has been reversed upon appeal to the Supreme Court of the United States, the rulings of the latter, and not the prior state court decision, are the law of the case, upon a second appeal to the state court.[43] Likewise, a prior decision of an intermediate appellate court is not the law of the case for the highest appellate court, when reviewing a later decision of the former court in the same case,[44] especially where the case is one the final decision of which may ultimately rest with the highest court;[45] and this, although it may not have been so reviewable in the first instance, because not a final judgment.[45] And in Missouri, by constitutional mandate, the supreme court is required to rehear and determine cases certified to it by the court of appeals, as in cases of jurisdiction obtained by ordinary appellate process, so that the supreme court cannot refuse to review a case which has twice been appealed to the court of appeals, and rely upon the decision on the first appeal as establishing the law of the case.[46]

However, these decisions do not compel an appellate court to permit its prior decision to be criticized in its presence, or to have questions reopened without its consent, but it is rather a matter of grace by the court than of right in the parties.[46] In

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[39] Spaulding v. Missouri Lumber & Min. Co. (1915) — Mo. App. —, 180 S. W. 1024.

[40] Zerulla v. Supreme Lodge, O. M. P. (1906) 223 Ill. 518, 79 N. E. 160 (so holding where the Illinois supreme court, between appeals to the Illinois appellate court in one case, had in another case laid down a rule contrary to that announced by the appellate court on the first appeal); Madl v. Chicago City R. Co. (1912) 167 Ill. App. 487 (holding same as preceding case); Steele v. Boley (1890) 7 Utah, 64, 24 Pac. 755 (holding that a decision by the supreme court of the territory of Utah would not be followed upon a second appeal to that court, where the Supreme Court of United States had, after the first appeal, but prior to the second appeal, laid down a contrary rule).

For cases laying down a contrary doctrine see supra, text and note 8.

[41] Chicago & E. I. R. Co. v. Jennings (1908) 138 Ill. App. 415; Union Nat. Bank v. Post (1900) 93 Ill. App. 339, affirmed in (1901) 192 Ill. 385, 61 N. E. 507; Griffen v. Manice (1902) 74 App. Div. 371, 77 N. Y. Supp. 626, 12 Am. Neg. Rep. 143, affirmed in (1903) 174 N. Y. 505, 66 N. E. 1109; Buker v. Leighton Lea Asso. (1901) 63 App. Div. 507, 71 N. Y. Supp. 610; Re Jerome Ave. (1903) 78 App. Div. 631, 79 N. Y. Supp. 662; Dunn v. Taylor (1912) — Tex. Civ. App. —, 143 S. W. 311.

[42] Chicago & E. I. R. Co. v. Jennings (Ill.) supra.

[43] Sherman v. Ward (1905) 9 Ariz. 327, 83 Pac. 356.

[44] Messinger v. Anderson (1911) 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 740 (so holding with respect to a former decision of a Federal circuit court of appeals in the same case); Brown v. Tourtelotte (1897) 24 Colo. 204, 50 Pac. 195 (so holding with respect to a former decision of the Colorado court of appeals on a former appeal).

[45] Brown v. Tourtelotte (Colo.) supra; Board of Trade v. Nelson (1896) 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. 743.

[46] Bealey v. Smith (1900) 158 Mo. 515, 81 Am. St. Rep. 317, 59 S. W. 984.

other words, the question as to whether a court will consider, upon a second appeal, what it has formerly decided in the same case, must always be addressed to the discretion of the court.[47] And even in those jurisdictions which admit that exceptions to the doctrine of "the law of the case" exist, a mere doubt as to whether the first case was correctly decided does not justify a second review of the questions there decided,[48] especially where such questions were thoroughly presented and carefully considered on the first appeal.[49] And the same has been held true where the members of the court, having the second appeal before them, did "not all concur in the view" taken on the first appeal.[50] In fact, it has often been said that it must be very clear that the first decision was erroneous, and that a serious error has been committed, in order to justify a re-examination on second appeal of the same questions decided on the first appeal;[51] or, as it has been put, cogent and convincing reasons must exist to induce a reopening, on the second appeal, of questions decided on a former appeal of the same case,[52] or that the deliberate judgment of an appellate court ought not to be departed from except for "strong reasons," since the public policy, which is subserved by stability in judicial decisions, especially requires that the court shall, in the absence of "manifest error" therein, adhere to the rule of law declared in a particular case, where the same question arises, upon the same facts and between the same parties, on another review.[53]

In Alabama, the legislature has abrogated the rule that an opinion of the court, however erroneous, was the law of the case in which it was rendered, and could not be questioned on a second appeal,[54] by expressly providing that it is the duty of the court, when a case comes before it a second time on appeal, to pronounce judgment without regard to the former ruling, if that be deemed erroneous.[55] And

[47] Kempner v. Huddleston (1896) 90 **Tex.** 182, 37 S. W. 1066; Speer v. Allen (1911) — **Tex.** Civ. App. —, 135 S. W. 231.

[48] See, for example, Chesapeake & O. R. Co. v. McKell (1913) 126 C. C. A. 336, 209 **Fed.** 514; Central Branch Union P. R. Co. v. Shoup (1882) 28 **Kan.** 394, 42 Am. Rep. 163; and Dugan v. Hollins (1858) 13 **Md.** 149.

[49] Chesapeake & O. R. Co. v. McKell (**Fed.**) supra; Cluff v. Day (1894) 141 **N. Y.** 580, 36 N. E. 182.

[50] Dougherty v. Horseheads (1896) 5 App. Div. 625, 39 **N. Y.** Supp. 447, reversed in (1899) 159 N. Y. 154, 53 N. E. 799, 6 Am. Neg. Rep. 348.

[51] See Central Branch Union P. R. Co. v. Shoup (1882) 28 **Kan.** 394, 42 Am. Rep. 163, and Bomar v. Parker (1887) 68 **Tex.** 435, 4 S. W. 599.

[52] Citizens Nat. Bank v. Donnell (1906) 195 **Mo.** 564, 94 S. W. 516; Dagnell Timber Co. v. Missouri, K. & T. R. Co. (1911) 242 **Mo.** 11, 145 S. W. 469; Trombley & Carrier Co. v. Seligman (1909) 133 App. Div. 525, 117 **N. Y.** Supp. 1063.

[53] Worrall v. Munn (1873) 53 **N. Y.** 185.

[54] It was said in Moulton v. Reid (1875) 54 **Ala.** 320, that the supreme court of Alabama had proceeded upon this "conservative rule" for over forty years.

[55] See Moulton v. Reid (**Ala.**) supra (wherein it was said, in considering and applying Alabama Revised Code, § 3510, that the former rule was sometimes applied so as to work great individual hardship and injustice, and that, while the court might regret it, it could not avoid the unseemly attitude in which the statute placed it, of reversing at a subsequent term the judgment it may, at a former time, have rendered in the cause); Meyer v. Johnson (1879) 64 **Ala.** 603; Stoudenmire v. De Bardelaben (1887) 85 **Ala.** 85, 4 So. 723 (quoting Alabama Code of 1886, § 683a); National Commercial Bank v. McDonnell (1890) 92 **Ala.** 387, 9 So. 149; Smith v. Smith (1908) 157 **Ala.** 79, 25 L.R.A.(N.S.) 1045, 47 So. 220 (quoting Alabama Code 1896, § 3840, and overruling the decision on former appeal on the ground that it was a misconception of the law; Alabama Consol. Coal & I. Co. v. Heald (1910) 168 **Ala.** 626, 53 So. 162 (citing Alabama Code 1907, § 5965); Mann v. Darden (1911) 171 **Ala.** 142, 54 So. 504 (citing same Code section); and Louisville & N. R. Co. v. Western U. Teleg. Co. (1915) 195 **Ala.** 124, 71 So. 118, Ann. Cas. 1917B,

although the statute is addressed only to the appellate court, yet, if the lower court departs from the former rule, and the appellate court, on a second appeal, is of opinion that the lower court decided correctly, its judgment must be affirmed.[56] But this statute, of course, operates only when a case brought before the court a second time involves the same principles and questions decided on the former appeal. For instance, it has been held,[57] where the former appeal was from a final decree in chancery and was affirmed, leaving for determination only the matter of account, that a second appeal sued out after the statutory period for appeal from such final decree had expired, from the subsequent proceedings for account, neither required nor authorized the court to reconsider the matters of right decided upon the first appeal. And on a second appeal the court will not retry questions decided on the first appeal, unless presented by proper assignments of error.[58] And it has also been said that, while the court is freed from "the law of the case" rule, it should still recognize and appreciate the necessity of the stability and uniformity of decisions, especially where the court is not really convinced that its former ruling is unsound or should be repudiated.[59]

Assuming that a court has become convinced that its decision on the former appeal was erroneous, its reluctance to abide by the rule of "the law of the case" is comprehensible, and no doubt often commendable, if regarded solely with reference to its effect in the particular case. But there are apparent difficulties, practical as well as logical, in preserving the rule at all, if an exception is to be admitted, when the court has become convinced of the error of its first decision, at least unless, as in the cases cited in footnotes 4 and 34, the decision has, in the meantime, been overruled in another case. How is the court to become convinced of its error? The attorney for the party adversely affected by the first decision may be confident of his ability to convince the court of the error, but, unless the court has already become convinced, it must, applying the general rule as to the law of the case refuse to hear him on the point; otherwise, the rule disappears altogether, or is at best converted into a rule which merely requires a very clear and convincing argument to demonstrate the error.

If the rule and the exception are to stand together, practical considerations would seem to suggest the advisability of a flank attack rather than a direct assault upon the prior decision. The exception, which is not easily defensible on logical grounds if the law of the case, as a distinctive rule, is to be retained at all, illustrates the tendency of the courts to achieve what is regarded as justice in the instant case, without very serious consideration of the theoretical effect which the decision may have upon the integrity of established principles and rules.

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696 (quoting same section, and stating that, however great may be the desire of the courts for a stability of decisions, it is their duty to review former decisions and, if convinced that they are erroneous, to disregard and overrule the same and be governed by what, in the opinion of the court at the time, is the law.

[56] Moulton v. Reid (1875) 54 Ala. 320. But see Meyer v. Johnson (1879) 64 Ala. 603, wherein it was said that, while the statute authorizes a party to question a former decision on a second appeal, a party had no right to do so in any forum of inferior jurisdiction, such forums being concluded by the former decision; and Bostick v. Jacobs (1904) 141 Ala. 598, 39 So. 629, wherein, without reference to the statute, it was held that, on a second appeal, a decree in accordance with the law as laid down in a former appeal "must" be affirmed.

[57] Stoudenmire v. De Bardelaben (1887) 85 Ala. 85, 4 So. 723.

[58] National Commercial Bank v. McDonnell (1890) 92 Ala. 387, 9 So. 149.

[59] See Alabama Consol. Coal & I. Co. v. Heald (1910) 168 Ala. 626, 53 So. 162. But in this connection, see also Louisville & N. R. Co. v. Western U. Teleg. Co. (1915) 195 Ala. 124, 71 So. 118, Ann. Cas. 1917B, 696, as set out supra, note 55. G. J. C.

WESTERN UNION TELEGRAPH COMPANY et al., Plffs. in Err.,
v.
CALVIN H. FOSTER et al., Members of the Public Service Commission of Massachusetts. (No. 274.)

SAME, Plffs. in Err.,
v.
FREDERICK J. MACLEOD et al., Constituting the Public Service Commission of the Commonwealth of Massachusetts. (No. 275.)

HENRY G. S. NOBLE, President of the New York Stock Exchange, Appt.,
v.
WESTERN UNION TELEGRAPH COMPANY et al. (No. 419.)

SAME, Appt.,
v.
UNITED TELEGRAM COMPANY et al. (No. 420.)

United States Supreme Court—May 20, 1918.

(247 U. S. 105, 62 L. ed. 1006, 38 Sup. Ct. Rep. 438.)

Commerce — distribution of stock quotations — ticker service — state regulation.

1. The telegraphic transmission of the quotations of the New York Stock Exchange to the Boston offices of the telegraph companies, whence they are transmitted by an operator to tickers in the offices of brokers within the state, who have subscribed for such service and have been approved by the exchange, conformably to a contract between the telegraph companies and the exchange, does not lose its character as interstate commerce until it is completed in the brokers' offices, and the state of Massachusetts may not interfere with such commerce by ordering the removal of an alleged discrimination resulting from the refusal of the telegraph companies to furnish one broker the service supplied to others.

[See note on this question beginning on page 1286.]

Judgment — res judicata — who concluded.

2. The New York Stock Exchange cannot be bound by a decree requiring telegraph companies transmitting its quotations to remove an alleged discrimination resulting from their refusal to furnish one broker with the service supplied others, merely because the exchange, by its contracts with the telegraph companies, had reserved the right to intervene in suits against telegraph companies, where it did not exercise such right.

WRITS of error to the Supreme Judicial Court of the Commonwealth of Massachusetts to review decrees for the enforcement of an order of the State Public Service Commission requiring the telegraph companies transmitting stock quotations to remove a discrimination resulting from their refusal to furnish one broker with the services supplied others. *Reversed.*

APPEALS from decrees of the District Court of the United States for the District of Massachusetts dismissing suits to enjoin violation of a contract with certain telegraph companies for the transmission of stock quotations. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Rush Taggart, John G. Milburn, and Arthur Lord,** for plaintiffs in error, in Nos. 274 and 275:

The transactions affected by the order of the Public Service Commission constitute interstate commerce.

Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 59 L. ed. 517, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275; Cain v. Western U. Teleg. Co. 10 Ohio Dec. Reprint, 72.

The contracts between the telegraph companies and the exchange are wholly outside of the jurisdiction of Massachusetts, and the order of the Public Service Commission is invalid, in that it attempts to nullify the provisions contained in such contracts.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024.

The condition which the order imposes upon the right to deliver continuous quotations to subscribers approved by the exchange, to wit, that such quotations shall also be delivered to applicants whom the exchange has disapproved, is a direct burden upon interstate commerce and renders the order invalid.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57.

The matters affected by the order of the Public Service Commission are within the sole jurisdiction of the Interstate Commerce Commission.

Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Atchison, T. & F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Erie R. Co. v. People, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A.(N.S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Gardner v. Western U. Teleg. Co. 145 C. C. A. 399, 231 Fed. 405; certiorari denied in 243 U. S. 644, 61 L. ed. 944, 37 Sup. Ct. Rep. 405; Williams v. Western U. Teleg. Co. 203 Fed. 140; White v. Western U. Teleg. Co. 33 Inters. Com. Rep. 500; Cultra v. Western U. Teleg. Co. 44 Inters. Com. Rep. 670; Western U. Teleg. Co. v. Dant, 42 App. D. C. 398, L.R.A.1915B, 685, Ann. Cas. 1916A, 1132; Western U. Teleg. Co. v. Bilisoly, 116 Va. 562, 82 S. E. 91; Western U. Teleg. Co. v. First Nat. Bank, 116 Va. 1009, 83 S. E. 424; Boyce v. Western U. Teleg. Co. 119 Va. 14, 89 S. E. 106; Western U. Teleg. Co. v. Compton, 114 Ark. 193, 169 S. E. 946; Western U. Teleg. Co. v. Culpepper, 120 Ark. 319, 179 S. E. 494; Bailey v. Western U. Teleg. Co. 97 Kan. 619, 156 Pac. 716, affirmed on rehearing in 99 Kan. 7, 160 Pac. 985; Western U. Teleg. Co. v. Lee, 174 Ky. 210, 192 S. W. 70; Haskell Implement & Seed Co. v. Postal Teleg.-Cable Co. 114 Me. 277, 96 Atl. 219; Western U. Teleg. Co. v. Bassett, 111 Miss. 468, 71 So. 750; Western U. Teleg. Co. v. Showers, 112 Miss. 411, 73 So. 276; Meadows v. Western U.

Teleg. Co. 132 N. C. 40, 43 S. E. 512; Strauss Gas Iron Co. v. Western U. Teleg. Co. 23 Pa. Dist. R. 291, affirmed in 59 Pa. Super. Ct. 122.

Messrs. **Henry S. Robbins** and **Walter F. Taylor,** for appellant, in Nos. 419 and 420:

A state may not impair one's right to make interstate sales, or a contract having this purpose.

Savage v. Jones, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715; American Exp. Co. v. Iowa, 196 U. S. 143, 49 L. ed. 422, 25 Sup. Ct. Rep. 182; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

Again, this order involves property which belongs to the exchange, and thus deprives the exchange of its property.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; McDearmott Commission Co. v. Board of Trade, 7 L.R.A.(N.S.) 889, 77 C. C. A. 479, 146 Fed. 961, 8 Ann. Cas. 759; Board of Trade v. Hadden-Krull Co. 109 Fed. 705; Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Simon v. Southern R. Co. 236 U. S. 115, 122, 59 L. ed. 492, 497, 35 Sup. Ct. Rep. 255.

The interstate character of the transaction does not terminate until the purchaser or consignee has taken over the property, or has had a reasonable time in which to do so.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Leisy v. Hardin, 135 U. S. 100, 124, 34 L. ed. 128, 137, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Schollenberger v. Pennsylvania, 171 U. S. 1, 21, 43 L. ed. 49, 56, 18 Sup. Ct. Rep. 757.

The telegraph company merely acts as a carrier in transporting for the exchange the quotations from New York city to the offices of approved brokers in Boston.

New York & C. Grain & Stock Exch. v. Board of Trade, 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855; Marine Grain & Stock Exch. v. Western U. Teleg. Co. 22 Fed. 23; Re Renville, 46 App. Div. 37, 61 N. Y. Supp. 549.

The interstate character is not lost because property brought into a state for the purpose of sale is, to a certain extent, manipulated, before delivery to the purchasers.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182.

The question whether a carrier, as to its interstate business, may establish and conform to a practice to restrict its distribution of quotations, or should be required to adopt a different one, is exclusively within the administrative functions of the Interstate Commerce Commission.

Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 131, 59 L. ed. 867, 873, 35 Sup. Ct. Rep. 484; Illinois C. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 427, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Loomis v. Lehigh Valley R. Co. 240 U. S. 43, 60 L. ed. 517, 36 Sup. Ct. Rep. 228; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114.

These quotations have not become legally impressed with a public use, to the extent that, if distributed at all, they must be distributed without discrimination, except to bucket shops.

New York & C. Grain & Stock Exch. v. Board of Trade, 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855; Board of Trade v. Christie Grain & Stock Co. 116 Fed. 944; Re Renville, 46 App. Div. 37, 61 N. Y. Supp. 549; Metropolitan Grain & Stock Exch. v. Chicago Bd. of Trade, 15 Fed. 847; Bryant v. Western U. Teleg. Co. 17 Fed. 825; Marine Grain & Stock Exch. v. Western U. Teleg. Co. 22 Fed. 23; Wilson v. Commercial Teleg. Co. 18 N. Y. S. R. 78, 3 N. Y. Supp. 633.

The state, by compelling, through its Public Service Commission and supreme court, the delivery of these quotations to Foster, would be taking without right the private property of the exchange for the private use of Foster,

in violation of the 14th Amendment of the Federal Constitution, requiring due process of law.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753.

The exchange, by resorting to the telegraph companies—as, because of the nature of the property, it must do in order to sell at all—does not involuntarily impair its property right to the extent of being obliged to sell it to those to whom it does not think it safe to intrust its quotations.

Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; Sargent v. Boston & L. R. Corp. 115 Mass. 416; Bradley v. Western U. Teleg. Co. 8 Ohio Dec. Reprint, 708; Sterrett v. Philadelphia Local Teleg. Co. 18 W. N. C. 77; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 247, 46 L. ed. 1144, 1148, 22 Sup. Ct. Rep. 881.

Mr. **Patrick Henry Kelley**, for defendant in error, Foster:

The telegraph company was under no obligation to the exchange to furnish or distribute the quotations after they had been delivered to the telegraph company by the exchange, and the furnishing and delivering of the quotations by the telegraph company to subscribers was a collateral undertaking, apart from its ordinary and usual occupation as a common carrier of messages for hire.

Tucker v. Western U. Teleg. Co. 95 Misc. 287, 158 N. Y. Supp. 959, affirmed in — App. Div. —, 156 N. Y. Supp. 1148.

There is no ground upon which to base the claim that the plaintiffs in error were deprived of their property without due process of law.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; St. Paul, M. & M. R. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 56 L. ed. 924, 32 Sup. Ct. Rep. 577.

In furnishing and distributing the quotations of the stock exchange, the telegraph company was engaged in the business of selling commercial news and information to its subscribers in New York and Boston.

Baccus v. Louisiana, 232 U. S. 334, 58 L. ed. 627, 34 Sup. Ct. Rep. 439; Northern P. R. Co. v. Meese, 239 U. S. 614, 60 L. ed. 467, 36 Sup. Ct. Rep. 223, 10 N. C. C. A. 939.

No question of interstate commerce is involved, as the furnishing of quotations by the ticker service to subscribers in Boston is purely intrastate business, and subject to state regulation.

Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 58 L. ed. 552, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 415; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; American Steel & Wire Co. v. Speed, 192 U. S. 520, 48 L. ed. 546, 24 Sup. Ct. Rep. 365; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Missouri P. R. Co. v. Larabee Flour Mills, 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Atlantic Coast Line R. Co. v. Glenn, 239 U. S. 388, 60 L. ed. 344, 36 Sup. Ct. Rep. 154; Illinois C. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518, 60 L. ed. 776, 36 Sup. Ct. Rep. 443; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Hall v. Geiger-Jones Co. 242 U. S.

541, 61 L. ed. 481, L.R.A. 1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Northern P. R. Co. v. Meese, 239 U. S. 613, 60 L. ed. 467, 36 Sup. Ct. Rep. 223, 10 N. C. C. A. 939; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 400, 57 L. ed. 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

The application of the state statute having been limited and confined to the local and domestic distribution of the quotations by the ticker service, after the interstate transmission in the Morse code had been completed, this disposes of and forecloses the claim of jurisdiction in the Interstate Commerce Commission.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14.

The Interstate Commerce Commission had no jurisdiction over Foster, nor over the telegraph company, in the character in which they each presented themselves before the court; nor had the Interstate Commission jurisdiction over the subject-matter of their dispute.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; United States v. Delaware & H. R. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; Interstate Commerce Commission v. Chicago, G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Langdon v. Pennsylvania R. Co. 194 Fed. 486; United States v. Pennsylvania R. Co. 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; Pipe Line Cases (United States v. Uncle Sam Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956.

Messrs. **H. Ware Barnum**, and **Henry C. Attwill**, Attorney General of Massachusetts, for defendant in error, the Massachusetts Public Service Commission:

The matter affected by the order of the Public Service Commission does not constitute interstate commerce.

Com. v. People's Exp. Co. 201 Mass. 564, 131 Am. St. Rep. 416, 88 N. E. 420; Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Rast v. Van Deman & L. Co. 240 U. S. 342, 360, 60 L. ed. 679, 688, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann Cas. 1917B, 455; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 240, 59 L. ed. 552, 558, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296.

Even if the matter affected is held to constitute interstate commerce, the subject is open to state regulation until acted upon by Congress.

Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Vermilye v. Western U. Teleg. Co. 207 Mass. 401, 93 N. E. 635; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 634, 42 L. ed. 878, 885, 18 Sup. Ct. Rep. 488; Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 55, 53 L. ed. 693,

695, 29 Sup. Ct. Rep. 403; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C. C. A. 268, 160 Fed. 316, 15 Ann. Cas. 1210; Postal Cable Teleg. Co. v. Cumberland Teleph. & Teleg. Co. 177 Fed. 726; Central U. Teleg. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; State ex rel. Goodwine v. Cadwallader, 172 Ind. 642, 87 N. E. 644, 89 N. E. 319; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

If the transaction can be regarded in any light as the sending of an interstate message, it is a message from the telegraph company in New York to the telegraph company itself in Boston; and so far as such interstate transaction is concerned, it is then completed. At that point there is a distinct change in relations.

Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623; Texas & N. O. R. Co. v. Sabine Tram. Co. 227 U. S. 111, 126, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 163, 59 L. ed. 517, 519, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 240, 59 L. ed. 552, 558, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 343, 58 L. ed. 988, 992, 34 Sup. Ct. Rep. 592.

Even if the Interstate Commerce Act is held applicable, action by state tribunals is not inconsistent with it.

Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 417, 58 L. ed. 1377, 1381, L.R.A. 1915E, 942, 34 Sup. Ct. Rep. 790; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Southern R. Co. v. Reid, 222 U. S. 424, 437, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; Illinois C. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 197, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315.

The telegraph companies are not deprived of property without due process of law.

United States v. Delaware & H. R. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Delaware, L. & W. R. Co. v. United States, 231 U. S. 363, 370, 58 L. ed. 269, 272, 34 Sup. Ct. Rep. 65; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Orient Ins. Co. v. Daggs, 172 U. S. 557, 566, 43 L. ed. 552, 555, 19 Sup. Ct. Rep. 281; Paul v. Virginia, 8 Wall. 168, 181, 19 L. ed. 357, 360; Bank of Augusta v. Earle, 13 Pet. 519, 589, 591, 10 L. ed. 274, 308, 309; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 228, 24 Sup. Ct. Rep. 93; Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57; Interstate Amusement Co. v. Albert, 239 U. S. 560, 60 L. ed. 439, 36 Sup. Ct. Rep. 168; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 467, 18 Ann. Cas. 989.

Corporations engaged in business of a public character are required to employ their property, where reasonably required for the public convenience, without discrimination.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Louisville & N. R. Co. v. United States, 238 U. S. 1, 20, 59 L. ed. 1177, 1184, 35 Sup. Ct. Rep. 696; Pennsylvania R. Co. v. United States, 236 U. S. 351, 366, 59 L. ed. 616, 625, P.U.R. 1915B, 261, 35 Sup. Ct. Rep. 370; Michigan C. R. Co. v. Michigan Railroad Commission, 236 U. S. 615, 631, 59 L. ed. 750, 756, P.U.R.1915C, 263, 35 Sup. Ct. Rep. 422; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R. 1918A, 792, 38 Sup. Ct. Rep. 122.

Mr Justice **Holmes** delivered the opinion of the court:

Four cases were argued together

in this court. The first two were suits in the supreme judicial court of Massachusetts,—one a statutory petition by the telegraph companies to have an order of the Public Service Commission annulled; the other a bill by the Commission to have the same order enforced. The cases were consolidated and reserved on the pleadings for determination by the full court, which decreed that the petition of the plaintiffs in error should be dismissed and the order of the Commission obeyed. 224 Mass. 365, P.U.R.1916F, 176, 113 N. E. 192. The order recited that the Gold & Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company, had, without just cause, refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service then supplied to others, declared the refusal an unlawful discrimination, and required the two companies to remove the discrimination forthwith.

The material facts may be abridged as follows: The New York Stock Exchange, having a monopoly of the information collected by it on the floor of the exchange concerning the prices quoted in transactions there, made contracts with the plaintiffs in error of the same general character as those before the court in Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 246, 49 L. ed. 1031, 1037, 25 Sup. Ct. Rep. 637, and Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529. By these contracts for specified lump sums the exchange agreed to furnish to the telegraph companies simultaneously full and continuous quotations of prices made in transactions upon the exchange. The telegraph companies "may" in their turn furnish quotations to their "patrons" at intervals of more than fifteen minutes, subject to discontinuance upon objection of the exchange, and may furnish continuous service by ticker to subscribers, provided the latter sign applications in duplicate, one of which is to go to the exchange, the application not to be effectual until the subscriber is approved by the exchange, agreeing that the telegraph company may discontinue the service "whenever directed so to do by said New York Stock Exchange." The application recognizes that the quotations are furnished under contract with the exchange, and agrees not to furnish the quotations to branch offices or correspondents unless first approved by the exchange and also signing agreements, one of which is to be delivered to the exchange. The contract states that the intent of the exchange in reserving the right to disapprove, etc., is only to prevent improper and unlawful use of the facts.

The Gold & Stock Telegraph Company's business is carried on by the Western Union Telegraph Company in the name of the former. The quotations are furnished to the latter in New York, telegraphed by it to the office of the Gold & Stock Company in Boston, translated from the Morse code into English, and thence transmitted by an operator to the tickers in the offices of the brokers who have subscribed and have been approved. The United Telegram Company, a New Jersey corporation, receives quotations for Boston alone, where is its principal office outside of New Jersey. They are furnished by the exchange in New York, telegraphed to the Boston office over a wire of the Postal Telegraph Cable Company, and thence transmitted as in the other case. On these facts the plaintiffs in error say that the order is an unwarranted interference with commerce among the states and takes property without due process of law, setting up the Constitution of the United States.

We shall not discuss the bearing of the 14th Amendment, nor yet how far an order simply to remove a discrimination could be effectual when, if Mr. Foster were let in on the same terms as those now ac-

cepted as subscribers, he would agree that the telegraph company might discontinue its service without notice whenever directed so to do by the New York Stock Exchange. It is enough that, in our opinion, the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices, and that the interference with it was of a kind not permitted to the states. The supposed analogy that has prevailed is that of a receiver of a package breaking bulk and selling at will in retail trade. But it appears to us misleading. We also think it unimportant that the contracts between the exchange and the telegraph companies emphasize the element of quasi sale for a lump sum, and leave it to the interest of the telegraph companies to find subscribers. Neither that nor the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the exchange. It does not matter if they have no contract with the exchange, directly. It does not matter that if the telegraph companies did not deliver to any given one the exchange could not complain. If the normal, contemplated, and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond.

Commerce—distribution of stock quotations—ticker service—state regulation.

Thus, lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 126, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229. Practice, intent, and the typical course, not title or niceties of form, were recognized as determining the character, and other cases to the same effect were cited. The principle was reaffirmed in Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837, and is too well settled to need to be further sustained. Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 349, 61 L. ed. 1181, 1183, 37 Sup. Ct. Rep. 623. See Swift & Co. v. United States, 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276. It is admitted that the transmission from New York to Massachusetts by the telegraph company was interstate commerce. If so, it continued such until it reached "the point where the parties originally intended that the movement should finally end." Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 163, 59 L. ed. 517, 519, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275.

If the transmission of the quotations is interstate commerce, the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control,—to change the criteria by which customers are to be determined and so to change the business. It is suggested that the state gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error, under their present charters, could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end (United States v. Reading Co. 226 U. S. 324, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90), and a constitutional power cannot be used by way of condition to attain an unconstitutional re-

sult (Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57). The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified "under that somewhat ambiguous term of 'police powers.'" Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 359, 30 L. ed. 1187, 1189, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Savage v. Jones, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 547, 58 L. ed. 1457, 1459, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024. Without going into further reasons we are of opinion that the decree of the supreme judicial court must be reversed.

The other two cases were suits brought by the New York Stock Exchange against the telegraph companies severally and Foster. The bills set forth the respective contracts with the companies, allege that Foster made applications to them in the prescribed form, was given a full hearing before a committee of the exchange, and that as a result the exchange reached the conclusion that Foster had been conducting bucket shops and wanted the quotations in aid of such shops, and therefore disapproved the applications. They set forth the order of the state commission, the decree of the state court, and the intent of the telegraph companies to comply with the order, and allege that it is void, as beyond the jurisdiction of the state commission under the Constitution and acts of Congress, and also as depriving the plaintiff of its property without due process of law. Injunctions are prayed against delivery of continuous quotations to Foster, or receipt of them by him, unless and until he shall have acquired the right by contract with the approval of the exchange. Subsequently the members of the Public Service Commission were made parties, and then upon their motion the bills were dismissed by the district court, the judge accepting the reasoning of the supreme court of the state. The decision seems to have been upon the merits, but the question is certified whether the bill presents a controversy which arises under the Constitution or laws of the United States within the meaning of § 24 of the Judicial Code [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1916, § 991]. In view of the decision in the state cases probably it will not be necessary to prosecute these suits farther. But it follows from what we have said that the decision of the District Court was wrong and that the decrees in these cases also must be reversed. It is suggested, to be sure, that the exchange would be barred by the state decree against the telegraph companies if it stood, because the exchange by its contracts reserved the right to intervene in such suits. It did not intervene, and therefore would not have been bound.

Judgment—res judicata—who concluded.

Decrees reversed.

ANNOTATION.

Telegraph ticker service.

I. In general, 1286.
II. Rules and regulations, 1288.
III. Discrimination, 1288.
IV. Obligation to furnish for gambling purposes, 1295.
V. Liability for errors, 1298.

I. In general.

This note is designed to discuss the rights and liabilities growing out of the so-called "ticker service," by which market quotations are transmitted by telegraph, and automatically record-

ed on a "tape." A few cases involving contracts by telegraph companies to furnish daily market reports have, however, been included.

The property right in market quotations is not discussed.

In National Teleg. News Co. v. Western U. Teleg. Co. (1902) 60 L.R.A. 805, 56 C. C. A. 198, 119 **Fed.** 294, the origin of ticker service was described as follows: "About 1881, there was invented an instrument which, by means of a type wheel, actuated by electrical impulse, automatically prints in plain ordinary type, upon a strip of paper, messages transmitted electrically from a distance. The instrument is now generally known as the 'ticker,' and is commonly found in the offices of brokers, bankers, and other persons interested in the current price of securities, and in hotels, saloons, and other places where people who are interested in the happenings of the race tracks, athletic clubs, baseball associations, and in pending events generally, are in the habit of gathering. Upon the perfecting of this instrument, appellee [the telegraph company] entered, in addition to its general telegraph business, upon a business heretofore new to it. It collected at various points where it had offices, news relating to events there transpiring, and, after accumulating in its central offices such product by means of its wires, redistributed to its tickers, in the offices and places of its patrons, by means of local wires, what was deemed of sufficient interest. The news thus gathered, and printed upon strips of paper, is open to the inspection of all persons who may come within these places."

The collection and distribution of market reports is not within the general scope of the business of a telegraph company, and it cannot be compelled, in the absence of a contract, to furnish such service. Metropolitan Grain & Stock Exch. v. Mutual U. Teleg. Co. (1883) 11 Biss. 531, 15 **Fed.** 847, wherein the court said: "The further reason which was urged in behalf of the telegraph company, that it is no part of the duty of the telegraph company to collect and transmit information, seems to me cogent and forcible. If they volunteer to follow that class of employment they are bound, perhaps, to do it with fidelity, while their contract continues, but whenever they terminate their contract, no person can compel them to enter into another, or to continue it when they wish it terminated. The defendant gave the complainant due and ample notice of more than a week of its intention to withdraw its reports, and therefore terminated its contract with the plaintiff, which, it seems to me, it had the right and power to do, and I do not know of any power which can enforce or compel the telegraph company to gather news and transmit it, when it ceases voluntarily to enter upon and continue in that class of business. If the telegraph company has assumed any contract obligations to the complainant which it is unable or unwilling longer to fulfil, complainant has an ample remedy at law for the damages sustained."

In Bradley v. Western U. Teleg. Co. (1883) 8 **Ohio** Dec. Reprint, 707, it was said: "This business of collecting and furnishing 'commercial news' is entirely separate and distinct from the business of the defendant as a common carrier of messages for hire from one person to another, over its wires, and I cannot see that it differs in its nature from the business of any of our merchants, who purchase goods and merchandise, in the east and elsewhere, and bring them here to dispose of to their customers. The fact that one is tangible in its nature, and the other intangible, does not, I think, make any difference in principle. I use the words 'common carrier,' not as applicable generally to telegraph companies, but only to their duty to receive and transmit messages for the public. The law of bailment is the foundation of the law governing common carriers, and the ordinary definition of bailment is, a delivery of something of a personal nature by one to another upon a contract, express or implied, that that other will dispose of the thing according to the instructions given him. 2 Black, Com. 451; Story

Bailm. § 2; 2 Kent, Com. 559. But in this case, the quotations collected by the defendant are its own property until delivered into the possession of the plaintiff, and are not in any sense the subject of a bailment. I am not aware of any adjudicated case on the subject, but it seems to me clear on principle that, in collecting and furnishing the quotations which are the subject of this controversy, the defendant was engaging in a business entirely distinct from its public duties. If I am correct in my conclusion, then, as to the business which is the subject of this controversy, the defendant occupied the same relation to the plaintiff that any private individual would; and, as the alleged contract had no definite time to run, the defendant might rightfully discontinue furnishing the quotations at any time, subject of course to the provision as to notice, and as to that, I think the plaintiff's remedy would be adequate at law in an action for the breach of the contract, and the court would refuse the aid of its extraordinary powers. I think this would apply to the removal of the ticker as well." See, to the same effect, Sterrett v. Philadelphia Local Teleg. Co. (1886) 18 Phila. (Pa.) 317.

But it is held in some jurisdictions that, where the business of furnishing ticker service is engaged in, that business is, from its nature, impressed with a public character, and the service must be furnished without discrimination. See infra, III.

The transmission of market quotations from one state to another constitutes interstate commerce, and is not subject to state regulation. See the reported case (WESTERN U. TELEG. CO. v. FOSTER, ante, 1278).

II. Rules and regulations.

It has been held that a telegraph company engaged in the business of furnishing market, news, or stock quotations by ticker service, and a board of trade or exchange with which it contracts to transmit quotations, have the right to make and enforce reasonable rules and regulations relating to the use and dissemination of such quotations.

Thus, a rule forbidding the customers of a ticker service to use the quotations in bucket-shop transactions has been upheld in a number of cases. See infra, V.

In Shepard v. Gold & Stock Teleg. Co. (1885) 38 Hun (N. Y.) 338, it was held that a regulation providing that the information furnished was not to be sold, or given for publication, was reasonable, and that a violation thereof warranted a discontinuance of the service.

In Sullivan v. Chicago Bd. of Trade (1903) 111 Ill. App. 492, a provision against the assignment of the contract for ticker service without the consent of the telegraph company was sustained.

But a provision authorizing the company to remove its instrument whenever, in its judgment, the subscriber violates any condition theref, has been held to be unreasonable. Smith v. Gold & Stock Teleg. Co. (1886) 42 Hun (N. Y.) 454, wherein the court said: "What regulations are reasonable may not in all cases be easy to determine. But there need be no hesitation in saying that the clause in their contract, permitting them to discontinue the service when, in their judgment, a breach of conditions has been had, is not a reasonable regulation, and affords no defense to this action. No man can be judge in his own case, and, to justify defendants in refusing to perform service, there must be a reason that the court can pronounce sufficient."

III. Discrimination.

It has been held in some jurisdictions that it is the duty of a telegraph company, which has engaged in the business of furnishing ticker service, to supply continuous quotations to all persons who desire them, and on the same terms exacted of others.

These decisions apply the principle laid down in Munn v. Illinois (1877) 94 U. S. 113, 24 L. ed. 77, that private property devoted by its owner to a public use becomes impressed with a public interest, and is, therefore, subject to public control and regulation. New York & C. Grain & Stock Exch. v. Board of Trade (1888) 127 Ill. 153,

2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855, reversing (1888) 27 Ill. App. 93; Christie-Street Commission Co. v. Board of Trade (1901) 94 Ill. App. 229; Western U. Teleg. Co. v. State (1905) 165 Ind. 492, 3 L.R.A. (N.S.) 153, 76 N. E. 100, 6 Ann. Cas. 880. See also Board of Trade v. Riordan (1901) 94 Ill. App. 298. And see Western U. Teleg. Co. v. Foster (1916) 224 Mass. 365, P.U.R.1916F, 176, 113 N. E. 192, reversed on other grounds in the reported case.

Thus, in New York & C. Grain & Stock Exch. v. Board of Trade (1888) 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855, reversing (1888) 27 Ill. App. 93, it was held that, while the market quotations of the board of trade were its private property, they had, in course of time, become clothed with a public interest; and the board, as long as it continued to collect and furnish quotations, must do so without unjust discrimination, and must furnish them on the same terms to all who might desire their use for lawful purposes. The court, in arriving at this conclusion, said: "The contention of the board of trade is that it is strictly a private corporation, and that both the individual and aggregate business of its members is essentially private business, and that the market news and statistics collected and compiled at the expense of the association are the private property of the association, and that it has a legal right to control such market news and statistics, and determine what telegraphic despatches touching the same it will send directly from the floor of its exchange during business hours, and to whom they shall be sent, or whether it will send any such despatches whatever. The board of trade is a private corporation, and it was incorporated for the purpose of affording facilities to its members in doing business with each other. In their transactions upon the floors of the exchange they deal as principles with each other, but in respect to the outside world they are brokers and commission merchants for the producers, consumers, shippers, and merchants whom they represent. For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessaries of life throughout the country and the world. The great power and influence which the board possesses in dictating market values are owing to the vast aggregation of products which are drawn to its portals for a market, and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business, though in form, and as between the members, the mere private and individual dealings of such members, is, in reality, the business of the numerous producers, consumers, merchants, and shippers for and on behalf of whom these members deal. A potential factor in attracting this accumulation of business to the halls of the exchange, and in vesting the board with this power to regulate and determine the market prices of grain and provisions, is the fact that many years ago the board admitted and invited the telegraph companies, which are quasi public corporations, to the floors of the exchange, and permitted and encouraged them to gather market quotations, showing the changes and fluctuations in the prices of the various products as they occurred, and send instantaneous information from the floors of the board, by means of telegraph lines and instruments, to all the principal towns and cities, and by means of ticker circuits to the places of business of all persons desirous of such information, which information was furnished to all persons and corporations, without discrimination, who were willing to receive and pay for the same. In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and determined on the board of trade, and the business of dealing in such products has been brought to conform to the method of receiving instantaneous

and continuous market reports, inaugurated, and for years persisted in, by the board of trade and the telegraph companies. This market news is a species of property, and, if the statistics with reference to the individual business of the members of the association, and the aggregate business of its members, had from the start been gathered and compiled at the expense of its members, and for their sole use, it may be it would have been strictly private property, held in trust by the board for the use and benefit of such members, and wholly free from any public interest therein. But the board did not so exercise its franchises and so conduct its business; but admitted the telegraph companies to the floors of its exchange, and permitted and encouraged them, from day to day and year after year, to gather these statistics of the dealings on the board, and telegraph them, immediately as they were made, throughout the land, to whosoever would pay for such information, until the business of the country had adapted itself to these means and appliances, and the point reached when the quotations upon the board were puissant to determine the market values of the products of the country; and all persons dealing in such products could not, without the knowledge and benefit of these immediate quotations, intelligently and safely so deal. The facts that the board of trade is a private corporation, and that the dealings between its members are private business, such as is transacted between dry goods, grocery, and commission merchants, and that the statistics of these dealings, collected as we have stated, are private property, are not conclusive that such statistics are not charged with a public interest, and that there is no duty due the public in respect thereto." The court then quoted from Munn v. Illinois (U. S.) supra, to the effect that, when one devoted his property to a use in which the public had an interest, he thereby granted to the public an interest in that use, and therefore must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created; and went on to say: "Assuming these market quotations and reports are property, and the private property of the board of trade, yet, if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily to all alike, common to all, and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others, who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them."

And in Western U. Teleg. Co. v. State (1905) 165 **Ind.** 492, 3 L.R.A. (N.S.) 153, 76 N. E. 100, 6 Ann. Cas. 880, the doctrine of Munn v. Illinois was against applied; and it was held that a quasi public corporation, as long as it continued in a business impressed with a public interest, must be subject to such regulations as might be necessary to prevent injury to that interest, and that a telegraph company which had purchased the continuous market quotations of a board of trade, and had been supplying them at a fixed price for such a length of time that they had become necessary to the business carried on in the products covered by the quotations, could not, while continuing in the business of furnishing quotations, refuse to furnish them to anyone able to pay for them, and willing to be governed by the company's reasonable rules and regulations.

The proposition that a public interest attaches to the promulgation of the quotations of a board of trade, or stock exchange, was repudiated in Board of Trade v. Christie Grain & Stock Co. (1900) 116 **Fed.** 944, reversed in (1903) 61 C. C. A. 11, 125 Fed. 161, wherein the court said: "It is further contended by the resisting defendants that the continuous market quotations are of such a character, and the board of trade has so conducted itself with reference to the same, that they have become clothed with a public interest, and that as long as it continues in the business of collecting and furnishing them to the public it must do so without unjust discrimination as to persons, and must furnish them to all who may desire to obtain them for lawful purposes, and upon the same terms and conditions. Assuming that this contention is well founded, it is not clear that it helps the defendants, in view of the fact that the conditions imposed by the board of trade are not unreasonable or prohibitive, and that, acting through the telegraph companies, it applies them alike to all persons who desire the quotations for lawful purposes. But, aside from this, I am of the opinion that courts cannot, by their decrees, assume the initiative in declaring private property to be impressed with a public use. There should first exist that condition of growth or expansion of a private business, or of its relation to the public service or public necessity, which justifies the assertion of a public interest therein, and the accompaniment of public control, followed by legislative recognition or declaration of such condition. The power to bring under governmental control the lawful business of individuals and private corporations not vested with the power of eminent domain, and who are not engaged in what, by common acceptation, is termed a public service, for the reason that such business, through the enterprise and prudent management if its conductors, has grown to be of great public interest and concern, is of the gravest and most momentous character. It is doubtful doctrine that, in the absence of legislative action, a suitor in a court of equity may be denied relief merely because the chancellor is of the opinion that his business, originally private in its character, has grown to such magnitude that the public is entitled to an interest therein, and to a control thereof commensurate with that interest. When such a condition arises, the measure of the public control is limited by the extent of the public interest, and the making of regulations pertaining thereto is of legislative, not judicial, cognizance."

After the decision in Munn v. Illinois (1877) 94 **U. S.** 113, 24 L. ed. 77, but before its principles had been applied by the Illinois courts to the market quotations of a board of trade, several decisions were rendered, principally by the Federal courts, that appear to be entirely in opposition to the doctrine of that case.

Thus, in Bryant v. Western U. Teleg. Co. (1883) 17 **Fed.** 825, an injunction was refused to compel a telegraph company to furnish quotations to a bucket shop, contrary to a rule of the Chicago Board of Trade, although the proprietors of the bucket shop were members of the board. It was held that the board of trade, being a private corporation, could distribute its transactions on such conditions as it deemed advisable; and that, since the reporting by the telegraph company was done by the permission of the board, it was not a right that it possessed without such permission. The court considered it "quite clear that a merchant, or a number of merchants and dealers organized into a corporation, can give to a reporter the terms of their private transactions, to be transmitted to others, upon any conditions they may choose to impose, even to the extent that these transactions shall not be transmitted to others dealing in the same goods or commodities. These transactions on the board of trade are private transactions, in the sense that the general public are not entitled to them, except by permission of the board."

In Marine Grain & Stock Exch. v. Western U. Teleg. Co. (1884) 22 **Fed.**

23, it was held that the Chicago Board of Trade had the right to decide to whom, other than its own members, the reports of its transactions should be distributed. It was also held that the board had control over its own floor, and could admit such persons there as it saw fit, and could keep its transactions entirely secret, or make them public so far as it saw fit. The court said: "Information as to the condition of the demand and prices for commodities dealt in on the board in other markets is collected and announced among the members of the board during the daily sessions of its members; and this information, together with reports of prices and dealings between the members at these sessions, if given as a matter of right to anyone demanding the same, could give to persons not members nearly if not quite all the advantages of membership, without the attendant expense and responsibility."

And the same principle was applied in Commercial Telegram Co. v. Smith (1888) 47 Hun (N. Y.) 494, wherein an injunction was refused to restrain the New York Stock Exchange from excluding the plaintiff company from its premises, and from making an exclusive arrangement with another company to collect the market quotations of the exchange, and to distribute them among its customers. The court said: "The claim that the stock exchange has no right to exclude the Commercial Telegram Company from its floor, upon the ground of public policy, evidently proceeds upon an entirely erroneous theory. The exchange is a private association; it has the right to admit to its floor whom it pleases; it obtained nothing from the state except that protection which the law affords to every citizen; it has sought no special privilege and obtained no special powers. It is, therefore, just as much the master of its own business and of the method of conducting the same as any private individual within the state. It may make public the transactions which occur within its walls, or it may refuse all information in respect thereto. No matter which course is pursued, so long as it violates no law it has a right to conduct its business as it pleases. . . . The New York Stock Exchange has asked nothing from the people of the state, except that which is granted to every citizen; it has no special privileges under the law; it has no special rights; and the people, therefore, have no right to interfere in the transaction of its business to any greater extent than they have in that of any individual. It will hardly be claimed, we imagine, that because a man has carried on business in a certain way for a number of years that he has no right to change his methods."

In Re Renville (1899) 46 App. Div. 37, 61 N. Y. Supp. 549, the foregoing case was followed, and mandamus was refused to compel a telegraph company to furnish the petitioner with the market quotations of the New York Stock Exchange in the same manner and at the same price as they were furnished to others. As to the doctrine enunciated in New York & C. Grain & Stock Exch. v. Board of Trade (1888) 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855, the court said: "The Chicago Board of Trade was a corporation, and the powers of a court of equity over a corporation are much more extensive than over private individuals; but we cannot agree with that decision so far as it appears to justify an interference by the public or the courts, with a voluntary association in the transaction of its business, because the public desire information as to its transactions. There is no doubt much information as to the method by which large corporations, associations, or firms transact their business, which would be quite valuable to their competitors and interesting to the public, but this would hardly be considered as justifying an interference by the courts. The basis of that decision is that as the board had so conducted its affairs for a long term of years as to create a standard market in agricultural products, and, acting in concert or combination with the telegraph companies, had built up a great system for the instantaneous communication of intel-

ligence concerning the market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, that it could not be allowed to create a monopoly in the matter of the market quotations by furnishing them to some and refusing them to others. It is difficult to see why a voluntary association, because of the importance and character of its business and members, and of their transactions, could be compelled to transmit to a particular individual information of its transactions. It was said in the case last cited: 'We do not wish to be understood as holding that the board of trade is bound by law to continue the business of collecting and furnishing to the public market quotations, or that it may not voluntarily abandon such business; but we hold that so long as it continues to carry it on, either directly or indirectly, it must do so without unjust discrimination as to persons.' (p. 166.) Or, in other words, that because it gives information to one person it must give the same information to all, and the court will compel it to give such information to anyone asking therefor. But the question may well be asked: Where does the court get this power? No statute gives it. Nothing that these individuals have done, no obligations that they have assumed to the public, no privileges which they have received from the public, gives to the public the right to interfere with their private business, or requires them to give information about it to those who desire such information. No franchise has been conferred upon this voluntary association by the public which justifies an interference by the public with its method of conducting its business, and to grant such an application would, it seems to me, be an interference with the liberty of the individual, which is protected by the Constitution and the law. The doctrine established in Munn v. Illinois (1877) 94 U. S. 113, 24 L. ed. 77, and kindred cases, does not apply. No property of the stock exchange has been devoted to public use. The stock exchange excludes the public from its property; restricts the transactions therein to its own members; sends information of such transactions to those whom it designates as the persons that are to receive it. Information as to transactions upon the stock exchange is not such property as could be 'clothed with a public interest,' so that a 'grant to the public of an interest in that use' is to be implied. Such information is not property in any sense, and the public or a particular individual has no right to go to this voluntary association and insist that information of its transactions should be furnished."

To the same effect is Wilson v. Commercial Telegram Co. (1888) 18 N. Y. S. R. 78, 3 N. Y. Supp. 633, wherein it was held that the New York Stock Exchange performed no public service, and was charged with no public duty; and that it might refuse its market quotations to such persons as it saw fit. The court said: "The right of the plaintiff to have these quotations through the medium of the telegram company cannot be maintained; for, assuming that the New York Exchange is under an obligation to make public the prices at which stocks are sold on its floor, it has a right to control absolutely the channel through which such quotations shall be given out. It may, therefore, select one 'ticker' company, and give to it all the privileges of collecting news upon its floor, and exclude all others. . . . I am unable to see how Munn v. Illinois has any application to the question involved in this case. That case arose under the statute of Illinois regulating the use of elevators and warehouses in the city of Chicago, and which was enacted pursuant to the general police power of the legislature. The question presented to the court was as to the constitutionality of that law. But we are not dealing with any legislation in reference to the stock exchange or its property. Whether the legislature has the power to control the stock business, and to require the exchange to make public their transactions, is not now a pertinent question. If such power does exist, it is among the police powers of the state. But the police

powers do not reside in the courts, but in the legislature. The courts can enforce no obligation against a citizen, except such as are imposed by law. We must, therefore, take the legal rights of the parties as we find them. The Munn Case decided nothing, except the power of the state to enact the law in question, and therefore everything said by the chief justice must be construed with reference to that fact, as was said by our court of appeals in Bertholf v. O'Reilly (1878) 74 N. Y. 523, 30 Am. Rep. 323, in speaking of this case: 'It may be deemed to have carried the right of legislative interference with private rights and property to its utmost limit, but it illustrates the scope of the police power in legislation.' In the absence of any act of the legislature regulating the stock business, or imposing any public duty upon the New York Stock Exchange, we must, therefore, be guided solely by the common law in determining the rights and obligations of the parties. And I think it will not be disputed that, if any duty rests upon the stock exchange to make public the ruling price of transactions on its floor, such duty must be found either in the character of the organization or in the nature of the business there transacted."

But in Friedman v. Gold & Stock Teleg. Co. (1884) 32 Hun (N. Y.) 4, it appeared that a firm of stock brokers brought suit to prevent the defendant company from depriving them of two "tickers," to the injury of their business. The court, in granting the relief sought, said: "The complaint, however, charges that this telegraph company was organized and is maintained for the purpose of transmitting, and its object is to transmit, over its lines 'and through its stock reporting instruments and general news reporting instruments, to all persons who hold and to all persons who desire to hold its said stock and news reporting instruments, certain quotations, news, and information, which quotations, news, and information are owned and contributed by it for the purpose of being so transmitted.' Telegraph companies are public; have the right to take land under the laws providing that lands may be taken for a public use. The act requires them to transmit despatches 'with impartiality and good faith.' For the purpose of applying to a profitable use certain instruments owned by it, the defendant has applied its lines to these instruments whenever required by persons who desire to use the instruments, and has entered upon the business of collecting a certain class of news and transmitting it over its wires to the individuals using the instruments. The defendant still remains a public corporation, owing the duty impartially to grant the right to all who comply with its rules, to have the privileges furnished. That there is no objection appears from the complaint. The plaintiffs have the instruments and pay, and are willing to pay, the price agreed upon, which shall be established. The defendant has no right arbitrarily to take away the instruments by force without default. The case of Breese v. United States Teleg. Co. (1871) 48 N. Y. 132, 8 Am. Rep. 526, does not touch a case like this. It is there decided that a by-law requiring important messages to be returned and verified at half rates was not an unreasonable by-law. This case seems to be an entire new one in the courts of this state. Upon principles of justice a public corporation should make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish." So, in Smith v. Gold & Stock Teleg. Co. (1886) 42 Hun (N. Y.) 454, it appeared that the defendant company had placed one of its stock tickers in the plaintiff's office, in consideration of the payment of a monthly rental therefor, and under a contract providing that the company could discontinue its service, without notice, whenever in its judgment the plaintiff committed any breach thereof. In an action to restrain the company from removing the instrument, the court said: "So, it is well settled that a common carrier must receive and transport goods offered him for that purpose, impartially and without discrimination between parties applying.

These obligations do not rest on contract, but on the ground that when one is engaged in a business public in its nature, he must, if public policy requires, serve the public impartially. The occasions for the application of this familiar principle are by no means diminished by the formation of corporations, which carry on a great part of the business of the country. And in applying these rules to a corporation, the charter of the corporation is not solely to be consulted in arriving at the measure of its obligations to the public. When the charter provides that a corporation shall engage in some specified public occupation, no doubt a reference thereto will be an easy way to establish its obligations to perform such service. But, we do not accede to the doctrine that when engaged in a business, concerning the performance of which its charter is silent, a corporation is freed from the obligations which ordinarily attach to a natural person engaging in such occupation. Had defendants in the present action answered that, collecting and distributing commercial intelligence being foreign to the objects for which they are incorporated, they had in consequence abandoned that branch of their business, and withdrawn their 'tickers' from all offices except the plaintiff's, we should not hold that they could be compelled to carry on the business for his benefit. But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations."

The doctrine laid down by the Illinois supreme court seems to have met with disapproval in Sterrett v. Philadelphia Local Teleg. Co. (1886) 18 Phila. (Pa.) 316, wherein it appeared that a telegraph company had established a system of stock reporting, under a special contract with each customer, and it was held that the company was not bound thereby to furnish the same service to every person, but could arbitrarily refuse any and all applications therefor, and could discontinue the service at its own pleasure when the contracts expired.

But in Davis v. Electric Reporting Co. (1887) 19 W. N. C. (Pa.) 567, mandamus was issued to compel the furnishing of ticker service by a corporation which was organized specifically for that purpose.

In the reported case (WESTERN U. TELEG. CO. v. FOSTER, ante, 1278) which reverses (1916) 224 Mass. 365, P.U.R. 1916F, 176, 113 N. E. 192, it is held that the transmission of stock quotations from New York to Massachusetts by telegraph, under a contract between a telegraph company and a stock exchange, constitutes interstate commerce, and retains that character until the quotations are delivered to the subscribers to the service of the exchange. It is accordingly held that an order of the Public Service Commission of Massachusetts, forbidding the exchange to discriminate in furnishing service, is void, as an attempted regulation of interstate commerce.

IV. Obligation to furnish for gambling purposes.

It seems to be well settled that courts will not compel a telegraph company, board of trade, or exchange to furnish market or stock quotations by ticker service, when it appears that such quotations are to be used by the recipient for gambling purposes, and a rule or regulation of a telegraph company, board of trade, or stock exchange, prohibiting all customers of ticker service from using market or stock quotations in bucket-shop transations, has been upheld as reasonable and enforceable. Bryant v. Western U. Teleg. Co. (1883) 17 **Fed.** 825; Board of Trade of O'Dell Commission Co. (1902) 115 **Fed.** 574; Sullivan v. Postal Teleg. Cable Co. (1903) 61 C. C. A. 1, 123 **Fed.** 411; Board of Trade v. Cella Commission Co. (1905) 76 C. C. A. 28, 145 **Fed.** 28, reversing (1903) 121 Fed. 1012; Gray v. Western U. Teleg. Co. (1891) 87 **Ga.** 350, 14 L.R.A. 95, 27 Am. St. Rep. 259, 13 S. E. 562; Central Stock & Grain Exch. v. Board of Trade (1902) 196 **Ill.** 396, 63 N. E. 740, affirming (1901) 98 Ill. App. 212; Christie-Street Commission Co. v. Board of Trade (1901) 94 **Ill. App.**

229; Western U. Teleg. Co. v. State (1905) 165 **Ind.** 492, 3 L.R.A.(N.S.) 153, 76 N. E. 100, 6 Ann. Cas. 880; Smith v. Western U. Teleg. Co. (1886) 84 **Ky.** 664, 2 S. W. 483; Griffin v. Western U. Teleg. Co. (1883) 8 **Ohio** Dec. Reprint, 572; Sterrett v. Electric Reporting Co. (1887) 3 **Pa.** Co. Ct. 554, And see Western U. Teleg. Co. v. Foster (1916) 224 **Mass.** 365, P.U.R.1916F, 176, 113 N. E. 192, reversed on other grounds in the reported case.

Thus, in Sullivan v. Postal Teleg. Cable Co. (1903) 61 C. C. A. 1, 123 **Fed.** 411, it was held that a rule requiring all customers, as a prerequisite to being furnished with quotations, to sign an agreement that they would not use them in conducting a bucket shop, was reasonable and capable of enforcement; and an injunction was granted, at the instance of a telegraph company, against one who refused to comply therewith.

In Western U. Teleg. Co. v. State (1905) 165 **Ind.** 492, 3 L.R.A.(N.S.) 153, 76 N. E. 100, 6 Ann. Cas. 880, the court, in referring to bucket-shop operations, said: "The requirement of the board of trade that every applicant for its continuous quotations shall, as a condition precedent to receiving them, obligate himself not to use the same for such illegal purposes, is not an unlawful discrimination meriting the condemnation of the court, but, on the contrary, is a proper and reasonable regulation, to which this court unhesitatingly gives its approval."

In Smith v. Western U. Teleg. Co. (1886) 84 **Ky.** 664, 2 S. W. 483, the action was to enjoin a telegraph company from removing its "ticker" from the complainant's place of business. It being established that the complainant was operating a bucket shop, the court held that the company could avail itself of the fact that the complainant was engaged in an unlawful business, quoting from Marshall v. Baltimore & O. R. Co. (1853) 16 How. (U. S.) 334, 14 L. ed. 958, that the law "will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions."

In Bryant v. Western U. Teleg. Co. (1883) 17 **Fed.** 825, it appeared that the complainants were engaged in operating a bucket shop, procuring their quotations from the defendant company. The company, on the ground that the complainants were using the quotations in violation of an agreement between the company and the board of trade from which the quotations were procured, proposed to remove its "ticker" from the complainant's office, which removal was restrained by a temporary injunction granted by the state court. The company then removed the case to the Federal court, wherein the injunction was dissolved on the ground that a court of equity would not protect the business in which the defendants were engaged.

In Griffin v. Western U. Teleg. Co. (1883) 8 **Ohio** Dec. Reprint, 572, an injunction was refused to prevent a telegraph company from removing its ticker from the complainant's office, where such action was contemplated by the company because of an order from the Chicago Board of Trade, forbidding it to furnish quotations to bucket shops.

In Gray v. Western U. Teleg. Co. (1891) 87 **Ga.** 350, 14 L.R.A. 95, 27 Am. St. Rep. 259, 13 S. E. 562, it was said: "Doubtless it is true that a telegraph company is not bound, even when it contracts to do so, to furnish to 'bucket shops' reports of the market prices of stocks and provisions, nor to allow 'tickers' for the purpose to remain in the offices of these immoral establishments."

In Sterrett v. Electric Reporting Co. (1887) 3 **Pa.** Co. Ct. 554, the court refused a writ of mandamus to compel the defendant company to furnish the complainant with a "ticker," on the ground that a court of equity will not aid, protect, or further one in conducting the illegal operation of a bucket shop. But in Sterrett v. Philadelphia Local Teleg. Co. (1886) 18 Phila. (**Pa.**) 316, the court held that it was "not prepared to agree" that, merely be-

cause the complainants who sought an injunction to restrain the removal of a "ticker" from their bucket shop were in a business which was unlawful, they were not entitled to relief, saying: "If, therefore, it were part of the public duty of the respondent to furnish the information called for by the bill, we are not prepared to say that the use likely to be made of it by this particular plaintiff would be a good reason for refusing to furnish it to him."

In Central Stock & Grain Exch. v. Board of Trade (1902) 196 Ill. 396, 63 N. E. 740, affirming (1901) 98 Ill. App. 212, the court said: "It clearly appears that the quotations of market prices, which appellant sought by its bill to compel appellees to continue to furnish, were used, and were obtained for the purpose of being used, in conducting a business in violation of law as well as of its contract with the telegraph company. Appellant was not entitled to any relief of that character."

In New York it has been held that a telegraph company is not compelled to furnish stock quotations, in violation of the wishes of the New York Stock Exchange which furnishes the quotations to the company, regardless of the purpose for which the quotations are to be used by the person to whom they are denied. Re Renville (1899) 46 App. Div. 37, 61 N. Y. Supp. 549, wherein the court said: "We fail to see any principle upon which this application could be granted. It may be conceded that the respondents are corporations charged with the performance of public duties, are under the control of the legislature, and may be compelled by mandamus to perform their obligations to the public. The obligation that they assume is to receive and transmit communications. No statute requires a telegraph company to communicate to the public despatches which it has received from certain individuals to be transmitted to specified persons; on the contrary, such a communication is prohibited. I cannot see that it makes any difference whether a despatch is given to a telegraph company to be communicated to a single individual, or to be communicated to ten, a hundred, or a thousand individuals. Under this agreement between the stock exchange and the respondents, certain information is given to the telegraph company to be communicated to individuals or corporations designated by the stock exchange. Whether we call this information a special despatch, or general information which the stock exchange desires to communicate, seems to me to be entirely immaterial. The fact that the telegraph company pays to the stock exchange a certain sum of money for the information which it receives to transmit is also immaterial. The substance is that those to whom this information is directed to be given by the stock exchange are willing to pay the stock exchange for such information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit to the persons it designates, and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents should be required to violate their agreement with the stock exchange and the law of this state, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose, and none other."

It has been held that a telegraph company will not be restrained from removing a "ticker" from a bucket shop, since the furnishing of news thereby is not a part of the corporate duty of the company. On a case in point, the court said: "If these instruments are solely used in the transaction of the respondent's business in furnishing the information specified in the bill, then the right to remove them follows from this opinion; but if they are part of the general apparatus of telegraphing, and constitute part of the facilities for sending

and receiving messages, which respondents, in the exercise of their corporate franchises, are bound to furnish to all applicants impartially upon the same terms, then the plaintiffs may have a right to their continuance for such purpose alone." Sterrett v. Philadelphia Local Teleg. Co. (1886) 18 Phila. (Pa.) 316. See, to the same effect, Bradley v. Western U. Teleg. Co. (1883) 8 Ohio Dec. Reprint, 707.

V. Liability for errors.

It has been held that, where a telegraph company agrees to furnish market or stock reports, it is liable for any losses sustained by the transmission of incorrect or erroneous reports. Western U. Teleg. Co. v. Osborn (1918) — Ark. —, 206 S. W. 54; Turner v. Hawkeye Teleg. Co. (1875) 41 Iowa, 458, 20 Am. Rep. 605; Bank of New Orleans v. Western U. Teleg. Co. (1875) 27 La. Ann. 49; Western U. Teleg. Co. v. Stevenson (1889) 128 Pa. 442, 5 L.R.A. 515, 15 Am. St. Rep. 687, 18 Atl. 441. Thus, in Bank of New Orleans v. Western U. Teleg. Co. (1875) 27 La. Ann. 49, it appeared that the telegraph company had agreed to furnish daily quotations as to the exchange rate of gold in New York. In an action to recover the loss sustained by reason of an erroneous quotation, the court said: "The defendants, however, contend that the error in the telegram was owing to no fault of theirs; that the information conveyed in the telegram was taken from the indicator of the Gold Stock Company of New York, a corporation distinct from the defendants, and the error occurred in the working of the indicator. It is true the error resulted from a defect in the working of the indicator of the Gold Stock Company, placed for convenience in the office of the defendants in New York; but this did not exonerate them from liability, because by their contract they were bound to convey to the plaintiffs correct information, which they could have obtained without relying on the indicator. Failing to comply with their contract, the defendants conveyed to the plaintiffs incorrect information, whereby they sustained the loss complained of."

Where a telegraph company contracts to furnish correct market reports, it has been held that its failure to do so constitutes a breach of its contract, and there is no question involved as to whether it exercised ordinary care. Western U. Teleg. Co. v. Bradford (1908) 52 Tex. Civ. App. 392, 114 S. W. 686.

If, in the transmission of quotations, the market price of stocks or other property is erroneously given, and a person enters into a contract on the basis of the erroneous quotations, it would seem that the measure of damages is the difference between the actual market value of the property and the price paid, or agreed to be paid. Western Union Teleg. Co. v. Osborn (1918) — Ark. —, 206 S. W. 54.

H. B.

THE KING
v.
LOUIS MARIE JOSEPH VOISIN, Appt.

English Court of Criminal Appeal — February 11, 1918.

([1918] 1 K. B. 531.)

Evidence — writing while in custody.

1. The body of a woman was found in a parcel, a piece of paper with the words "Bladie Belgiam" written upon it being also in the parcel. The police, in the course of their investigations, requested the appellant to go to a police station and account for his movements. After making a statement he voluntarily, at the request of the police to write the words "Bloody

Belgian," wrote the words "Bladie Belgiam." He had not been cautioned before making the statement or writing the words. At that time the police had not decided to charge the appellant with having murdered the woman, although they were detaining him in custody for inquiries. The appellant was subsequently tried for the murder of the woman and convicted:—

Held, that the writing by the appellant was admissible in evidence notwithstanding that he had not been cautioned before writing the words.

[See note on this question beginning on page 1304.]

Same — statement of accused.

2. A statement by an accused person is not admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The question whether a person has been duly cautioned before making a statement is a circumstance to be taken into account by the judge in exercising his discretion whether to exclude the statement, but the absence of a caution does not, as a matter of law, make the statement inadmissible.

APPEAL from a conviction.

The appellant, Louis Marie Joseph Voisin, a Frenchman, was tried at the central criminal court before Darling, J., on January 16, 17, 18, 1918, for the murder of a woman named Emilienne Gerard. The trunk of the body of the murdered woman had been found in a parcel in Regent square, a piece of paper with the words "Bladie Belgiam" upon it being also found in the parcel. The police, in the course of their investigations, requested the appellant to go to Bow street police station and account for his movements at the supposed time of the murder. He made a statement which was taken down in writing. He was afterwards asked whether he had any objection to write the words "Bloody Belgian." He said, "Not at all," and then wrote the words "Bladie Belgiam." The appellant was not cautioned by the police before he made the statement or wrote the words. At that time the head and hands of the murdered woman had not been discovered and the trunk had not been identified, and the police, although they were detaining the appellant in custody for inquiries, had not decided to charge him with the crime. It was contended at the trial that the writing with the words "Bladie Belgiam" upon it was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the appellant and while he was in custody; the writing, however, was admitted as evidence. The jury found the appellant guilty of murder, and he was sentenced to death. He appealed against his conviction upon the grounds of the misreception of evidence and of misdirection.

Argued before A. T. Lawrence, Lush, and Salter, JJ.

L. Morgan May, for the appellant: The paper with the words "Bladie Belgiam" upon it which the appellant wrote at the request of the police ought not to have been admitted in evidence. At the time the appellant wrote the words he was, as Darling, J., said, to all intents and purposes in custody; he never regained his liberty. The writing was obtained by the police officers acting outside the scope of their authority and without cautioning the appellant. A prisoner who is in custody must not be questioned except in accordance with the provisions of the Criminal Evidence Act 1898. Even if the appellant had not actually been charged with the crime at the time he wrote the words, if he thought he was under arrest the result would be the same as if he were actually under arrest. Lord Sumner in Ibrahim v. Rex [1914] A. C. 609, said that the rule of English criminal law was "that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense

that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." Lord Sumner also stated that the point had frequently arisen "whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart all together from fear of prejudice or hope of advantage inspired by a person in authority."

[**Lush, J.**: There is a difference between the admissibility of a statement and the admissibility of handwriting. A statement may be made under such circumstances that the true facts are not brought out, but it cannot make any difference to the admissibility of handwriting whether it is written voluntarily or under the compulsion of threats.]

Handwriting obtained by means of threats is not admissible, because an accused person ought not to be compelled to assist the police in taking proceedings against him. The admissibility of any evidence so obtained which may be detrimental to the accused ought to be scrutinized very closely. In Reg. v. Gavin (1885) 15 Cox, C. C. 656, A. L. Smith, J., laid it down that when a prisoner is in custody the police have no right to ask him questions, and that an admission obtained in that way is inadmissible in evidence. Cave, J., in Reg. v. Male (1893) 17 Cox, C. C. 689, also rejected a statement made by a prisoner after arrest, in answer to questions put by the police. He pointed out that the law does not allow the judge or jury to put questions in open court to prisoners, and that it would be monstrous if the law permitted a police officer to put a prisoner through an examination and then produce the effects of that examination against him. It is true that in Reg. v. Brackenbury (1893) 17 Cox, C. C. 628, Day, J., expressly dissented from the ruling of A. L. Smith, J., in Reg. v. Gavin, supra, and admitted a statement made by the accused in answer to questions put by a policeman, but there the admissions were made before the man was taken into custody and after he had been cautioned. Lord Russell of Killowen, Ch. J., said in Rogers v. Hawken (1898) 67 L. J. Q. B. N. S. 526, 62 J. P. 279, 78 L. T. N. S. 655, 19 Cox, C. C. 122, that the observations made by Cave, J., in Reg. v. Male, supra, were perfectly just. Hawkins, J., in Reg. v. Histed (1898) 19 Cox, C. C. 16, 11 Am. Crim. Rep. 167, excluded the answers made by a prisoner in custody to questions put by a policeman who had not previously cautioned the prisoner. He pointed out that "no one, either a policeman or anyone else, has a right to put questions to a prisoner for the purpose of entrapping him into making admissions."

[**Lush, J.**: This court in Rex v. Best [1909] 1 K. B. 692, 78 L. J. K. B. N. S. 658, 100 L. T. N. S. 622, 25 Times L. R. 280, held that a statement made by a prisoner in custody was not rendered inadmissible in evidence merely because it was made in answer to a question put to him by a police constable, and further, that Reg. v. Gavin, 15 Cox, C. C. 656, was not a good decision.]

Rex v. Best, supra, is distinguishable, because the prisoner in that case had been cautioned by the policeman before the question was put. The court did not overrule Reg. v. Gavin, supra; it merely said that the statement of law as reported was too wide and required qualification.

[**Lush, J.**: The headnote in Lewis v. Harris (1913) 78 J. P. 68, is that "there is no rule of law excluding statements made by an accused person to a constable in reply to an inquiry, even though the constable has given him no caution, provided that the constable, when he made the inquiry, had not made up his mind to take criminal proceedings against him, and provided that the constable makes no threat and holds out no inducement to the accused person to make the statement."]

That case turned entirely upon the point that the justices were wrong in excluding the statement merely because no caution had been administered. In Rex v. Knight (1905) 20 Cox, C. C. 711, 69 J. P. 108, 21 Times L. R. 130, where a man had been subjected to a very long interrogation before arrest by a person in authority over him, Channell, J., admitted the earlier answers, but rejected the statements made during the latter part of the interrogation. Cockburn, Ch. J., in Yeovil Murder Case (1877) 41 J. P. 187, said that "the law did not allow a man under suspicion and about to be apprehended to be interrogated at all." Even if the handwriting is admissible in evidence, the court ought, in the exercise of its discretion, to have excluded it.

The judge in his summing-up omitted to put to the jury certain evidence

in favor of the appellant, and also commented on the fact that the appellant did not go into the witness-box and give evidence. Those passages in his summing-up, when taken together, amount to misdirection. It was held in Reg. v. Rhodes [1899] 1 Q. B. 77, 68 L. J. Q. B. N. S. 83, 62 J. P. 774, 47 Week. Rep. 121, 79 L. T. N. S. 360, 15 Times L. R. 37, 19 Cox, C. C. 182, that the Criminal Evidence Act 1898 (61 & 62 Vict. chap. 36) has not deprived the court of the right to comment on the failure of the prisoner to give evidence at the trial; but it would appear from Kops v. Reg. [1894] A. C. 650, 653, 64 L. J. P. C. N. S. 34, 6 Reports, 522, 70 L. T. N. S. 890, 58 J. P. 668, that such comments ought to be both legitimate and necessary. In the present case those limits were exceeded. The Criminal Evidence Act 1898 was not intended to do away with the elemental principle that the prosecution must prove their case against the prisoner.

R. D. Muir and **Percival Clarke**, for the Crown, were called in with regard to the admissibility of the writing. The fact that the appellant wrote the words on the piece of paper at the request of the police, but without being cautioned, does not make the writing inadmissible in evidence; the "objections . . . go to the weight, and not to the admissibility, of the evidence," per Lord Sumner in Ibrahim v. Rex [1914] A. C. 610, 83 L. J. P. C. N. S. 185, 111 L. T. N. S. 20, 30 Times L. R. 383. A statement is admissible in evidence, even though made after the person making it is in custody, provided it is made voluntarily, and not from fear of prejudice or hope of advantage exercised or held out by a person in authority. The statement of the law by Lord Sumner in Ibrahim v. Rex [1914] A. C. 609, was approved by this court in Rex v. Colpus [1917] 1 K. B. 574, 579, 86 L. J. K. B. N. S. 459, 116 L. T. N. S. 703, 81 J. P. 135, 33 Times L. R. 184. Channell, J., pointed out in Rex v. Knight, 20 Cox, C. C. 711, 69 J. P. 108, 21 Times L. R. 130, that there is no distinct rule of evidence that if questions are asked by a constable after arresting a prisoner, or after he has decided to charge him, the answers to them are inadmissible, but the judge at the trial may, in his discretion, refuse to allow the answers to be given in evidence. The same judge in Rex v. Booth (1910) 5 Crim. App. Rep. 177, 179, said that "there is no actual authority yet that if a policeman does ask questions it is inadmissible; what happens is that the judge says it is not advisable to press the matter." If a caution is given to a man from whom it is sought to obtain valuable information about a crime, the effect will probably be to prevent the information being obtained. At the time the appellant wrote the words, the body of the murdered woman had not been identified, the head and hands not having been discovered. The police only decided to arrest the appellant when subsequently the head and hands were found. No threat or inducement was held out to the appellant to induce him to write the words.

L. Morgan May in reply: The question as to the admissibility of this evidence must be decided according to the whole of the circumstances of the case. Reg. v. Miller (1895) 18 Cox, C. C. 54. When all the facts in the present case are taken into account it is clear, on the principle laid down in Reg. v. Thompson [1893] 2 Q. B. 12, 62 L. J. Mag. Cas. N. S. 93, 5 Reports, 392, 69 L. T. N. S. 22, 41 Week. Rep. 525, 17 Cox, C. C. 641, 57 J. P. 312, 8 Eng. Rul. Cas. 90, that this writing is not admissible.

Cur. adv. vult.

The judgment of the court was read by **A. T. Lawrence, J.**:

The prisoner and a woman named Berthe Roche were indicted for the murder of Emilienne Gerard. A verdict of not guilty was directed by the judge in the case of Roche. The jury found the prisoner Voisin guilty of murder and he was sentenced to death.

He has appealed to this court against his conviction upon the grounds of misdirection and misreception of evidence. The argument on misdirection may be dealt with quite shortly. Mr. May, who appeared for the prisoner and presented his case with considerable skill, had to admit that the passages from the summing-up upon which he relied as misdirection did not in themselves amount to directions in point of law, but were comments upon the evidence from which he said the jury would infer that the judge was of opinion that the prisoner was guilty. He argued that as there

were three or four such passages in the summing-up, they had a cumulative effect and amounted together to misdirection in law. We think this argument is founded upon an erroneous view of the law. Comments on the evidence which are not misdirections do not, by being added together, constitute a misdirection. The only ground of appeal where such cumulative effect of a judge's observation is relied on is where it can be said that they have caused or contributed to cause a miscarriage of justice. Mr. May could not, and did not, suggest that there had been any miscarriage of justice in this case, and it is plain to us that the learned judge was throughout endeavoring, in the case of a very horrible murder, to be scrupulously fair to the prisoner. The judge's comments upon the prisoner not going into the witness-box and his not calling the woman Roche after her discharge were within his judicial discretion and are not matters for this court to review. It was a case demanding explanation by the only persons who could know the facts, if ever a case did. For both the rooms occupied by the prisoner and Roche and those occupied by the victim contained many traces of human blood, and in the prisoner's cellar were found the head and hands of the dead woman. Both the prisoner and Roche had keys of the deceased's flat, and the prisoner had the key of his cellar in his pocket.

The alleged misreception of evidence relates to a paper writing containing the words "Bladie Belgiam." This was written by the prisoner at the request of the police at a time while he was being detained at Bow street. The trunk of the body of the murdered woman had been found contained in a parcel in Regent square with a label containing these words upon it. The police were making investigations. They requested the prisoner to go to Bow street and to account for his movements at the supposed time of the murder. He had just made a statement which had been taken down in writing, and after he had done so he was asked whether he would have any objection to write down the two words "Bloody Belgian." He said "Not at all," and then wrote them down as above. It was argued that that writing was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the prisoner while he was in custody. A number of cases were called to our attention in which different views had been entertained by judges as to when statements by prisoners should and when they should not be excluded from consideration by the jury. It is clear, and has been frequently held, that the duty of the judge to exclude statements is one that must depend upon the particular circumstances of each case. The general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in Ibrahim v. Rex [1914] A. C. 599, 609, 610, as follows: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." The point of that passage is that the statement must be a voluntary statement; any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord Sumner points out, logically these considerations go to the value of the statement rather than to its admissibliity. The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a

Evidence—statement of accused.

caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying, or as to its bearing upon some charge of which he has not been informed. In this case the prisoner wrote these words quite voluntarily. The mere fact that the words were written at the request of police officers, or that he was being detained at Bow street, does not make the writing inadmissible in evidence. Those facts do not tend to change the character of handwriting, nor do they explain the resemblance between his handwriting and that upon the label, or account for the same misspellings occurring in both. There was nothing in the nature of a "trap" or of the "manufacture of evidence;" the identity of the deceased woman had not at this moment been established, and the police, though they were detaining the prisoner in custody for inquiries, had not then decided to charge him with this crime; indeed, if the writing had turned out other than it did and other circumstances had not subsequently transpired, it is certain that he, like others who were similarly detained, would have been discharged. It is desirable in the interests of the community that investigations into crime should not be cramped. The court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made under the circumstances here proved was inadmissible in evidence.

Same—writing while in custody.

We think an error has crept into Lord Sumner's judgment in Ibrahim's Case [1914] A. C. 613, 83 L. J. P. C. N. S. 185, 111 L. T. N. S. 20, 30 Times L. R. 383, where he is made to say that the actual decision in Rex v. Best [1909] 1 K. B. 692, 78 L. J. K. B. N. S. 658, 100 L. T. N. S. 622, 25 Times L. R. 280, "was that under the proviso of § 4 of the Criminal Appeal Act 1907, the court would not interfere." As reported in the Law Reports there is no allusion in Rex v. Best to the proviso of § 4. We read that case as deciding that the mere fact that a statement is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner. Even if we disagree with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This was evidence admissible in law, and it could not be fairly inferred from the other circumstances that it was not voluntary.

In 1912 the judges, at the request of the Home Secretary, drew up some rules as guides for police officers.[1] These rules have not the force of law; they are administrative directions the observance of which the

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[1] Police Inquiries.

Memorandum by H. M. Judges of the King's Bench Division.

1. When a police officer is endeavoring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any questions or any further questions, as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.

4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence."

Alverstone, Ch. J.

October, 1912.

police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.

Appeal dismissed.

Solicitor for appellant: Registrar of Court of Criminal Appeal.

Solicitor for Crown: Director of Public Prosecutions.

ANNOTATION.

Admissibility in evidence, for purpose of comparison, of writing made by accused person at request of public authorities.

I. Introductory, 1304.
II. Writing made out of court, 1304.
III. Writing made in court, 1307.

I. Introductory.

This note is confined to the specific question whether a writing made by a person accused of crime, at the request or demand of the public authorities, is admissible at his trial for the purpose of comparison with a disputed writing, whose authorship is attributed to the accused. The general question of the permissibility of a comparison of handwriting is not considered, except as it arises in connection with the specific situation discussed in this note.

II. Writing made out of court.

The weight of authority is to the effect that a writing made out of court by a person accused of crime, at the request of a public officer, is admissible at his trial for comparison with a writing whose authorship is in dispute.

In the reported case it appeared that a writing consisting of two misspelled words was found at the scene of a homicide. The person accused of the homicide was requested by the police to write those words, and did so, misspelling them in the same manner as was done in the paper found. It is held that the writing of the accused was admissible at the trial.

A decision on facts analogous to those of the reported case was made in Sprouse v. Com. (1886) 81 Va. 374. In that case the accused was convicted of forging a check payable to one Gibson, that name being misspelled. Before his arrest he was requested by an official to write the name "Gibson," and did so, spelling it in the same manner as it was on the check. Holding this writing to be admissible, the court said: "The third assignment is as to the proof offered on the trial, by the commonwealth, that the prisoner, being requested to write 'Gibson' by the mayor, wrote it 'Gipson,' substituting the letter b with the letter p; and that this was the way the word was spelled in the alleged forged paper. It was proved that after the prisoner was brought before the mayor, but before his arrest, the mayor, without showing him the paper, asked him to write this name; that, first saying he could not write, or that he wrote so badly that no one could read it, after showing some reluctance, but without threat or promise to induce him to write, and without compulsion, he wrote the word. It cannot be said that he was compelled to furnish evidence against himself, or that he made an undue confession; and there was no error in receiving the evidence on this subject."

In People v. Molineux (1901) 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286, it was held that specimens of handwriting made by a person before his arrest and when he was under suspicion of committing a crime, made voluntarily at the request of the prosecuting attorney, were admissible in evidence for the purpose of comparison with other writings, alleged to have been made by him.

In State v. Scott (1912) 63 Or. 444, 128 Pac. 441, the accused was charged with writing a threatening communication. Specimens of his handwriting, made immediately after his arrest in

the presence of the sheriff and his deputy and the district attorney, were used as a basis for comparison with the comunication, to determine whether he wrote it. Holding the comparison to be proper, the court said: "The defendant objects that such a writing could not be used in any event, and likewise that it was obnoxious to the law because it was not shown to have been written voluntarily. As to the second objection, the testimony narrated in the bill of exceptions is to the effect that the defendant was arrested and taken to the sheriff's office; and, while there, the district attorney came in and said to him: 'Scott, you know who I am?' And he answered he did not, and the district attorney then said: 'I am the district attorney, and any statement that you make must be made voluntarily. You are not obliged to make any statements, not compelled to answer any questions that I may ask you.' The witnesses state that the defendant then went ahead and did the writing voluntarily. The accused relies principally upon the case of State v. Andrews (1899) 35 **Or.** 391, 58 Pac. 765, in this connection. That case, however, depends upon § 1781, L. O. L.: 'When the examination of the witnesses on the part of the state is closed the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement and that his waiver cannot be used against him on the trial.' That case and the section quoted refer to judicial confessions made in the presence of a magistrate; and in such instances the procedure laid down by the statute must be followed, if any validity is to be given to the judicial confession. The statute, however, does not refer to or govern extrajudicial confessions made to any person, although he be an officer. Of course, if any inducement is held out to the defendant influencing him to make the confession, or any compulsion is used to produce that result, the confession is without value against him. Such is the doctrine of State v. Wintzingerode (1881) 9 **Or.** 153; State v. Garrison (1911) 59 **Or.** 440, 117 Pac. 657. But if it shall appear to the trial court that the statement of the defendant was made voluntarily, without the influence of hope or threats, the statement is admissible, even though the defendant be in the custody of an officer. State v. Blodgett (1907) 50 **Or.** 329, 92 Pac. 820; State v. McDaniel (1901) 39 **Or.** 161, 65 Pac. 520. Enough is shown by the bill of exceptions to make the writing admissible, as against the objection that it was obtained from the defendant either by threats or inducements. It is urged by the defendant that the writing mentioned could not be used in any event as a standard of comparison, by which to determine whether or not the letter quoted in the indictment was written by the defendant. The authorities cited by the counsel for the defendant in some instances depend upon a different statute, or upon the absence of any statute upon the subject. Our Code, however, has fixed the rule thus: 'Evidence respecting the handwriting may also be given by a comparison made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered.' L. O. L. § 788. The rule established in Munkers v. Farmers' & M. Ins. Co. (1896) 30 **Or.** 211, 46 Pac. 850, and followed in the case of State v. Branton (1906) 49 **Or.** 86, 87 Pac. 535, is thus stated: 'Under this statute it is clear that any writing which is admitted to be or treated as genuine by the party against whom the evidence is offered may be used for the purpose of comparison with the writing or signature in question, although it may not be admissible in evidence for any other purpose.' It has been shown to the satisfaction of the circuit court that the writing by the defendant in the sheriff's office was performed voluntarily. The matter there written was certainly treated by the defendant as genuine, having been inscribed by himself in person, and hence, under the rule

stated above, was admissible as a proper standard of comparison with the writing mentioned in the indictment."

However, in Reg. v. Aldridge (1863) 3 Fost. & F. (Eng.) 781, it appeared that the accused, after being suspected of forgery, was asked by the colonel of his regiment to write his name for the purpose of comparison with the signature on the alleged forged check. It was held that the signature so obtained was not admissible in evidence, "as it could only be material for the purpose of comparison of handwriting; and a document was not admissible simply for that purpose in a criminal case."

In State v. Miller (1879) 47 Wis. 530, 3 N. W. 31, it appeared that the trial court permitted a letter written by the accused in a police station, at the request of police officers, and after his arrest, to be admitted in evidence and given to the jury. The appellate court, in holding the letter to be inadmissible, said: "It was in proof that the defendant was being examined and questioned generally by the police officers, concerning his participation in the crime charged, and a letter supposed to have been written by him, containing threats of arson, was orally and verbally repeated in his hearing, and he was requested to write, and did write, on another paper the same words, in the presence of such officers, and the original letter so repeated contained words of peculiar form, style, and orthography, and the copy so made was in these respects a facsimile of the same; and such officers, as witnesses on the trial, produced such copy, while testifying to the admissions of the defendant in such examination, and it was received in evidence and submitted to the jury for the purpose of comparison with the original letter, and determining thereby the authenticity of the same. The act of so copying the original letter could not, by the most liberal construction of language, be considered and treated as any part of the oral and verbal statement or admission of the defendant, elicited upon such examination. It was an independent act and fact, which had nothing to do with his oral statement or admission, which, to be evidence, must have been voluntary, and made understandingly, and repeated in the same language, if possible. But if language could be so liberally construed for the state, and so illiberally construed for the defendant, as to make such act of copying a part of the oral statement, by being connected with it, even then it would not be the province or right of the prosecution to prove it on the ground that the whole of such statement must be given, if any of it; but the defendant alone had the right to demand such testimony, if he chose to exercise it, on such ground. 1 Greenl. Ev. §§ 201, 202. If such an act of copying a letter, at the dictation or request of a witness, can be treated and admitted in evidence as a part of his oral confessions, then such an act would be admissible if it constituted the whole of such confession; and a fact might thus be proved as a confession or admission which could not be proved in any other way, and any other proof of which would be incompetent. It will not be contended that it would be proper to prove that the defendant actually wrote the copy, for the purpose of introducing it in evidence to convince the jury, by comparison, that he also wrote the original, unless such copy is already in evidence for some other purpose. It must be held, therefore, that such copy was not properly in evidence as a writing or paper with which the original letter could be compared by the jury upon the question of its authorship. The true rule in such cases is: 'The jury may form their opinion as to the genuineness of a document by a comparison of it with any other documents already in evidence before them, and shown to be the genuine production of the person whose handwriting is in question.' Roscoe, Crim. Ev. 5. This was the Eglish rule until changed by Statute of 28 Victoria, and is the rule adopted by this court, and will be, unless changed by our own legislature. The rule as stated by this court is explicit, that such a comparison will not be allowed except with writings 'clearly proved and already in the case, and before the jury

for some other purpose.' Pierce v. Northey (1861) 14 Wis. 10; Hazleton v. Union Bank (1872) 32 Wis. 34."

III. Writing made in court.

It has been held in several cases that a person accused of crime may be required, at the trial, to write for comparison with a disputed writing.

In Reg. v. Taylor (1852) 6 Cox, C. C. (Eng.) 58, during the trial of an action involving an agreement to pay a certain sum of money, the defendant testified that his signature thereto was a forgery. The trial judge directed him to write his name, and then compared his signature with the signature to the alleged forgery. On the trial of an indictment for perjury growing out of the defendant's testimony, the court said: "I am inclined to think the jury may look at and compare the two signatures. The signing of his name by the defendant during his examination on oath forms, in fact, part of the transaction out of which the charge arises. At all events, as it is not objected to, the jury may look at it."

In State v. Gordon (1915) 32 N. D. 31, 155 N. W. 59, Ann. Cas. 1918A, 442, the defendant in a criminal trial, while testifying in court, was requested by the prosecutor to write his signature as a basis for comparison with other signatures claimed to have been made by him. It was held that such evidence was properly admissible, where no objection on the ground of self-incrimination was made. The court said: "We thus see that the jury had ample means of comparing the signatures. Objection, it is true, was made to the introduction of the exhibit. No objection, however, was made to signing the exhibit on the ground of self-incrimination, or any other ground. The objection merely was that it was no proper method of proving his signature, not made at the time or prior to the time of the alleged signature. The insufficiency of this objection must be apparent to all."

In Bradford v. People (1896) 22 Colo. 157, 43 Pac. 1013, it was held that when an accused denies under oath that he wrote a document the court may require him to write in the presence of the jury, for the purpose of comparison. The court said: "At the trial the defendant offered himself as a witness in his own behalf. Upon cross-examination he was required to write in the presence of the jury, against the objection of his counsel, and this constitutes the second assignment of error discussed in this court. The law in reference to the admission of writings for the purpose of comparison is the same in criminal cases as in civil cases. In Wilbur v. Eicholtz (1880) 5 Colo. 240, it was held that papers cannot be introduced for the purpose of comparison merely, but where the papers belong to the files in the cause, or have been previously received in evidence, and are admitted to be genuine, either the witnesses or jurors may make comparison for the purpose of forming an opinion concerning the handwriting. Although this is the general rule, it is well settled that where a witness has denied writing a document, which is alleged to be a forgery, or has denied his signature thereto, he may be called upon, on cross-examination, to write in open court, in order that the jury may compare such writing with the writing controverted. 2 Taylor, Ev. 4th ed. § 1669; Wharton, Crim. Ev. § 550; Chandler v. Le Barron (1858) 45 Me. 534; Sanderson v. Osgood (1880) 52 Vt. 309; Huff v. Nims (1881) 11 Neb. 363; Doe ex dem. Devine v. Wilson (1855) 10 Moore, P. C. C. 530, 14 Eng. Reprint, 581; Brookes v. Tichborne (1850) 5 Exch. 929, 155 Eng. Reprint, 405, 20 L. J. Exch. N. S. 69, 14 Jur. 1122. The benefit of this kind of cross-examination is well illustrated in this case. The check alleged to have been forged was for the sum of twenty-four dollars and sixty cents ($24.60), the word 'four' in the check having been written 'foure;' and in the writing executed by the defendant upon the witness stand the same orthography is used. In so far as the objection to this testimony is based upon the personal privilege of the witness, there are two sufficient answers: First, this objection must be made by the witness himself, to be available; second, having offered himself as a

witness in the case in his own behalf, he thereby waived the privilege."

In United States v. Mullaney (1887) 32 Fed. 370, the accused was charged with a violation of the Election Law in that he wrote certain names improperly on a registration book. On the trial he was asked to write the names in question, which he did, over his counsel's objection. The court, in holding the writing admissible, said: "The writing was admitted in evidence, and the jury were permitted to compare it with the writing in the registration book. That is the error complained of,—that the defendant was compelled to furnish testimony against himself by thus writing in the presence of the jury, and that the jury were permitted to compare this writing with that in the registration book. Counsel have argued the question under two aspects: First, they insist that it is not legitimate cross-examination of any witness who has simply testified that he did not make a writing; and, second, that it is compelling him to furnish testimony against himself, in violation of the constitutional protection. I think really there is but one question, and that is whether it was legitimate, in the cross-examination of a witness who gave such direct testimony as he did, to compel him to so write in the presence of the jury. For, while a defendant in a criminal case cannot be compelled to give testimony against himself, while he may not be put upon the stand against his will, yet if he avails himself of the privilege, and goes onto the witness stand, and testifies in his own behalf, he subjects himself to the ordinary rules of cross-examination; and, if this was legitimate cross-examination, then he cannot be heard to say that by it he furnished testimony against himself. He may be impeached in any way that any other witness can be. Of course, cross-examination is, in the Federal courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject-matter of the direct testimony. The question will perhaps resolve itself into two forms or two phases. The first, is the writing of the same names on an independent piece of paper, a matter directly connected with the subject of the direct testimony. I think there can be little doubt on that point. Of course, it would not be doubted but that questions could be asked as to whether the witness was present at the time of the writing, whether he could or could not write, and other kindred matters, because all that is connected directly with the question whether he did or did not make the writing upon the book. I suppose it matters not whether the case is one in which the testimony is sought to show that he did or did not make the writing. Supposing, in any civil case, a witness testifies that he did make a particular writing, would not it be germane to that matter to show that he could not write at all; to give him a pen, and have him show before the jury that he either could not write at all, or that his writing was so completely variant from that in question that it was utterly impossible that he could have written it? Surely, the two matters are connected as closely as two things can be; and it would be conclusive against the testimony of any witness that he had written a certain writing, if it appeared from his own demonstration before the jury that he could not write at all, or that his handwriting was completely variant from that in question. Then the other phase is whether you can compel a witness on cross-examination to do other than answer questions. This was a physical act which he was called upon to do in the presence of the jury. It is a matter of common experience in a court room that witnesses are often called upon, either for some exposure of their person, or to do some physical act supporting or contradicting their direct testimony. A chemist who has stated that a certain test discloses the presence of poison may be called upon to repeat that test in the presence of the jury, that they may see whether the testimony is true, and the test accurate. A person who testifies as to his physical condition may be compelled, there

being no improper exposure of person, to uncover his body, that the jury may see whether there be such a physical condition as he has testified to. The witness may say, for instance, that he never was wounded in the arm, and on cross-examination it would be competent to compel him to lift up his sleeve, that the jury may see whether or no there was a scar or mark of wound on his arm. In some recent cases, although the matter has been questioned, courts have required plaintiffs in personal damage cases to submit themselves to an examination of the witnesses of the defendant outside of the court room, in order that their testimony might be given to the jury as to the physical condition; so the fact that the witness is called upon to do some physical act or to make some exposure of his person which supports or contradicts his direct testimony is not, necessarily, objection to its validity. Taking this question in either one of the two phases, as to whether the matter was connected with the subject-matter of the direct testimony, or whether in the act,—the physical act which he was called upon to do,—there was any invasion of his rights, I am clearly of the opinion there was no error in the ruling of the district court, and that the testimony was legitimate cross-examination."

In Bronner v. Loomis (1878) 14 Hun (N. Y.) 341, on the trial of an action brought on a document claimed to be a forgery, the party alleging the forgery was asked to write his name for comparison with the disputed signature. The court, in holding the evidence to be admissible, said: "The only exception to which our attention is called by the counsel for the defendant is that stated at the close of the case, as follows: 'A signature made by the defendant upon trial, at the request of the plaintiff's counsel, offered in evidence, written by the defendant, objected to by the defendant's counsel and objection overruled, and exception taken by the defendant.' The defendant's counsel undertakes to sustain his objection and exception by a reference to the general rule of law as settled in this state, that, when the question is upon the genuineness of the signature, you cannot give in evidence other instruments which are genuine to enable the jury to compare the signatures thereto with the one which is disputed. It is true, this is the general rule as adopted in this state. This rule seems to be founded on two reasons: 1. Because, in the absence of such a rule, there would be a great temptation to make an unfair selection of signatures. 2. Because the introduction of a large number of signatures would create a number of collateral issues, and thus tend to burden the case with irrelevant questions, and to embarrass the jury. Van Wyck v. McIntosh (1856) 14 N. Y. 439; Greenl. Ev. § 580. But, where the signature is made by the person whose signature is in controversy, in the presence of the court and jury, at the request of the adverse party, or where such a signature is obtained on the cross-examination of the witness the reasons for the application of the rule do not exist. The party asserting the forgery cannot, upon the trial, make his own signature, and then offer the signature so made in evidence, for the purpose of comparison with the controverted signature, for obvious reasons (King v. Donahoe (1872) 110 Mass. 155, 14 Am. Rep. 589); but, if the opposite party chooses to take the risk, we think a signature thus made may be offered in evidence by the latter, for the purpose of comparing it with the signature in question (Greenl. Ev. 13th ed. § 581, note; Taylor, Ev. § 1669, and note; 1 Wharton, Ev. § 706; Chandler v. Le Barron (1858) 45 Me. 534; Roe v. Roe (1875) 8 Jones & S. (N. Y.) 1; Hayes v. Adams (1874) 2 Thomp. & C. (N. Y.) 593; Doe ex dem. Devine v. Wilson (1850) 10 Moore P. C. C. 502, 14 Eng. Reprint, 581)."

In State v. David (1895) 131 Mo. 380, 33 S. W. 28, it appeared that certain evidence given at a coroner's inquest was signed by the accused, as required by law, and was later produced in evidence at the trial to compare his signature thereto with his alleged signature to a druggist's poison record. The court held the evidence to be admissible.

In Hunt v. State (1894) 33 Tex.

Crim. Rep. 252, 26 S. W. 206, a witness testified that a document handed to him was an application for an attachment in the cause, made and signed by the defendant Hunt, who was under arrest and in the custody of an officer at the time he signed the paper; that the signature to the application and the signature, "E. W. Hunt," to two letters shown him, were made by the same person, and that the signature to the application and the writing of the two letters were the same. Another witness testified that the two letters shown him and signed "E. W. Hunt," and the signature, "E. W. Hunt," made to the application, were all written by the same person. The defense objected to this testimony on the ground that the signing of the application was an act required by law and to secure the defendant's rights in the trial of the cause, and was an act done while he was under arrest, and unwarned. The objection was overruled and the testimony admitted. The state then offered in evidence the two letters referred to, and the defense objected on the ground that the execution of the letters had not been proved by legal and sufficient evidence, but this objection was overruled and the letters admitted. The appellate court, in passing on this evidence, said: "Counsel for appellant contends that, under the rule which excludes the admissions and confessions of a defendant made while in custody and unwarned, the state could not prove the signature to the application executed by him under like conditions. To this proposition we do not assent. The act of signing the document was neither an admission nor a confession by defendant. It was not an act tending to show guilt. It does not come within the letter or the reason of the rule. The fact that defendant was in custody when he signed the application would not likely affect the signature in any manner so as to render it unfit for use as a standard of comparison. That he did sign it was no evidence against him. There was no error in this matter."

But in Whittle v. State (1902) 43 Tex. Crim. Rep. 468, 66 S. W. 771, it was held to be error to admit, on a trial for forgery, the signature of the prosecutrix, written in the presence of the jury, and at the request of the prosecuting attorney. The court said: "In bill of exceptions No. 6 appellant brings in review the admissibility of certain evidence introduced before the jury for the comparison of signatures. The bill is substantially as follows: The state had the witness Dollie Trimble to write her name on a blank piece of paper three times before the court and jury; and offered her signature, in connection with the signature upon the note, in evidence before the jury, thereby securing a comparison of the signature as written upon the note and as written upon the blank piece of paper, which was offered as evidence in this case. To which defendant excepted upon the ground that the same had been written long after the signature was written upon the back of the note, and under different circumstances, and was written with a stub pen, when the signature on the back of the note appeared to have been with a sharp-pointed pen and that the manner of proving the handwriting of Dollie Trimble, in the way it was done, was illegal; and for the further reason that the signature made by her in the court room in the way and manner aforesaid should not have been introduced, for, she being the main witness and the alleged injured party, she could, therefore, on account of her hostility to defendant, disguise her handwriting and dissemble the same if she saw proper to do so, and in that way showing the dissimilarity in her signature on the back of the said note and as written upon the blank piece of paper. Which objections the court overruled, and permitted the evidence to go to the jury, and the defendant excepted. In support of this contention that the evidence thus affording the jury a comparison of the handwriting was inadmissible, appellant cites us to McGlasson v. State (1897) 37 Tex. Crim. Rep. 620, 66 Am. St. Rep. 842, 40 S. W. 503. However, the state insists that said case is not in point and conclusive upon the question, inasmuch as the bill, on its face, does not make it appear that at the

time Dollie Trimble wrote her signature she had the indorsement on the back of the note before her. It is true, the bill does not state in so many words that she had said indorsement before her at the time she made the signatures before the jury, and in that respect the cases, as presented, are not similar. But it does occur to us, even if it be conceded that she had not seen the indorsement on the note at that time, yet, if she had really signed the indorsement thereon, she would, no doubt, have recalled how she signed the same. She certainly would remember how she made her ordinary signature. And of course the opportunity would be afforded her to dissemble and disguise her handwriting,—that is, not write in her ordinary method,—so that the danger of fabrication upon which the cases seem to be based would still be present. Evidence of the genuineness or want of genuineness by comparison of handwriting, to go to the jury, does not appear to be encouraged by the authorities, and is only permitted under proper safeguards. Such comparison is permitted between the alleged forged instrument and one offered in evidence, executed before there was any inducement to fabricate, and proved to be genuine; but the authorities hold that it is not competent, as was held in McGlasson's Case, to have the witness make her signature before the jury for the purpose of comparing same with the signature on the alleged forged instrument. We see no reason to change the rule laid down in said case, and we believe the bill here presented brings the question squarely under the doctrine laid down in McGlasson's Case, and the authorities therein cited. In this particular case appellant's defense appears to have been twofold, to wit: (1) That he executed the indorsement on the instrument himself (though there is no positive proof of this), under authority of the prosecutrix; and (2) that prosecutrix herein executed the indorsement. And the admission of illegal testimony tending to support the evidence of prosecutrix and destroy the theory of appellant, to the effect that the indorsement was made by her, was calculated to injure and impair his rights before the jury."

In Williams v. State (1878) 61 Ala. 33, a witness who confessed to have written a forged instrument, was permitted, at the request and under the direction of the person accused of the crime, to write in the presence of the court and jury a similar instrument so that the jury might institute a comparison. It was held that this was error. H. B.

EMIL KLINGBEIL, Appt.,

v.

WILLARD T. SAUCERMAN, Exr., etc., of N. A. Loofbourow, Deceased.

Wisconsin Supreme Court — January 16, 1917.

(165 Wis. 60, 160 N. W. 1051.)

Physician — malpractice — notice of claim.

An action for damages for breach of contract because of malpractice of a physician, causing personal injuries to the patient, is within a statute requiring preliminary notice of intention to bring an action to recover damages for injury to the person.

[See note on this question beginning on page 1313.]

APPEAL by plaintiff from an order of the Circuit Court for Green County overruling a demurrer to the answer in an action brought to recover damages for alleged malpractice. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Lehr & Kiefer** for appellant.

Messrs. **J. M. Becker and W. H. McGrath** for respondent.

Vinje, J., delivered the opinion of the court:

This appeal raises the question whether the notice provided for by subd. (5), § 4222, Stat. 1913, must be given in order to maintain an action for malpractice based upon a breach of the implied contract on the part of the physician to exercise proper skill and care in the treatment of plaintiff. In Frechette v. Ravn, 145 Wis. 589, 130 N. W. 453, this court held that in such an action, based upon tort, the notice must be given, but expressly reserved the question here presented. The Frechette Case was followed in Lotten v. O'Brien, 146 Wis. 258, 131 N. W. 361. The part of the section in question reads as follows: "No action to recover damages for an injury to the person shall be maintained unless within two years after the happening of the event causing such damages notice in writing signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation."

It is to be noticed that the clause in question, though in the nature of a statute of limitations, differs therefrom in that it requires a preliminary notice to be served within a specified time, instead of fixing the time within which an action shall be begun (Arp v. Allis-Chalmers Co. 130 Wis. 454, 8 L.R.A. (N.S.) 997, 118 Am. St. Rep. 1036, 110 N. W. 386; Guile v. LaCrosse Gas & E. Co. 145 Wis. 157, 130 N. W. 234); also that the notice must be served in every action for injuries to the person, irrespective of the form of such action. It was stated in Frechette v. Ravn, supra, that an action in tort for malpractice was "plainly one to recover damages for injuries to the person." Why? Because defendant's conduct resulted in an injury to the person of plaintiff. If it did so because of the tort, which consisted in a breach of duty created by law, it is difficult to see why it does not do so when the same identical conduct produces the same identical result, though the complaint charges the breach of a duty created by contract between the parties instead of the breach of a duty created by law. Damages may flow from the breach of both duties, and likewise an injury to the person may result from the breach of a contract as well as from a tort. Where, as in malpractice, there is an option to sue in tort or on contract, each cause of action is grounded upon the same identical acts of the defendant, namely, his failure to exercise the proper skill or care, or both. The very same conduct gives plaintiff his option as to remedies. Hence, if defendant's conduct, when sued in tort, gives rise to an action for injuries to the person, the very same conduct must give rise to the same kind of action when sued on contract. The word "action," as used in the statute, has reference to the subject-matter or nature thereof, not to its form as a matter of remedial procedure. Whether it be in tort or on contract, it is an action to recover damages for injuries to the person, and comes alike under the terms of the statute, since the phrase therein, "no action to recover damages for injuries to the person," refers to bodily injuries, and not to injuries to feelings. Wysocki v. Wisconsin Lakes Ice & Cartage Co. 125 Wis. 638, 104 N. W. 707.

Physician—malpractice—notice of claim.

Cases cited to us from other jurisdictions, holding that, where statutes prescribe different limitations upon actions sounding in tort and upon those on contract, each form of action will be governed by the limitation prescribed

for that form, though both might arise from the same transaction and the one be barred and the other not, are clearly not applicable. For in the instant case the service of notice is not made dependent upon the form of action, but upon its nature or subject-matter. The words, "action to recover damages for an injury to the person," mean an action brought on account of or by reason of bodily injuries inflicted upon a human being. Here the complaint charges the infliction of bodily injuries upon plaintiff, and the fact that such infliction is alleged to constitute a breach of contract, instead of a breach of legal duty, makes it none the less an action for injuries to the person. And if the action is in fact one for injury to the person, then the notice must be served, no matter what form the action takes. As we have already pointed out, it is an action for injury to the person, though based upon the breach of a contract, and the demurrer to the answer was properly overruled.

In the following cases the same result has been reached under somewhat similar statutory provisions: Griffin v. Woodhead, 30 R. I. 204, 74 Atl. 417; Basler v. Sacramento Electric Gas & R. Co. 166 Cal. 33, 134 Pac. 993; Webber v. Herkimer & M. St. R. Co. 109 N. Y. 311, 313, 16 N. E. 358; Nord v. Burlington & M. River R. Co. 37 Iowa, 498; Emmert v. Grill, 39 Iowa, 690; Sherman v. Western Stage Co. 22 Iowa, 556; Blackwell v. Memphis Street R. Co. 124 Tenn. 516, 137 S. W. 486. The contrary has been held in Staley v. Jameson, 46 Ind. 159, 15 Am. Rep. 285; Howard v. Ritchie, 9 Kan. 102; and Menefee v. Alexander, 107 Ky. 279, 53 S. W. 653.

Order affirmed.

ANNOTATION.

Action "for injury to person" in statutes relating to notice or limitation as including actions ex contractu.

The question, What constitutes "an injury to person" within the meaning of the statute, is not within the scope of the note, which is confined to the question whether the statute applies to an action, ex contractu, the real purpose of which is to recover for an injury of a kind that is concededly within the purview of the statute. There is, for example, some conflict among the cases as to whether an action by a husband for loss of services of the wife, or by a parent for loss of services of a child, regardless of its form as ex contractu or ex delicto, is an action for "injury to person" within the meaning of the statute. Such cases are, of course, not within the scope of the note. However, if it be held or assumed that such an action, ex delicto, is for an injury to the person within the statute, the question within the scope of the note might arise as to the effect of bringing the action ex contractu.

The reported case (KLINGBEIL v. SAUCERMAN, ante, 1311) seems to be the only one in which the question under annotation has arisen in connection with a statute prescribing notice as a condition of an action for injury to the person; but the question has arisen in a number of cases involving the Statute of Limitations.

Cases in which the statute has been applied, even though the decision is based upon the holding that the action was not an action ex contractu, are not strictly within the scope of the note. Some cases of that kind, however, have been taken for illustrative purposes.

The holding in the reported case (KLINGBEIL v. SAUCERMAN) that the phrase, "actions to recover damages for injury to the person," includes actions ex contractu, appears to be in harmony with the weight of authority. Almost all of the courts seem to regard such a statute as creating a

special class of cases, "carved out of the general classes" created by the general Statute of Limitations.

Where a statute limits the time in which an action for "injuries to the person" may be brought, the statute is applicable to all actions, the real purpose of which is to recover for an injury to the person, whether based upon contract or tort, in preference to a general statute limiting the time for bringing actions ex contractu. Basler v. Sacramento Electric, Gas & R. Co. (1913) 166 **Cal.** 33, 134 Pac. 993; Marty v. Somers (1917) 35 **Cal.** App. 182, 169 Pac. 411; Handtoffski v. Chicago Consol. Traction Co. (1916) 274 **Ill.** 282, 113 N. E. 620; Nord v. Burlington & M. River R. Co. (1873) 37 **Iowa**, 498; Webber v. Herkimer & M. Street R. Co. (1888) 109 **N. Y.** 311, 16 N. E. 358, affirming (1885) 35 Hun, 44 (see discussion of this case, infra); Griffin v. Woodhead (1909) 30 **R. I.** 204, 74 Atl. 417 (see quotation from this case, infra); Martin v. Western U. Teleg. Co. (1894) 6 **Tex.** Civ. App. 619, 26 S. W. 136; Kelly v. Western U. Teleg. Co. (1897) 17 **Tex.** Civ. App. 619, 43 S. W. 532; Birmingham v. Chesapeake & O. R. Co. (1900) 98 **Va.** 548, 37 S. E. 17; Baltimore & O. R. Co. v. Reed (1915) 139 C. C. A. 192, 223 **Fed.** 689, 10 N. C. C. A. 107, writ of certiorari denied in (1915) 239 **U. S.** 640, 60 L. ed. 481, 36 Sup. Ct. Rep. 160. **Contra:** Staley v. Jameson (1874) 46 **Ind.** 159, 15 Am. Rep. 285 (but see quotation from Baltimore & O. R. Co. v. Reed (1915) 139 C. C. A. 192, 223 **Fed.** 689, 10 N. C. C. A. 107, infra); Menifee v. Alexander (1899) 107 **Ky.** 279, 53 S. W. 653; Western U. Teleg. Co. v. Witt (1908) 33 **Ky.** L. Rep. 685, 110 S. W. 889.

In Basler v. Sacramento Electric, Gas, & R. Co. (**Cal.**) supra, it was held that a statute which prescribes a period of one year as the time within which an action may be commenced "for injury to or for the death of one, caused by the wrongful act or neglect of another," is applicable to an action for personal injuries, in preference to the two-year period prescribed by another statute as regards "an action upon a contract, or petition, or liability, not founded upon an instrument in writing." The court, it is true, found that the action was not an action ex contractu, but added: "But even if we should regard it as arising upon contract, nevertheless the damage is done and is directly referable to the personal injuries suffered." And this case was cited and followed in Marty v. Somers (1917) 35 **Cal.** App. 182, 169 Pac. 411.

But in Harding v. Liberty Hospital Corp. (1918) — **Cal.** —, 171 Pac. 98, where the action was against a hospital for damages caused by negligent treatment, and the plaintiff endeavored to base the action upon the contractual relations between the parties, and it was held that the statute barring action for personal injuries applied, the court reviewed these California decisions, and apparently took the position that they were based upon the idea that the action was not ex contractu. This court said: "No distinction in principle can be discovered between this case and the case of Basler v. Sacramento Electric, Gas, & R. Co. (1913) 166 **Cal.** 33, 134 Pac. 993. That was an action brought to recover damages for injuries suffered by one of the plaintiffs while a passenger on a street car operated by the defendant in the city of Sacramento. There, as here, the plaintiffs pleaded the terms of the contract out of which the relation between the parties arose. In that case, the relation was the contractual one of carrier and passenger. In this, the relation was the contractual one of hospital and patient. In that case, this court held that the pleading of the contract by the plaintiffs was merely matter of inducement, out of the existence of which the definite legal duty of the defendant arose; and in that case, as in the instant one, the breach of that definite legal duty consisted in the alleged negligent acts and omissions of the agent of the defendant and consequent injury directly and solely caused thereby. The court there held that this was the gravamen of the action, citing numerous authorities in support of its view. In the later case of Krebenois v. Lindauer (1917) 175

Cal. 431, 166 Pac. 17, the same question arose, and was similarly decided. There the injury complained of was the alleged negligence of the defendant in failing to provide the plaintiff with a safe place to work, in violation of its contract of employment, and the court there held the action to be one arising ex delicto, and to be barred by the provision of the section and subdivision of the Code above quoted. . . . In the recent case of Marty v. Somers (1917) 35 Cal. App. 182, 169 Pac. 411, in which a rehearing has been denied by this court, the precise question presented in the instant case, upon almost an identical state of facts, arose. There, the contract of employment was directly with the physician, who was alleged to have negligently performed the operation which caused the plaintiff's injury; and upon the authority of Basler v. Sacramento Electric, Gas, & R. Co. (Cal.) supra, the court there held that subdivision 3 of § 340 operated as a bar to the action. The authorities cited herein from other jurisdictions, dealing with cases of alleged malpractice on the part of physicians, are not uniform in their rulings as to whether the action is one arising upon contract or tort. But the case of Lotten v. O'Brien (1911) 146 Wis. 258, 131 N. W. 362, bears instructively upon the case at bar. Its facts are similar. It appears that the employment of the physician continued for some time after the date of the negligent setting of the plaintiff's broken arm. The court held that the action sounded in tort, and that the cause of action accrued when the negligent acts were committed, without reference to the time of the physician's discharge. Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury, and that the fact that the parties stand in contractual relation to each other does not operate to change the rule, or extend the time for the commencement of such actions."

Where a statute provides that actions for damages for injuries to the person shall be commenced within two years next after the cause of action accrues, an action for personal injuries will be barred unless it is brought within two years, even though the action is properly brought in assumpsit. Handtoffski v. Chicago Consol. Traction Co. (1916) 274 Ill. 282, 113 N. E. 620, supra.

The holding in Webber v. Herkimer & M. Street R. Co. (1888) 109 N. Y. 311, 16 N. E. 358, supra, is based upon a statute which fixes a period of three years for the bringing of "an action to recover damages for a personal injury, resulting from negligence." The plaintiff was injured while a passenger on a street railway car, by the negligence of defendant's employee, and attempted to base his action upon the contract of carriage. The court seems to make a strong point of the wording of the statute, especially the words "resulting from negligence." The court said: "The form of the action, whether ex contractu, as claimed to be the case here by appellant's counsel, or ex delicto, does not affect the case under this statute." This same statutory phrase, "resulting from negligence," formed the basis of the holding in Maxson v. Delaware, L. & W. R. Co. (1889) 112 N. Y. 559, 20 N. E. 544.

In Griffin v. Woodhead (1909) 30 R. I. 204, 74 Atl. 417, supra, the court said: "We do not find it necessary to decide whether the declaration in this 'action on the case for malpractice,' as it is therein styled, which begins by averring an employment of the defendant by the plaintiff as her physician, for a suitable compensation, and then avers a breach of duty in negligently and unskilfully attending the plaintiff, is to be considered as sounding in contract rather than in tort, for the reason that we are of the opinion that the provisions of § 248 are explicit as to the period of limitation for all actions for injuries to the person, whatever may be their form. And this for several reasons. No ex-

ception as to the form of action is made by the section, and lest it should be supposed that the period of four years allowed in § 249 as to other actions of trespass should be supposed to be inconsistent with § 248, 'injuries to the person' are expressly excepted from it. So in § 250, in specifying the actions as to which six years are allowed, 'words spoken, and for injuries to the person,' are specially excepted, and it is not contended that an action for 'words spoken' can be brought after the period of one year provided in § 248. Again, to adopt the plaintiff's contention would be to permit a plaintiff to sue in tort within two years, or to frame his action in contract upon the same facts, and thus gain four years."

In Birmingham v. Chesapeake & O. R. Co. (1900) 98 Va. 548, 37 S. E. 17, supra, the court said: "The limitation is not determined by the form of action, but by its object. If the thing complained of is an injury to the person, the limitation in assumpsit is the same as if the action were, in form, ex delicto. 'Whenever the injury is merely personal, whether resulting from breach of contract or from tort, the maxim, Actio personalis moritur cum persona, prevails.' Grubb v. Sult (1879) 32 Gratt. (Va.) 203, 34 Am. Rep. 765. The object of the suit at bar being to recover damage for personal injuries alleged to have been sustained by the plaintiff, the limitation in tort actions is applicable."

In Fadden v. Satterlee (1890) 43 Fed. 568, the decision, in an action by a patient against a physician, depends upon the peculiar wording of the statute, which provided: "Actions founded on injuries to the person or reputation, whether based on contract or tort," must be brought within two years. Of course, the form of action could make no difference under this statute.

In Baltimore & O. R. Co. v. Reed (1915) 139 C. C. A. 192, 223 Fed. 689, 10 N. C. C. A. 107, supra, the court (deciding the case under the Indiana statute, and refusing to follow Staley v. Jameson (1874) 46 Ind. 159, 15 Am. Rep. 285, supra) said: "Staley v. Jameson was a suit against physicians and surgeons, in which it was alleged that for a special consideration they undertook to attend and care for the plaintiff in the setting and healing of a fracture, and that they so negligently and unskilfully conducted themselves in performing their contractual duty in that respect as to impair and destroy the efficiency of plaintiff's arm, wherefore they were sued for damages. The case specifically raises the question involved here. The second paragraph of the answer pleaded that the cause of action set forth in the complaint did not accrue within two years next before the commencement of the suit. A demurrer to this second paragraph was overruled by the trial judge, whereupon judgment was entered against the plaintiff. The supreme court of Indiana says (46 Ind. 160, 115 Am. Rep. 285): 'The appellees insist that the action is for a personal injury to the appellant, resulting from the alleged unskilfulness and negligence of the appellees. The opinion of the court below, in general term, is copied into the transcript. From that we learn that its ruling was based upon the theory that the gravamen of the action was the personal injuries resulting to the appellant from the omission of the appellees to exercise the care and use the skill in the discharge of their undertaking to care for his broken arm, which the law required of them upon the facts of the case, and not on a contract to properly treat the arm as surgeons . . .' Also (46 Ind. 165): 'We think the action was upon the contract. That a breach of the contract should result in impairing and destroying the efficiency of the appellant's arm does not show that the gravamen of the action is an injury to his person, within the meaning of § 211, 2 Gavin & H. 158' (Burns's Stat. 1901, § 294). The court below was reversed for error in overruling the demurrer to the second paragraph of the answer. This case was followed under similar circumstances, and to the same result, by the court in Burns v. Barenfield (1882) 84 Ind. 43. It appears from the opinion of the court below in the instant case

that it had the advantage of no other decisions on this subject in Indiana than these. However, subsequent holdings by that court very materially narrow their scope and destroy them as authority here. In Boor v. Lowrey (1885) 103 **Ind.** 468, 53 Am. Rep. 519, 3 N. E. 151, being again an action wherein the plaintiff sued physicians for negligent and unskilful treatment of a fracture, it was held that an action for damages to the person caused by malpractice of a physician does not survive his death, no matter whether it be brought on contract or in tort. The particular statute involved (§ 283, Burns's Stat.) provided that 'a cause of action arising out of an injury to the person dies with the person of either party,' etc. The court recognized that Staley v. Jameson and Burns v. Barenfield (**Ind.**) supra, were necessary to be considered, wherefore they were distinguished and limited in this language: 'These were cases against surgeons for malpractice, and both turned upon the statute which requires actions for injuries to the person to be commenced within two years. In each it was held that the action was, in form, ex contractu, and that the statute limiting the time for the commencement of actions for injury to the person did not apply. What the particular damages were which were claimed as the subject of the actions, respectively, does not clearly appear from the statement of the complaint in either case. It must be assumed, however, that the actions were for the recovery of special damages, which had relation to property. They were not, therefore, actions to recover for injuries to the person. If they were, the conclusions reached could not be maintained. This assumption would seem to be justified by an examination of the authorities upon which the decisions are made to rest. Those which support the conclusion reached are cases involving injury to personal property. Dale v. Hall (1750) 1 Wils. 281, 95 **Eng.** Reprint, 619; Burnett v. Lynch (1826) 5 Barn. & C. 589, 108 **Eng.** Reprint, 220, 8 Dowl. & R. 368, 4 L. J. K. B. 274, 29 Revised Rep. 343. It may be that actions ex contractu are maintainable for the recovery of special damages resulting from a breach of duty founded on contract, even though injury to the person results. The action thus maintainable, however, is not and cannot be predicated upon the personal injury, nor to recover damages resulting from injuries to the person. The action must involve injury to the estate, and not to the person. Where the primary cause of action is an injury to the person, and the damages sought to be recovered relate primarily to such personal injury, the statute which provides that actions to recover damages for injuries to the person die with the person of either party cannot be abrogated by the mere form in which the action is brought.' A review of this case was had under the title of Hess v. Lowrey (1890) 122 **Ind.** 226, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156, in which the position formerly taken was adhered to. A still later case on this subject, and one which, we understand, states the present judicial construction in Indiana, is that of Feary v. Hamilton (1895) 140 **Ind.** 45, 39 N. E. 516. This was also an action involving the interpretation of § 283 (formerly § 232), Burns's Stat., providing that a cause of action arising out of an injury to the person dies with the person of either party. There the holding is that, no matter whether the suit sounds in contract or in tort, the statute applies and the action abates. The court says: 'It is settled law that actions arising out of contracts, express or implied, will not survive, where the damages sustained by such breach are for injuries to the person, as mental anguish, pain of body, or injury to character. . . . It is true, as a general proposition, that actions in form ex contractu survive; but this is due rather to the substance of the action than its form.' The force of these decisions compels us to believe that, if the precise question involved in Staley v. Jameson were again before the Indiana court, it would be held that unless the action counted primarily upon the damages to personal estate resulting from the accident, the

two-year limitation in § 294, Burns's Stat., would apply, for we are clear that the phraseology of the section under consideration in Staley v. Jameson and Burns v. Barenfield, as well as here, requires the same construction as that placed by the three cases just considered upon the language of § 283, Burns's Stat."

And it has been held that an action by a patient against his physician for injuries caused by the defendant's negligent treatment of the plaintiff, regardless of the form of action, is not an action ex contractu, and is within a statute limiting the time for bringing an action for injuries to the person. Marty v. Somers (1917) 35 Cal. App. 182, 169 Pac. 411; Burrell v. Prespon (1889) 54 Hun, 70, 7 N. Y. Supp. 177 (see discussion of same case, infra); Griffin v. Woodhead (1909) 30 R. I. 204, 74 Atl. 417 (see discussion of this case, supra).

But there are some cases in which it is held that the question must be determined by an inspection of the plaintiff's declaration, to determine whether his action is based upon a contract or upon the negligence of defendant. Keirsey v. McNeemer (1915) 197 Ill. App. 173; Staley v. Jameson (1874) 46 Ind. 159, 15 Am. Rep. 285 (but see quotation from Baltimore & O. R. Co. v. Reed (1915) 139 C. C. A. 192, 223 Fed. 689, 10 N. C. C. A. 107, supra); Menefee v. Alexander (1899) 107 Ky. 279, 53 S. W. 653.

In Burrell v. Prespon (N. Y.) supra, the court said: "The counsel for the appellant argues, quite against the plain utterance of the Code of Civil Procedure, as it seems to us, that, in as much as the relation existing between the patient and the doctor was by virtue of a contract existing between them, on the one side to render services, and on the other to pay for the same, the six-year Statute of Limitations is alone applicable. It is true that negligence in this, as in all other cases arising incidentally between parties who have contract relations with each other, is in some sort a breach of contract; but this by no means relieves the parties from the operation of the provisions of the Statutes of Limitations, which are designed to limit the right of action in case of negligence to three years, whether the negligence was caused by a party having any duty to perform to the other or not. Subdivision 5 of the three-year statute (Code, § 383) is: 'An action to recover damages for a personal injury resulting from negligence.' It contains no qualification or limitation of cases where the negligence is caused by a person who has agreed by contract to do a certain thing in behalf of the party injured."

An action against a railroad company for injuries caused an employee because of the negligence of a fellow employee, although brought upon the contract of employment, is barred unless brought in two years, under a statute providing that period of limitations for actions for injuries to the person. Nord v. Burlington & M. River R. Co. (1873) 37 Iowa, 498.

It has been held that an action by an employee for damages for personal injuries, alleged to have been caused by the negligence of the employer, is, whatever the form of the action, within a statute that bars all actions for "injuries to the person" not brought within a specified time. Krebenois v. Lindauer (1917) 175 Cal. 431, 166 Pac. 17.

And it has been held that an action against a telegraph company for negligence in failing to deliver a telegram in time for plaintiff to attend the funeral of a near relative, of which the telegram was notice, is governed by a statute limiting the time for bringing an action for injuries to the person, even though the action was one for breach of contract. Martin v. Western U. Teleg. Co. (1894) 6 Tex. Civ. App. 619, 26 S. W. 136; Kelly v. Western U. Teleg. Co. (1897) 17 Tex. Civ. App. 344, 43 S. W. 532. But in Kentucky, where the statute does not apply to actions ex contractu (see Kentucky cases cited, supra), this kind of action is not barred by the statute. Western U. Teleg. Co. v. Witt (1908) 33 Ky. L. Rep. 685, 110 S. W. 889.

J. W. M.

CENTRAL PACIFIC RAILWAY COMPANY, Respt.,
v.
DAVID TARPEY, Admr., etc., of D. P. Tarpey, Deceased et al.

PETER J. PETERSON, Appt.

Utah Supreme Court—September 26, 1917.

(— Utah, —, 168 Pac. 554.)

Adverse possession — conveyance — executory contract.

1. A contract to cause a conveyance of land to be made to the purchaser upon payment of the purchase money and the issuance of a patent by the government to a railroad company is not within a statute providing for title by adverse possession by one entering under claim of right founded upon a written instrument as being a conveyance of the land in question; and payment of the purchase price will not carry the adverse possession back to the time of entry.

[See note on this question beginning on page 1329.]

Same — uninclosed land.

2. Open, notorious, and peaceable occupation of uninclosed land under claim of right, for purposes of pasturage, will not, where the claim is not founded on a written instrument, ripen into title by adverse possession, under a statute providing that in absence of such instrument land shall be deemed to have been possessed and occupied in the following cases only: (1) Where it has been protected by substantial inclosure; (2) where it has been usually cultivated or improved; (3) where labor or money has been expended for irrigation.

Notice — recitals in title papers.

3. One claiming possession adverse to a railroad company under an executory contract for sale of real estate cannot plead ignorance of the interest of the railroad company if his contract refers to the land as that of the railroad company, and agrees to cause a conveyance of it to be made as soon as a patent for it is obtained.

Adverse possession — recognition of title — adverse claim.

4. Instituting an action for specific performance of a contract to convey real estate is a recognition of the title of defendant, and some subsequent, unequivocal act or declaration is necessary to start the statute running in favor of the one instituting such suit as an adverse claimant.

Same — failure to pay taxes — effect.

5. Failure to pay taxes on land claimed adversely, for some portion of the time relied on to perfect an adverse title, prevents the acquisition of such title, where the statute requires all taxes to be paid by the adverse claimant.

APPEAL by defendant Peterson from a judgment of the District Court for Cache County in favor of plaintiff in an action brought to quiet title to certain land. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. **George Halverson,** for appellant:

Color of title is immaterial, as regards adverse possession, except for the purpose of determining the extent of the possession.

Welner v. Stearns, 40 Utah, 185, 120 Pac. 490, Ann. Cas. 1914C, 1175; Owsley v. Matson, 156 Cal. 401, 104 Pac. 985; 1 Cyc. 1084; 2 C. J. §§ 331, 332, 597.

Railroad land grants are grants in præsenti.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158.

Where there is a direct grant of the fee in præsenti, the statute will begin to run from the time when the title

passes, even though a patent has not been issued.

2 C. J. § 453, p. 217; Toltec Ranch Co. v. Babcock, 24 Utah, 191, 66 Pac. 876; Francoeur v. Newhouse, 14 Sawy. 600, 43 Fed. 236; 9 Am. & Eng. Enc. Law, 58; Hayes v. Martin, 45 Cal. 559.

As no taxes were ever levied or assessed, it was not necessary to pay taxes in order to acquire title by adverse possession, the other elements being present.

Utah Copper Co. v. Chandler, 45 Utah, 85, 142 Pac. 1119; Toltec Ranch Co. v. Babcock, 24 Utah, 191, 66 Pac. 876.

A person holding under an executory contract may claim adversely as against strangers.

Welner v. Stearns, 40 Utah, 185, 120 Pac. 490, Ann. Cas. 1914C, 1175; State v. Connor, 69 Ala. 212; Tayloe v. Dugger, 66 Ala. 444; Schauble v. Schulz, 69 C. C. A. 581, 137 Fed. 389; Montgomery County v. Severson, 64 Iowa, 326, 17 N. W. 197, 20 N. W. 458; Ripley v. Miller, 165 Mich. 47, 130 N. W. 345, Ann. Cas. 1912C, 952; Simpson v. Sneclode, 83 Wis. 201, 53 N. W. 499; Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624; Pacific Mut. L. Ins. Co. v. Stroup, 63 Cal. 150; McNeeley v. South Penn Oil Co. 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508; McManus v. O'Sullivan, 48 Cal. 7; Hayes v. Martin, 45 Cal. 563; Allen v. McKay & Co. 120 Cal. 338, 53 Pac. 828; Toltec Ranch Co. v. Babcock, 24 Utah, 193, 66 Pac. 876; Adams v. Guerrard, 29 Ga. 651, 76 Am. Dec. 626; La Frombois v. Jackson, 8 Cow. 589, 18 Am. Dec. 463; Hart v. Bostwick, 14 Fla. 162; Coogler v. Rogers, 25 Fla. 853, 7 So. 391; Alabama State Land Co. v. Matthews, 168 Ala. 200, 53 So. 174; Graham v. Warren, 81 Miss. 330, 33 So. 71; Barrett v. McKinney, — Tex. Civ. App. —, 93 S. W. 240; Ward v. Cochran, 18 C. C. A. 5, 36 U. S. App. 307, 71 Fed. 127.

Messrs. J. V. Lyle, H. G. Nebeker, and Frank Thunen, for respondent:

To acquire title by adverse possession, the possession must not only be continuous for the time prescribed, but must be actual, open, and notorious, with an intention on the part of the claimant to claim the title as owner, and against the rights of the true owner; and the adverse claimant must pay all the taxes which are lawful charges upon the land.

Dignan v. Nelson, 26 Utah, 186, 72 Pac. 936.

Appellant had no color of title.

Laraway v. Zenor, 100 Iowa, 181, 69 N. W. 416; Smith v. Jones, 21 Utah, 270, 60 Pac. 1104; Hall v. Law, 102 U. S. 461, 466, 26 L. ed. 217, 219; Rigor v. Frye, 62 Ill. 507; Dunlap v. Dougherty, 20 Ill. 398; Osterman v. Baldwin, 6 Wall. 116, 124, 18 L. ed. 730, 732; Elliott v. Mitchell, 47 Tex. 445; Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Converse v. Calumet River R. Co. 195 Ill. 204, 62 N. W. 887; Bride v. Watt, 23 Ill. 507; Dickenson v. Breeden, 30 Ill. 279; Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Salt Lake Invest. Co. v. Fox, 32 Utah, 301, 13 L.R.A.(N.S.) 627, 125 Am. St. Rep. 865, 90 Pac. 564.

While appellant's contract remained executory, he was estopped, as was Tarpey, to deny the railroad company's title.

Potts v. Coleman, 67 Ala. 221; Pratt v. Canfield, 67 Mo. 50; Anderson v. McCormick, 18 Or. 301, 22 Pac. 1062; Blackwell v. Ryan, 21 S. C. 112; Munro v. Jeter, 24 S. C. 33; Lewis v. Hawkins, 23 Wall. 119, 23 L. ed. 113; Brown v. Huey, 103 Ga. 448, 30 S. E. 429; Swartwout v. Burr, 1 Barb. 499; Champion v. Brown, 6 Johns. Ch. 402, 10 Am. Dec. 343; Pearson v. Boyd, 62 Tex. 541; Clark v. Adams, 80 Tex. 674, 16 S. W. 552; Laraway v. Zenor, 100 Iowa, 181, 69 N. W. 416; Wendell v. Moulton, 26 N. H. 41; Keys v. Mason, 44 Tex. 144; Warren v. Fredericks, 83 Tex. 380, 18 S. W. 750; Wilson v. Atkinson, 77 Cal. 485, 11 Am. St. Rep. 299, 20 Pac. 66; Reay v. Butler, 95 Cal. 219, 30 Pac. 208; Hardin v. Gouveneur, 69 Ill. 140; Freedman v. Oppenheim, 80 App. Div. 487, 81 N. Y. Supp. 110; Sheppick v. Sheppick, 44 Utah, 131, 138 Pac. 1169; Dothard v. Denson, 75 Ala. 482; Lovell v. Frost, 44 Cal. 471.

Appellant has failed to prove exclusive actual occupation for the period required by the statute, or for any period, or that his claim was hostile or known to the railroad company.

Bracken v. Union P. R. Co. 5 C. C. A. 548, 12 U. S. App. 421, 56 Fed. 447; Larsen v. Onesite, 21 Utah, 38, 59 Pac. 234; Coleman v. Hines, 24 Utah, 360, 67 Pac. 1122; Ward v. Cochrane, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; Furlong v. Cooney, 72 Cal. 327, 14 Pac. 12; Ringo v. Woodruff, 43 Ark. 469; Johnston v. Albuquerque, 12 N. M. 20, 72 Pac. 9; Strauss v. Canty, 169 Cal. 101, 145 Pac. 1012.

Mr. George H. Smith also for respondent.

Thurman, J., delivered the opinion of the court:

Plaintiff by this action seeks to quiet its title to the east half of section 5, and all of sections 9, 15, 23, and 27, in township 8 north, range 1 east, Salt Lake meridian, United States survey. The complaint filed by the plaintiff includes all of the odd sections from 1 to 29, inclusive, in said township, but all of the defendants, except Tarpey and Peter J. Peterson, filed disclaimers, thus eliminating from the case the particular land ooccupied by them. Tarpey failed to appear and answer, and the only answer filed in the case is by defendant Peterson who claims ownership of the land first above described; hence the lands claimed by him are the only lands involved in the action. The complaint, in effect alleges ownership of the land by the plaintiff in fee simple, adverse claim and possession by the defendants, and that said claim and possession are without right. Defendant Peterson answers and, in effect, admits his claim of interest in and possession of the land, but denies the remaining allegations of the complaint. As a further defense, defendant, in effect, alleges that, in 1887, he entered into a contract in writing to purchase the land in controversy from one D. P. Tarpey for a certain consideration; that Tarpey immediately put defendant in possession of the land, and that defendant has ever since held the same adversely to the plaintiff and all the world, openly, notoriously, uninterruptedly, and peaceably, under color of title and claim of right thereto, to the exclusion of the plaintiff and all the world, and has ever since paid all the taxes legally levied and assessed on said land, and has used said land according to the usual course and custom of the country. Defendant also alleges full performance of the contract with Tarpey by final payment for the land, December 24, 1896. Both plaintiff and defendant pray for equitable relief.

Plaintiff, replying to defendant's further defense, for want of knowledge or information sufficient to form a belief, denies, in effect, all of the allegations thereof, except that said Tarpey did execute said agreement. Plaintiff affirmatively alleges that defendant, at all times, expressly admitted the title of plaintiff and its predecessor in interest to said land. By way of explaining Tarpey's connection with said land, plaintiff then alleges, in effect, that, in 1887, plaintiff's predecessor in interest, the Central Pacific Railroad Company, agreed to sell, and, when fully paid for, to convey, to said Tarpey said land, but that no payment was ever made thereon, and, in 1895, the contract with Tarpey was rescinded and canceled by mutual consent of the parties, and thereafter, by instrument in writing, Tarpey assigned and transferred back to the railway company all his rights under said contract.

In this statement, for the sake of brevity and simplicity, we have paraphrased the substance of the contract between Tarpey and the defendants so as to include only so much as relates to the defendant Peterson and the land claimed by him. All the rest is immaterial under the issues tried in the court below. The case was tried by the court, without a jury. The evidence, without dispute, tends to show that the plaintiff is the owner of the legal title to the land in controversy by grant under an act of Congress enacted prior to 1887, and also, by patent issued by the United States in 1894. The evidence also tends to show that defendant first entered into possession of the land, under an executory contract for purchase with said Tarpey, in 1887, as alleged in the answer, and that ever since that time defendant has used the same and all of it for grazing purposes, either by himself or by persons claiming under him, the use thereof being open, notorious, and peaceable under claim of right. It does not appear that the land was ever

inclosed by a fence, or other inclosure, or cultivated, or improved, or money expended upon it for purposes of irrigation. The evidence also shows, without dispute, that defendant fully performed his part of the contract with Tarpey by payment of the purchase price within the time limited by the contract, which was December 24, 1896. It does not show, however, that the plaintiff or its predecessors in interest received any part of the purchase price so paid, but, on the contrary, such payment is affirmatively denied. The court found that the contract was entered into with Tarpey as alleged in the defendant's answer, and that defendant had fully paid for the land according to its terms. It also found that defendant, upon the execution of the contract in 1887, was immediately put into possession of the land by Tarpey, and had ever since continued in the exclusive possession thereof, openly, notoriously, exclusively, and peaceably, under claim of right so to do, against all the world except Tarpey and the plaintiff up to the time of full payment of the purchase price, and after that time against all the world.

Other findings were made by the court which, at this point, are not material. As conclusions of law the court found the contract with Tarpey was and is not color of title, and that the possession of land by the defendant was not adverse until the date of final payment, December 24, 1896. It also found that defendant had acknowledged title in the plaintiff by bringing suit against it in respect to the land, and, further, that defendant had failed to pay the taxes legally levied and assessed against the property continuously for seven years during said time. It further found that plaintiff was entitled to a decree as prayed for in its complaint. Judgment was rendered accordingly and defendant appeals.

Appellant assigns as error the above findings and conclusions of the trial court, and also makes other assignments which, in our view of the case, are not necessary to determine. The vital and only question to be determined is, Was the defendant's occupancy and possession of the land during any period of seven years adverse to the plaintiff, within the meaning and purview of the statutes of Utah, relating to title by adverse possession? The law defining the conditions under which title by adverse possession may be acquired is found in Utah Comp. Laws 1907, §§ 2862 to 2866, inclusive. As all of these sections are necessary to an intelligent understanding of the question before the court, they are here presented in full:

"2862. Whenever it shall appear that the occupant, or those under whom he claims, entered into possession of the property under claim of title exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim, for seven years, the property so included shall be deemed to have held adversely, except that when the property so included consists of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

"2863. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: 1. Where it has been usually cultivated or improved; 2. Where it has been protected by a substantial inclosure; 3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant; 4. Where a

known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

"2864. Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, shall be deemed to have been held adversely.

"2865. For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial inclosure; 2. Where it has been usually cultivated or improved; 3. Where labor or money has been expended upon dams, canals, embankments, aqueducts, or otherwise, for the purpose of irrigating said lands, amounting to the sum of $5 per acre.

"2866. In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party or persons, their predecessors, and grantors have paid all taxes which have been levied and assessed upon such land according to law."

The presumption in case of a claim of adverse possession is in favor of the person holding the legal title, and the burden is therefore upon the claimant to show that whatever possession he has is not under and in subordination to the legal title. Utah Comp. Laws 1907, § 2861.

By reference to the sections of the statute which we have set out in full it will appear that there are only two kinds of adverse possession of real estate under the laws of Utah: (1) Where the occupant founds his claim of title upon a written instrument as a conveyance of the property in question, etc., in which case he may claim all the property described in the instrument, as provided in § 2862. In such case the character of his possession and occupancy is determined by the provisions of § 2863. (2) Where he claims title exclusive of other right, not founded upon a written instrument, etc., in which case he can only claim to the extent of his actual occupation, as provided in § 2864. In such case the character of his possession is determined by the provisions of § 2865.

Appellant in this case, in order to succeed against the legal title of respondent, must establish his title by a preponderance of the evidence under one or the other of these provisions of the statute.

It suits our convenience to first determine whether or not appellant established a title to the land by actual occupancy of the entire tract adversely to the plaintiff, under the provisions of §§ 2864 to 2866, inclusive. Under these sections, it will be observed, he need not rely upon a written instrument. His claim of title is based upon actual possession and occupancy of the land under claim of title exclusive of any other right. But under these sections the land must have been protected by a substantial inclosure, or have been usually cultivated or improved, or money expended upon it for irrigation, as provided in § 2865. By reference to § 2863, where the claim is founded upon a written instrument as a conveyance, protection by a substantial inclosure is not required where the land has been used for pasturage or other purposes mentioned. That is for the reason that, in that case, the extent of the possession and occupancy is determined by the written instrument upon which the claim of title is founded. But

where the claim of title is not founded upon a written instrument, but is based entirely upon actual possession of every part of the land, the requirement that the land be protected by a substantial inclosure, or that it has been usually cultivated or improved, or money expended upon it for irrigation, as provided in that section, is imperatively necessary. 2 C. J. pp. 60 to 64, inclusive, also id. pp. 67, 68. There being no cultivation, or improvement, or money expended for irrigation, or any protection by a substantial inclosure upon the land in question, appellant cannot succeed under this provision of the statute, even though his occupancy may have been open, notorious, peaceable, and under claim of right. The law fixes these conditions, one of which, at least, must exist and be proven in order to establish title by adverse possession under this provision of the statute. We do not understand that appellant seriously contends that he has established title to the land under §§ 2864 and 2865. If he does, the contention seems to rest solely upon that portion of the court's finding in which it stated that defendant's possession had been open, notorious, under claim of right. But this, as we have seen, is not sufficient. Appellant's claim under these sections cannot prevail.

Adverse possession—uninclosed land.

Can appellant succeed under the provisions of §§ 2862 and 2863, supra? This seems to be the real ground of appellant's contention. He insists that by virtue of his written agreement with Tarpey, in which Tarpey agreed to convey the land to him upon his payment of the purchase price, and his continuous possession of the land thereafter, openly, notoriously, peaceably, and under claim of title founded upon this written agreement and payment of taxes, he is entitled to a decree in his favor. This brings us to a consideration of the written instrument itself, for, by its terms, we must determine its character, whether or not it be a conveyance of the property in question, as that term is used in § 2862.

The court found, and there is no complaint made of this finding, that on the 10th day of September, 1887, the defendant Peter J. Peterson (and others, naming them) entered into a contract with D. P. Tarpey for the purchase of all lands of the Central Pacific Railroad Company, to which it was or should thereafter become entitled, in certain sections, naming them (including the lands in controversy) for the sum of $9,600; $960 down, and the balance in nine equal annual payments with interest thereon annually in advance at 7 per cent per annum, payable on the 24th of December of each year until paid, by which said contract the said Tarpey agreed, upon such payment being made and upon the issuance of patent therefor from the United States, to cause a deed in fee simple for the conveyance of said premises to be executed and delivered to the said Peter J. Peterson (and others, naming them) and, in the meantime, said parties should have immediate possession and enjoyment of said premises.

It is also found by the court that said contract was duly performed by said parties by payment in full according to the terms of the contract, as witnessed by Tarpey's receipt for final payment, of date December 24, 1896.

This is the substance of the written instrument relied on by appellant as color of title which, together with his possession for more than seven years, constitutes his muniments of title to the land. Perhaps the most serious question for appellant is, is the instrument in question, upon which appellant founds his claim, a conveyance of the property, or can it be treated as a conveyance of the property for the purpose of claiming the property adversely as against the respondent within the meaning of § 2862, Utah Comp. Laws, upon which he bases his claim?

Manifestly, on its face, the con-

tract between Tarpey and appellant relied on as color of title is not and does not purport to be a conveyance of the property. Tarpey did not have the legal title to the land when he contracted with appellant and others for the sale of it. The contract itself refers to the land as land of the Central Pacific Railroad Company to which it was or should thereafter become entitled, naming the sections. The contract also only promises conveyance of the land to appellant when patent is issued by the United States. At most the contract was only a promise to convey when its conditions were performed and when patent issued by the United States. Such an instrument, it has been held by this court, does not even create an equitable title to the property until the purchaser has performed all the conditions to be performed by him. Smith v. Jones, 21 Utah, 270, 60 Pac. 1104.

"An instrument, in order to operate as color of title, must purport to convey title to the claimant thereunder, or to those with whom he is in privity, and must describe and purport to convey the land in controversy." 2 C. J. p. 174.

"Color of title for the purpose of adverse possession under the Statutes of Limitation as to land is that which has the semblance or appearance of title, legal or equitable, but which is in fact no title." 1 Cyc. 1082.

"Color of title is 'that which in appearance is title, but which in reality is not title;' that which seems and professes to convey the property described, but for some reason does not do so." Powers v. Kitching, 88 Am. St. Rep. 702, note.

"Whenever an instrument by apt words of conveyance from grantor to grantee in form transfers what purports to be the title, it gives color of title." Powers v. Kitching, 88 Am. St. Rep. 708, note.

See also, to the same effect, Hall v. Law, 102 U. S. 461, 26 L. ed. 217; Rigor v. Frye, 62 Ill. 507; Osterman v. Baldwin, 6 Wall. 116, 124, 18 L. ed. 730, 732; 1 Am. & Eng. Enc. Law, 857 and 859. See also Converse v. Calumet River R. Co. 195 Ill. 204, 62 N. E. 887, and cases cited.

The opinion of this court, in Smith v. Jones, supra, that a mere promise to convey on performance of conditions does not convey title, either legal or equitable, when considered in connection with the authorities defining color of title, shows quite conclusively that the instrument relied on by appellant is insufficient to constitute color of title upon which to found a claim to property by adverse possession. The authorities cited seem to be in harmony with the great weight of authority on that question.

Appellant, however, cites and relies on the opinion of this court in the case of Welner v. Stearns, 40 Utah, 185, 120 Pac. 490, Ann. Cas. 1914C, 1175. Plaintiff, under a parol agreement with Salt Lake county, was put in possession of certain lots, in 1899, in consideration of his payment of the taxes and costs which had accrued against the lots. He immediately inclosed the lots with a fence. In May, 1900, the county gave him a deed. He then commenced suit to quiet title by publication of summons. A decree was entered in his favor in 1906. In 1907, after the decree was entered, a party claiming under the legal title procured an order setting aside the decree, and then set up his title and prayed that it be quieted as against the plaintiff. The plaintiff claimed title by adverse possession, and failed in the trial court. He appealed to this court, and it sustained his contention. The court first determined that the plaintiff having inclosed the lots with a fence, in 1899, and entered into actual possession under an agreement with the county, and having paid the taxes and costs, his possession for seven years continuously, being a pedis possessio, was sufficient to give him title by adverse possession. But it was contended by respondent in that case that ap-

pellant, from the time of his deed, which was delivered in 1900, had not had possession for seven years before respondent filed his counterclaim in the action, and therefore his claim of adverse possession was invalid. To this contention this court replied, in effect, that, having entered into possession in 1899, and having received his deed in pursuance of the agreement, in 1900, his right to claim adversely related back to the time possession was actually taken. This proposition is supported by the case cited by the court in that opinion. Howland v. Newark Cemetery Asso. 66 Barb. 367. In further support we also cite 2 C. J. 87, and Schauble v. Schulz, 69 C. C. A. 581, 137 Fed. 389, cited by appellant. In the case at bar appellant never received a deed. The case, therefore, does not come within the rule laid down by this court in the case cited, and in the authorities to which we have referred.

The fact that appellant may have performed all the conditions of the contract to be by him performed, strictly according to its terms, does not, without an actual conveyance in pursuance of the terms of the contract, entitle him to claim adversely from the time he entered into possession. In such case his right to claim adversely begins only when he has performed all the conditions of the contract and becomes entitled to a conveyance of the property. 1 Cyc. 1098.

Same—conveyance—executory contract.

It will be remembered that Tarpey was a vendee of the plaintiff under a contract to convey the land in question, at the time he entered into the contract with the defendant, in 1887. His contract with plaintiff was similar in form to his contract with the defendant. Tarpey never paid the purchase price of the land to the plaintiff, notwithstanding he received final payment from the defendant December 24, 1896. Under these conditions defendant's right to claim adversely, not only against Tarpey, but against the plaintiff as well, would not begin until December 24, 1896, when he made final payment. Potts v. Coleman, 67 Ala. 221, and cases cited in the opinion at page 225; 1 Cyc. 1094; Hannibal & St. J. R. Co. v. Miller, 115 Mo. 158, 21 S. W. 915; Jackson ex dem. Griswold v. Bard, 4 Johns. 230, 4 Am. Dec. 267; Pratt v. Canfield, 67 Mo. 50; Anderson v. McCormick, 18 Or. 301, 22 Pac. 1062; Lewis v. Hawkins, 23 Wall. 119, 23 L. ed. 113; Champion v. Brown, 6 Johns. Ch. 402, 10 Am. Dec. 343; Pearson v. Boyd, 62 Tex. 541.

Appellant, in support of his contention, cites many cases, most if not all of which are clearly distinguishable from the present case. Many of them are in accord with the authorities we have cited on one proposition or another. In connection with this contention, however, appellant contends that he never knew of the existence of any claim of interest in the land on the part of the plaintiff until shortly before the 11th day of December, 1900. It is assumed that ignorance on the part of appellant of plaintiff's claim of title to the property is a circumstance to be considered in determining whether or not he can claim adversely to the plaintiff. Without taking the trouble to determine what might be the effect of appellant's ignorance on that point, we are disposed to hold that that is a matter as to which, under the circumstances of this case, appellant cannot plead ignorance. He came into this case founding his right upon a written instrument. If he recovers, he expects to recover by virtue of that instrument. He was and is a party to it. While he did not subscribe his name to it himself, it was done by his authority. He read it within a day or two after it was executed, and had it in his possession afterwards. That instrument, in plain language, refers to the land in controversy as lands of the railroad company, to which it was then en-

Notice—recitals in title papers.

titled or might thereafter become entitled. It also occurs in the instrument that upon payment of the purchase price a deed will be issued as soon as patent could be obtained from the United States. In view of these facts, while his plea of ignorance in fact may be true, it should not be permitted to have controlling influence in determining the rights of the parties before the court. For the purpose of this case the presumption is conclusive that he knew the railroad company owned the land or had an interest in it, and that Tarpey did not have the title. If for no other reason, in the interest of sound morality in judicial proceedings we are disposed to hold the presumption conclusive. If, then, appellant is conclusively bound to know at the time he entered into the contract with Tarpey, and from the contract itself, that the railroad company owned the land in question, was not the execution of the contract a recognition of the company's title? And even assuming that the written contract constituted color of title, would not appellant in that case be required, in some positive form, to repudiate the railroad company's title before the statute relating to adverse possession would begin to run? 2 C. J. 101 to 103, inclusive; 1 Cyc. 1032 to 1034, inclusive.

In view of the facts and circumstances as we find them in this record, we are unable to reach any other conclusion than that appellant's adverse possession of the property in dispute did not begin until December 24, 1896, and from and after that date, only, could he acquire a title adverse to the respondent.

Assuming, as we do under the authorities cited, that after full compliance with the terms of the executory agreement, exclusive possession by appellant under claim of right would be adverse to respondent, we now proceed to consider the character of appellant's possession from December 24, 1896, when final payment was made, down to the commencement of this action in 1911. Giving appellant the benefit of a positive admission that during the whole of that period, so far as external appearances were concerned, his possession was open, notorious, exclusive, and under claim of right, still the important question is, Was it at all times, or for any consecutive period of seven years, adverse to the respondent in contemplation of law? It appears that on December 11, 1900, appellant, and others associated with him in said written agreement with Tarpey, assuming that Tarpey was the agent in said agreement of the railroad company, predecessor of plaintiff, instituted a suit against said company for a specific performance of said written agreement, by which he recognized and admitted the legal title of the company to the land in question. It will be noted that this was less than seven years from the time appellant's adverse possession could possibly begin, to wit, December 24, 1896.

"The possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other until such occupant has changed the character of his possession, either by express declaration or by the exercise of actual ownership inconsistent with a subordinate character." 1 Cyc. 1033, 1034; 2 C. J. 103; 1 R. C. L. p. 722, § 37, title, Adverse Possession.

These authorities, and the cases cited in the notes, generally support the doctrine that a recognition of title in another at any time before the statute completely runs, in whatever form the recognition may appear, breaks the continuity of adverse possession, and thereafter it will require some unequivocal act or declaration to start the statute running in favor of the adverse claimant. We find no dissent from this doctrine among the authorities we have examined upon this ques-

tion. It is evident, therefore, that whatever right by adverse possession appellant has, as against respondent, is based upon the character of his possession after the filing of the action against respondent's predecessor, December 11, 1900.

Adverse possession—recognition of title—adverse claim.

The record shows that appellant paid the taxes on all the land in 1901. In 1904, he paid on section 27 only. Respondent paid them all in 1905. In 1906, appellant paid on sections 15, 23, and 27. In 1907, proof is not clear. In 1909, 1910, and 1911, appellant paid on a large part but not on all the sections. In 1902, 1903, and 1908, there is no proof as to payment. This is a manifest failure to comply with the provisions of Comp. Laws 1907, § 2866, which applies to every character of adverse possession. That section, which is set out in full with the other sections relating to adverse possession on a previous page of this opinion, is mandatory in its terms, and provides, in effect, that in no case shall adverse possession be considered established under the provisions of any section of the Code, unless it shall be shown, among other things, "that the party or persons, their predecessors and grantors, have paid all taxes which have been levied and assessed upon such land according to law." The section is not only mandatory in terms, but it clearly imposes the burden of proof upon the adverse claimant.

Appellant does not claim that he paid the taxes on all the land levied and assessed, after 1900, or that he paid a part in each and every year, but rests his claim upon the proposition that his adverse possession was perfected prior to 1896, during which time no taxes were levied or assessed. This court has heretofore held that, where no taxes are levied or assessed, adverse possession may be acquired without payment. Utah Copper Co. v. Chandler, 45 Utah, 85, 142 Pac. 1119. But, as we have already shown, plaintiff's adverse possession could not begin in any event until December, 1896. Consequently, whether taxes were levied and assessed, or paid, prior to that date, becomes wholly immaterial. But after that date, and especially after 1900, when appellant recognized respondent's title by bringing suit for specific performance of the Tarpey contract, payment of all the taxes on the land by appellant each and every year, if they were levied and assessed, became vitally material to the perfection of his title. If they were not levied and assessed the burden was on him to show that fact. If they were levied and assessed the burden was on him to show that he paid them. There is no other conclusion possible under the statute as construed by the authorities. From the foregoing it conclusively appears appellant did not pay the taxes on the land, although they were levied and assessed for seven consecutive years after his claim of adverse possession began to run; hence he did not acquire title to the land as against the respondent, the holder of the legal title. 2 C. J. 203; 1 R. C. L. p. 700, § 10, "Adverse Possession;" 1 Cyc. 1106.

Same—failure to pay taxes—effect.

The writer of this opinion keenly senses the effect the conclusion reached will have upon the appellant. He paid for the land, strictly according to his contract with Tarpey, and no doubt is conscientious in the belief that he is entitled to the land, and to have his title thereto quieted and affirmed. His misfortune is a hardship beyond the power of this court to redress. Having based his claim upon adverse possession, he can only succeed by showing a substantial compliance with every provision of the statute relating to that character of title. In the opinion of the court he has not done so.

It is therefore ordered that the

judgment be affirmed. Respondent to recover costs.

Frick, Ch. J., and McCarty, Corfman, and Gideon, JJ., concur.

A petition for rehearing having been filed, **Thurman, J.**, on November 19, 1917, handed down the following additional opinion:

Appellant, on application for rehearing of this case, complains that the court, in finding that Tarpey was a vendee of the railroad company under a contract for the purchase of the land in controversy, assumed a state of facts not supported by the evidence. Appellant's counsel during the trial of the case in the lower court, while appellant was on the stand as a witness in his own behalf, introduced in evidence an answer filed by the railroad company in a former suit between the same parties, in which answer it clearly appears that the relation of vendor and vendee did exist between the railroad company and Tarpey, as stated in our former opinion, and just why the assertion is now made that there was no evidence to that effect is more than we can understand.

Appellant also reiterates the doctrine laid down by Cyc. that executory agreements in writing for the sale of land become color of title after payment of the purchase price. We accepted that doctrine without qualification, and made it the fundamental basis of our opinion. We fail to see the reason for again bringing it to the attention of the court. Commencing with the contract as color of title at the time the last payment was made to Tarpey, in December, 1896, we find appellant's possession had not been adverse for any period of seven years thereafter, for the reason that he had not paid all the taxes that had been levied and assessed on the land every year continuously, as provided in Utah Comp. Laws 1907, § 2866.

Appellant in his application for rehearing admits that the taxes levied and assessed for at least one year of the seven were not paid by him. As the statute referred to is mandatory and must be strictly complied with, this admission alone defeats appellant's title by adverse possession.

The law cited by appellant relating to usurious liens (39 Cyc. 1067) has no application to this case. As stated in our former opinion, we are powerless to remedy any hardship or misfortune that may result from the conclusion we have reached. We can neither make the law nor distort it. We can only declare it as we find it. We find no reason to change or modify our opinion. The application for a rehearing is therefore denied.

Frick, Ch. J., and McCarty, Corfman, and Gideon, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Adverse possession as against vendor by one who enters under executory contract.

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I. Scope.

The question here under discussion is the adverse nature of the possession, as against his immediate vendor, of one who purchases land under an executory contract or bond for title. The question of the nature of the possession of a purchaser, as against his vendor's vendor, is not gone into, a somewhat different consideration being there involved.

The matter of the effect of the purchase by a vendee of an outstanding title adverse to the title of the vendor is likewise not within the scope of this discussion, the question here being limited to the nature of the possession taken by a vendee under an executory contract and the effect thereon of acts done by him in pursuance or repudiation of the contract.

II. General rule against possession being adverse.

a. Contracts of purchase.

The vendee under an executory contract of sale enters into possession under, and without hostility to, his vendor. Hostility being one of the elements necessary to adverse possession, it follows that the vendee's possession is not adverse. Accordingly, it is the general rule,—which, however, as subsequently shown, frequently yields when additional circumstances appear,—that the possession taken by a vendee under an executory written contract for the purchase of land is not adverse as to his vendor.

United States.—Stansbury v. Taggart (1844) 3 McLean, 457, Fed. Cas. No. 13,292; Heermans v. Schmaltz (1881) 10 Biss. 323, 7 Fed. 566; Kirk v. Smith (1824) 9 Wheat. 241, 6 L. ed. 81.

Alabama.—Seabury v. Doe (1853) 22 Ala. 207, 58 Am. Dec. 254; Miller v. State (1863) 38 Ala. 600; Collins v. Johnson (1876) 57 Ala. 304 (obiter); Tayloe v. Dugger (1880) 66 Ala. 444; Potts v. Coleman (1880) 67 Ala. 221; Casey v. Morgan (1880) 67 Ala. 441; Walker v. Crawford (1881) 70 Ala. 567; Beard v. Ryan (1884) 78 Ala. 37; Woodstock Iron Co. v. Roberts (1888) 87 Ala. 436, 6 So. 349; Perry v. Lawson (1895) 112 Ala. 480, 20 So. 611; Rankin v. Dean (1908) 157 Ala. 490, 47 So. 1015.

Arkansas.—Perry v. Arkadelphia Lumber Co. (1907) 83 Ark. 374, 103 S. W. 724; Cleveland v. Aldridge (1910) 94 Ark. 51, 125 S. W. 1016; Little Rock & Ft. S. R. Co. v. Rankin (1913) 107 Ark. 487, 156 S. W. 431.

California.—Farish v. Coon (1870) 40 Cal. 33; Kerns v. McKean (1884) 65 Cal. 411, 4 Pac. 404; Kerns v. Dean (1888) 77 Cal. 555, 19 Pac. 817; Phelan v. Smith (1893) 100 Cal. 158, 34 Pac. 667; Hooper v. Young (1909) 10 Cal. App. 509, 102 Pac. 950; Dresser v. Allen (1911) 17 Cal. App. 508, 120 Pac. 65.

Connecticut.—Harral v. Leverty (1882) 50 Conn. 46, 47 Am. Rep. 608.

Delaware.—Doe ex dem. Lynch v. Cannon (1886) 7 Houst. (Del.) 386, 32 Atl. 391.

Florida.—Hart v. Bostwick (1872) 14 Fla. 162; Coogler v. Rogers (1889) 25 Fla. 853, 7 So. 391; Gamble v. Hamilton (1893) 31 Fla. 401, 12 So. 229; Spratt v. Livingston (1893) 32 Fla. 507, 22 L.R.A. 453, 14 So. 160; Smith v. Klay (1904) 47 Fla. 216, 36 So. 54; Dannelly v. Russ (1907) 54 Fla. 285, 45 So. 496.

Georgia.—Ford v. Holmes (1878) 61 Ga. 419; Moore v. Mobley (1905) 123 Ga. 424, 51 S. E. 351.

Idaho.—Davis v. Devanney (1901) 7 Idaho, 742, 65 Pac. 500.

Illinois.—Tilghman v. Little (1851) 13 Ill. 239; Timmons v. Kidwell (1891) 138 Ill. 13, 27 N. E. 756; Peadro v. Carriker (1897) 168 Ill. 570, 48 N. E. 102.

Indiana.—Cole v. Wright (1880) 70 Ind. 179; Rucker v. Steelman (1884) 97 Ind. 222.

Kentucky.—Higginbothan v. Fishback (1819) 1 A. K. Marsh. 506; Moore

v. Farrow (1820) 3 A. K. Marsh. 41; Hamilton v. Taylor (1821) Litt. Sel. Cas. 444; Hawkins v. Page (1827) 4 T. B. Mon. 136; Doe ex dem Riley v. Million (1830) 4 J. J. Marsh. 395; Sprigg v. Albin (1831) 6 J. J. Marsh. 158; Chiles v. Jones (1836) 4 Dana, 479; Kirk v. Taylor (1848) 8 B. Mon. 262; Strother v. Cyrus (1883) 5 Ky. L. Rep. 58 (obiter); Henderson v. Dupree (1885) 82 Ky. 678; Adams v. Casaway (1886) 7 Ky. L. Rep. 533 (abstract); Spradlin v. Spradlin (1892) 13 Ky. L. Rep. 723, 18 S. W. 14 (obiter); Creech v. Abner (1899) 106 Ky. 239, 50 S. W. 58; New Domain Oil Gas Co. v. Gaffney (1909) 134 Ky. 792, 121 S. W. 699; Frazier v. Morris (1914) 161 Ky. 72, 170 S. W. 496; Rice v. Blair (1914) 161 Ky. 280, 170 S. W. 657.

Louisiana.—Clark v. Comford (1893) 45 La. Ann. 502, 12 So. 763.

Maine.—Roxbury v. Huston (1853) 37 Me. 42; Peabody v. Hewett (1861) 52 Me. 33, 83 Am. Dec. 486.

Maryland.—Dean v. Brown (1865) 23 Md. 11, 87 Am. Dec. 555.

Massachusetts.—Brown v. King (1842) 5 Met. 173.

Michigan.—Rayner v. Lee (1870) 20 Mich. 384; Wolf v. Holton (1892) 92 Mich. 136, 52 N. W. 459; Burke v. Douglass (1897) 115 Mich. 197, 73 N. W. 133; Petroski v. Minzgohr (1906) 144 Mich. 356, 115 Am. St. Rep. 450, 108 N. W. 77; Rodgers v. Beckel (1912) 172 Mich. 544, 138 N. W. 202.

Minnesota.—Johnson v. Peterson (1903) 90 Minn. 503, 97 N. W. 384.

Mississippi.—Brown v. Issaquena County (1876) 54 Miss. 230; Jones v. Madison County (1895) 72 Miss. 777, 18 So. 87 (obiter).

Missouri.—Pratt v. Canfield (1877) 67 Mo. 50; Fulkerson v. Brownlee (1879) 69 Mo. 371; Adair v. Adair (1883) 78 Mo. 630; Long v. Kansas City Stock-Yards Co. (1891) 107 Mo. 298, 28 Am. St. Rep. 413, 17 S. W. 656; Hannibal & St. J. R. Co. v. Miller (1892) 115 Mo. 158, 21 S. W. 915; Dollarhide v. Mabary (1894) 125 Mo. 197, 28 S. W. 332.

Montana.—Alderson v. Marshall (1888) 7 Mont. 288, 16 Pac. 576.

Nebraska.—Beer v. Dalton (1902) 3 Neb. Unof. 694, 92 N. W. 593.

New Hampshire.—Drew v. Towle (1855) 30 N. H. 531, 64 Am. Dec. 309.

New Jersey.—Den ex dem. Van Wickle v. Alpough (1808) 3 N. J. L. 446; Appleby v. Obert (1838) 16 N. J. L. 336; Den ex dem. Van Blarcom v. Kip (1857) 26 N. J. L. 351 (obiter).

New Mexico.—Bergere v. Chaves (1908) 14 N. M. 352, 51 L.R.A.(N.S.) 50, 93 Pac. 762, affirmed in (1913) 231 U. S. 482, 58 L. ed. 325, 34 Sup. Ct. Rep. 144.

New York.—Jackson ex dem. Duncan v. Harder (1809) 4 Johns. 202, 4 Am. Dec. 262; Jackson ex dem. Griswold v. Bard (1809) 4 Johns. 230, 4 Am. Dec. 267; Jackson ex dem. Bonnell v. Sharp (1812) 9 Johns. 163, 6 Am. Dec. 267; Jackson ex dem. Young v. Camp (1824) 1 Cow. 605; Jackson ex dem. Swartwout v. Johnson (1825) 5 Cow. 74, 15 Am. Dec. 433; Jackson ex dem. Livingston v. Walker (1826) 7 Cow. 637; Jackson ex dem. Williams v. Miller (1830) 6 Wend. 228, 21 Am. Dec. 316 (obiter); Jackson ex dem. Shaw v. Spear (1831) 7 Wend. 401; Briggs v. Prosser (1835) 14 Wend. 227; Whitney v. Wright (1836) 15 Wend. 171; Fosgate v. Herkimer Mfg. & Hydraulic Co. (1852) 12 Barb. 352, affirmed in (1855) 12 N. Y. 580; Vrooman v. Shephard (1852) 14 Barb. 441; Tompkins v. Snow (1872) 63 Barb. 525; Howland v. Newark Cemetery Asso. (1873) 66 Barb. 366; Re Department of Public Parks (1878) 73 N. Y. 560; Griswold v. Little (1895) 13 Misc. 281, 34 N. Y. Supp. 703; Bird v. New Jersey & N. Y. R. Co. (1896) 3 App. Div. 344, 38 N. Y. Supp. 281; Harison v. Caswell (1897) 17 App. Div. 252, 45 N. Y. Supp. 560.

North Carolina.—Young v. Irwin (1797) 3 N. C. (2 Hayw.) 9; Overman v. Jackson (1889) 104 N. C. 4, 10 S. E. 87.

Oklahoma.—Jennings v. Brown (1907) 20 Okla. 294, 94 Pac. 557; Moore v. Kelly (1916) — Okla. —, 157 Pac. 81.

Oregon.—Anderson v. McCormick (1889) 18 Or. 301, 22 Pac. 1062; Stephenson v. Van Blokland (1911) 60 Or. 247, 118 Pac. 1026; Haberly v. Treadgold (1913) 67 Or. 425, 136 Pac. 334.

Pennsylvania.—Congregation v. Miles (1835) 4 Watts, 146; Piper v.

Sloneker (1854) 2 Grant, Cas. 113; Eichelberger v. Gitt (1883) 104 Pa. 64; Jenkins v. McMichael (1901) 17 Pa. Super. Ct. 476.

South Carolina.—Richardson v. Broughton (1820) 2 Nott & M'C. 417; Richards v. M'Kie (1824) Harp. Eq. 184; Gregorie v. Bulow (1831) Rich. Eq. Cas. 235; Ellison v. Cathcart (1840) 1 McMull. L. 5; Bank of State v. Smyers (1847) 2 Strobh. L. 24; Blackwell v. Ryan (1884) 21 S. C. 112; Munro v. Jeter (1885) 24 S. C. 29.

Texas.—Browning v. Estes (1848) 3 Tex. 462, 49 Am. Dec. 760; Robertson v. Wood (1855) 15 Tex. 1, 65 Am. Dec. 140; Keys v. Mason (1875) 44 Tex. 140; Howard v. McKenzie (1880) 54 Tex. 171; McKelvain v. Allen (1883) 58 Tex. 383; Pearson v. Boyd (1884) 62 Tex. 541; Burnett v. Atteberry (1912) 105 Tex. 119, 145 S. W. 582, modifying (1910) — Tex. Civ. App. —, 130 S. W. 1028; Durat v. Skillern (1898) — Tex. Civ. App. —, 45 S. W. 840; Shotwell v. McCardell (1898) 19 Tex. Civ. App. 174, 47 S. W. 39; Thompson v. Dutton (1902) — Tex. Civ. App. —, 69 S. W. 641, reversed on rehearing on another point (1902) — Tex. Civ. App. —, 69 S. W. 996, which is reversed in (1903) 96 Tex. 205, 71 S. W. 544; Runge v. Gilbough (1905) — Tex. Civ. App. —, 87 S. W. 832, affirmed in (1906) 99 Tex. 539, 122 Am. St. Rep. 659, 91 S. W. 566; Wilson v. Nugent (1906) — Tex. Civ. App. —, 91 S. W. 241; Barrett v. McKinney (1906) — Tex. Civ. App. —, 93 S. W. 240; Tipton v. Tipton (1909) 55 Tex. Civ. App. 192, 118 S. W. 842; First Nat. Bank v. Zundelowitz (1914) — Tex. Civ. App. —, 168 S. W. 40.

Vermont.—Greeno v. Munson (1837) 9 Vt. 37, 31 Am. Dec. 605; Ripley v. Yale (1846) 18 Vt. 220; Robinson v. Sherwin (1863) 36 Vt. 69.

Virginia.—Williams v. Sindow (1832) 4 Leigh, 14; Clarke v. McClure (1853) 10 Gratt. 305; Alleghany County v. Parrish (1896) 93 Va. 615, 25 S. E. 882.

West Virginia.—Core v. Faupel (1884) 24 W. Va. 238; Parkersburg Bank v. Neal (1886) 28 W. Va. 744; Ketchum v. Spurlock (1891) 34 W. Va. 597, 12 S. E. 832 (obiter); State v. Harman (1905) 57 W. Va. 447, 50 S. E. 828; King v. Thompson (1905) 58 W. Va. 455, 52 S. E. 487; Pickens v. Stout (1910) 67 W. Va. 422, 68 S. E. 354; William James Sons Co. v. Hutchinso (1916) 79 W. Va. 389, 90 S. E. 1047.

Wisconsin.—Miller v. Larson (1864) 17 Wis. 624; Furlong v. Garrett (1878) 44 Wis. 111; Simpson v. Sneclode (1892) 83 Wis. 201, 53 N. W. 499.

England.—Doe ex dem. Counsell v. Caperton (1839) 9 Car. & P. 112; Doe ex dem. Milbourne v. Edgar (1836) 2 Scott, 732, 2 Bing. N. C. 498, 132 Eng. Reprint, 195, 1 Hodges, 437, 5 L. J. C. P. N. S. 147.

In Allen v. Smith (1843) 6 Blackf. (**Ind.**) 527, it is said that "a possession and claim of land under an executory contract of purchase is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance."

So, it is said in Dubois v. Marshall (1835) 3 Dana (**Ky.**) 336, that if one enters "as a tenant, or quasi tenant, under an executory contract, as he would be *estopped* to controvert the *title* of his landlord, or quasi landlord, so he would be *estopped* to claim *possession adverse* to either."

It is held in Brady v. Begun (1862) 36 Barb. (**N. Y.**) 533, that one who enters land under a contract to purchase the premises from the state, making some small payments on the purchase price and endeavoring to effect an arrangement to pay the balance, and who frequently refers to the claim and title of the state and of his own subserviency thereto, does not hold adversely to the state.

So, under contracts wherein the owner of lands agrees with persons settling on portions thereof to give warranty deeds in consideration of their settling on the land, their building of homes, their clearing of the land, and their residence thereon for five years, it is held in State v. Harman (1905) 57 W. Va. 447, 50 S. E. 828, that the possession taken by the settlers is not adverse to the proprietor.

And it is held in Woods v. Dille (1842) 11 **Ohio,** 455, that possession under a contract of sale cannot become

adverse to the vendor while the purchaser is claiming the benefit of his contract and making payments upon it.

See also Neal v. Pressell (1853) 4 Ind. 594; Chiles v. Booth (1835) 3 Dana (Ky.) 566; Lochausen v. Laughter (1893) 4 Tex. Civ. App. 291, 23 S. W. 513.

But in Doe ex dem. Barrett v. Jefferson (1879) 5 Houst. (Del.) 477, the court, in its charge to the jury, says that a vendee, holding under an executory contract of sale, takes a possession that is adverse to that of the vendor.

In Canada, a vendee, under a contract making no provision for possession by him, is considered a tenant at will, and, under the statute relating to such, his possession is adverse after the expiration of one year of possession. Doe ex dem. Perry v. Henderson (1858) 3 U. C. Q. B. 486; Jones v. Cleaveland (1859) 16 U. C. Q. B. 9.

b. Bonds for title.

With respect to the nature of the possession taken by the purchasers thereunder, no distinction is made between executory contracts for the sale of lands and bonds for title. It is, almost without exception, the rule that the possession taken by a vendee under a bond for title to land is not adverse as to his vendor.

United States.—Lewis v. Hawkins (1874) 23 Wall. 119, 23 L. ed. 113; Hardin v. Boyd (1885) 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771.

Alabama.—Sellers v. Hayes (1850) 17 Ala. 749; McQueen v. Ivey (1860) 36 Ala. 308; Ormond v. Martin (1861) 37 Ala. 598.

Arkansas.—Coldeleugh v. Johnson (1879) 34 Ark. 312; Williams v. Young (1903) 71 Ark. 164, 71 S. W. 669; Dickson v. Sentell (1907) 83 Ark. 385, 104 S. W. 148; Little Rock & Ft. S. R. Co. v. Rankin (1913) 107 Ark. 487, 156 S. W. 431.

California.—Kilburn v. Ritchie (1852) 2 Cal. 145, 56 Am. Dec. 326; Woodward v. Hennegan (1900) 128 Cal. 293, 60 Pac. 769.

Colorado.—Brownlee v. Williams (1904) 32 Colo. 502, 77 Pac. 250.

Georgia.—Stamper v. Griffin (1853) 12 Ga. 450; Beverly v. Burke (1853) 14 Ga. 70; Paxson v. Bailey (1855) 17 Ga. 600; Stamper v. Griffin (1856) 20 Ga. 312, 65 Am. Dec. 628; Brown v. Newsom (1858) 24 Ga. 466; Rutherford v. Hobbs (1879) 63 Ga. 243; Hines v. Rutherford (1881) 67 Ga. 606; Allen v. Napier (1885) 75 Ga. 275; Parrott v. Baker (1889) 82 Ga. 364, 9 S. E. 1068; Hawkins v. Dearing (1893) 93 Ga. 108, 19 S. E. 717; Brown v. Huey (1898) 103 Ga. 448, 30 S. E. 429.

Illinois.—Alsup v. Stewart (1902) 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795.

Indiana.—Allen v. Smith (1843) 6 Blackf. 527.

Kentucky.—Fowke v. Darnell (1824) 5 Litt. 317; Henderson v. Dupree (1885) 82 Ky. 678; Rice v. Blair (1914) 161 Ky. 280, 170 S. W. 657; Grigsby v. Smith (1917) 174 Ky. 819, 192 S. W. 856.

Maine.—Gray v. Hutchins (1853) 36 Me. 142.

Massachusetts.—Knox v. Hook (1815) 12 Mass. 329.

Mississippi.—Benson v. Stewart (1855) 30 Miss. 49; Brown v. Issaquena Co. (1876) 54 Miss. 230; Moring v. Ables (1884) 62 Miss. 263, 52 Am. Rep. 186.

Missouri.—Ash v. Holder (1865) 36 Mo. 163.

North Carolina.—Allen v. Taylor (1887) 96 N. C. 37; Bradsher v. Hightower (1896) 118 N. C. 399, 24 S. E. 120; Worth v. Wrenn (1907) 144 N. C. 656, 57 S. E. 388.

Oregon.—West v. Edwards (1902) 41 Or. 609, 69 Pac. 992.

South Carolina.—Secrest v. McKenna (1852) 6 Rich. Eq. 72.

Tennessee.—Norris v. Elles (1846) 7 Humph. 463.

Texas.—Lander v. Rounsaville (1854) 12 Tex. 195; Elliott v. Mitchell (1877) 47 Tex. 445; Clark v. Adams (1891) 80 Tex. 674, 16 S. W. 552; Smith v. Lee (1891) 82 Tex. 124, 17 S. W. 598; Cook v. Coleman (1895) — Tex. Civ. App. —, 33 S. W. 756; McCulloch v. Nicholson (1914) — Tex. Civ. App. —, 162 S. W. 432.

Virginia.—Erskine v. North (1857) 14 Gratt. 60.

West Virginia.—Hudson v. Putney (1878) 14 W. Va. 561; King v. Thomp-

son (1905) 58 W. Va. 455, 52 S. E. 487.

Wisconsin.—Quinn v. Quinn (1870) 27 Wis. 168.

Under a bond to make title to a vendee upon a specified day, falling before a part of the purchase money is due, it is held in Ormond v. Martin (1861) 37 **Ala.** 598, that the vendee's possession of title is not adverse.

But where, in Bryan v. Atwater (1811) 5 Day (**Conn.**) 181, 5 Am. Dec. 136, the widow of a decedent made a bond for title to certain persons desirous of purchasing lands belonging to decedent's minor heirs, conditioned upon a conveyance to them by the heirs upon the attainment of majority, it is held that the possession of the purchasers is not a possession under the heirs, although the taking of the bond is an acknowledgment of the title of the heirs, and that the possession of the purchasers is adverse.

In Tennessee, it is the rule that the possession of a vendee under a bond for title is adverse as to his vendor.

Thus, in Ray v. Goodman (1854) 1 Sneed (**Tenn.**) 586, it is said: "Now, can it for a moment be questioned that a purchaser of land, of which he enters into the possession, whether his title is legal or equitable, holds and claims the land as his own, whether he has paid for it or not? If so, his possession is *adverse*."

So, in Gudger v. Barnes (1871) 4 Heisk. (**Tenn.**) 570, it is likewise said: "So far, then, as the possession of the land under the title bond goes, it is a possession for himself [vendee], and adverse to the right of possession of the vendor, so that, if such vendee shall hold possession under the title bond and purchase evidenced by it, seven years, he would be protected against possessory action, or action in law or equity, on the part of the vendor, in which the vendor should seek to oust him of his possession, and obtain it for himself."

And in Moore v. Knight (1880) 6 Lea (**Tenn.**) 427, the court speaks as follows: "The vendee is not a tenant at will of the vendor; in fact, is no tenant at all. As in the case of a mortgagor holding possession after the mortgage is executed, he owes no rent to the vendor. He holds, as held by this court in several cases, for himself, and adverse to the vendor. So that, if he continues in possession for seven years, this gives him a possessory right that may be set up against his vendor seeking to obtain possession of the land, armed with the legal title. So it was held in Ray v. Goodman (1854) 1 Sneed (**Tenn.**) 586, a case never overruled on this point, but approved in Gudger v. Barnes (1871) 4 Heisk. (**Tenn.**) 570, as well as since, in other cases. The case was disapproved of and overruled in the above case, so far as it is held that the bill of the vendor to enforce his lien for unpaid purchase money was a suit for the possession of the land, or that the adverse holding was against this right."

And see Ellege v. Cooke (1880) 5 Lea (**Tenn.**) 622; Wood v. Neely (1874) 7 Baxt. (**Tenn.**) 586.

But although, under the Tennessee rule, the possession of the vendee is adverse as against the vendor's title, such possession is not considered adverse with respect to the vendor's lien on the land for the purchase price.

In White v. Blakemore (1881) 8 Lea (**Tenn.**) 49, it is said that "the relation of a purchaser by title bond to his vendor is similar to that of mortgagor and mortgagee, and his possession is not adverse to the lien of the vendor, until it is made so by notice of a hostile holding."

And see Moore v. Knight (1880) 6 Lea (**Tenn.**) 427, supra.

Under a statute providing that, in cases where the vendor of real property gives a bond, or other writing, to convey the same on payment of the purchase money, and such money or any part of it remains unpaid after the day fixed for payment, the vendor may file his petition asking the court to require the purchaser to perform the contract, or he may foreclose and sell his interest in the property, the vendee in such cases being treated as a mortgagor of the property, and his rights being subject to foreclosure in the same manner, it has been held that the possession of a vendee under a

contract of purchase is adverse to that of the vendor. Montgomery Co. v. Severson (1884) 64 **Iowa**, 326, 17 N. W. 197, 20 N. W. 458; Knudson v. Litchfield (1893) 87 **Iowa**, 111, 54 N. W. 199. In the former of these cases it is said that "it cannot be said that a vendee of lands holds as a tenant under the vendor, and, for that reason, cannot set up against him or his vendor the Statute of Limitations."

But see Laraway v. Zenor (1896) 100 **Iowa**, 181, 69 N. W. 416.

III. Reason for rule.

"The vendee, though not strictly a tenant of the vendor, and though the technical relation of landlord and tenant is not created, is estopped from denying the title of the vendor, upon principle and reasoning like that which estops the tenant from disputing the title of the landlord." Potts v. Coleman (1880) 67 **Ala.** 221.

So, in Brown v. Huey (1897) 103 **Ga.** 448, 30 S. E. 429, it is said: "A vendee under a bond or contract for conveyance, though placed in possession by the vendor, does not hold adversely to the latter. By the very fact of taking under a bond or contract for a deed to be thereafter executed by the vendor, a purchaser recognizes the title of his vendor, and acknowledges himself as holding in subordination and not in antagonism to it. . . . The possession of the vendee under bond for title is permissive merely; it is never adverse as to the maker of the bond; but the vendee is a quasi tenant under him, so long, at least, as the conditions of the bond, on the part of the vendee, are uncomplied with."

In Long v. Kansas City Stock-Yards Co. (1891) 107 **Mo.** 298, 28 Am. St. Rep. 413, 17 S. W. 656, the court says: "The ground upon which the vendee in such case is estopped to set up the bar of the statute against the vendor is based upon the fact that the possession is taken and held with the permission of the vendor, or subservient to his rights. The vendee is placed in possession by the vendor, and 'holds as a licensee or tenant at will.'"

According to Howard v. McKenzie (1880) 54 **Tex.** 171, "the reason of the rule forbidding the person who has gone into possession under a contract to purchase, to dispute the title of his vendor, is believed to be the same as in case of landlord and tenant, viz.: 'The injustice of allowing a person who has obtained possession by admitting the title of another, to deny that title, and, in case of failure in proof of it, hold the premises himself.'"

And in Rice v. Blair (1914) 161 **Ky.** 280, 170 S. W. 657, and De Bergere v. Chaves (1908) 14 **N. M.** 352, 51 L.R.A. (N.S.) 50, 93 Pac. 762, affirmed in (1913) 231 **U. S.** 482, 58 L. ed. 325, 34 Sup. Ct. Rep. 144, the same reason is assigned as in the preceding case.

In Bank of State v. Smyers (1847) 2 Strobh. L. (**S. C.**) 24, the court speaks as follows: "He who goes into possession under a contract to purchase holds the land adversely to the claim of all other persons, except him from whom he bought; but as to him, the tenant cannot plead the Statute of Limitations, because he entered on the condition that the land was not to be his unless he paid the money, and the possession, as between them, was not adverse, or in hostility to the seller's title."

"It is certainly a well-settled rule," it is said in Sellers v. Hayes (1850) 17 **Ala.** 749, "that he who obtains the possession of land by acknowledging the title of another cannot be permitted to set up title in himself, or in a stranger, to defeat the title of him from whom he obtained possession. Thus, a tenant cannot dispute the title of his landlord, nor a trustee the title of his cestui que trust; and it would be a perversion of justice to permit one who acquired possession under an executory contract to repudiate the title of him from whom he derived possession, and assert an adversary title in himself or another, in defiance of the contract by which he obtained possession. A vendor of land is a trustee, pending an executory contract, of the legal title for the vendee, who in turn is a trustee for the unpaid purchase money. . . . To allow him to set up an adverse title to the vendor, and thereby to defeat the recovery of the purchase money, would be to permit him to repudiate his contract, whilst

he held onto the benefits of it, to wit, possession."

In Rankin v. Dean (1908) 157 Ala. 490, 47 So. 1015, it is said: "The relation between the vendee in possession and the vendor is that of trust; the vendee being the trustee, for the vendor, of the unpaid balance of the purchase money, and the vendor being the trustee, for the vendee, of the legal title remaining in such vendor. . . . This is the foundation for the doctrine that inhibits the creation of any right affecting the title of the vendor, by mere lapse of time, or presumptions usually arising therefrom."

And in Williams v. Young (1903) 71 Ark. 164, 71 S. W. 669, it is said: "Where land is sold, and notes given for the purchase price, and a bond for title to be made by the vendor upon payment of the notes, the vendor is a trustee holding the legal title in trust for the vendee upon payment of the purchase money, and the vendee is considered as a trustee holding the purchase money for the vendor. There exists an express trust by contract between the parties, and the Statute of Limitations will not begin to run until there is a determination of the trust relation."

IV. As affected by invalidity of contract.

a. In general.

As a general rule, the invalidity of the executory contract of purchase will not have the effect of rendering adverse, as to the vendor, the possession taken thereunder by the vendee who enters into possession in pursuance thereof. Although the instrument is invalid, the possession of the vendee is taken in pursuance thereof, and therefore amicably to the vendor; and, being so taken, it is looked upon as so continuing, regardless of the fact that the vendee cannot enforce his rights as purchaser under the contract.

In Chiles v. Jones (1836) 4 Dana (Ky.) 479, involving a question of the validity of certain executory contracts, under a statute prohibiting the conveyance of land by one not in possession thereof for a year preceding the conveyance, it is said: "It it be conceded that such contracts were within the provisions of the statute, and void, we cannot doubt that a possession taken under them by the purchaser, when executory, by the authority and assent of the vendor, and under his title, so long as the same is held by him, or those claiming under him, will inure to the benefit of the vendor. If the contract was void, the possession was still derived from him, by his assent and under his title, and it is the taking possession under another that fixes the relation between them, and estops the possessor, and those who may come in under him, from contesting the title of him from whom he derived the possession. And the relation exists, and the estoppel should operate, when the possession is obtained under an executory contract, whether the contract was legal or illegal, valid or invalid. If the contract is a nullity, the possessor holds as tenant at will to the person from whom he derived the possession, and the relation still exists, and the estoppel works."

b. Parol contracts.

Although the contract of purchase under which the vendee enters into the possession of land be void, because in parol, the vendee's possession is still held not to be adverse as to the vendor. This is on the ground that, although the instrument is invalid, the possession of the vendee is taken amicably to the vendor, and that, being so taken, it will so continue. Lanham v. Bowlby (1910) 86 Neb. 148, 125 N. W. 149, on former appeal (1907) 79 Neb. 39, 112 N. W. 324; Blake v. West (1911) 89 Neb. 794, 132 N. W. 394; Robinson v. Kime (1877) 70 N. Y. 147; Watts v. Witt (1893) 39 S. C. 356, 17 S. E. 822; Thompson v. Camper (1906) 106 Va. 315, 55 S. E. 674.

"When a party goes into possession under a verbal contract for the purchase of land, his possession is not adverse to the other party, but is held under him." Cole v. Roe (1867) 39 Mo. 411.

And it is said in Collins v. Johnson (1876) 57 Ala. 304, that "if there is an entry, or a continuance in possession, under a contract of purchase, by

parol or in writing, so long as the purchase money is unpaid the possession is not adverse to the vendor, but in subordination to his title, and is not protected by the Statute of Limitations, or any presumption arising from lapse of time."

So where, in Bishop v. Truett (1888) 85 Ala. 376, 5 So. 154, the contract of purchase is in parol, it is said that, without the payment of the purchase money or the conveyance of the title, the vendee's possession will not be adverse.

In East Tennessee, V. & G. R. Co. v. Davis (1890) 91 Ala. 615, 8 So. 349, involving a parol contract of purchase, it is said that "when a purchaser of land, or of an interest therein, takes possession under his purchase, his possession does not become adverse until he pays the purchase money."

And in Tillar v. Clayton (1905) 76 Ark. 405, 88 S. W. 972, involving a purchaser under a verbal contract of sale, it is said that "the Statute of Limitations does not run against a vendor, in favor of a vendee holding under a contract for sale and purchase."

After stating that the purchaser of land by verbal contract, who pays the purchase price, has adverse possession thereof, the court, in Adams v. Fullam (1871) 43 Vt. 592, holds that "if, by the contract of purchase, he is to have the premises if he pays the price, and never complies with the condition, a possession for fifteen years by the purchaser under such contract would not be of such an adverse character as would ripen into a title against the vendor by fifteen years' possession, unless something further were shown."

"It is well settled," according to the court in Manning v. Kansas & T. Coal Co. (1904) 181 Mo. 359, 81 S. W. 140, "that the possession of a party entering upon land, upon a verbal contract with the owner for its purchase, is not in adverse or hostile possession as against his vendor."

"Where a sale is made, whether by parol or by title bond, and the conveyance is to be made only upon the payment of the purchase money, there is an express reservation of the title by the vendor for the security of the purchase money, and a recognition of such title by the vendee," it is said in Moring v. Ables (1889) 62 Miss. 263, 52 Am. Rep. 186. "And until the purchase money is paid, . . . the possession of the vendee is not adverse to the title of the vendor, but is, by the contract under which the vendee enters, in subservience to and recognition of it."

In Alabama State Land Co. v. Matthews (1910) 169 Ala. 200, 53 So. 174, involving a purchase of land under a bond for title, it is said that, "as against all the world except his vendor, a vendee entering upon land under an executory contract of purchase holds adversely."

Where, in McClanahan v. Barrow (1854) 27 Miss. 664, a vendee went into possession of land under a verbal contract of purchase, and he held and claimed neither in himself nor under anyone else, his possession is held not to be adverse as to his vendor.

So, a railroad which takes possession of land under a parol contract, whereby it is to receive a conveyance when it has constructed its line thereover, and has built a station thereon at which all trains are stopped, is held, in Southern California R. Co. v. Slauson (1902) 6 Cal. Unrep. 874, 68 Pac. 107, not to hold, prior to the performance of its part of the contract, adversely to the owner.

And one holding possession of land under an unperformed parol contract, whereby the vendee is to erect a wall in payment therefor, is held, in Lamme v. Dodson (1883) 4 Mont. 560, 2 Pac. 298, not to hold possession adversely to the vendor.

Where, in Petty v. Mays (1883) 19 Fla. 652, the contract of purchase was in parol, the court, without calling attention to that point, says that the vendee's "possession, instead of being adverse, is, in law, subordinate to the rights" of the vendor.

So, in Padgett v. Decker (1911) 145 Ky. 227, 140 S. W. 152, involving a parol contract of purchase, the possession of the vendee is held not to be adverse.

And see Clouse v. Elliott (1880) 71 Ind. 302, infra, V. a, 1; Mitchell v. Freeman (1913) 161 N. C. 322, 77 S. E. 230; Harris v. Richey (1867) 56 Pa. 395.

See also infra, VI. a, 1; VI. a, 2; VI. a, 4, and VI. c, 1, for cases involving parol contracts, in which, without holding the possession of the vendee to be originally amicable, certain subsequent acts on the part of vendee are held to render his possession hostile.

c. Forged contracts.

Purchasers holding under a forged bond for title in the owner's name, which they believe to have been made by him, and not by some other person whom they take to be he, do not hold adversely. Stamper v. Griffin (1856) 20 Ga. 312, 65 Am. Dec. 628. But purchasers holding under a forged bond for title in the owner's name, made by a person impersonating the true owner, and believed by the purchasers to be the true owner, but made by that person as his own bond, do hold adversely to the owner. The court said: "To illustrate: C is the owner of a lot of land. A goes to B and says to him that he is agent for C to sell the lot, and sells the lot to B, with the understanding that the title is to be made by C, when the purchase money shall have been paid by B, and that he is to get from C for B, C's bond to that effect. A brings a bond to B with C's name signed to it, and delivers it as the bond of C. The bond is a forgery. B takes possession under it. B does not hold adversely to C, because he *thinks* he is holding under C, and, so thinking, it cannot be supposed that he *intends* to hold adversely to C. But take the case to be that what A says to B is, that he, A, is C, and that as C he sells to B the lot, and, as C, makes the bond and delivers the possession of the lot. B, in this case, holds adversely to C, because he *thinks* he is *holding under* A, although he also thinks that A is C, and thinking that he holds under A, it is to be supposed that he *intends* to hold under A; and, therefore, intends to hold adversely to C."

d. Unauthorized contracts.

Where a bond to make title is executed by an agent in the name of joint principals, and he is unauthorized by one of the principals, the possession of the vendee holding under the bond, which recognizes the title of the vendors and stipulates for a future conveyance, is not adverse to the principal who has not authorized the contract. Ormond v. Martin (1861) 37 Ala. 598. This is on the ground that adverse possession is a matter of intent, and that the vendee's intent must have been the same with respect to the principal who did not authorize the contract, as to those who did. With respect to the authorizing principals there was, of course, no intent to hold adversely.

V. Where vendee enters upon land not covered by contract.

In Farish v. Coon (1870) 40 Cal. 33, the holder of a warrant from the state to locate on certain lands of the United States located, in violation of the agreement, on tidelands not subject to location. In holding the possession of such tidelands not adverse, the court says: "It is strictly analogous to the case of a vendee who purchases from his vendor a particular tract of land, and who, through mistake or fraud under color of his purchase, enters upon another tract of the same vendor. Notwithstanding the mistake or fraud, the entry is under the claim of title assumed to have been derived from the vendor, and is in subordination to the vendor's title. The vendee professes to hold and claim under the vendor, and not in hostility to his title. Such a possession cannot be deemed 'adverse' in any just sense. The very essence of an adverse possession is that the holder of it claims the right to his possession not under, but in opposition to, the title to which his possession is alleged to be adverse. So long as he claims to hold under that title, his possession is not adverse to it, and the Statute of Limitations does not run against it." And see Robinson v. Kime (1877) 70 N. Y. 147.

In Wendell v. Moulton (1852) 26 N. H. 41, the owner of land agreed to give 25 acres of land in consideration

of the surrender of improvements made by the donee upon his land. But, instead of making a deed for the 25 acres, he made an agreement to give the donee a bond to make title to 50 acres, upon payment for the additional 25. The bond, when given, did not cover the land selected and taken possession of by the donee. The failure of the owner to give a deed for the 25 acres constituting the consideration for the improvements, together with the fact of the failure of the bond to cover the land selected, indicated to the court the existence of fraud, and fraud, it is held, will prevent the operation of the rule against adverse possession with respect to the land taken possession of by the donee in pursuance of the agreement. "If the bond was fraudulently given," the court says, "it cannot now be used to defeat an adverse title to lands which it did not cover. The possession must have been open and visible and well known to Wendell [donor], and, if the bond was a fraudulent instrument, it could not avail either to make a title or defeat one."

So, in Michigan Land & Iron Co. v. Thoney (1891) 89 **Mich.** 226, 50 N. W. 845, the purchaser of four lots made a new agreement with the vendor, whereby he surrendered two of the lots, it being agreed that the payments already made on the four should apply on the two, and the purchaser retained possession of the two. When the agreement was reduced to writing a mistake was made in specifying the lots to be retained, and one of those which was intended to be surrendered was named as one intended to be retained. The court holds that, the testimony affording a strong inference that the vendor regarded the original contract for the purchase of the four lots as at an end, the possession of the purchaser is adverse as to the lot intended to be included as one of those to be retained, but by mistake not so included.

In Schneider v. Botsch (1878) 90 **Ill.** 577, it is held that one who takes possession of a lot under a contract of purchase holds adversely that portion of land which is erroneously included with his lot by the erection of a fence on what is supposed to be the boundary line.

VI. Circumstances under which possession becomes, or fails to become, adverse.

a. Performance by vendee.

1. In general.

The performance by the vendee of the obligations imposed upon him by the executory contract of purchase, entitling him to demand a deed, is generally held to convert his possession into an adverse one. Perry v. Lawson (1895) 112 **Ala.** 480, 20 So. 611; Southern California R. Co. v. Slauson (1902) 6 **Cal.** Unrep. 874, 68 Pac. 107; Brown v. Huey (1897) 103 **Ga.** 448, 30 S. E. 429; Davis v. Howard (1898) 172 **Ill.** 340, 50 N. E. 258; Rucker v. Steelman (1884) 97 **Ind.** 222; Rice v. Blair (1914) 161 **Ky.** 280, 170 S. W. 657; Dean v. Brown (1865) 23 **Md.** 11, 87 Am. Dec. 555; Burke v. Douglass (1897) 115 **Mich.** 197, 73 N. W. 133; Adair v. Adair (1883) 78 **Mo.** 630; Hannibal & St. J. R. Co. v. Miller (1892) 115 **Mo.** 158, 21 S. W. 915; Beer v. Dalton (1902) 3 **Neb.** (Unof.) 694, 92 N. W. 593; Jackson ex dem. Young v. Camp (1824) 1 Cow. (**N. Y.**) 605; Fosgate v. Herkimer Mfg. & Hydraulic Co. (1852) 12 Barb. (**N. Y.**) 352, affirmed in (1855) 12 N. Y. 580; Vrooman v. Shephard (1852) 14 Barb. (**N. Y.**) 441; Re Department of Public Parks (1878) 73 **N. Y.** 560; Jennings v. Brown (1907) 20 **Okla.** 294, 94 Pac. 557; West v. Edwards (1902) 41 **Or.** 609, 69 Pac. 992; Browning v. Estes (1848) 3 **Tex.** 462, 49 Am. Dec. 760; Robertson v. Wood (1855) 15 **Tex.** 1, 65 Am. Dec. 140 (obiter); CENTRAL P. R. Co. v. TARPEY (reported herewith) ante, 1319; Parkersburg Nat. Bank v. Neal (1886) 28 **W. Va.** 744; Schauble v. Schulz (1905) 69 C. C. A. 581, 137 **Fed.** 389.

"Where a party enters into possession of real estate, by the consent of the owner, under a contract of final purchase between them, some one or more of the terms of which remain to be performed by such party before he can call for a deed, his possession is to be considered as by consent only

. . . until all the terms of the contract to be performed on his part are complied with by him, from which time the possession becomes adverse." Doe ex dem. Lynch v. Roe (1886) 7 Houst. (Del.) 386, 32 Atl. 391.

So, in Schauble v. Schulz (1905) 69 C. C. A. 581, 137 Fed. 389, it is said that "from the moment the vendee, by compliance with the conditions of the contract, entitles himself to a conveyance, his possession is adverse as to the vendor."

It is well settled, it is said in Johnson v. Peterson (1903) 90 Minn. 503, 97 N. W. 384, "that the possession of a vendee under an executory contract for the purchase of land is not adverse to the vendor so long as the purchase money is not paid, or, at least, not before the vendee is entitled to demand a deed."

In Robinson v. Sherwin (1863) 36 Vt. 69, it is said, obiter, that if the vendee, under the executory contract of sale in question, "had fully performed the contract on his part, so as to entitle himself to a deed by the terms of the contract, the plaintiff [vendor] would perhaps be bound to take notice that he was claiming title in himself, without being specially notified of it."

And it is said, obiter, in Briggs v. Prosser (1835) 14 Wend. (N. Y.) 227, that "after performance, and an equitable title to a deed of the premises acquired, I perceive no reason why his [vendee's] possession may not become adverse, or, in other words, there is nothing in the character of it inconsistent with the idea of an adverse possession. Whether it were in fact adverse or not would depend upon the circumstances of each particular case."

Where one takes possession under a parol contract, in pursuance of which he is to have a deed, upon the performance of certain conditions by him, it is held that in Clouse v. Elliott (1880) 71 Ind. 302, that his possession is not adverse until the performance of such conditions. "The vendee in such cases does not enter into possession under a specific claim of title," it is pointed out; "but enters into possession upon condition that he cannot have a title until he shall have performed certain acts stipulated in the executory contract of purchase."

So, one who is put into possession of land under an oral agreement that when he has performed certain services he shall be given a deed is held, in Endicott v. Haviland (1914) 220 Mass. 48, 107 N. E. 394, to hold possession adversely, after the performance of the services and the refusal of the vendor to make a deed.

And in Dean v. Gupton (1904) 136 N. C. 141, 48 S. E. 576, involving a parol contract whereby certain persons were to receive certain lands, provided they cared for an invalid during her lifetime, it is held that after the death of the invalid the possession of the vendees is adverse.

See Quinn v. Quinn (1887) 76 Iowa, 565, 41 N. W. 316.

2. Payment of purchase price.

Where the obligation imposed upon the vendee by an executory contract of sale is the payment of a money consideration, it is generally held that the payment by him of such purchase price will convert his possession into an adverse one.

United States.—Stansbury v. Taggart (1844) 3 McLean, 457, Fed. Cas. No. 13,292; Ward v. Cochran (1895) 18 C. C. A. 1, 36 U. S. App. 307, 71 Fed. 127; Boone v. Chiles (1836) 10 Pet. 177, 7 L. ed. 388.

Alabama. — Jernigan v. Flowers (1891) 94 Ala. 508, 10 So. 437; Perry v. Lawson (1895) 112 Ala. 480, 20 So. 611; Tennessee Coal, Iron & R. Co. v. Linn (1898) 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245; Alabama State Land Co. v. Matthews (1910) 168 Ala. 200, 53 So. 174; Cannon v. Prude (1913) 181 Ala. 629, 62 So. 24.

Arkansas. — Dickson v. Sentell (1907) 83 Ark. 385, 104 S. W. 148; Cleveland v. Aldridge (1910) 94 Ark. 51, 125 S. W. 1016.

Florida.—Hart v. Bostwick (1872) 14 Fla. 162; Gamble v. Hamilton (1893) 31 Fla. 401, 12 So. 229; Smith v. Klay (1904) 47 Fla. 216, 36 So. 54; Dannelly v. Russ (1907) 54 Fla. 285, 45 So. 496.

Georgia.—Beverly v. Burke (1853)

14 Ga. 70; Paxson v. Bailey (1855) 17 Ga. 600; Stamper v. Griffin (1856) 20 Ga. 312, 65 Am. Dec. 628; Ford v. Holmes (1878) 61 Ga. 419; Hines v. Rutherford (1881) 67 Ga. 606; Allen v. Napier (1885) 75 Ga. 275; Parrott v. Baker (1889) 82 Ga. 364, 9 S. E. 1068; Hawkins v. Dearing (1893) 93 Ga. 108, 19 S. E. 717; Moore v. Mobley (1905) 123 Ga. 424, 51 S. E. 351.

Illinois.—Peadro v. Carriker (1897) 168 Ill. 570, 48 N. E. 102; Davis v. Howard (1898) 172 Ill. 340, 50 N. E. 258; Alsup v. Stewart (1902) 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795.

Kentucky.—New Domain Oil Gas Co. v. Gaffney (1909) 134 Ky. 792, 121 S. W. 699; Frazier v. Morris (1914) 161 Ky. 72, 170 S. W. 496; Rice v. Blair (1914) 161 Ky. 280, 170 S. W. 657; Grigsby v. Smith (1917) 174 Ky. 819, 192 S. W. 856.

Minnesota. — Johnson v. Peterson (1903) 90 Minn. 503, 97 N. W. 384.

Mississippi. — Benson v. Stewart (1855) 30 Miss. 49.

Missouri.—Tibeau v. Tibeau (1853) 19 Mo. 78, 59 Am. Dec. 329; Fulkerson v. Brownlee (1879) 69 Mo. 371; Adair v. Adair (1883) 78 Mo. 630; Long v. Kansas City Stock-Yards Co. (1891) 107 Mo. 298, 28 Am. St. Rep. 413, 17 S. W. 656.

Nebraska.—Beer v. Dalton (1902) 3 Neb. (Unof.) 694, 92 N. W. 593.

New York.—Jackson ex dem. Young v. Camp (1824) 1 Cow. 605; La Frombois v. Jackson (1826) 8 Cow. 589, 18 Am. Dec. 463; Fosgate v. Herkimer Mfg. & Hydraulic Co. (1852) 12 Barb. 352, affirmed in (1855) 12 N. Y. 580; Griswold v. Little (1895) 13 Misc. 281, 34 N. Y. Supp. 703.

Oregon.—Anderson v. McCormick (1889) 18 Or. 301, 22 Pac. 1062; Ambrose v. Huntington (1899) 34 Or. 484, 56 Pac. 513; West v. Edwards (1902) 41 Or. 609, 69 Pac. 992.

South Carolina.—Ellison v. Cathcart (1840) 1 McMull. L. 5; Secrest v. McKenna (1853) 6 Rich. Eq. 72; Bank of State v. Smyers (1847) 2 Strobh. L. 24; Blackwell v. Ryan (1883) 21 S. C. 112.

Texas.—Browning v. Estes (1898) 3 Tex. 462; 49 Am. Dec. 760; Lander v. Rounsaville (1854) 12 Tex. 195; Robertson v. Wood (1855) 15 Tex. 1; 65 Am. Dec. 140 (obiter); Vardeman v. Lawson (1856) 17 Tex. 10; Newsom v. Davis (1857) 20 Tex. 419; Elliott v. Mitchell (1877) 47 Tex. 445; McKelvain v. Allen (1883) 58 Tex. 383; Clark v. Adams (1891) 80 Tex. 674, 16 S. W. 552; Roemer v. Meyer (1891) — Tex. —, 17 S. W. 597; Durst v. Skillern (1878) — Tex. Civ. App. —, 45 S. W. 840; Daniels v. Murray (1907) 47 Tex. Civ. App. 19, 103 S. W. 425; First Nat. Bank v. Zundelowitz (1914) — Tex. Civ. App. —, 168 S. W. 40.

Utah.—CENTRAL P. R. Co. v. TARPEY (reported herewith) ante, 1319.

Wisconsin. — Furlong v. Garrett (1878) 44 Wis. 111.

It is said in McQueen v. Ivey (1860) 36 Ala. 308, that, "when the vendee has complied with the terms of the contract on his part by paying the purchase money, such bond is color of title, and if he thereafter remain in possession, claiming the land as his own for the period prescribed by the Statute of Limitations, the legal title will be barred."

And the same language is used in Ormond v. Martin (1861) 37 Ala. 598.

In Beard v. Ryan (1889) 78 Ala. 37, the following charge is held proper: "A purchaser of land, who is let into possession under an executory contract, without a deed, becomes an adverse holder as soon as he pays the purchase money; and if his possession continues uninterrupted for ten years, he may maintain or defend an action of ejectment."

So, it is said in Woods v. Montevallo Coal & Transp. Co. (1887) 84 Ala. 560, 5 Am. St. Rep. 394, 3 So. 475, that, "where a vendee of land pays the purchase money due by him to the vendor, his possession under a bond for title at once commences presumptively to be adverse."

In Potts v. Coleman (1880) 67 Ala. 221, it is held that possession under an executory contract of sale, by the terms of which no conveyance is to be executed till the final payment of the purchase money, is not adverse, prior to the full payment of the consideration.

And in Tayloe v. Dugger (1880) 66

Ala. 444, it is said that, although "a purchaser by executory contract, who is let into possession without a title deed, and without paying the purchase money, . . . does not hold adversely to the vendor," the rule does not apply where the purchase money is paid; and that, "after the purchase money is paid, the purchaser thus entering becomes an adverse holder."

"If the purchase money is not paid," it is said in Benson v. Stewart (1855) 30 Miss. 49, "the possession is not adverse, but is held to be in subordination to the title of the vendor, until the money is paid."

"After performance by the vendee of the conditions of sale, as the payment of the purchase money, and when, in equity, he would be entitled to have a conveyance of the title, his possession may become adverse to the title of the vendor; and, in the absence of any proof to the contrary, should be presumed to be so." Stark v. Starr (1870) 1 Sawy. 15, Fed. Cas. No. 13,307.

In Barker v. Salmon (1840) 2 Met. (Mass.) 32, where the owner of one eighth of a mill agreed to convey his interest therein to a purchaser who paid the purchase price, the possession of the purchaser is held to be adverse.

And in Morgan v. Casey (1882) 73 Ala. 222, it is said that the Statute of Limitations does not commence to run on behalf of the purchaser at an administrator's sale until after the payment of the purchase money.

In laying down the rule that possession of a tenant becomes adverse after the payment of the purchase money, the court in McQueen v. Ivey (1860) 36 Ala. 308, referring to Sellers v. Hayes (1850) 17 Ala. 749, says that the earlier case is not in conflict with the doctrine stated. "In that case," it is explained, "the court did hold that the possession of the vendee, under a bond for titles, will not prevent the lien of a judgment rendered against the vendor during the continuance of such possession from attaching to the land; and this was so held, although it was shown that the vendee in that case had paid the purchase money at the time of the purchase. Whether this fact was allowed its due weight, we do not now inquire. On examining the opinion of the court, it will be seen that it is placed upon an assumed distinction between an adverse possession that will give title under the Statute of Limitations, and such adverse possession as will enable the tenant to set up title in himself or another, or would prevent him who had the title from transferring it; and it is expressly said that, if no suit had been brought against the vendee or those claiming under him until twenty years from the time he took possession, the Statute of Limitations would have protected him from a recovery."

In Farley v. Smith (1863) 39 Ala. 38, it is said: "Where the purchaser of land holds under a bond for titles and has paid the purchase money, it is settled in this state that he has color of title, *at least*, after the time when, according to the stipulation of the bond, the title was to be made, where the defense is the Statute of Limitations. On the other hand, our decisions leave room for controversy, whether under such circumstances there would be such color of title as would vitiate a conveyance by the owner, while the land was in possession of the obligee of the bond."

And it is held in Newsome v. Snow (1890) 91 Ala. 641, 24 Am. St. Rep. 934, 8 So. 377, that where the purchaser under a bond for title, conditioned to make title on the payment of the purchase money, pays the purchase money and becomes entitled to a conveyance, a mere demand on his part for the execution of a conveyance is not a recognition of the title of the vendor, sufficient to show his claim still to be permissive, and not under a claim of right.

Where the owner of land executes a power of attorney in which he recites his seisin in a lot of land and authorizes his attorney to sell, the possession of the person to whom the attorney does sell and who pays the consideration is adverse, it is held in Jackson ex dem. Bonnel v. Foster (1815) 12 Johns. (N. Y.) 488, although he receives no deed.

And where the vendee under an

executory contract, covering the whole of a tract of land, pays the purchase price and, through mistake, receives a deed conveying him less than the whole of the tract, his possession of the portion of the tract not included in the deed will be adverse. West v. Edwards (1902) 41 **Or.** 609, 69 Pac. 992.

It is held in Eichelberger v. Gitt (1883) 104 **Pa.** 64, that where land is conveyed subject, according to the terms of the conveyance, to the payment of the purchase money, the possession of the grantee under the conveyance is no more adverse than if the grantee held under articles for the sale and purchase of the land.

After holding, in Normant v. Eureka Co. (1892) 98 **Ala.** 181, 39 Am. St. Rep. 45, 12 So. 454, that "the possession of land by a purchaser under a contract of purchase, who has paid all the purchase money, in law, is presumed to hold in his own right, and his possession, after payment of the purchase money, is adversely to his vendor," it is added that "the law does not require of him further notice to his vendor that he holds adversely, and if his possession is continuous for the statutory period, without some recognition of or subordination to the legal estate of the vendor, the right of entry or of action to recover possession is barred."

Where, in Marston v. Rowe (1886) 39 **Ala.** 722, one person advanced money to another to purchase land, under an agreement that the land was to be divided between them, and the recipient of the money executed a title bond conditioned upon the performance of the agreement as soon as the title to the land should be obtained by him, it is held that the possession of the person advancing the money, continuing for the statutory period after he was entitled to a deed, with the full knowledge and acquiescence of the recipient of the money and his devisees, would perfect a title in the holder of the bond.

So, where, in Watts v. Witt (1893) 39 S. C. 356, 17 S. E. 822, it is urged that the possession of one holding under a parol contract of purchase, whose purchase money is fully paid up, does not become adverse until notification by him to the vendor that he is asserting a claim in himself, it is held that, "where one goes into possession of real estate under a parol contract to buy the same; he cannot claim to hold adversely to his vendor *until the purchase money is fully paid;* but when it is paid, he then holds not in subordination to the rights of the vendor, but in his own right, and his possession from that time becomes adverse to the vendor."

And see Tillman v. Spann (1880) 68 **Ala.** 102; Fountain v. Lewiston Nat. Bank (1905) 11 **Idaho,** 451, 83 Pac. 505.

The payment of the purchase price renders adverse the possession of a vendee under an executory contract of purchase, even though the contract be in parol.

In Newsome v. Snow (1890) 91 **Ala.** 641, 24 Am. St. Rep. 934, 8 So. 377, it is said: "It is well settled that when the vendee has complied with the terms of the contract on his part by paying the purchase money, and is entitled to the legal title, whether the contract be in writing or by parol, having discharged all pecuniary duty to the vendor, he has a perfect equity, and his possession in pursuance of such sale and purchase is presumed to be antagonistic."

So, where one enters upon land under a parol contract for the purchase thereof, and pays the purchase price, and erects valuable improvements thereon, greatly exceeding the value of the land, the circumstances of the holding are held in Magee v. Magee (1859) 37 **Miss.** 138, clearly to indicate an adverse possession.

And a purchaser entering upon land under a parol contract of purchase, by the terms of which it is to receive the land in consideration of the erection of a spur track thereon, has complied with its part of the agreement when the track is laid, and the agreed price has been paid, and from the date of the completion of the track its possession is adverse. East Tennessee, V. & G. R. Co. v. Davis (1890) 91 **Ala.** 615, 8 So. 349.

It is said, obiter, in Adams v. Fullam (1871) 43 Vt. 592: "A purchaser of real estate by verbal contract may occupy it under such circumstances as to acquire the title from the vendor by fifteen years' possession. For instance, if he purchase, and pay the stipulated price, and go into possession as the present absolute owner in pursuance of such purchase, and continue the possession as such owner under such claim for fifteen years, his title would thereby be perfected."

And in Moring v. Ables (1884) 62 Miss. 263, 52 Am. Rep. 186, involving a parol executory contract of purchase, it is said, obiter, that, where "the vendee has executed his part of the agreement by payment of the purchase money, his possession is from that time adverse to the vendor."

And see Watts v. Witt (S. C.) supra.

In Virginia and West Virginia, it is the rule that payment of the purchase price by the vendee, under an executory contract of purchase, does not render the vendee's possession adverse.

In Core v. Faupel (1884) 24 W. Va. 238, it is said that "it is the established law of this state that the possession of the purchaser of land, under an executory contract, is not adverse to his vendor, although he has paid all the purchase money and used and occupied the land for his own exclusive benefit."

And so it is held in Chapman v. Chapman (1895) 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813, that a purchaser who has paid all of the purchase money and entered into possession of the land, but who has not obtained the legal title of the vendor, does not hold adversely to the vendor. This is on the ground that "adverse possession is not the mere holding over, against the will of the party from whom you obtain the possession. It is the holding by claim of *title*, adverse to *another's* title that constitutes adverse possession." "Before adverse possession can arise between a vendor and his vendee," it is said, "or between the grantee of the vendor and such vendee, where the vendor has retained the title, and the Statute of Limitations commences to run, the vendee must have dissevered the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor."

And it is said in William James Sons Co. v. Hutchinson (1916) 79 W. Va. 389, 90 S. E. 1047, that "the possession of the purchaser is not adverse to his vendor, although he has paid all the purchase money and used and occupied the land for his exclusive benefit."

And see Parkersburg Nat. Bank v. Neal (1886) 28 W. Va. 744.

In Litz v. Lowry (1911) 69 W. Va. 181, 71 S. E. 263, Brannon, J., concurring with the decision of the majority of the court, which is reached without reference to the question here in point, goes beyond them in their reasoning, and says: "I am not satisfied with the position that a vendee under an executory contract, after he has paid the purchase money and is entitled to a deed, still holds not adversely to his vendor. I assert that it ought to be the law, and is, that such possession is adverse to the vendor. It is said not to be so in Virginia and West Virginia. Nor so under the generality of expression in the decisions; but I do not find any actual decision pointedly so holding." This expression of opinion, however, is ignored in the later case of William James Sons Co. v. Hutchinson (W. Va.) supra.

3. Tender of performance.

Tender of performance being sufficient to entitle the vendee to a deed, it is generally held that after such tender on the part of the vendee his possession is adverse.

Where the vendee under a bond for title pays a portion of the purchase money and tenders the remainder to the agent of the vendor, who refuses to receive it because of a rumor of the vendor's death, it is held in Dolton v. Cain (1871) 14 Wall. (U. S.) 472, 20 L. ed. 830, that the Statute of Limitations will run in favor of the vendee.

So where, in Beer v. Dalton (1902) 3 Neb. (Unof.) 694, 92 N. W. 593, the

vendee under an executory contract of purchase, which the vendor refused to perform, tendered payment in accordance with the terms of the contract, the court is apparently inclined to the opinion that, after the tender of the last payment, the vendee's possession is adverse in the same manner as if the whole of the purchase price had actually been paid.

See also Den ex dem. Van Wickle v. Alpough (1808) 3 N. J. L. 446, infra, VI. c, 1; Griswold v. Little (1895) 13 Misc. 281, 34 N. Y. Supp. 703.

4. Part payment of purchase price.

In order to render the possession of a vendee under an executory contract of purchase adverse, the whole of the purchase price must be paid, or at least tendered. Until the vendee has wholly performed his portion of the contract, he can set up no claim to adverse possession.

Thus, in Gamble v. Hamilton (1893) 31 Fla. 401, 12 So. 229, where only a portion of the purchase price had been paid by the vendee under a parol contract of purchase, his possession is held not to be adverse.

And in Brown v. Huey (1898) 103 Ga. 448, 30 S. E. 429, it is said that "the possession of the vendee, with any portion of the purchase money remaining unpaid, not being in his own right, but in the right of the vendor, there can never be such adverse possession as will ripen into a prescriptive title."

b. Execution of deed.

"It is well settled," it is said in Ash v. Holder (1865) 36 Mo. 163, "that a vendee may dispute the title of the vendor after conveyance passed, because then he owes him no faith or allegiance; he holds adversely to him and all the world."

So where, in Henderson v. Dupree (1885) 82 Ky. 678, the purchasers in question had received deeds, it is said that one who enters under an executory contract "may show a subsequent adverse possession in himself; and if he was such [quasi tenant] under an executory contract of purchase, then whenever a deed is made to him his possession becomes adverse instead of amicable."

And in Perry v. Lawson (1895) 112 Ala. 480, 20 So. 611, it is said: "Where a party holds under an executory contract of purchase, his possession does not become adverse to his vendor, in the absence of a clear repudiation of his allegiance, brought home to the vendor, until he becomes entitled to a conveyance by paying the purchase money, or otherwise complying with the conditions of the purchase. This rule, however, does not apply where a conveyance has been executed, under which, and not under the executory contract, the vendee continues to hold and claim the lands. This is true, although the purchase money, for which a vendor's lien would exist, has not been paid." The deed in this case was invalid because executed by a married woman without joining her husband.

So, where the vendee pays a part of the purchase price of the land, secures the remainder in a manner equivalent to payment, and receives a conveyance from the vendor, from the date of the conveyance the possession of the vendee is adverse. Simpson v. Sneclode (1892) 83 Wis. 201, 53 N. W. 499.

In Phelan v. Smith (1893) 100 Cal. 158, 34 Pac. 667, it is said that the possession of the vendee in question, who was holding under a contract to purchase, did not become adverse to the vendors until the execution of the deed. In that case the statutory period had not elapsed since the execution of the deed.

Where, in Henderson v. Dupree (1885) 82 Ky. 678, it is urged that the deeds received by the vendees are void because of the lack of authority on the part of the agent who made them, it is said that, whenever a deed is made to a vendee under an executory contract, "his possession becomes adverse instead of amicable, although the deed may be void and pass no title, provided he *then ceases to look to the vendor for title, and claims the land as his own.* The question depends upon how he in fact claims and holds; and if he regards the contract as *executed,* and no longer looks to the vendor for title, but

claims in his own right, then his possession becomes adverse as to all the world."

But see Ormond v. Martin (1861) 37 Ala. 598, supra, II. b.

c. Repudiation by vendee.

1. In general.

The vendee under an executory contract to purchase may convert his possession thereunder into an adverse one by repudiation of the contract, and the assertion of a claim of right in himself, brought home to the vendor. Lanham v. Bowlby (1910) 86 Neb. 148, 125 N. W. 149, on former appeal (1907) 79 Neb. 39, 112 N. W. 324; Griswold v. Little (1895) 13 Misc. 281, 34 N. Y. Supp. 703; Jennings v. Brown (1907) 20 Okla. 294, 94 Pa. 557; Moore v. Kelly (1916) — Okla. —, 157 Pac. 81; Durst v. Skillern (1898) — Tex. Civ. App. —, 45 S. W. 840; Burnett v. Atteberry (1912) 105 Tex. 119, 145 S. W. 582, modifying (1910) — Tex. Civ. App. —, 130 S. W. 1028; McManus v. Matthews (1900) — Tex. Civ. App. —, 55 S. W. 589; Barrett v. McKinney (1906) — Tex. Civ. App. —, 93 S. W. 240; Tipton v. Tipton (1909) 55 Tex. Civ. App. 192, 118 S. W. 842; McCulloch v. Nicholson (1914) — Tex. Civ. App. —, 162 S. W. 432; First Nat. Bank v. Zundelowitz (1914) — Tex. Civ. App. —, 168 S. W. 40; Ripley v. Yale (1846) 18 Vt. 220; Furlong v. Garrett (1878) 44 Wis. 111; Zeller v. Eckert (1846) 4 How. (U. S.) 289, 11 L. ed. 979.

It is said in Farish v. Coon (1870) 40 Cal. 33, with respect to a vendee under contract of purchase: "In order to put the Statute of Limitations in motion in such a case, it must appear that the purchaser repudiated the title of the vendor, and claimed to hold not under that title, but in hostility to it. The statute will commence to run only from the time when the purchaser openly disavows the title of the vendor, and claims in hostility to it; and, even in that case, notice of the repudiation of his title must be brought home to the vendor, or the hostile claim of the vendee must be evidenced by acts of such notoriety that notice to the vendor will be presumed."

So, it is said in Henderson v. Dupree (1885) 82 Ky. 678, that "a purchaser by title bond or executory contract, although a quasi tenant, or even a tenant, may, by disclaiming the relation and by notoriously claiming to hold adversely to his contract, or by actual notice to the landlord or vendor to that effect, hold adversely *in fact*."

And "it is a general rule," it is said in Rice v. Blair (1914) 161 Ky. 280, 170 S. W. 657, "that when one enters into and holds possession of land under an executory contract of purchase, or bond for title, the entry and possession are in subordination to the title of the vendor . . . until the vendor [vendee] has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly, or by legal implication, to the vendor's knowledge."

"Without some act on the part of the vendee under a claim of right, with intent to assert such claim against the vendor, and thereby give him notice that any further delay in the assertion of his right to possession or to foreclose the contract would be at his peril," it is held in Bradsher v. Hightower (1896) 118 N. C. 399, 24 S. E. 120, that the possession of a vendee who takes possession under a bond for title is not adverse.

In Tillar v. Clayton (1905) 76 Ark. 405, 88 S. W. 972, it is held that, the original possession of a purchaser under a bond for title being subordinate to the rights of the vendor, the law presumes that it continues in subordination thereto until some hostile act is shown and notice thereof is brought home to the vendor.

And the preceding case is cited and followed in Perry v. Arkadelphia Lumber Co. (1907) 83 Ark. 374, 103 S. W. 724.

In Stamper v. Griffin (1853) 12 Ga. 450, it is said: "We will not say that in such a case as this, where an unconditional bond for titles is given, the vendee might not, by an absolute sale of the property, or by some overt act, so far repudiate the legal relation subsisting between him and the vendor as to render his holding adverse, even before and without the payment of the

purchase money. But unless and until this is done there would seem to be no inconsistency between his possession and his vendor's right."

And in Greeno v. Munson (1837) 9 Vt. 37, 31 Am. Dec. 605, it is said: "A possession commenced under a contract of sale is not an adverse possession in any sense, nor can the vendee, or anyone going in under him, whether knowing the contract of sale or not, ever acquire title by the Statute of Limitations to the land sold, unless his possession has been first bona fide surrendered, or until he has by some unequivocal act repudiated the contract, and this is distinctly known to the vendor."

So, it is said in Frazier v. Morris (1914) 161 Ky. 72, 170 S. W. 496, that the holding of a vendee under an executory contract of purchase was not hostile until "he repudiated and renounced the contract under which he entered."

It is held in Estes v. Long (1880) 71 Mo. 605, that where one buys land with borrowed money, taking title in the name of the lender, and going into possession under an agreement with the lender that the title is to be conveyed to him whenever he repays the loan, his possession will not become adverse as against the lender until he has made an open and explicit disavowal of the lender's title and an assertion of title in himself, and such disavowal and assertion have been brought home to the lender.

Where a person claiming land under a deed thereof from his grantors, fearing to be dispossessed by another claimant thereto, enters into a contract of purchase with such other claimant, and subsequently refuses to make payments due thereunder, and disclaims holding thereunder, and notifies the claimant that he is holding possession under his deed, it is held in Cook v. Knott (1866) 28 Tex. 85, that subsequent to such disclaimer the possession of the vendee is adverse to his vendor, the claimant.

In McCulloch v. Nicholson (1914) — Tex. Civ. App. —, 162 S. W. 432, it is held that an issue for the jury of repudiation and adverse possession is made by evidence of a tender of the seven bales of cotton due under the bond, and of a notification of the vendor by the vendee that in the future he is going to hold the land independent of him and adversely to him.

So, it is held in Den ex dem. Van Wickle v. Alpough (1808) 3 N. J. L. 446, that when the purchaser of lands "paid part of the purchase money, tendered the remainder, claimed the land as his own, demanded a deed, and continued to exercise all the rights of complete ownership, he most certainly set up a title as adverse to that of [the vendor's] as can well be imagined."

In Southern California R. Co. v. Slauson (1902) 6 Cal. Unrep. 874, 68 Pac. 107, involving the possession of a railroad under a contract whereby the owner of land agreed to convey to the company upon the construction of the railroad, the erection of a station, and the stopping of all trains thereat, it is said that, "the railroad company having gone into possession under respondent's permission and in consonance with the latter's title, which it was not to have until it should have performed the conditions named, the Statute of Limitations would not commence to run until the company had in some open way repudiated that title."

So, although the vendor under a contract of purchase seeks to oust the vendee from his possession, where the vendee is unwilling to accept the view that his possession is not rightful under the contract, but resists the demands of the vendor, there is nothing to show repudiation on the part of the vendee, so as to render his possession adverse. Spratt v. Livingston (1893) 32 Fla. 507, 22 L.R.A. 453, 14 So. 160.

See also Walker v. Crawford (1881) 70 Ala. 567; Perry v. Lawson (1895) 112 Ala. 480, 20 So. 611; Catlin v. Decker (1871) 38 Conn. 262, infra, V. d.

The repudiation of the contract by the vendee and the assertion of a claim of right in himself will convert his possession into an adverse one, even though the contract be in parol.

In Creech v. Abner (1899) 106 Ky.

239, 50 S. W. 58, it is said: "A parol contract for the sale of land is not enforceable, and the vendee acquires no title whatever to the land by virtue of such sale; but all the modern decisions of this court sustain the doctrine that a party may, by parol, purchase land, and enter upon the same, and he may then openly and notoriously hold, claim, and occupy the same adverse to all the world, and that such adverse holding and occupancy will ripen into a perfect title within fifteen years, unless the statute is suspended or extended on account of the disabilities of the holder of the legal title."

And in Com. v. Gibson (1887) 85 Ky. 666, 4 S. W. 453, it is said: "If one in fact enters under a purchase or a gift, although it may be verbal, and holds the land by actual, open possession, claiming it as his own, such possession is adverse, and a right of action at once accrues to the vendor or donor. The moment such possession begins, the owner is disseised. It is immaterial whether the entry was by the owner's consent or not. If, after entry, the new owner claims the land as his own, and the owner has notice of it, either actual or constructive, then there is a disseisin."

So where, in Hornsby v. Davidson (1900) 21 Ky. L. Rep. 1531, 55 S. W. 684, the vendee of land under a parol contract took possession thereof and cultivated and claimed it as his own, his possession is held to be adverse.

Where a portion of the joint owners of land do not sign a title bond, and where one of them actually signing is under the disability of coverture, it is held in Pope v. Brassfield (1901) 110 Ky. 128, 61 S. W. 5, that as to such persons the holding of the vendee rests upon the same plane as a holding under a verbal contract, and that accordingly, as to such persons, the possession of the vendees is adverse, provided the holding is under a claim of right in themselves, and not under the vendors.

And see Spradlin v. Spradlin (1892) 13 Ky. L. Rep. 723, 18 S. W. 14; Gilbert v. Kelly (1900) 22 Ky. L. Rep. 353, 57 S. W. 228; Miller v. Wireman (1904) 25 Ky. L. Rep. 2300, 80 S. W. 517.

In Virginia and West Virginia, where the payment of the purchase price by the vendee does not render his possession adverse (see supra, VI. a, 2), it seems that the only manner in which he may make his possession adverse is in repudiating the contract and in setting up a claim to the land in his own right.

It is said in Marbach v. Holmes (1906) 105 Va. 178, 52 S. E. 828, that, in the case of an executory contract of sale, "the doctrine is well settled in this state that the possession of an incomplete purchaser only becomes adverse when there has been a severance of the relation of vendor and vendee by a distinct avowal on his part that he is holding adversely, and not in subordination to the title of the vendor, and notice of such disclaimer is brought home to the vendor."

And the preceding case is cited with approval in William James Sons Co. v. Hutchinson (1916) 79 W. Va. 389, 90 S. E. 1047.

And in Hudson v. Putney (1878) 14 W. Va. 561, involving possession of land under a bond for title, it is said that "such possession so commencing cannot be converted into an adversary possession but by a disclaimer, the assertion of an adverse title, and notice thereof to the owners of the legal title."

And see Chapman v. Chapman (1895) 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813.

2. Necessity of notice to vendor.

Where the vendee under an executory contract of purchase repudiates the contract, sets up a claim in himself, and does not surrender possession of the land, it is necessary, in order to establish a possession adverse to his vendor, that notice, either actual or constructive, of the repudiation be given to the vendor. Perry v. Lawson (1895) 112 Ala. 480, 20 So. 611, supra, VI. b; Tillar v. Clayton (1905) 76 Ark. 405, 88 S. W. 972, supra, VI. c, 1; Farish v. Coon (1870) 40 Cal. 33, supra, VI. c, 1; Rice v. Blair (1914) 161 Ky. 280, 170 S. W. 657, supra, VI. c, 1;

Burke v. Douglass (1897) 115 **Mich.** 197, 73 N. W. 133; Estes v. Long (1880) 71 **Mo.** 605, supra, VI. c, 1; Alderson v. Marshall (1888) 7 **Mont.** 288, 16 Pac. 576, infra, VI. c, 3; Bradsher v. Hightower (1896) 118 **N. C.** 399, 24 S. E. 120, supra, VI. c, 1; Stephenson v. Van Blokland (1911) 60 **Or.** 247, 118 Pac. 1026; Keys v. Mason (1875) 44 **Tex.** 140, infra, VI. c, 3; Barrett v. McKinney (1906) — **Tex.** Civ. App. —, 93 S. W. 240; Tipton v. Tipton (1909) 55 **Tex.** Civ. App. 192, 118 S. W. 842; McCulloch v. Nicholson (1914) — **Tex.** Civ. App. —, 162 S. W. 432; Greeno v. Munson (1837) 9 **Vt.** 37; 31 Am. Dec. 605, supra, VI. c, 1; Ripley v. Yale (1846) 18 **Vt.** 220; Robinson v. Sherwin (1863) 36 **Vt.** 69; Chapman v. Chapman (1895) 91 **Va.** 397, 50 Am. St. Rep. 846, 21 S. E. 813, supra, VI. a, 2; Marbach v. Holmes (1906) 105 **Va.** 178, 52 S. E. 828, supra, VI. c, 1; Hudson v. Putney (1878) 14 **W. Va.** 561, supra, VI. c, 1; Heermans v. Schmaltz (1881) 10 Biss. 323, 7 **Fed.** 566.

It is said in Kerns v. Dean (1888) 77 **Cal.** 555, 19 Pac. 817, that the possession of a vendee under a contract of purchase "could not be adverse, unless its hostility was manifested by unquestionable acts brought expressly to the knowledge of [the vendor], or of such a character as to clearly charge him in law with such knowledge."

So, it is said in Hannibal & St. J. R. Co. v. Miller (1892) 115 **Mo.** 158, 21 S. W. 915, that "one who has obtained possession of land under a treaty with the owner for its purchase cannot, before compliance with its terms, put the Statute of Limitations into effect against the true title, without at least some unequivocal and positive action to indicate such a purpose. It is not enough to form a design to get the property in that manner, and to lock the claim in one's own breast in the hope to give thereby a different legal complexion to acts in their nature friendly to the title to be acquired. Justice required more of him than the mere claim of ownership to start a title adverse to that of the real owner, where one has come into possession by the latter's consent. Here, there is no evidence that the 'claim' was ever spoken to anyone."

Where in Padgett v. Decker (1911) 145 **Ky.** 227, 140 S. W. 152, the vendee under a parol contract had done nothing to apprise the vendor of an intention to hold the land adversely, and had divided the yearly crops with the vendor as the vendor's other tenants had done, the vendee is denied the right to claim adverse possession.

The required notice of repudiation by a vendee under an executory contract, it is held in Durst v. Skillern (1898) — **Tex.** Civ. App. —, 45 S. W. 840, "need not be formal and express, . . . but may be shown by circumstances. The adverse claim may be asserted by acts so openly hostile to the claim of the vendor as to necessarily put him upon notice."

So, where the purchaser under an executory contract assigns his interest therein after default in payment, and continues to hold as tenant of his assignee, and the vendor refuses the assignee's tender of payments, although the vendor does not have knowledge of the precise nature of the contract of tenancy, where he knows that the vendee and the assignee are in privity, that the assignee is making tender under a claim of right, and that he claims the right to absolute possession upon making the final tender, and he is notified that the assignee will thereafter hold the premises as his own, the presumption arises that the vendor has notice that the vendee is holding adversely on behalf of the assignee, as his tenant. Catlin v. Decker (1871) 38 **Conn.** 262.

But the payment of taxes, the making of improvements, and the claiming of the land by the purchaser as his own, are held in Cleveland v. Aldridge (1910) 94 **Ark.** 51, 125 S. W. 1016, not to be acts inconsistent with the rights of the vendor, so as to render the possession of the vendee adverse. "In such cases the vendee's outward acts of ownership must have been of such an unequivocal character as to impart a notice to his vendor that an adverse possession is intended to be asserted against him," the court says.

And where it is not shown that the

vendor under an executory contract of sale has actual notice of the execution and delivery of a deed by the grantee, and the registration of the deed, being constructive notice only to subsequent purchasers from the maker, constitutes no constructive notice of the vendee's act to the vendor, the vendor being without notice of the vendee's act, such act is not sufficient to constitute a repudiation of the vendor's title and the assertion of an adverse title in the vendee. Runge v. Gilbough (1905) — Tex. Civ. App. —, 87 S. W. 832, affirmed in (1906) 99 Tex. 539, 122 Am. St. Rep. 659, 91 S. W. 566.

3. Necessity of surrender of possession.

In Jackson ex dem. Shaw v. Spear (1831) 7 Wend. (N. Y.) 401, it is said that persons entering upon land under contracts of purchase are precluded from denying the title of their vendors until they have surrendered the possession thus obtained.

However, the rule followed by the greater number of courts recognizes that the possession of the vendee under an executory contract may be rendered adverse by repudiation, with notice to the vendors (see supra, VI. c, 1, 2), without the necessity of surrendering the possession.

It is said in Zeller v. Eckert (1846) 4 How. (U. S.) 289, 11 L. ed. 979, involving the nature of the possession of one holding land under a will, that there is no propriety in the rule to the effect that one obtaining possession of land amicably must, in order to render his possession adverse, surrender possession thereof. "The trustee may disavow and disclaim his trust, the tenant, the title of his landlord after the expiration of his lease, the vendee, the title of his vendor after breach of the contract," it is said.

In holding in Keys v. Mason (1875) 44 Tex. 140, that the vendee under the executory contract in question did not hold possession of the land adversely, it is said that, having gotten possession on faith of the contract, he could not claim to hold adversely to the vendor, "without surrendering the possession thus acquired, or certainly without giving him notice of a repudiation of the contract and possession under it."

"The authorities hold," it is said in Alderson v. Marshall (1888) 7 Mont. 288, 16 Pac. 576, "that where the defendant in an action for ejectment is shown to have gained or entered in possession of the premises, either under a lease or a contract for the sale of the property, he will be estopped from denying the title of his landlord or vendor, in an action for ejectment, until he has surrendered the possession, or given notice that he does not intend to hold in subordination to the title under which he entered."

d. Default by vendee.

It seems to be the rule that by the mere default of the vendee under an executory contract of purchase his possession is not rendered adverse to his vendor. But where there is some act, either on the part of the vendee or of the vendor, which characterizes the possession as hostile, it then is deemed to become adverse.

It is said in Worth v. Wrenn (1907) 144 N. C. 656, 57 S. E. 388, that, "where a vendee has entered and continued in possession under a bond for title and in recognition of the contract, the statute does not begin to run until the possession of the vendee has become hostile by a refusal to surrender after a demand and notice."

Where the vendor in an executory contract, upon the default of the vendee, recovers judgment in ejectment against him, but permits him and his assignees to retain possession, it is held in Bennett v. Morrison (1888) 120 Pa. 390, 6 Am. St. Rep. 711, 14 Atl. 264, that the possession of the vendee is not rendered adverse by the mere recovery of the judgment.

So, it is held in Austin v. Wilson (1877) 46 Iowa, 362, that a person in possession of land under a bond for a deed, providing that in case of default the vendee shall have the rights of a tenant at will, and be allowed thirty days' notice to leave, does not hold adversely to the owner until after such notice is served.

Where the purchaser under an executory contract assigns his interest therein after default in payment, and

continues to hold as tenant of his assignee, his possession, after the vendor has refused the assignee's tender of payment of all instalments and the assignee has set up the claim that the contract is fulfilled, is held, in Catlin v. Decker (1871) 38 **Conn.** 262, to be adverse on behalf of his landlord.

And it is said, obiter, in Catlin v. Decker (**Conn.**) supra, that, upon the maker of a bond for title insisting upon the benefit of the vendee's breach thereof in failing to pay, the vendee may disclaim, and thereby render his possession adverse.

And see Zeller v. Eckert (1846) 4 How. (U. S.) 289, 11 L. ed. 979, supra, VI. c, 3.

e. Rescission of contract.

After the rescission of an executory contract for the purchase of land, the vendee still in possession is a tenant by sufferance, it is held in Williams v. Snidow (1832) 4 Leigh (**Va.**) 14, and his possession is under the owner, and not adverse to him.

So where, in Quinn v. Quinn (1870) 27 **Wis.** 168, the vendee under a bond for title had released the vendor from the covenants of the bond, but had remained in possession of the land, the possession is held not to be adverse. The vendee "having entered in pursuance of the bond for a conveyance," it is said, "the relation in the nature of tenancy existing between him and Swain [vendor] continued, notwithstanding the release of the bond and surrender of his interest under it, because his possession remained the same. His possession was continuous and unchanged from the time of entry until his death."

Where, in Piper v. Sloneker (1854) 2 Grant, Cas. (**Pa.**) 113, a vendee in possession under a contract of purchase sued the vendor for the recovery of the portion of the purchase money paid, and obtained a judgment which was to be released upon a title being made within five months, it is held that, after execution was issued on the judgment and satisfaction of it had, the parties were in the position of vendor and vendee under a contract of purchase, with the purchase money unpaid; and between them the Statute of Limitations would not run. This is on the ground that the action for recovery of the purchase money did not amount to a rescission of the contract, the vendee being in default as to so much of the purchase money as was unpaid, and being for that reason not entitled to rescind.

f. Attornment by vendee to stranger.

In Pratt v. Canfield (1877) 67 **Mo.** 50, it is held that the acceptance by one holding under a contract of purchase, of a lease from a stranger, does not convert his holding into an adverse possession against his vendor; and that, if one so holding abandons the land and afterwards re-enters under a lease from a stranger, without having rescinded his contract, and before any other has occupied the land, his re-entry will be considered as relating back and constituting a continuation of the original possession, and not as creating a new and adverse possession.

So where, in Turner v. Thomas (1877) 13 Bush (**Ky.**) 518, purchasers under an executory contract attorned for a time to a third person who claimed title to the land, but subsequently repudiated the tenancy and returned to their claim to be holding under the executory contract, it is held that such attornment does not render the possession of the purchasers adverse, the possession having been taken originally under the vendor. "In such a case," it is said, "the purchaser or quasi tenant holds the possession (so far as strangers are concerned) for the benefit of his vendor's title, which he is estopped to deny, and which he cannot prejudice by any contract he may make with any other person."

In Kirk v. Taylor (1848) 8 B. Mon. (**Ky.**) 262, where the vendee under an executory contract, while in possession thereunder, took a lease of the land from a third person, the court has the following to say: "Crum, having purchased from Marcum by executory contract, became a quasi tenant, and held the possession for the benefit of his vendor's title, which his attitude estopped him to deny. Marcum

had the legal power to dispossess him; and he could not, by seeking shelter under another title, deprive him of this right. An attornment to a stranger by a tenant during his occupancy, without the consent of his landlord, is not legal, does not disseise the landlord, nor transfer the title to the stranger, and when the tenant leaves the premises the stranger cannot be deemed to have the possession. . . . The same doctrine applies in a case of quasi tenancy created by a contract of purchase not competent by a conveyance. It would be inconsistent with the relation that exists between the parties, to permit the vendee to make any contract with other persons, with the effect of prejudicing the rights of the vendor." E. L. D.

ISABEL M. R. DE PARIS, Plff. in Err.,

v.

WILMINGTON TRUST COMPANY, Admr., etc., of Federico Evaristo Schemel, Deceased.

Delaware Supreme Court—September 5, 1918.

(— Del. —, 104 Atl. 691.)

Executor and administrator — action by ancillary administrator.

1. The payment of a guaranteed debt by domiciliary administrators of a coguarantor, after his death, gives an ancillary administrator appointed in another jurisdiction no right to proceed against the other guarantor for contribution, since there is no privity between domiciliary and ancillary administrators.

[See note on this question beginning on page 1359.]

Contribution — enforcement at law.

2. The duty of one coguarantor of debt to contribute to the guarantor who satisfies the debt may be enforced in an action at law upon the implied contract.

Same — enforcement by executor.

3. Where an executor of a cosurety pays the debt, he may enforce contribution from the other surety.

Same — when enforceable.

4. A cosurety cannot enforce contribution until he has paid more than his share of the debt.

Executor and administrator — actions on judgments.

5. A domiciliary administrator may sue in his own name in another state on a judgment recovered by him in his representative capacity in the state of his domicil.

ERROR to the Superior Court for New Castle County to review a judgment in favor of plaintiff in an action on a contract of guaranty to compel contribution by defendant. *Reversed.*

Statement by **Curtis, Ch.:**

The case is in this court on a writ of error to a judgment entered in a suit in the superior court for New Castle County. The action was a foreign attachment case, under which shares of stock of a Delaware corporation owned by the defendant were attached, and special bail was afterwards given by the defendant, and she appeared. From the declaration it appeared that, in 1911, Joseph J. de Paris made in Venezuela three promissory notes and an account current (which was also an evidence of indebtedness), and these were held by certain banks there. Federico Evaristo Schemel and the defendant below, Isabel M. R. de Paris, bound themselves in writing, jointly with the maker of the notes, to the fulfilment of the obligations, i. e., to the payment of the notes and account cur-

rent. The obligations fell due in the lifetime of Schemel, and, the principal debtor having made default in the payment thereof, demand was made upon Schemel to pay them. But no payment was made by him. On July 15, 1912, Schemel died intestate in Venezuela, leaving a widow and several children as his heirs. It was alleged in the declaration that, as such heirs, the widow and children became "the legally constituted administrators and representatives of the said Federico Evaristo Schemel, deceased, in and for the jurisdiction of the republic of the United States of Venezuela," and that, under the laws of the republic, in the event of the death of a person intestate, the heirs, to the extent to which they have assumed jurisdiction of the estate of the decedent, stand in the place of the deceased, and succeed as such heirs to all the legal and equitable rights which the deceased might have enforced if he were alive, and to all the liabilities for which the deceased would have been liable if he were alive. The notes and account current were not paid at maturity, but were paid by the heirs of Schemel in September, 1912, after his death.

By the Code of Venezuela, "when many persons have given bond for the same debtor, for one same debt, the bondsman who has paid the debt has action against the other bondsmen for their respective parts." See article 1811 of Venezuela Code of 1904.

On September 12, 1913, the Wilmington Trust Company, a corporation of Delaware, was appointed administrator of Schemel, and claims that the defendant, the cosurety with Schemel, pay one half of the money paid by the heirs of Schemel.

In addition to nonassumpsit, the defendant filed two special pleas: (1) A special plea alleging that the situs of the chose in action is without the state of Delaware; that the chose in action did not constitute a part of the estate, rights, or credits of the decedent within the state of Delaware, and that the plaintiff did not, by virtue of its letters of administration, acquire any claim, right, title, or interest in or to the said chose in action. (2) That under the laws of Venezuela the payment of said obligations by the widow and children of the decedent in Venezuela was a payment by them in their individual and personal capacity, and not as administrators of the decedent; that any right of contribution accruing to them under the Venezuelan laws, as a result of such payment, accrued to them in their personal capacity, and not as administrators, and that title to the choses in action is not in the plaintiff.

At the trial, in addition to proof of the facts alleged as above, it appeared that all the parties were residents of Venezuela; and that the obligations were paid after Schemel's death by his heirs, and a demand made on behalf of the heirs on the defendant below for contribution; but that she had failed to contribute and pay her part of the debts. There was testimony to the effect that the heirs of Schemel paid the principal debt as administrators of Schemel's estate, and as heirs they were administrators. A motion for a nonsuit was refused. The defendant later moved that the jury be instructed to find a verdict for the defendant on the grounds: (1) that the debt sued for was not an asset of the estate of the decedent within the state of Delaware; and (2) that the declaration and evidence disclosed no title in the plaintiff to the causes of action. This motion was refused, the court taking the position that it was not a question of privity between administration of an estate in different jurisdictions, but as to the right of an administrator to enforce a contract made by his intestate, and, as the obligation of Schemel to pay the debt was complete in his lifetime, his Delaware administrator had as much right to bring the suit here on the contract

as though Schemel had in his lifetime paid the debt, his Venezuela representatives, by paying the debt, having done nothing more than carry out the contract made by Schemel.

There was a verdict for the plaintiff for the amount claimed, and judgment was entered thereon, notwithstanding a motion in arrest of judgment based on substantially the same grounds as the prior motions. A writ of error was sued out.

There are six assignments of error. The first assignment is that the court erred in refusing to instruct the jury to return a verdict for the defendant. The other assignments are that the court erred in sustaining objections made by the plaintiff to questions asked by the defendant in the examination of Julian A. Arroyo, a witness called by the defendant as an expert, to testify as to the law of Venezuela. On his voir dire the witness had stated that, though not counsel of record in the action, he had been acting as co-counsel with Mr. Morris, the attorney of record. The court ruled that counsel in the case should not be allowed to construe the laws of Venzuela, because the testimony was the basis for a resistance of the right of the plaintiff to recover.

Mr. Hugh M. Morris, for plaintiff in error:

Neither the declaration nor proof shows title (i. e., right of action) in the plaintiff.

Gould, Pl. p. 160; Greenl. Ev. § 50.

A domiciliary administrator not only has sole and exclusive title to the assets and effects of the decedent within the jurisdiction of his appointment, but he may gather in foreign assets to the extent of his ability, and accept voluntary payments from foreign debtors, provided there is not an ancillary administrator at the residence of the debtor at the time of payment.

18 Cyc. 1228, 1229; 11 R. C. L. §§ 533, 534.

Title of an ancillary administrator extends only to the assets of the decedent which are within the jurisdiction of his appointment; he can properly collect only what are properly assets of his jurisdiction, and a voluntary payment to him by a debtor of another jurisdiction will not discharge the debt.

18 Cyc. 1227; 13 Am. & Eng. Enc. Law, 2d ed. 931; Equitable Life Assur. Soc. v. Vogel, 76 Ala. 441, 52 Am. Rep. 344; Cureton v. Mills, 13 S. C. 409, 36 Am. Rep. 703; Union Mut. Ins. Co. v. Lewis, 97 U. S. 682, 24 L. ed. 1114; Purple v. Whithed, 49 Vt. 189.

Plaintiff did not acquire title from the decedent, for right of contribution and the relation of debtor and creditor do not arise between cosureties until one surety has paid more than his share of the debt.

4 Am. & Eng. Enc. Law, 2; Davies v. Humphreys, 6 Mees. & W. 168, 151 Eng. Reprint, 367; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; May v. Vann, 15 Fla. 556; Brackett v. Winslow, 17 Mass. 153; Martin v. Frantz, 127 Pa. 395, 14 Am. St. Rep. 859, 18 Atl. 20.

Plaintiff did not acquire title from the Venezuelan heirs or "administrators," for there is no privity between administrators of different jurisdictions.

18 Cyc. 1226; 13 Am. & Eng. Enc. Law, 2d ed. 920; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; McLean v. Meek, 18 How. 16, 15 L. ed. 277; McGarvey v. Darnall, 134 Ill. 367, 10 L.R.A. 861, 25 N. E. 1005; Anderson v. Louisville & N. R. Co. 127 C. C. A. 277, 210 Fed. 689; Brown v. Fletcher, 210 U. S. 82, 90–92, 52 L. ed. 966, 970, 971, 28 Sup. Ct. Rep. 702; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; Davis v. Heralds of Liberty, 39 Pa. Co. Ct. 399.

There being no privity between the plaintiff and the Venezuelan heirs or "administrators," the acts of such heirs or "administrators" are res inter alios acta, and inadmissible in evidence; or if admitted, have no legal effect.

Stacy v. Thrasher, 6 How. 44–61, 12 L. ed. 337–344; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; Williams v. Moore, 9 Pick. 433; Mowry v. Adams, 14 Mass. 327, 13 Am. & Eng. Enc. Law, 2d ed. 950, 951; 18 Cyc. 878; Moore v. Petty, 68 C. C. A. 306, 135 Fed. 673; Hare v. O'Brien, 233 Pa. 330, 39 L.R.A.(N.S.) 430, 82 Atl. 475, Ann. Cas. 1913B, 624; Abbott v. Miller, 10 Mo. 141; Greenl. Ev. § 50; Davis v. Heralds of Liberty, 39 Pa. Co. Ct. 399.

Messrs. **A. C. Gray** and **Winthrop H. Kellogg**, for defendant in error:

Plaintiff, as administrator in Delaware, has the right to maintain this action.

Fox v. Carr, 16 Hun, 434; Saunders v. Weston, 74 Me. 85; Amsden v. Danielson, 18 R. I. 789, 31 Atl. 4, s. c. 19 R. I. 535, 35 Atl. 70; O'Reilly v. New York & N. E. R. Co. 16 R. I. 397, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244; Perkins v. Stone, 18 Conn. 270; Mansfield v. McFarland, 202 Pa. 173, 51 Atl. 763; 18 Cyc. 1241; Merrill v. New England Mut. L. Ins. Co. 103 Mass. 245, 4 Am. Rep. 548; Zollickoffer v. Seth, 44 Md. 359; Nally v. Long, 56 Md. 567; Wayland v. Tucker, 4 Gratt. 267, 50 Am. Dec. 76; Comstock v. Potter, 191 Mich. 629, 158 N. W. 102; Wolmerschausen v. Gullick [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 3 Reports, 610, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823; Washington v. Norwood, 128 Ala. 383, 30 So. 405; Fitzhugh v. Fitzhugh, 11 Gratt. 300, 62 Am. Dec. 653; Re Koch, 148 Wis. 548, 134 N. W. 663; Swifts v. Donahue, 104 Ky. 137, 46 S. W. 683; 7 Am. & Eng. Enc. Law, 2d ed. 332; 1 Brandt, Suretyship & Guaranty, 3d ed. § 310; Bradley v. Burwell, 3 Denio, 61; Johnson v. Harvey, 84 N. Y. 363, 38 Am. Rep. 515; McAllister v. Irwin, 31 Colo. 253, 73 Pac. 47; Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416; Wyckoff v. Gardner, — N. J. Eq. —, 5 Atl. 801; Wood v. Leland, 22 Pick. 503; Bachelder v. Fiske, 17 Mass. 464; Crosby v. Wyatt, 23 Me. 156; Hare v. O'Brien, 233 Pa. 330, 39 L.R.A.(N.S.) 430, 82 Atl. 475, Ann. Cas. 1913B, 624; Rice v. Southgate, 16 Gray, 142.

Curtis, Ch., delivered the opinion of the court:

In brief, there were two guarantors of a debt, both residents in Venezuela, and after notice of the default of the principal debtor had been received by one of the guarantors, he died in Venezuela with assets there. His personal representatives there, viz.: his widow and children, who, as his heirs, became administrators by the laws of Venezuela, without appointment, paid the whole of the debt. Later the plaintiff below was appointed administrator in Delaware, and brought suit in Delaware against the other coguarantor for contribution, by attachment of property of the defendant in Delaware.

The law of contribution as between two coguarantors is well settled. If one pays the whole of the principal debt he may compel the other to pay one half thereof. This is also the law of Venezuela. See article 1811 of Code of 1904. It is an equitable principle based on natural justice (Eliason v. Eliason, 3 Del. Ch. 260, 263), and was originally enforceable in equity only; but is now enforceable at law, the duty of one guarantor to reimburse his coguarantor being the basis of an implied promise to do so. This promise is considered as made when the liability is assumed. Miller v. Stout, 5 Del. Ch. 259. In the same case Chancellor Saulsbury stated the further well-established and undisputed rule, recognized by the court below, that the right to sue on the promise did not arise until the cosurety had paid the whole of the principal debt, or more than his share thereof.

Contribution—enforcement at law.

A court of equity will, under special circumstances, protect the rights of one guarantor against his coguarantor before payment of the debt. But this is usually done to prevent the consequences of fraudulent conduct of such coguarantor. It does not tend to show that there is a right of action at law for contribution until payment of the principal debt.

The death of one cosurety does not affect the right to demand contribution; but the right may be enforced against the estate of a cosurety by the surety who has paid the debt. Conversely, where an executor of a deceased surety pays the debt, he may enforce contribution against the cosurety. 27 Am. & Eng. Enc. Law, 484. When an administrator of a surety pays the principal debt, he may maintain an action in his own name against the principal debtor for repayment, and the amount recovered by him will be assets in his

Same—enforcement by executor.

hands. In the case of Mowry v. Adams, 14 Mass. 327, the plaintiff was administrator of B, who was surety for A the defendant, and after the death of B paid the debt, brought suit in his own name, and not as administrator of B, against A, the principal. The court said that the right to so sue depended on whether A the defendant was indebted to the plaintiff, or to the estate of B, and that this depended on the time and manner of his becoming liable. And further, that as B had no right of action until he had paid the debt of the principal, and as he, B, died without paying, there was no promise by the defendant to him.

Same—when enforceable.

"His (B's) estate was, however, liable, and the administrator, if called upon, was obliged to pay. The debt of A accrued when M (the plaintiff) paid the money, an implied promise then arising to repay, it being, in fact, the debt of A for which M (B) was surety, and which was paid by M to the use of A. But the promise could not accrue to B, he being dead. It was, therefore, a promise to the administrator. Now, it is settled that when a contract is made with an executor or administrator personally, after the death of the testator or intestate, or where money is received by the person sued after the death, in such cases the executor or administrator may sue, either in his own name, or as executor or administrator. By suing in his own name, he becomes answerable to the estate for the amount recovered, and it is an implied acknowledgment of assets to the amount in his hands. The present is a case of that sort. The plaintiff takes money of the estate to pay a debt for which the estate is answerable; he sues the principal debtor in his own name; he is chargeable with the amount of the debt as assets; and he may recover the amount . . . in his own name."

This case was cited in Cobb v. Wood, 8 Cush. 228; Williams v. Moore, 9 Pick. 432; Moore v. Petty, 68 C. C. A. 306, 135 Fed. 668.

The general principle was thus stated in Moore v. Petty, supra, though it should be noted that the suit in a foreign jurisdiction was by a domiciliary executor, to recover proceeds of sale of property of the decedent received by the defendant, who had made the sale as agent for the domiciliary administrator.

The fact that the principal debtor in this case had made default in paying his debt did not, of itself, cause a loss to either of those who had guaranteed payment of the debt, or give either a right of action against the other for contribution, for the principal debt might still be paid by the principal debtor, or be released, compromised, or abated, as between the principal debtor and principal creditor. A notice to the guarantors of such default did no more damage to the guarantors, and gave no right of action for contribution. Thereafter, either of the guarantors could pay the debt without waiting to be sued, and could then have recourse against the other. But until that payment be made there was no cause of action. No cause of action arose merely because of the relationship of the coguarantors. It follows, then, that Schemel never had a cause of action against the defendant. If he had in his life no right to compel contribution, then his administrator could not acquire from him a right to sue therefor.

The court below erroneously considered that, by the contract of guaranty, there was a cause of action as between Schemel, "or his estate," and Mrs. De Paris, the other guarantor. In other words, the court considered that there could be a cause of action without a right of action. But clearly that is impossible.

If the widow and heirs of Schemel paid as heirs, then clearly the Delaware administrator had no right

Executor and administrator —action by ancillary administrator.

to sue. If they paid as administrators of Schemel, then the Delaware administrator cannot have the right to sue for contribution, unless there be privity between the Venezuela domiciliary administrators and the ancillary Delaware administrator. It is settled, however, that there is no privity between a domiciliary and an ancillary administrator. There is but one estate, and both are in privity with the decedent and his estate, but not with each other in law or in estate. Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; Hare v. O'Brien, 233 Pa. 330, 336, 39 L.R.A.(N.S.) 430, 82 Atl. 475, Ann. Cas. 1913B, 624; Merrill v. New England Mut. L. Ins. Co. 103 Mass. 245, 4 Am. Rep. 548; Equitable Life Assur. Soc. v. Vogel, 76 Ala. 441, 52 Am. Rep. 344. If the legal title to a demand, or the possession of evidence of it, be in the domiciliary administrator, the ancillary administrator cannot sue thereon. Merrill v. New England Mut. L. Ins. Co. 103 Mass. 248, 4 Am. Rep. 548; Union Ins. Co. v. Lewis, 97 U. S. 682, 24 L. ed. 1114.

When a decedent has assets in more than one jurisdiction, there is unity of estate without unity of administration. But the estate of a decedent is not an entity, corporate or otherwise. Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; Anderson v. Louisville & N. R. Co. 127 C. C. A. 277, 210 Fed. 689; Davis v. Heralds of Liberty, 39 Pa. Co. Ct. 399; McGarvey v. Darnall, 134 Ill. 367, 10 L.R.A.(N.S.) 861, 25 N. E. 1005; Equitable Life Assur. Soc. v. Vogel, 76 Ala. 441, 52 Am. Rep. 344. This is a logical deduction from the principle of the lack of privity between an ancillary and domiciliary administrator. In Stacy v. Thrasher, supra, a leading case on the subject, a judgment had been recovered against the administrator of Lee in Mississippi, the domicil of the decedent, and was assigned to Thrasher. Later, letters were granted in Louisiana to Stacy on the estate of Lee, and Thrasher sought to enforce, in the United States circuit court in Louisiana, payment of the judgment debt of which he was assignee, by suit against the administrator of Lee in Louisiana. The court denied him the right to recover in that way. A judgment against one administrator in one jurisdiction furnished no right of action thereon against another person appointed administrator of the same decedent in another jurisdiction, because there was no privity between them, for that denotes mutual succession or relationship to the same rights of property. The Supreme Court said: "It is for those who assert this privity to show wherein it lies, and the argument . . . seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situated, is liable to pay his debts; therefore, the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is in rem, and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction."

This language was quoted with approval in Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525, and the court said that a judgment against an administrator in one state is res inter alios acta as to an administrator of the same decedent in another state, "and cannot be even prima facie evidence of a debt."

A further illustration of the effect of the lack of privity between administrators of the same decedent appointed in different jurisdictions is the rule that an ancillary administrator cannot maintain suit on a judgment recovered in the domicil of the decedent, by the

domiciliary administrator, for a debt due the decedent. This was so decided in Davis v. Heralds of Liberty, 39 Pa. Co. Ct. 399, citing Talmage v. Chapel, 16 Mass. 71; 1 Freeman, Judgm. 163. The Philadelphia court based its view on the lack of privity, and upon the fact that the domiciliary administrator could have sued in Pennsylvania on the judgment obtained by him as administrator in the domiciliary jurisdiction, and therefore that the ancillary administrator could not also sue, saying: "If the foreign administrator has the right to sue here, how can the local administrator have the same right? The defendant cannot be required to answer the demands of two administrators, accountable as they are to different jurisdictions."

There was, therefore, no cause of action for contribution vested in the estate of Schemel as an entity represented by two independent agents, with no privity between them; but there was a right of action given to whichever agent paid the decedent's debt. If the ancillary administrator was not in privity with the domiciliary administrator, the former could not enforce a right of action which the latter had acquired because of something done by him. This conclusion is inevitable from the premises.

Counsel for the defendant in error urged that injustice would be done to the estate of Schemel, if the defendant in error be denied a right to maintain its present action in the court below. But there is, or was, clearly a way to enforce contribution from the plaintiff in error. The heirs of Schemel have had an action in Delaware for contribution for moneys paid by them as such. It is probably true that as administrators of Schemel they would also have had such right of action, though it is not in this case necessary to decide a point not argued. Certain it is that a judgment against the defaulting coguarantor recovered in Venezuela, or elsewhere, by the widow and heirs of Schemel as individuals, or by them as administrators according to the law of Venezuela, would be enforceable here by attachment of property of the plaintiff in error.

A domiciliary administrator may sue in his own name in another state on a judgment recovered by him in his representative capacity in the state of the domicil, because the judgment is his property. Hare v. O'Brien, 233 Pa. 330, 334, 39 L.R.A.(N.S.) 430, 82 Atl. 475, Ann. Cas. 1913B, 624, citing 1 Freeman, Judgm. 4th ed. 217; 2 Wharton, Confl. L. 3d ed. 615½; 18 Cyc. 1239, and cases cited there; Alley v. Caspari, 80 Me. 234, 6 Am. St. Rep. 178, 14 Atl. 12; Fisher v. Fielding, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714; Mowry v. Chase, 100 Mass. 79.

The court, therefore, are all of the opinion that the plaintiff had no right of action, because the right to enforce contribution was not due to Schemel in his life, and the payment of the principal debt having been made by the widow and children of Schemel, they could enforce payment, either in their own names, or as administrators of Schemel; and further, that this excluded a right of action to the plaintiff, who was not in privity with them and obtained no right of action from or through them.

Same—actions on judgments.

In view of the foregoing conclusion, it is not necessary in this case to decide whether the court below erred in excluding the testimony of Arroyo, who, as counsel for the defendant, though not so of record, was not allowed to testify as to the law of Venezuela.

The court below having erred in refusing to instruct the jury to return a verdict for the defendant below, being the first assignment of error, when, as hereinabove indicated, it should have done so, because the plaintiff below had no right to the action, the judgment of

the court below should be reversed, and a mandate awarded to the court below to enter in the cause a judgment for the defendant below, with costs in this court and the court below upon the plaintiff below.

ANNOTATION.

What actions may be maintained or rights vindicated by ancillary executor or administrator.

I. Recovery of personal assets generally, 1359.
II. Recovery on insurance policy, 1361.
III. Recovery of corporate stock, 1362.
IV. Preference over domicilary executor or administrator, 1363.
V. Defenses, 1364.

I. Recovery of personal assets generally.

An ancillary executor, or administrator, may bring an action to collect the assets belonging to the estate of a nonresident decedent, which are situated within the jurisdiction in which the ancillary executor, or administrator, is appointed. Grimball v. Patton (1881) 70 Ala. 626; McCully v. Cooper (1896) 114 Cal. 258, 35 L.R.A. 492, 55 Am. St. Rep. 66, 46 Pac. 82; Fox v. Carr (1879) 16 Hun (N. Y.) 434. See also Wheelock v. Pierce (1850) 6 Cush. (Mass.) 288; Dial v. Gary (1881) 14 S. C. 573, 37 Am. Rep. 737.

In McCully v. Cooper (1896) 114 Cal. 258, 35 L.R.A. 492, 55 Am. St. Rep. 66, 46 Pac. 82, the action was by an ancillary administratrix against the domiciliary administrator, to recover a certificate of deposit, or the amount of money it represented. It appeared that the intestate, who was the owner of the certificate, died while domiciled in Indiana, leaving on deposit in a bank in California the money represented by the certificate. It was held that the plaintiff could recover. The court said: "The very object of the ancillary administration in this state is to collect assets of the estate here, and it is the bounden duty of plaintiff to so collect them. A paramount object of the local or ancillary administration is to collect the assets, locally situated, and to pay therefrom the demand of local creditors, if any there be. Whether there are any such creditors can only be determined by giving the notice to creditors required by our law. It would seem that, upon principle, it became the duty of the defendant, when plaintiff was appointed and qualified, to surrender to the latter the evidence of the debt in question, which is upon simple contract, the payment of which can only be enforced here."

In Grimball v. Patton (1881) 70 Ala. 626, it appeared that testatrix owned certain personal property and choses in action in Alabama. She removed to New York and established her domicil there. Before the removal she appointed one Cruse as trustee of her property in Alabama. Thereafter, she died in New York. An ancillary administrator was appointed in Alabama. Cruse brought an action in an Alabama court to have the will construed, and to have the court pass on the claims of several heirs and next of kin. It was held that he could not maintain the suit, since the right to sue for such relief was vested in the ancillary administrator. The court said: "There being an administrator of Mrs. Grimball's estate rightly appointed in the state, the personal assets within this state must, in the first instance, be paid to him. The law, in its own policy, and for wise and necessary purposes, devolves the legal title on him, and he alone can maintain suits to reduce the personal assets and choses in action to possession. He is entitled to them, first, for payment of the debts in this state, if there be any, and for the payment of the expenses of administration. Second, he is entitled to them for the purpose of ulterior administration."

In Fox v. Carr (1879) 16 Hun (N. Y.) 434, it appeared that the plaintiff was appointed ancillary administrator of the assets, in New York, of a person who was domiciled in North Carolina, and died there. It further appeared that the defendant, also a resident of

North Carolina, had obtained, during the decedent's lifetime, certain money from the latter. This money he obtained in New York, and soon thereafter took to North Carolina. After the plaintiff was appointed ancillary administrator, the defendant came to New York for a temporary purpose. The plaintiff brought suit against him to recover the money there. It was held that the subject-matter of the suit was assets within the state of New York, and therefore the plaintiff could maintain the action for their recovery. The court said: "We think it very clear that if the defendant had removed his domicil to this state, the debt owing by him, not having been paid or sued upon in North Carolina, would have become assets in this state, so that the surrogate of the county in which he took up his domicil would have had jurisdiction to grant letters, under the statute referred to. What difference does it make, so far as the question of jurisdiction is concerned, that he came into this state without the intention of changing his domicil? He thereby voluntarily subjected himself to the courts of this state. Jurisdiction over the demand owing by him to the estate had not been exercised in North Carolina. He had not paid the debt, nor had he been sued upon it. The case was as completely within the letter of the statute above referred to, as if he had removed permanently. Was it not within its meaning? Suppose he had been in this state several years, for a temporary purpose, without the intention of making his domicil here, would not the claim have been assets here, notwithstanding his domicil continued to be in North Carolina? If not, he could successfully avoid paying the debt as long as he should choose to remain here, unless there should be other assets in this state; for foreign administrators cannot sue in our courts without taking out letters here, and no surrogate in this state can grant letters, without assets in his county, upon the estate of a deceased person, not an inhabitant of his county, dying without the state. 2 Rev. Stat. 73, § 23; see Hollister v. Hollister (1854) 10 How. Pr. (N. Y.) 532. If the stay of the defendant in this state for a temporary purpose, however protracted, could have the effect to make the claim against him assets here, the length of his stay is immaterial. It is enough that he is within the state a sufficient length of time to be sued by an administrator of the estate duly appointed here, and that such suit is actually brought in good faith. We have not been referred to any case, and are not aware of any, in which the precise question before us has been adjudged. The result of such examination as we have been able to give to the subject is that the claim in suit was assets in this state, the defendant not having paid it or been sued upon it in North Carolina, or elsewhere, at the time when the plaintiff took out letters here and commenced the present action. This result involves no conflict of jurisdiction. If the views above expressed are correct, the claim in suit ceased to be assets in North Carolina, and became assets here, by the voluntary act of the debtor in coming into this state, followed by suit brought in good faith against him here. Being assets in New York and not in North Carolina, a judgment in favor of the administrator here will be a bar to a future action by the administrators in the latter state."

In Wheelock v. Pierce (1850) 6 Cush. (Mass.) 288, it appeared that a native citizen of the United States died at Tahiti, in the Society islands, while domiciled there. He left a will, made and executed according to the law of Tahiti. His executor carried out the terms of the will and, after paying all the debts and legacies, sent the balance of the estate to an agent in Massachusetts, with instructions to pay the same to the testator's father, the residuary legatee. Thereafter, a creditor of the testator was appointed ancillary administrator in Massachusetts, and he attached the money in the hands of the agent. It was held, in an action by the residuary legatee to recover the balance remitted, that he was entitled thereto, and that the defendant, the ancillary administrator, could not claim the money, since it

was not assets in the state of Massachusetts.

In Dial v. Gary (1881) 14 S. C. 573, 37 Am. Rep. 737, it appeared that an intestate died while domiciled in Massachusetts. The defendant and several other individuals, residents of South Carolina, had executed a bond to the intestate in his lifetime, for the payment of a certain sum of money. An administrator was appointed in Massachusetts, and he assigned the claim on the bond to the plaintiff, a resident of South Carolina. It was held that the plaintiff could not recover on the bond, as this could be done only by an ancillary administrator.

In Davis v. Heralds of Liberty (1912) 39 Pa. Co. Ct. 399, it was held that an ancillary administrator in Pennsylvania could not bring an action there on a judgment obtained by the principal or domiciliary administrator in Georgia, there being no privity between the two administrators.

In the reported case (DE PARIS v. WILMINGTON TRUST CO. ante, 1352), it appeared that several residents of Venezuela entered into a contract there, whereby one of them became the principal obligor on several promissory notes, and the other two became joint guarantors thereof. One of the guarantors died in Venezuela, and his estate was compelled to pay the entire obligation. Thereafter, an ancillary administrator of his estate was appointed in Delaware, and brought an action against the coguarantor for contribution. It was held that the plaintiff could not recover, since the contract was not an asset of the ancillary estate in Delaware.

II. Recovery on insurance policy.

It has been held that an ancillary executor, or administrator, cannot bring an action to recover the proceeds of a life insurance policy, unless the policy has been within the jurisdiction in which the ancillary executor, or administrator, was appointed. Morrison v. Mutual L. Ins. Co. (1890) 57 Hun, 97, 10 N. Y. Supp. 445; Ellis v. Northwestern Mut. L. Ins. Co. (1897) 100 Tenn. 177, 43 S. W. 766.

In Ellis v. Northwestern Mut. L. Ins. Co. (Tenn.) supra, it was held that where an insured died while domiciled in Alabama, and left certain policies of insurance which, at his death, were in the possession of a pledgee in Alabama, an ancillary administrator could not bring suit in Tennessee on the policies.

In Morrisson v. Mutual L. Ins. Co. (1890) 57 Hun, 97, 10 N. Y. Supp. 445, it was held that an ancillary administrator, appointed in New York, could not bring an action in that state on an insurance policy issued by a New York corporation to a resident of Maine, who died in Massachusetts and who never kept the policy in New York.

In Holyoke v. Union Mut. L. Ins. Co. (1881) 84 N. Y. 648, affirming (1880) 22 Hun, 75, it was held that an ancillary administrator appointed in Maine had the right, in preference to a New York domiciliary administrator, to bring an action on a policy of insurance which the decedent acquired by assignment in Maine, and which policy was never outside of that state.

In Sulz v. Mutual Reserve Fund Life Asso. (1895) 145 N. Y. 563, 28 L.R.A. 379, 40 N. E. 242, it appeared that a person whose life was insured with the defendant company, through an agent of the latter in San Francisco, California, removed to New York, where he made his home for some time, and where he kept the insurance policy. Later, he went to Washington and, although he left his wife in New York, he notified the defendant that he had made Washington his home. While still alone and having possession of the insurance policy, Sulz died in Washington. His widow obtained letters of administration in New York, and having renounced her right to obtain letters of administration in Washington, one Thomas was there appointed administrator. Thomas instituted an action in Washington on the policy. A few days later the widow also instituted an action in New York on the policy. It was held that the widow was precluded from prosecuting the suit by the action in Washington.

In Merrill v. New England Mut. L. Ins. Co. (1869) 103 Mass. 245, 4 Am. Rep. 548, it appeared that a resident of

Illinois took out a policy of insurance on his life in the defendant company, a Massachusetts corporation. The policy never left the state of Massachusetts, as the insured, immediately on its being issued, pledged the same to his uncle, a resident of Massachusetts, as security for a loan. While the uncle had possession of the policy, the insured died in Illinois. An administrator was there appointed, and he brought an action in Illinois on the policy. Subsequently the uncle in Boston was appointed ancillary administrator. He also instituted an action on the policy in the Massachusetts courts. It was held that the uncle was entitled to sue, and that the action in Illinois was no bar to his right to recover. It seems, however, that the decision was rested not so much on the uncle's right as ancillary administrator, as on his right as pledgee of the policy.

III. Recovery of corporate stock.

Where certificates of stock are left as part of the personal estate of a decedent, in order that an ancillary executor or administrator may maintain an action thereon, it must appear that the certificates of stock are assets within the jurisdiction of his appointment.

Thus, in Lockwood v. United States Steel Corp. (1912) 153 App. Div. 655, 138 N. Y. Supp. 725, it appeared that a resident of New York purchased certain shares of stock of the defendant, a New Jersey corporation. Thereafter, she removed to and resided in the island of Bermuda, where she died. The plaintiff was appointed ancillary executor in New York, and he brought suit to compel the defendant to transfer the stock to his name. A demurrer to the complaint was sustained on the ground that the defendant was a foreign corporation, and, as the decedent was domiciled in the island of Bermuda, she left no personal property situated in New York.

In Willing v. Perot (1835) 5 Rawle (Pa.) 264, the action was brought by an ancillary administrator to recover certain United States certificates of stock, and also the dividends thereon. It appeared that the owner of the stock died domiciled in Calcutta. He left a will by which he appointed his widow and sons executors. The latter made an assignment of their interests in the American assets to the defendants, as trustees. Thereafter, the surviving executor revoked the assignment, and appointed one Agobeg as attorney, substituting him for the defendants. Later Agobeg substituted the plaintiff in his stead, who obtained ancillary letters of administration in Pennsylania, where the defendants resided. The defendants contended that the plaintiff could not recover the stock or the dividends, since they, the defendants, held the stock under the authority of the foreign executors. The court held this contention to be untenable, saying: "The principle of this case was settled in Brodie v. Bickley (1830) 2 Rawle (Pa.) 431. The contest is, in fact, between a local administrator and the representatives of the executor at Calcutta, who set up his title as a defense to an action against a third party in possession of the assets. In any other community than one which has heretofore suffered an action to be maintained on a foreign grant of administration, the question would not bear a moment's consideration. But the maintenance of such an action here could have respect but to cases where there is no local administrator; for it certainly was not intended to postpone his title to one derived from any foreign authority whatever. Any other construction would put the domestic creditors in the power of foreign agents and foreign laws, whose disposition of the assets might be less favorable to them; and the duty payable to the state under the Collateral Inheritance Law would be evaded altogether. No foreign power can step between the administrator and the assets. They must be collected and administered, in the first instance, to satisfy domestic charges, and afterwards distributed, or, should circumstances require it, remitted to the foreign executor to answer the same purpose there. But he can obtain them only from the local administrator, into whose hands they must go in the first instance; and the

defense made here is, therefore, not to be sustained. Judgment for plaintiff."

IV. Preference over domiciliary executor or administrator.

In Purcell v. Heinberger (1858) 3 **Ohio** Dec. Reprint, 343, it was held that an ancillary administrator has the right, in preference to a domiciliary administrator, to bring an action to collect the personal assets of the intestate within the ancillary jurisdiction.

In Harrison v. Mahorner (1848) 14 **Ala.** 829, it was held that, as between a domiciliary executor appointed in Virginia and an ancillary executor appointed in Mississippi, the former had the right to bring an action in Alabama against a person who was indebted to the estate.

As to the right of an ancillary administrator to recover from the domiciliary administrator a certificate of deposit, representing funds on deposit in the ancillary jurisdiction, see McCully v. Cooper (1896) 114 **Cal.** 258, 35 L.R.A. 492, 55 Am. St. Rep. 66, 46 Pac. 82, set out supra, I.

Where a nonresident debtor voluntarily pays a debt to the domiciliary administrator, an ancillary administrator cannot thereafter sue for the debt. Thus, in Wilkins v. Ellett (1870) 9 Wall. (**U. S.**) 740, 19 L. ed. 586, it appeared that one Quareles died in Alabama, domiciled there. An administrator of his effects was appointed in Alabama. A resident of Tennessee owed the estate a certain sum of money, which he voluntarily paid to the administrator. Thereafter, the plaintiff was appointed ancillary administrator in Tennessee. He brought an action to recover the debt. It was held that the payment to the Alabama administrator protected the debtor.

In Maas v. German Sav. Bank (1903) 176 **N. Y.** 377, 98 Am. St. Rep. 689, 68 N. E. 658, affirming (1902) 73 App. Div. 524, 77 N. Y. Supp. 256, it appeared that a resident of New Jersey died, leaving money on deposit in a bank in New York. The bank voluntarily and in good faith paid the amount of the deposit to the administrator appointed in New Jersey. Prior to the payment, an ancillary administrator in New York had been appointed, but the bank had no notice thereof. It was held that the payment protected the bank from liability to the ancillary administrator. The court said: "It is thus apparent that the plaintiff, upon receiving letters of administration in this state, became entitled to the assets of his intestate, and had the right to collect from the defendant the amount she had on deposit in the bank at the time of her decease. He, however, was required to act with reasonable despatch. He could not be permitted to remain silent and suffer the administrator of the domicil to collect the debts and carry away the assets, without objection or the disclosing of his appointment as administrator in this state to the persons owing the debts, or having the custody of the assets, and then recover from them. As we have seen, the plaintiff was appointed administrator in this state on the 9th day of March, 1899, and for five months and a half thereafter he remained idle, taking no steps to give notice to the defendant bank of his appointment, or to make any demand upon it to pay him the amount on deposit, until after the administrator of the domicil had called upon the bank for payment, and received the amount due from it to the estate. We consequently conclude that the act of the bank in making the payment to him in good faith, without knowledge that another administrator had been appointed in this state, operated as a discharge of the indebtedness."

But in Stone v. Scripture (1870) 4 Lans. (**N. Y.**) 186, it appeared that Scripture borrowed the sum of $300 from Stone. To secure the repayment of the loan, the borrower gave to the lender a bond, and also a mortgage on a farm in New York. At the time of this transaction the lender was a resident of New Hampshire, and continued to reside there until he died. He was survived by three brothers, two residing in New York, and one residing in New Hampshire. Until the death of the lender, the bond and mortgage were in his possession in New Hampshire, but thereafter came into the hands of one of his brothers living in

New York. The brother residing in New Hampshire, assisted by the brother who had the bond and mortgage, undertook to collect the debt, without having obtained letters of administration. He collected the entire amount, and interest, before any letters of administration were issued. However, he subsequently was appointed administrator in New Hampshire, and later, as administrator, gave a satisfaction piece of the mortgage to the borrower. Thereafter one of the brothers, living in New York, was there appointed ancillary administrator, and he brought an action to foreclose the mortgage. It was held that he had the right to maintain the action, as the satisfaction piece given by the domiciliary administrator was of no force or effect.

V. Defenses.

It has been held that, where a claim has been presented to and rejected by the domiciliary administrator, the rejection, which becomes a matter of judicial record, is a bar to a presentation of the claim to the ancillary administrator. Goodall v. Marshall (1843) 14 **N. H.** 161. But in Wilson v. Hartford Fire Ins. Co. (1908) 19 L.R.A.(N.S.) 553, 90 C. C. A. 593, 164 **Fed.** 817, it was held that an ancillary administrator could not plead, in bar to an action on a claim against a decedent's estate, a judgment against the plaintiff rendered in a previous action by the latter, and for the same claim, against the domiciliary executor. And in Taylor v. Baron (1857) 35 **N. H.** 484, it appeared that a creditor presented his claim to the commissioners appointed in the domiciliary state to administer the decedent's estate. The commissioners rejected the claim. Thereafter, the creditor presented his claim to an ancillary administrator, appointed in another state than that in which the decedent was domiciled. The latter also rejected the claim, and the claimant then instituted the action against him, to which the defendant pleaded the former rejection. It was held that, since there existed no privity between the respective administrators, and since the first rejection of the claim was not a judicial proceeding, it was not available as a bar to the proceeding against the ancillary administrator.

In Richards v. Blaisdell (1909) 12 **Cal.** App. 101, 106 Pac. 732, it was held that a judgment obtained by a domestic creditor against the executor of a resident deceased debtor could not be used as the basis of a suit against an ancillary executor of the debtor, nor as evidence of the indebtedness.

In Kennedy v. Kennedy (1845) 8 **Ala.** 391, it was held that an ancillary administrator, who was a debtor of the decedent, could plead his appointment in bar to an action on the debt by a foreign administrator of the decedent's estate.

In Hopper v. Hopper, 125 **N. Y.** 400, 12 L.R.A. 237, 26 N. E. 457, it appeared that a testator was a resident of New Jersey. His widow was appointed executrix in that state, and later she was also appointed an ancillary executrix in New York. It further appeared that the testator in his lifetime carried on a brokerage business, as a member of a firm in New York. After his widow obtained ancillary letters of administration, the plaintiff, a creditor of the brokerage firm, brought an action against her as ancillary executrix, to recover his claim, it appearing that the firm was insolvent. The defendant contended that she could not be sued in New York, as she was a foreign executrix. But the court held that, as she had obtained ancillary letters of administration in New York, and was within that jurisdiction, her contention was untenable. C. M.

E. M. THOMPSON et al.
v.
HAMLIN B. BOWES.

Maine Supreme Judicial Court—April 3, 1916.

(115 Me. 6, 97 Atl. 1.)

Adverse possession — right of way — church property.

1. A prescriptive way may be acquired across church property.

[See note on this question beginning on page 1368.]

Appeal — stipulation — question open.

2. That the writ in an action for obstructing a right of way does not set it out by metes and bounds is not open on appeal where the parties stipulate that judgment is to be entered for plaintiff if he has a right of way.

Adverse possession — use by others — effect.

3. The occupants of a building are not precluded from securing a right of way by prescription over adjoining property by the fact that other persons used the way whenever they had occasion to do so.

REPORT by the Supreme Judicial Court for Knox County for the opinion of the full bench of an action brought to recover damages for the obstruction of an alleged right of way. *Judgment for plaintiffs.*

The facts are stated in the opinion of the court.

Mr. **Arthur S. Littlefield,** for plaintiffs:

Private property belonging to a church corporation is in no different situation as to adverse possession or rights than is any private corporation or individual.

Ft. Smith v. McKibbin, 41 Ark. 45, 48 Am. Rep. 19; Wheeling v. Campbell, 12 W. Va. 36; Cary v. Whitney, 48 Me. 532; Charlotte v. Pembroke Iron Works, 82 Me. 393, 8 L.R.A. 828, 19 Atl. 902; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; Kinsell v. Daggett, 11 Me. 309; Greenl. Ev. 50; Crooker v. Pendleton, 23 Me. 341; Board of Education v. Martin, 92 Cal. 215, 28 Pac. 799; Pella v. Scholte, 24 Iowa, 293, 95 Am. Dec. 729; Almy v. Church, 18 R. I. 182, 26 Atl. 58; Mowry v. Providence, 10 R. I. 57; Society for Propagation of Gospel v. Sharon, 28 Vt. 603; Kennebunkport v. Smith, 22 Me. 445.

Messrs. **Edward C. Payson** and **Rodney I. Thompson,** for defendant:

The doctrine of adverse user does not apply to cases like the one at bar.

Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754; Gloucester v. Beach, 2 Pick. 60, note; Com. v. Fisk, 8 Met. 238; Harper v. Parish of the Advent, 7 Allen, 480; Sprow v. Boston & A. R. Co. 163 Mass. 330, 39 N. E. 1024; Mullen v. Clark, 203 Mass. 13, 89 N. E. 112; Thomas v. Marshfield, 13 Pick. 240; Com. v. Newbury, 2 Pick. 60; Burnham v. McQuesten, 48 N. H. 446; Warren v. Jacksonville, 15 Ill. 241, 58 Am. Dec. 610.

In order to obtain an easement by adverse user there must have been something that plaintiffs have used,—something definite. Such definiteness is necessary.

South Branch R. Co. v. Parker, 41 N. J. Eq. 490, 5 Atl. 641; Oliver v. Hook, 47 Md. 301; Jones v. Percival, 5 Pick. 485, 16 Am. Dec. 415; 3 Kent, Com. 419; Gentleman v. Soule, 32 Ill. 271, 83 Am. Dec. 264; Hall v. McLeod, 2 Met. (Ky.) 98, 74 Am. Dec. 400; Bowman v. Wickliffe, 15 B. Mon. 84; Arnold v. Cornman, 50 Pa. 361.

Savage, Ch. J., delivered the opinion of the court:

This case comes before this court upon the following report: This is an action on the case by the owners of Moneka Block in Union to recover against the defendant for obstructing an alleged right of way. The defendant has built a building over the right of way claimed. The way claimed is around the east end of

Moneka Block. The southerly line of said block faces Union common. Said way claimed is across land which is a part of the Free Church lot, so-called, which church is a duly organized and a regular parish under the laws of this state. The block, church, surrounding land, and buildings are as shown on the plan. The said church was built in 1839, and that and the lot have, up to within less than twenty years, been used for the church purposes. Moneka Block was built in 1857, and since that time the way in question has been so used by the owners of said block as would give them a right of way if the property over which it is claimed were private property, unless the fact that others used it would prevent the acquisition of that right; it being admitted that the use by the plaintiff was not exclusive, but that others having occasion used it. The defendant contends that no right of way could be acquired across said church property. If the plaintiffs have a right of way, judgment is to be awarded for them for an amount sufficient to carry costs; otherwise judgment is to be entered for the defendant.

The defendant objects in the first place that plaintiffs in their writ have not set out any right of way by limits and bounds, and have left the location of the claimed right indefinite and uncertain. But that question is not before us. The parties have stipulated in the report that, "if the plaintiffs have a right of way," judgment is to be awarded for them. The existence of a right of way is the only question submitted to the court; not its location.

Appeal—stipulation—question open.

It is admitted that the plaintiffs have used the way in such manner and for such length of time as would have gained for them a prescriptive right of way if the land over which the right is claimed had been private property. By the phrase "private property" we understand is meant property belonging to a private individual; for church property is private property as distinguished from the property of the state or of a municipality, which is public property. Property held for pious or charitable uses, not for the whole public, but for a limited portion of the public, is private property, and, as such, we have no doubt, is subject to the application of the doctrine of prescriptive easements. Kinsell v. Daggett, 11 Me. 309; Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754; Burnham v. McQuestion, 48 N. H. 446; Society for Propagation of Gospel v. Sharon, 28 Vt. 603; Mowry v. Providence, 10 R. I. 52. Accordingly we hold that a right of way could be acquired by prescription across the church property.

Adverse possession—right of way—church property.

Was such a right of way acquired? Certainly the fact that others having occasion used it did not prevent the plaintiffs from acquiring the right for themselves. That needs no argument.

Same—use by others—effect.

The space between the plaintiffs' building and the church edifice was about 16 feet wide. The exhibits which are made a part of the report show that the land in front of and about the church edifice, including that at the side of it over which the right of way is claimed, was open and uninclosed. And, this being so, the defendant relies largely upon Kilburn v. Adams, 7 Met. 33, 39 Am. Dec. 754, in which case Chief Justice Shaw, speaking for the court, said that, where a tract of land attached to a public building, such as a meetinghouse, and occupied with such house, is designedly left open and uninclosed, for convenience or ornament, the rule is that "the passage of persons over it, in common with those for whose use it is appropriated, is in general to be regarded as permissive, and under an implied license, and not adverse. Such a use is not inconsistent with the only use which the proprietors think fit to make of it; and therefore, until they think proper to inclose it, such use is not adverse, and

will not preclude them from inclosing it, when other views of the interests of the proprietors render it proper to do so. And, though an adjacent proprietor may make such use of the open land more frequently than another, yet the same rule will apply, unless there be some decisive act indicating a separate and exclusive use, under a claim of right. A regularly formed and wrought way across the ground, paved, macadamized, or graveled, and fitted for use as a way, from his own estate to the highway, indicating a use distinct from any use to be made of it by the proprietors, would, in our opinion, be evidence of such exclusive use and claim of right. So would be any plain unequivocal act indicating a peculiar and exclusive claim, open and ostensible, and distinguishable from that of others. But the fact that a particular track or line was a little more worn and marked by travel than the general surface of the lot, or that the adjacent proprietor had occasionally leveled a spot gullied by the rain, could scarcely be regarded, independently of other proof, as indicative of a claim of right."

We do not question the soundness of this doctrine.

But it will be noticed that the discussion in Kilburn v. Adams relates to the evidentiary force of long and uninterrupted user for a way of the uninclosed lands about an academy building, which, of course, would be the same in case of a church edifice, as in the present case. It relates to a presumption of a permissive use under an implied license. It points out that evidence of decisive acts of an adverse character are necessary to overcome the presumption of possession. It marks, to a certain extent, a distinction between the use of such lands and those of a private proprietor. The general rule sustained in most jurisdictions is that, where the claimant has shown an open, visible, continuous, and unmolested use for twenty years or more, inconsistent with the owner's rights, and under circumstances from which may be inferred the knowledge and acquiescence of the owner, the use will be presumed to be under a claim of right, and adverse to the owner, so as to place upon the owner, in order to avoid the acquisition of a prescriptive easement, the burden of rebutting this presumption by showing that the use was permissive. Barnes v. Haynes, 13 Gray, 188, 74 Am. Dec. 629; Blake v. Everett, 1 Allen, 248; 9 R. C. L. 781. See Rollins v. Blackden, 112 Me. 450, 92 Atl. 521, Ann. Cas. 1917A, 875. But, as held in Kilburn v. Adams, where the use is of the open and uninclosed lands about a quasi public building, as a church or academy, the presumption is otherwise, and the distinctively adverse character of the use must be shown to rebut the presumption of permission.

Now, the distinction between Kilburn v. Adams and the case at bar is this: In this case the presumption arising from possession is not a factor. It is admitted that the use was of such a character as would give the plaintiffs a right of way as against an individual proprietor. Such a use was necessarily adverse. The admission excludes any inference of permission. No presumption of permissive use is admissible. We must hold, therefore, that the plaintiffs' use of the way has been adverse for the requisite period of time to acquire a prescriptive easement. And since, as we hold, such an easement may be acquired in the land of a church society, it follows that the plaintiffs have a legal right of way, and are entitled to judgment.

Judgment for plaintiffs for $21.

ANNOTATION.

Acquisition by user or prescription of right of way over uninclosed land.

I. In general, 1368.
II. Ordinary uninclosed land, 1368.
III. Over church, school, or similar property, 1373.

I. In general.

The prevailing principle seems to be that, while a way may be acquired by user or prescription by one person over the uninclosed land of another, mere use of the way for the required time is not, as a general rule, sufficient to give rise to the presumption of a grant; hence, it generally requires some circumstances or act, in addition to or in connection with the use of the way, tending to indicate that the use of the way was not merely permissive. The reasons underlying this rule are stated by the courts in various forms. See quotations infra.

But the courts in Pennsylvania and in West Virginia have held consistently to the proposition that there is no distinction in this regard between inclosed and uninclosed land, and that the mere use of the way in either case for the required time will give rise to the presumption of a grant. See cases from these states cited infra. It will also be noted that, in the former state, the legislature changed the rule in 1850 so far as it applied to uninclosed woodland, making it impossible to acquire a way by user or prescription over the uninclosed woodland of another. See Bosch v. Hoffman (1910) 42 Pa. Super. Ct. 313, infra.

On the other hand, in two South Carolina decisions (Rowland v. Wolfe (1828) 1 Bail. L. (S. C.) 56, 19 Am. Dec. 651, and M'Kee v. Garrett (1830) 1 Bail. L. (S. C.) 31, infra) the court goes to the opposite extreme, holding that a way over uninclosed land cannot, under any circumstances, be acquired by user or prescription. But in later decisions this principle has been overruled and the general rule above stated has been adopted. See Smith v. Kinard (1835) 2 Hill, L. (S. C.) 642, note, and other South Carolina cases, infra.

II. Ordinary uninclosed land.

A right of way by one person over the uninclosed land of another may be acquired by user or prescription. Short v. Walton (1878) 61 Ga. 28; Hansford v. Berry (1893) 95 Ky. 56, 23 S. W. 665; Worrall v. Rhoads (1837) 2 Whart. (Pa.) 427, 30 Am. Dec. 274; Reimer v. Stuber (1853) 20 Pa. 458, 59 Am. Dec. 744; Fisher v. Farley (1854) 23 Pa. 501; Kurtz v. Hoke (1896) 172 Pa. 165, 33 Atl. 549 (but rule changed by statute); Sims v. Davis (1839) 1 Cheves, L. (S. C.) 1, 34 Am. Dec. 581; Smith v. Kinard (1835) 2 Hill, L. (S. C.) 642, note; Walton v. Knight (1907) 62 W. Va. 223, 58 S. E. 1025. Also see other cases cited under the following headings.

In Worrall v. Rhoads (1837) 2 Whart. (Pa.) 427, the court said: "By analogy to the Statute of Limitations of 21 Jac. I., chap. 16, relating to lands in England, the general rule established on the subject is, that an uninterrupted enjoyment of such an easement as is claimed here, for the space of twenty years, unanswered and unexplained, affords presumptive evidence of title. Campbell v. Wilson (1803) 3 East, 294, 102 Eng. Reprint, 610, 7 Revised Rep. 462, 2 Starkie, Ev. 5th Am. ed. 914. And though this presumption may be repelled by evidence which accounts for the possession or user, without resorting to a title by grant or otherwise, yet I am not aware that, before this case, it was ever thought, much less adjudicated, that the circumstance of the land being uninclosed, whether clear or woodland, over which the way or road was used and occupied for the space of twenty-one years, or upwards, was sufficient to repel or rebut the presumption. It cannot be pretended that one man has a right to enter or pass, even for a single occasion, upon the land of another, without some authority, either of law or by the consent of the latter, notwithstanding it may be clear or woodland uninclosed.

And certainly much less can it be claimed that he has a right to do so, and to use it at all times and continuously for all purposes as his right of way, as would seem to have been the case here, without having a title to warrant it. 'The land,' says the author of the Doctor and Student, diag. 1, chap. 8, p. 30, 'of every man is in the law inclosed from other, though it lie in the open field; and therefore, if a man do a trespass therein, the writ shall be quare clausum fregit.' "

In Hansford v. Berry (1893) 95 **Ky.** 56, 23 S. W. 665, the court reviewed the earlier Kentucky cases on this question, saying: "The case of Bowman v. Wickliffe (1854) 15 B. Mon. (Ky.) 84, is relied on as sustaining the position that no presumption arises in favor of the adverse use of a pass way over woodland, but that the presumption is that the passage over woodland is by permission of the owner. It will be seen from the Bowman Case that for many years there were several pass ways over the owner's woodland; that they were changed from time to time by the owner, and one or the other discontinued as he cleared the land, and new ones opened, and that no one claimed the pass way as a matter of right, but all claimed it by permission only. Under these circumstances the court held that there was no presumption of adverse use, although such permission had continued for many years; that in order to create a right of way by prescription, it must be shown that it was claimed and used as an adverse right for at least fifteen years, and as long as it was used permissively no presumption of adverse use could arise. In the case of O'Daniel v. O'Daniel (1889) 88 **Ky.** 185, it was held that the Bowman Case (Ky.) supra, was unlike that case, because there the pass way had not only been practically upon the same ground for many years, but the circumstances of the locality and constant and necessary use made it evident that it had been used adversely and under a claim of right. The case of Conyers v. Scott (1893) 94 **Ky.** 123, 21 S. W. 530, reviews the Bowman and O'Daniel Cases and points out the distinction very clearly. The case of Talbott v. Thorn (1891) 91 **Ky.** 417, 16 S. W. 88, does the same. The doctrine established by the three cases supra is, that a right to a pass way may be created by prescription over woodland if continued the requisite length of time. In such case the question is: Was the pass way used as a matter of right for the period of fifteen years or more? If it was, and not in the manner indicated in the Bowman Case, the right will be established over woodland as well as over inclosed land. Now let us see what the weight of the evidence establishes. It is, first, that the appellant has no other way to reach the Livermore public road, which leads to the county seat, than the way in controversy. Second, that it has been used for such purpose at least fifty years, and by the appellee at least twenty years. And third, that the pass way has been all the time substantially at the same place, and all the time has had a well-defined roadbed. Fourth, that the way has been kept up by the appellee as his pass way; that the changes in it are only such as resulted occasionally from the fall of a tree across the roadbed, or similar obstructions. These facts clearly create the presumption that the pass way was used as a matter of right, and having been so used for fifteen years or more, the appellee's right to its continued use is established." But see quotation from Bales v. Rafferty (1914) 161 **Ky.** 511, 170 S. W. 1184, infra.

Since the passage of the Act of 1850, no right of way can be acquired by user or prescription over uninclosed woodland in Pennsylvania. Bosch v. Hoffman (1910) 42 **Pa.** Super. Ct. 313.

In Fisher v. Farley (1854) 23 **Pa.** 501, it was held that a statute providing that "no right of way shall hereafter be acquired by user where such way passes through uninclosed woodland" is not applicable to a case where the right had become perfect before the passage of the statute; and the case was cited and followed in Peter v. Hunsiker (1857) 28 **Pa.** 202.

Where a statute abrogates the com-

mon-law rule as applied to "uninclosed woodland," the fact that the way lies across cleared land also does not aid in acquiring the right of way across the woodland. Kurtz v. Hoke (1896) 172 Pa. 165, 33 Atl. 549.

User alone does not give rise to the presumption of a grant of a right of way over uninclosed land. Trump v. McDonnell (1898) 120 Ala. 200, 24 So. 353; Warren v. Jacksonville (1853) 15 Ill. 241, 58 Am. Dec. 610; Bowman v. Wickliffe (1854) 15 B. Mon. (Ky.) 84; Conyers v. Scott (1893) 94 Ky. 123, 21 S. W. 530; Downing v. Benedict (1912) 147 Ky. 8, 143 S. W. 756; Sims v. Davis (1839) Cheves, L. (S. C.) 1, 34 Am. Dec. 581; Smith v. Kinard (1835) 2 Hill, L. (S. C.) 642, note; Watt v. Trapp (1845) 2 Rich. L. (S. C.) 136; Gibson v. Durham (1846) 3 Rich. L. (S. C.) 85; Hutto v. Tindall (1853) 6 Rich. L. (S. C.) 396; Watson v. Adams County (1905) 38 Wash. 662, 80 Pac. 201; Schulenbarger v. Johnstone (1911) 64 Wash. 202, 35 L.R.A. (N.S.) 941, 116 Pac. 843.

Thus, in Sims v. Davis (1839) Cheves, L. (S. C.) 1, 34 Am. Dec. 581, the court said: "Since this case was argued, we have carefully considered and examined it; and we all concur in the opinion that a right of way may exist by prescription over the uninclosed woodlands of another, subject to the qualifications and limitations hereinafter stated. As a general rule, I would say that the use of every such way is permissive, or held at sufferance, where the claimant has done no act showing that he claimed the right adversely, and the allowance of the use by the owner of the soil has been unaccompanied by any act which shows a recognition, on his part, of the right of the claimant to use the road without his permission. Most of the old roads which, like this, lead from one public road to another, or from neighborhood to neighborhood, sprang up from accident. In the early settlement of the country, paths through the woods were made by repeated traveling along the same track. In process of time, by continued use, these tracks were enlarged into cart and wagon ways. They were convenient to the proprietor's neighbors and did not interfere with his dominion over the land. In the beginning, therefore, they may be said to have originated in the tacit permission of the owner. The use continued in the same way, no one ever supposing that a use thus commencing could ever ripen into a right. An adverse use must be something for which the owner may sue: it must be something hostile to his entire dominion over his property. In England lands are, generally, if not altogether, inclosed, and to enter on a man's land is, literally, to break his close; but in this country, the fact is otherwise. Most of the land is uninclosed, and I can scarcely conceive it possible that the riding over such lands, and, especially, along a road which has originated in the implied assent of the owner, can be even a technical trespass, until the implied permission has been revoked. We feel the difficulty of laying down general rules to govern all cases, and it is not intended to do it on this occasion; but we think we may venture to say that no right of way can arise from merely riding or walking over a man's uninclosed woodland, unless there be some assertion of ownership by the claimant, or some act of the owner of the soil showing an admission that the claimant had a right. Thus, if the claimant laid out the road and used it for twenty years; or if he worked on, enlarged, or kept it in repair; or if the owner of the soil cleared the land and left a lane for the claimant's use; these, with acts of the like kind, would seem to amount to an assertion of a right on the one part, and an admission of it on the other."

And in Trump v. McDonnell (Ala.) supra, it was said: "In view of the custom of the country and the usage of the people to pass without hindrance over uninclosed land, whether it be woodland which has not been reclaimed for the purpose of husbandry, or lands which, having once been reclaimed and put to the uses of agriculture, have been 'turned out' and left open as 'old fields' (to employ the expressions of common parlance), the law is settled with us that the mere user of such land for road purposes, involving, as it does, ordina-

rily, no injury to the owner having presently no end to subserve by excluding others from it, carried with it no presumption of adverse claim or claim of right to so use it; and of necessary consequence that the adverse character of such user, if it has such character, essential to the establishment of a continuing right of user resting on prescription or the like, must be shown by evidence aliunde, so to speak,—evidence other than the fact of user, however long continued. The presumption in such cases is that the user is permissive; and it is a perfectly natural presumption, since the use conflicts with no interest of the owner in the land, does not interfere with any use he presently desires to make of it, nor curtail or limit in any way his enjoyment of it in the state and condition in which he has put it or allowed it to remain, and very frequently, as in this case, conserves the ends of good neighborhood. We need do no more on this branch of the case than to cite the adjudications of this court. Sultzner v. State (1869) 43 Ala. 30; Steele v. Sullivan (1881) 70 Ala. 595; Gage v. Mobile & O. R. Co. (1887) 84 Ala. 224, 4 So. 415; Rosser v. Bunn (1880) 66 Ala. 89."

Likewise, in Bowman v. Wickliffe (1854) 15 B. Mon. (Ky.) 84, supra, the court said: "It has been usual and customary in this state to travel over uninclosed woodland without asking the permission of the owner; and considering the extent and universality of this custom, it tends strongly, if not conclusively, to repel any presumption that might otherwise arise, in such a case, from long continued use of the grant of the right of way by the proprietor of the land. The mere use of this road, then, during the period of time that the land through which it passed was uninclosed woodland, cannot be regarded as proving anything detrimental to the rights of the proprietors of the land. Roads also are frequently made and left open by the owners of land for their own convenience, and the mere fact that other persons are permitted to use and enjoy such roads does not, of itself, tend to create a presumption of a grant of the right of way by the proprietor of the soil, to them or to the public. The use of a pass way, to create a presumption of a grant, must have been claimed and enjoyed as a right, and not merely as a privilege, which the proprietor of the land might have withdrawn at his pleasure."

And the Kentucky cases are reviewed in Bales v. Rafferty (1914) 161 Ky. 511, 170 S. W. 1184, where the court said: "It appears from the evidence that the pass way in dispute has been used by Bales and his vendors, immediate and remote, for more than forty years; that until about twenty years ago, the land through which it ran was woodland and waste fields, uninclosed. And it is claimed by appellee that because the land was uninclosed, the law presumes the use of a pass way over same to have been permissive; that having been permissive in its inception, it remained so, in the absence of acts apprising the owner of a change in the character of the claim thereto. In support of this contention are cited the following cases: Bowman v. Wickliffe (1854) 15 B. Mon. (Ky.) 98; Wilkins v. Barnes (1880) 79 Ky. 323; Wray v. Brown (1913) 155 Ky. 757, 160 S. W. 488, and Downing v. Benedict (1912) 147 Ky. 8, 143 S. W. 756. But we do not think these cases go so far as appellee suggests. The doctrine of these cases is that the use of a pass way across uninclosed lands of the character mentioned is not ordinarily deemed to be adverse, and therefore proof of continuous and uninterrupted use thereof for more than fifteen years does not raise a conclusive presumption of grant and the ripening of a hostile right. The use of a pass way through uninclosed woodland and waste lands uninclosed may be proven to be adverse where the pass way in question was the only outlet to public highways available to the claimant thereof. O'Daniel v. O'Daniel (1889) 88 Ky. 185, 10 S. W. 638; Talbott v. Thorn (1891) 91 Ky. 417, 16 S. W. 88; Hansford v. Berry (1893) 95 Ky. 57, 23 S. W. 665. In this case, it appears from the evidence that Bales and his vendors had and

did use prior to Rafferty's inclosure of his farm about twenty years ago, two ways of travel in getting out to a county road over Rafferty's land, both ways beginning at the same point in the line between Rafferty and the farm now owned by Bales; one of the ways, that in dispute, running across Rafferty's back lands out to the county road; and the other running by Rafferty's house to the county road. The route chosen by Bales's vendors depended on which way they were going after reaching the county road. It is conceded that the pass way by the house was purely permissive. And, in addition, Bales's vendors had access to a county road by other routes. Under this state of facts, the use of the disputed pass way up to twenty years ago, when Rafferty inclosed his farm, was not adverse; and no length of time would ripen such user into a hostile right."

In Rowland v. Wolfe (1828) 1 Bail. L. (S. C.) 56, 19 Am. Dec. 651, it was said: "Most of the old roads in this country were, as they must be in every new and unsettled country, laid out by accident, or as convenience might direct, without the sanction of public authority. They were afterwards altered, changed, or entirely discontinued, as population advanced, or as necessity or convenience required. The road in question appears to me to be one of that description. It has become so unimportant as not to be considered worthy the attention of the commissioners of the roads; but has, nevertheless, remained a public neighborhood road, common to all who have thought proper to travel that way. It has been convenient for the plaintiff, in passing from one plantation to another, to travel along that road; but there is no evidence to show that he has any exclusive right. No man has a right to appropriate the property of another to his own use. A right of way over the land of another is an accommodation, which no one can claim without an equivalent. A right by prescription is founded on a presumption that a grant once existed, which has been lost by lapse of time. But lapse of time is not alone sufficient to afford such a presumption. The use must be adverse to the claim of the owner of the land. Merely passing over an uncultivated and uninclosed forest, which is common to everyone, cannot, by any lapse of time, give a right to any individual. To determine a question of this sort, we must look to the situation of the country and the habits of the people. We know that it is an indulgence allowed to everybody, by the universal consent of the country, to make roads through uninclosed lands in any direction, without any kind of restraint. But no one ever dreamed that by this kind of courtesy a neighbor might, by and by, claim a right to such a road, to the exclusion of the owner of the soil. Such an use is not adverse. It deprives the owner of no right, and subjects him to no inconvenience. A privilege thus enjoyed can never be claimed as a right." And this case was cited and followed in M'Kee v. Garrett (1830) 1 Bail. L. (S. C.) 341. But in Smith v. Kinard (1835) 2 Hill, L. (S. C.) 642, note, the court expressly repudiates the doctrine of these cases so far as they indicate an impossibility of acquiring the way by prescription, and it establishes the rule as already stated at the beginning of this note.

And it was said in Nash v. Peden (1842) 1 Speer, L. (S. C.) 17: "I think it is now pretty well settled by the cases of Sims v. Davis (1839) Cheves, L. (S. C.) 1, 34 Am. Dec. 581, and Hogg v. Gill (1841) 1 McMull. L. (S. C.) 329, that no prescriptive way can be established otherwise than by an adverse use of it for twenty years; and where the way passes through forest land, the mere use, unaccompanied by any acts indicating that the party claims the use as a right, cannot give a right of way. In this case the acts from which the plaintiff attempts to give an adverse or hostile character to his use are, that he cut out a tree or trees that had fallen across the path, and that at different times the way had passed on one side of the pond, then on the other, and at another time through the edge, one of which changes had been made by the plaintiff. Exactly when these changes were made, the

report of the case does not inform us. The use, I apprehend, in order to give title, must have assumed its character as adverse, twenty years before the right can accrue; though I would not be understood to lay it down as a rule of law that some assertion of right, by use hostile to the owner's title, should be proved to have been made twenty years before. These recent acts, acquiesced in by the owner, may go to the jury as evidence that the use had been in derogation of the owner's right for the full term of twenty years. In this case we are of opinion the acts proved are not such as establish a use hostile to the right of the owner of the soil. They are perfectly consistent with the supposition that the use was permissive, as all these roads through woodland are presumed to be, until some evidence is offered to give them a different character, which the plaintiff in this case has failed to produce. The motion for a new trial is therefore granted."

In Schulenbarger v. Johnstone (1911) 64 **Wash.** 202, 35 L.R.A.(N.S.) 941, 116 Pac. 843, supra, the court said: "It can hardly be contended that it was ever the intent of the law to hold that a private easement could be created over the lands of another at a time when they were open and uninclosed. It has never been so held, although the right be asserted by the public, unless under some controlling circumstances, such as the expenditure of public moneys under the supervision of the road overseer, or some element of acquiescence on the part of the owner, as instanced in the case of State v. Horlacher (1897) 16 **Wash.** 325, 47 Pac. 748. It was held in Watson v. Adams County (1905) 38 **Wash.** 662, 80 Pac. 201, where the court said: 'While we do not now hold that a right of way by prescription cannot be acquired over wild, unoccupied prairie lands, we do hold that, in order to give a prescriptive right, the use must at least be such as to convey to the absent owner reasonable notice that a claim is made in hostility to his title. It seems to us that any other rule amounts to a practical confiscation of private property for public purposes.' "

III. Over church, school, or similar property.

In the cases involving ways over church, school, or similar property, the property was uninclosed, and in most cases the decision turned largely upon the general rule governing uninclosed property. There would seem, however, to be an added reason for the rule in respect to property of this class; i. e., the semipublic character of the property and the usual liberality in permitting it to be used in all ways not detrimental to its use by the owner. In the reported case (THOMPSON v. BOWES, ante, 1365), however, the court observed that the defendant's admission that the use was of such a character as would give the plaintiff a right of way as against an individual, excluded any inference of permission.

And the rule which requires more than mere use of the way for the required time to acquire the right seems specially applicable to uninclosed land surrounding a church, schoolhouse, or other similar building. Kilburn v. Adams (1843) 7 Met. (**Mass.**) 33, 39 Am. Dec. 754 (see quotation in THOMPSON v. BOWES); Gloucester v. Beach (1821) 2 Pick. (**Mass.**) 60, note; Burnham v. McQuesten (1869) 48 **N. H.** 446.

In Gloucester v. Beach (1821) 2 Pick. (**Mass.**) 60, note, the court said: "Here there were many circumstances to strengthen the presumption of a grant (which the counsel stated in detail), and the use was clearly adverse and equivalent to a claim as of right. The use made by the defendant of the passage was peculiar and unlike that made by any other persons; it was the only passage to a barn which had been on the lot more than forty years. The verdict must be supported, unless, in the opinion of the court, the presumption of a grant can never arise against a local corporation leaving land uninclosed for any length of time. There was no misdirection; the question put to the jury was whether the way was by indulgence or under a claim of right."

And the court in Putnam v. Bowker (1853) 11 Cush. (**Mass.**) 542, remarked that "the use of a passage

through the yard of a tavern to the lot of an adjoining owner may present a different case from that of the use of public grounds, attached to an academy building."

And it has been held that title may be acquired by adverse possession to land that has been dedicated as a burial ground that serves only a limited portion of the public. Mowry v. Providence (1871) 10 R. I. 52. But this and similar cases are not within the scope of the present note, which is limited to the acquisition of a right of way rather than title to the whole property. J. W. M.

ALBERT LORANDO
v.
JOSEPH C. GETHRO et al.

Massachusetts Supreme Judicial Court — September 13, 1917.

(228 Mass. 181, 117 N. E. 185.)

Insurance — Power of legislature — indemnity — payment of loss.

1. The legislature has constitutional power to provide that indemnity insurance policies subsequently written shall not require payment of the loss by insured as a condition to liability of the insurer, and that the injured person may look to the insurer for compensation.

[See note on this question beginning on page 1381.]

Same — indemnity — absolute liability.

2. A provision in a statute for the attaching of liability of an indemnity insurer that the liability of the insurance company shall become absolute whenever a loss occurs on account of a casualty covered by the contract of insurance does not destroy any ground of defense which may exist against the claim made.

Contract — statutory effect.

3. Persons entering into contracts given special force and effect by statute are held to contemplate and assent to the force and effect which the statute attributes to them.

Legislature — power — providing remedies.

4. The legislature may establish appropriate forms of relief for existing rights, or those rightly created, and it may provide equitable procedure for the enforcement or protection of such rights.

REPORT by the Supreme Judicial Court for Suffolk County for the determination by the full court, after the overruling of a demurrer to a bill filed to enforce payment by the defendant insurance company, of a judgment recovered against defendant Gethro for personal injuries sustained by plaintiff in an automobile accident. *Order overruling demurrer affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Ralph H. Willard, and William H. Taylor,** for defendants:

There was a contract of insurance, and the contract is one of indemnity and not one of liability.

Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; People ex rel. Kasson v. Rose, 174 Ill. 310, 44 L.R.A.124, 51 N. E. 246; Castellain v. Preston, L. R. 11 Q. B. Div. 380; State ex rel. Clapp v. Federal Invest. Co. 48 Minn. 111, 50 N. W. 1028; Hawkins v. McCalla, 95 Ga. 192, 22 S. E. 141; Bain v. Atkins, 181 Mass. 240, 57 L.R.A. 791, 92 Am. St. Rep. 411, 63 N. E. 414; Kinnan v. Fidelity & C. Co. 107 Ill. App. 406; Burke v. London Guarantee & Acci. Co. 47 Misc. 171, 93 N. Y. Supp. 652.

In determining whether the person is insured, the application for insurance and policy must be construed together, and considered in connection

with facts that may develop during the evidence in the course of the trial of the case.

New York L. Ins. Co. v. Hardison, 199 Mass. 190, 127 Am. St. Rep. 478, 85 N. E. 410; Paquette v. Prudential Ins. Co. 193 Mass. 215, 79 N. E. 250.

Statements made by the assured in the application, which subsequently prove untrue, and the untruth of which, if known in the beginning would have influenced the judgment of the insurer in accepting the risk, render the contract void from the beginning, and consequently the person is not insured.

Carstairs v. American Bonding & T. Co. 54 C. C. A. 85, 116 Fed. 449; Deming Invest. Co. v. Shawnee F. Ins. Co. 16 Okla. 1, 4 L.R.A.(N.S.) 607, 83 Pac. 918; National Annuity Asso. v. McCall, 103 Ark. 201, 48 L.R.A.(N.S.) 418, 146 S. W. 125; Bryant v. Modern Woodmen, 86 Neb. 372, 27 L.R.A. (N.S.) 326, 125 N. W. 621, 21 Ann. Cas. 365; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; People's Ice Co. v. Employers' Liability Assur. Corp. 161 Mass. 122, 36 N. E. 754.

If it should appear, after trial or final determination of liabilities, that the accident was one which was not covered by the terms of the insurance policy, the insurer, by virtue of a statute, would be deprived of any rights which it might have in defense of its own liability to the insured by the terms of the contract or policy.

McWilliams v. Home Ins. Co. 40 App. Div. 404, 57 N. Y. Supp. 1100; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 891; Allen v. Ætna L. Ins. Co. 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881; Cushman v. Carbondale Fuel Co. 122 Iowa, 656, 98 N. W. 509; Travellers Ins. Co. v. Moses, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720; Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; Munro v. Maryland Casualty Co. 48 Misc. 183, 96 N. Y. Supp. 705; Hampshire County v. Franklin County, 16 Mass. 76; Medford v. Learned, 16 Mass. 216; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; State v. Derry, 171 Ind. 18, 131 Am. St. Rep. 237, 85 N. E. 765; Liebman v. San Francisco, 11 Sawy. 158, 24 Fed. 705; Adair v. United States, 208 U. S. 161, 173, 175, 52 L. ed. 436, 442, 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; Coppage v. Kansas, 236 U. S. 1, 10, 59 L. ed. 441, 444, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Bogni v. Perotti, 224 Mass. 155, L.R.A.1916F, 831, 112 N. E. 853; Anderson v. Indianapolis Drop Forging Co. 34 Ind. App. 100, 72 N. E. 277; People ex rel. Kelly v. Haws, 24 How. Pr. 148; Brown v. Buck, 75 Mich. 274, 5 L.R.A. 226, 13 Am. St. Rep. 438, 42 N. W. 827; Daugherty v. Thomas, 174 Mich. 371, 45 L.R.A.(N.S.) 699, 140 N. W. 615, Ann. Cas. 1915A, 1163.

Messrs. **Joseph W. Bartlett, Frederick E. Jennings,** and **Arthur Thad Smith,** for plaintiff:

It was within the power of the legislature to enact chapter 464 of the Acts of 1914, and there is nothing in the form of the act that renders it unconstitutional.

Com. v. Perry, 155 Mass. 121, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Mutual Loan Co. v. Martell, 200 Mass. 484, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, 86 N. E. 916; 1 Tiedeman, State & Federal Control of Persons & Property, 346; Whitfield v. Ætna Life Ins. Co. 205 U. S. 489, 495, 51 L. ed. 895, 898, 27 Sup. Ct. Rep. 578; Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; Knight Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 204, 205, 47 L. ed. 139, 145, 146, 23 Sup. Ct. Rep. 108; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 565, 41 L. ed. 1114, 1117, 17 Sup. Ct. Rep. 653.

Rugg, Ch. J., delivered the opinion of the court:

This is a suit in equity under Stat. 1914, chap. 464, brought by one who has recovered judgment for bodily injuries against the principal defendant, caused by his negligence, and against an insurance company which had insured the principal against loss or damage arising from such cause, by policy dated subsequent to the time when the statute became effective. The defendants demurred to the bill on the ground that the statute is unconstitutional. The statute is printed in the margin.[1]

[1] "Section 1. In respect to every contract of insurance made between an insurance company and any person, firm or corporation, by which such person, firm or corporation is insured against loss or

The phraseology of this statute is somewhat involved. The words "loss or damage" are found four times in § 1 and twice in § 2. The first time these words occur, manifestly they refer to the subject-matter of the contract of insurance, namely, the loss or damage which the assured ultimately may suffer through paying or being liable to pay the amount recovered for the bodily injuries or death by accident caused by him to others. The second, third, and fourth times these words are used they refer equally plainly to the "bodily injury or death by accident of any person" for which the assured legally may be responsible. The tautological addition of the words "or death" in connection with their use the third time does not affect their sense. Clearly a like meaning attaches to them at their first occurrence in § 2. At their second appearance in that section, they refer to the loss or damage suffered by the insured, and this is so notwithstanding the circumstance that they are preceded immediately by the word "said," which at first would seem to make them synonymous with the first "loss or damage" in that section. The word "loss" alone, without other connected or modifying word, occurs twice in the first section. It refers in each instance to the detriment caused to the insured, for which he is to be indemnified by the insurer.

Indubitably, "loss" as thus used does not refer to the event out of which, as a consequence, the pecuniary liability of the assured flows. A "loss occurs on account of a casualty" as the words here are used, not when the casualty happens, but when the damages resulting from that casualty have been fixed in any legal way. "Loss" in this connection means the actual financial obligation of the insured, measured in money, in respect of the casualty against which he is insured. Ordinarily, in cases of dispute, that loss can be ascertained only by the judgment of a court. It can "occur," in the sense of the statute, only when so ascertained.

The clause following, namely, "the liability of the insurance company shall become absolute," in its context, means only that the liability of the insurance company, so far as concerns the amount of the loss, shall not thereafter be open to dispute. The insurer's liability is absolute only in respect of the amount of the loss and not in other respects.

This clause, thus interpreted, is or might be of great force in cases of bankruptcy or financial irresponsibility of the insured. It fixes the amount of loss for which the insured has been found liable, not exceeding the extent of the insurance, rather than the financial loss actually sustained by him through payment of money damages, as the measure of the insurer's liability. In many conceivable instances this distinction might be exceedingly important. Perhaps the clause thus interpreted adds little or nothing to

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damage on account of the bodily injury or death by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, occasioned by said casualty. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancelation or annulment shall be void.

"Sec. 2. Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

what might be implied from the ordinary contract of insurance between abundantly solvent parties. But that matter is not left hereafter to be the subject of contract between the parties. It is definitely established as the relation imposed by law upon the parties. Whatever may be their degree of financial responsibility, the clause does not mean that the other valid conditions of a contract of casualty insurance are abrogated. Whatever conditions are imposed by that contract, whether as to written notice by the insured to the insurer of any accident and claim, the delivery to the insured of summons in case of action instituted, as to time of bringing action on the policy, or otherwise, are left in full force, unaffected by this clause.

This clause also leaves open for determination the question whether the policy of insurance covers the casualty in issue, or whether otherwise the insurer is liable to the assured. It does not prohibit any ground of defense which ordinarily would be open to an insurer in an action brought against it by the assured on the policy. It forecloses only the ground that the amount of the loss shall not be open to dispute. As to that subject, it provides that the "loss," as that word is used in contracts of casualty insurance, shall mean loss as we have defined it, and that its meaning in that respect shall not be modified, affected, or limited by stipulations between the parties.

Insurance—indemnity—absolute liability.

The contention is untenable that the words, "the liability of the insurance company shall become absolute," mean that the insurance company thereafter shall have no ground of defense open to it. It is almost inconceivable that the legislature would attempt to make an insurance company unconditionally liable to pay for a loss without giving it an opportunity to require any notices of loss or of actions at law, and thus to ascertain the circumstances out of which the loss arises, and its nature and extent at or near the time when the event occurs, or to make reasonable conditions as to the establishment of its liability under the insurance contract. Such an intent on the part of the general court could not be inferred, in the absence of unequivocal words expressing that purpose so clearly as to be beyond discussion. A statute of such import would present a constitutional question quite different from those now at the bar. It would require unmistakable words to warrant the supposition that the legislature had pressed its power to such an extreme. The instant statute conveys no such meaning. All its words may be given an effective and natural interpretation without reaching so unusual a result.

The statute then provides that the payment of the "loss," as thus defined, by the insurer to the insured, shall not depend upon the satisfaction by the latter of final judgment against him, founded on the casualty against which he was insured. The meaning of this clause is plain. As matter of construction, its effect is to nullify "Condition 7" of the present policy of insurance, namely, that "no action shall lie against the company to recover for any loss . . . unless . . . for loss or expense actually sustained and paid in money by the assured in satisfaction of a final judgment."

Its design, obviously, is to prevent the enforcement of such and like conditions, which were held valid in Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981, and in Davison v. Maryland Casualty Co. 197 Mass. 167, 170, 83 N. E. 407, and which, unless prohibited by law, indisputably are binding terms of a contract. By the express provision of this statute, such conditions are to be of no effect.

The final sentence of § 1 prohibits the cancelation or annulment of a policy of casualty insurance by agreement between the insured and the insurer, after a casualty has occurred for which the assured is lia-

ble, and against the damage accruing from which to him he is insured by the policy, without the assent of the person injured by the casualty. It is not a dominant provision, but is ancillary to the main purpose of the act.

The second section establishes a temporary lien in favor of one who has put the damages resulting to him from the casualty insured against in the form of a judgment, on the amount due under the policy as between the insured and the insurer. It also affords him the usual remedies of a judgment creditor (Rioux v. Cronin, 222 Mass. 131, 109 N. E. 898), or the special equitable attachment provided by Rev. Laws, chap. 159, § 3, cl. 7.

Same—power of legislature—indemnity—payment of loss.

The legislature has power, under the Constitution, to enact the statute as thus interpreted. Said Chief Justice Knowlton in New York L. Ins. Co. v. Hardison, 199 Mass. 190, 198, 127 Am. St. Rep. 478, 85 N. E. 413: "The legislature has large powers for the regulation of the business of insurance. It may act under the police power for the protection of the public, or it may act as the creator and controller of corporations, domestic and foreign, which are subject to this power. This has been decided in many cases in this commonwealth and elsewhere."

A number of decisions there are collected. It was held in Considine v. Metropolitan L. Ins. Co. 165 Mass. 462, 466, 43 N. E. 203, that there is "no doubt of the constitutional power of the legislature to prescribe the form of a policy of insurance." To the same effect, in substance, are Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 204, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108, and Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 495, 51 L. ed. 895, 898, 27 Sup. Ct. Rep. 578.

The instant statute has for its chief object simply a regulation as to the form of a policy of insurance. It prohibits, in substance, the insertion in any contract for casualty insurance of a condition that the insured must actually pay the loss before liability attaches to the insurer. With that single exception and its accompanying incidents the insurer and assured are free to make such contracts as they choose, and the scope and validity of such contracts are left as before, unaffected by this statute.

A further important feature of the statute is to give to the person injured by the conduct, against loss from which the assured is insured by his policy of insurance, a certain beneficial interest in the proceeds of that policy. It does not enlarge or modify in any respect the substantial liability created by the contract of insurance. It merely enables the person suffering the initial damages, out of which grows the loss to the insured, to acquire a lien against the loss and the right to damages or indemnity arising under the policy, and to enforce it in his own name. In a constitutional sense this phase of the statute does not differ from many others which have been upheld. When a statute is in force, giving special force and effect to a particular contract, parties who enter into such a contract are held to contemplate and assent to the force and effect attributed to it by such statute. The instant statute is similar in this respect to Stat. 1907, chap. 576, § 73, whereby there is given to a beneficiary under life insurance policies a vested interest and right of direct action on the contract of insurance against the insurer, though no party to it (Dean v. American Legion of Honor, 156 Mass. 435, 31 N. E. 1; Blinn v. Dame, 207 Mass. 159, 163, 93 N. E. 601, 20 Ann. Cas. 1184), to Stat. 1911, chap. 751, pt. 3, § 17, whereby the employee of a subcontractor of a subscriber is entitled to the rights of an employee of the subscriber, although having no relations to him (White v. George A. Fuller Co. 226 Mass. 1, 114 N. E. 829), and to the numerous lien statutes whereby

Contract—statutory effect.

rights are given to laborers and to materialmen, who have no contractual or other direct relation to the landowner against whom they are given a right of action (Parker v. Bell, 7 Gray, 429; Bowen v. Phinney, 162 Mass. 593, 44 Am. St. Rep. 391, 39 N. E. 283).

In its practical operation in this respect the statute is not altogether unlike the enforcement of an agreement or covenant merely personal in its nature, not purporting to bind assignees and not running with land, by and against those not parties thereto by means of the doctrine of equitable restrictions. Whitney v. Union R. Co. 11 Gray, 359, 363, 71 Am. Dec. 715; Bailey v. Agawam Nat. Bank, 190 Mass. 20, 3 L.R.A. (N.S.) 98, 112 Am. St. Rep. 296, 76 N. E. 449; Childs v. Boston & M. R. Co. 213 Mass. 91, 48 L.R.A. (N.S.) 378, 99 N. E. 957.

No constitutional right of the insurer or of the insured is violated by enabling one who has recovered a judgment against the latter on a liability, against loss from which he is protected by contract with the insurer, to bring a suit in his own name. Such a judgment creditor has a direct interest in the performance of the undertakings in the contract of casualty insurance. It may be that the only source from which his debtor can secure money enough to pay his judgment will be from the proceeds of that insurance contract. See German Alliance Ins. Co. v. Home Water Co. 226 U. S. 220, 230, 57 L. ed. 195, 199, 42 L.R.A. (N.S.) 1000, 33 Sup. Ct. Rep. 32.

The subject of insurance is of such general public interest as to be under the control of the legislature within rational limits. When a statute has been enacted governing any particular part of the field of insurance, the parties entering into contracts respecting that field are presumed to do so with reference to the obligations and terms established by that statute. Although, previous to the passage of the statute now attacked, a contract of insurance like that here in question would have been valid and enforceable under Connolly v. Bolster, ubi supra, yet now the insurer, by issuing a policy of casualty insurance, impliedly agrees to be governed by the terms of the statute and to consent that his obligation to the insured shall, to the extent of a judgment recovered by a third person against the assured for a casualty covered by the insurance, be hypothecated for the benefit of such third person.

The statute is reasonable in its purpose and effect. Its obvious design is to afford to the assured of modest resources the direct benefit of his insurance. It well might be a practical impossibility for an insured who has complied with every other term of his contract, and has paid all premiums demanded by the insurer, first to pay the loss and damage for which he was liable and against which he was insured. The man without capital or credit might be powerless to meet his obligation and put himself in position to recover against the insurer. The man of slender resources, or doing a considerable business on small capital, might be forced into bankruptcy, and get little or no benefit from the insurance for which he had paid. The persons injured by accidents, for which such classes of persons insured might be liable, would be in effect remediless as to practical results for the damages sustained by them. It well might be thought by the legislature a sound public policy that casualty insurance should become an effective instrumentality for both the insured and the injured, and not be a snare to the insured and a barren hope to the injured. If the legislature believed this, it reasonably might decide to frame the terms of policies of casualty insurance, and to provide means for their enforcements, to the end that these results might be avoided, and to declare that policies lacking these requisites should not be written, or, if written, should be ineffective as to these terms.

When confessedly the general subject of insurance is under legislative

control, there is a broad latitude of choice as to the means which may be employed to reach results thought to be desirable.

The principle here declared and the decisions upon which it rests do not derogate in any degree from the right of freedom of reasonable contract and the right to acquire and possess property, which are among the essential guaranties of our Constitution. They do not infringe upon the principles declared in numerous cases sustaining such rights, illustrated by Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126, and Bogni v. Perotti, 224 Mass. 152, L.R.A.1916F, 831, 112 N. E. 853, and the cases there collected.

Of course the legislature cannot create a debt out of hand from one person to another, without the express or implied consent of the person to be charged. But it is a very different thing to enact a statute to take effect as to contracts thereafter made. Hanscom v. Malden & M. Gaslight Co. 220 Mass. 1, 107 N. E. 426, Ann. Cas. 1917A, 145.

Perhaps there are decisions upon kindred subjects, the grounds for which are equally applicable to the case at bar, and the principles of which, rationally extended, would require the conclusion that this statute violates the constitutional right of freedom of contract. Rittenhouse & E. Co. v. Warren Constr. Co. 264 Ill. 619, 106 N. E. 466; Young v. Lion Hardware Co. 55 Ohio St. 423, 45 N. E. 313. But these adjudications seem to restrict unduly the power of the legislature to pass all manner of reasonable and wholesome laws, and to be contrary to the great weight of authority. See Jones v. Great Southern Fireprooof Hotel Co. 30 C. C. A. 108, 115, 127, 58 U. S. App. 397, 86 Fed. 370, for an exhaustive review of cases where "reasons . . . are cogently stated in the able and elaborate opinion of Judge Lurton," which were adopted by reference, without repetition, in Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532, 550, 48 L. ed. 778, 788, 24 Sup. Ct. Rep. 576.

No discussion is required to demonstrate that the legislature may establish appropriate forms of relief for existing rights, or those rightly created, and that it may provide equitable procedure for the enforcement or protection of such rights. Stockbridge v. Mixer, 215 Mass. 415, 102 N. E. 646; Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60.

Legislature—power—providing remedies.

The instant statute is a declaration of public policy by the general court respecting one aspect of casualty insurance. It is a declaration as to a subject within its general power of regulation. It governs contracts made after it took effect. It is not retroactive. Its terms are reasonable, and violate no right secured by the Constitution. It is well within the principle of numerous decisions where statutes more or less interfering with the freedom of contract have been upheld. Mutual Loan Co. v. Martell, 200 Mass. 482, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, 86 N. E. 916, affirmed in 222 U. S. 225, 32 Sup. Ct. Rep. 74, 56 L. ed. 175, Ann. Cas. 1913B, 529; Dewey v. Richardson, 206 Mass. 430, 92 N. E. 708; Com. v. Strauss, 191 Mass. 545, 11 L.R.A. (N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; Com. v. Libbey, 216 Mass. 356, 49 L.R.A.(N.S.)879, 103 N. E. 923, Ann. Cas. 1915B, 659; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312.

Order overruling demurrer affirmed.

ANNOTATION.

Insurance: validity of statute avoiding provision in casualty or indemnity policy making satisfaction by insured a condition of liability.

It will be noted that in the reported case (LORANDO v. GETHRO, ante, 1374) a statute was held constitutional which provided in one section that, whenever a loss occurred on account of a casualty covered by a contract of insurance, the liability of the insurer should become absolute, and the payment of the loss should not depend upon the satisfaction by the insured of a final judgment against him for loss or damage occasioned by the casualty; and, in another section, provided that the judgment creditor, in an action against one responsible for a personal injury, and who carried casualty insurance, should be entitled to have the insurance money applied to the satisfaction of the judgment and, if it was not satisfied within thirty days after it was rendered, the judgment creditor might proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment.

The purpose of this legislation was to prevent the insertion in casualty or indemnity policies of provisions that no action should lie against the insurer to recover for any loss, unless for loss or expense actually sustained and paid in money by the insured in satisfaction of a final judgment. The effect of such a statute, obviously, is to convert all contracts of casualty insurance into contracts of liability insurance, as distinguished from contracts of indemnity.

It would seem that a statute of this kind could not be held applicable to contracts of insurance entered into before its passage, or sustained, if it was held to apply to them. But with respect to its validity as to contracts of insurance entered into after its passage there appears to be no doubt.

The same statute which was before the court in LORANDO v. GETHRO was involved in Williams v. Nelson (1917) 228 **Mass.** 191, 117 N. E. 189, Ann. Cas. 1918D, 538, where the court stated that the statute had been held constitutional in the Lorando Case, and that that decision governed them upon that point.

A provision similar to the second provision of the statute before the court in the Lorando Case was involved in Verducci v. Casualty Co. of America (1917) 96 **Ohio** St. 260, 117 N. E. 235, where a statute providing that an employee who recovered against his employer for injuries sustained should be subrogated to all the rights of the employer under any policy of insurance against loss or damage resulting to the employer for injury or death of an employee, was held not in conflict with § 1, art. 14, of the Federal Constitution, the court stating that the right of the state to regulate and control the business of insurance and contracts of insurance was no longer an open question in Ohio.

J. T. W.

ZIEHM by Guardian, Plff. in Err.,

v.

VALE.

Ohio Supreme Court—June 21, 1918.

(— Ohio St. —, 120 N. E. 702.)

Automobile — infant trespasser — duty.

1. Where the owner of an automobile, upon returning to his car, finds an infant four and one-half years of age thereon, and twice drives the

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Headnotes by the COURT.

infant from the car, the owner is not thereby absolved from further duty towards such infant. Under such circumstances, when the child still remains in close proximity to the car, the driver is required to exercise reasonable care to avoid injury to the child.

[See note on this question beginning on page 1385.]

Negligence — unsafe premises.

2. The principle of nonliability does not apply where the statical condition of the premises is made perilous by the active and negligent operation thereof by the owner.

ERROR to the Court of Appeals for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Jones, J.**:

At the time of the accident the plaintiff was an infant about four and one half years of age. The defendant was driving an open, four-door, seven-passenger automobile. On the morning of June 15, 1913, the defendant had driven his car to his father-in-law's house on East Sixty-fourth street, in Cleveland. He left his automobile standing at the curb on the right-hand side of the street in front of his father-in-law's house, which he entered, remaining there about twenty minutes. Returning to his car, he found the plaintiff and two or three other small boys upon the right-hand running board of his car near the curb. The children asked to be given a ride. This the defendant refused, and drove them away from the car. The defendant proceeded in front of his car, cranked his engine, and, upon getting into the car on the left-hand side, noticed the plaintiff upon the left-hand running board of his car. The car was one with a right-hand drive.

At this instant point of time there is considerable conflict in the testimony as to what occurred. The plaintiff gave testimony tending to show that the little fellow remained on the left-hand running board of the car when the defendant started it. In the defendant's own testimony, while he concedes that the child appeared upon the left-hand running board after he had cranked his engine, he says that he "shooed him away with his cap," and that the child left the car for a short distance, and that he did not know the child was on the running board when the car started.

Upon this phase of the defendant's testimony the requests asked by the defendant below were proffered, and refused by the trial court, and in lieu thereof the court charged generally on the subject of ordinary care, as hereafter shown. The special requests asked by the defendant, and refused, were as follows:

"First. Unless you find from a preponderance of the evidence that the defendant, at the time he started his automobile or while he was running it forward, knew that the plaintiff was then upon the running board of his automobile, then you should return a verdict for the defendant.

"Second. If you find that the defendant, before starting his automobile forward, had driven the plaintiff away from his automobile, then I say to you that the defendant was under no other or further duty towards the plaintiff, and under such circumstances he was under no duty or obligation to see that the plaintiff remained away from the automobile; and if he then started his automobile forward, not knowing that plaintiff was upon its step or running board, then he would not be liable to the plaintiff in this case, and your verdict should be for defendant.

"Third. The defendant can only be liable to the plaintiff in case he

actually knew that plaintiff was upon the running board or step of his auto at the time he started or while running the same forward. The defendant cannot be held liable merely for neglecting to investigate and find out that plaintiff was upon said running board or step."

Under the facts stated the trial court charged the jury as follows:

"The defendant when he came from the house of his father-in-law, if he saw children there in his automobile or upon some portion of it —that is, if he did see them—was, under the circumstances surrounding him at the time, bound to use ordinary care to determine, from the size and appearance of the children, their age and their discretion, and to exercise care commensurate with the perils of the situation, if any perils then existed.

"If you find, however, that the defendant was exercising the degree of care the circumstances required and demanded before he put his automobile in motion, and that after the automobile was in motion the plaintiff jumped upon some portion of it, without knowledge on the part of the defendant that the plaintiff was about to do so, or had done so, then the defendant would not be liable for any injuries sustained by the plaintiff under such circumstances. If, however, the defendant had reason to believe that children, including the plaintiff, from their conduct and their actions, would follow the car or automobile, or come from the side and attempt to climb or jump upon it, or some portion of it, he was bound to use ordinary care in the use of his eyes and senses to avoid injuring them, or any one of them. If he chased these children away, and warned them to keep away from his vehicle or car, what did ordinary care require or demand of him at the time he put the automobile in motion? Was he bound to anticipate that the plaintiff would return, or that he would not return, or would return and place himself in a position of danger? What would a man of ordinary prudence have done under the circumstances?"

And further: "I say to you this defendant was bound to know that a child under the age of five years might act upon a childish impulse, and if the plaintiff was so close to the car as the defendant got into the car and started it, or put it in motion, and his conduct was such as to lead a prudent man to believe that he was about to jump upon the car, you have a right to inquire what ordinary care and prudence required of the defendant under such circumstances."

In the trial court the plaintiff recovered a judgment. This judgment was reversed by the court of appeals, for error in refusing the requests noted, and in submitting to the jury the question of ordinary care, as disclosed in the general charge. This reversal was based chiefly upon the authority of Wheeling & L. E. R. Co. v. Harvey, 77 Ohio St. 235, 19 L.R.A.(N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272. Error is now prosecuted to this court.

Messrs. **Payer, Winch, Rogers & Minshall** for plaintiff in error.

Messrs. **Boyd, Cannon & Brooks** for defendant in error.

Jones, J., delivered the opinion of the court:

If there was a violation of legal duty owing by the defendant to the infant child under the circumstances detailed, it would be actionable negligence. In the present case the feature of invitation or license is not involved, for it is conceded that the child was on the car against the express command of the defendant. As disclosed by the first and second special requests, the defendant conceived that he was not liable unless he actually knew that the child was on the running board of the car at the time he started his car, or while he was running the same forward. The second request was predicated upon the principle claimed that, after driving the child away from the car, there devolved no further

duty upon the defendant, and that no obligation rested upon him to see that the child remained away.

The trial court refused to apply the principle of nonliability as requested, but imposed upon the defendant the obligation to use ordinary care, if the circumstances would apprise the defendant, as an ordinarily prudent man, that a child of four and one-half years, acting under childish impulses, would renew his attempt to get upon the running board of the automobile. The court of appeals reversed the judgment, on the authority of Wheeling & L. E. R. Co. v. Harvey, 77 Ohio St. 235, 19 L.R.A.(N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272, and in its opinion says: "We think that, when the plaintiff left the street for the purposes of travel and got upon the defendant's automobile without invitation, he was not rightfully there and brought himself fairly within the reason of the rule in the Harvey Case, and is to be governed by its principles."

This case is clearly distinguishable from the reported case cited. In that case there was neither knowledge of the presence of the infant nor any active force employed which caused its injury. Under the facts disclosed in the Harvey Case, the rule there stated in the syllabus applies to the condition of the premises, its construction or maintenance, and does not embrace a situation where a statical condition of the premises is made perilous by the active, negligent operation thereof by the owner. If a servant of the company at the time of the injury had failed to exercise ordinary care toward the Harvey child, by operating the turntable under circumstances where an ordinarily prudent person would have known that the life of the child might be imperiled, that case would have assumed an entirely different aspect. This is the situation presented by the nisi prius court in the instant case.

Negligence—unsafe premises.

It may be conceded that the duty of exercising ordinary care does not inure to the benefit of a bare licensee who commits a trespass, and that a child of plaintiff's age is incapable of committing a conscious trespass. The Harvey rule is based on the principle that no legal duty devolves upon the landowner to so construct his property as not to injure a child who approaches it without the knowledge or invitation of the occupier. If the driver of this automobile, when he approached the car, had no knowledge that the child was on the car or in its immediate vicinity, obviously there would be no liability. But when he concedes that he drove the child, first from the right running board, and again from the left running board, of his car, would not these and other attending circumstances apprise the defendant that a child of that age, acting under childish instinct, and unaware of its peril, would make still another attempt to board the car? This actually did occur. The trial court was therefore not in error when it charged the jury upon the subject of the defendant using ordinary care under the facts disclosed.

Automobile—infant trespasser—duty.

The distinction between the legal duty due uninvited persons, in cases arising from the construction of the premises, and in those arising from their negligent operation, is clearly made and discussed in Cincinnati, H. & D. R. Co. v. Aller, 64 Ohio St. 183, 60 N. E. 205. On page 193 of 64 Ohio St., Shauck, J., in discussing the case of Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, said of that case: "The injury was not occasioned by any real or alleged defect in the construction of the road. The injury there resulted from the operation of the road."

The petition sufficiently pleaded facts imposing the duty of ordinary care covered by the general charge. It contained an allegation of negligence, charging that the defendant

saw and knew that the child was on the running board, or "by the exercise of ordinary care would have seen that said plaintiff was on the running board of said car."

For the reasons stated, the judgment of the Court of Appeals is reversed, and that of the Common Pleas affirmed.

Judgment reversed.

Nichols, Ch. J., and **Newman, Matthias, Johnson**, and **Donahue**, JJ., concur.

Wanamaker, J., concurring:

I heartily concur in the judgment in this case. In the syllabus and the opinion an effort is made to distinguish this case from the Harvey Case, upon which the court of appeals based its judgment.

Whenever a court undertakes to distinguish or differentiate one case from another a strong presumption arises that the court approves such other case, the judgment, and the course of reasoning through which such judgment was reached. I desire here and now to register my protest against the judgment of that case. It was an astonisher to the profession and the public at the time it was rendered, in 1907, and indicates the high-water mark of the supreme court of that time in its effort to magnify property right and minimize personal right,—the right to life, limb, health, and safety,—especially when applied to a child four and one-half years of age. The opinion notes more than 100 cases pro and con, and reviews many of them touching the subject-matter of that case. Concurring in the judgment were Judges Shauck, Crew, Davis, and Summers. Judges Spear and Price did not concur.

The Supreme Court of the United States, in Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745, decided in 1873, laid down the doctrine that entitled Harvey to a verdict in that case. The opinion in the Harvey Case laments the fact that "the multitude of circumstances under which the owner of property would be liable for injuries to children, and the very serious burden that was, in consequence, being placed on the owners of property, were very probably not foreseen in the Stout Case."

Throughout the opinion much consideration is given to the conservation of property, but substantially no regard to the conservation of child life, limb, and safety. Many cases no doubt sustain the Harvey Case, but an equal number of cases may be found in the books sustaining witchcraft, slavery, and other inhumanities and infamies, in the light of present-day civilization and jurisprudence.

I desire to especially commend the late lamented Judges Price and Spear for their refusal to concur in the doctrine announced in the Harvey Case.

ANNOTATION.

Liability for injury to child playing on or in proximity to automobile.

The doctrine that one owes a trespasser only the duty of refraining from inflicting wanton or wilful injury upon him has been applied to cases involving injury to minors playing about or upon automobiles. It has been held that an intelligent boy about fifteen years of age, who was accustomed to street traffic, and who fell under a wheel and was injured while undertaking to board a passing motor truck, which was moving at a speed of from 6 to 10 miles an hour, was a conscious trespasser and responsible for his own negligence, unless the driver of the motor car wilfully and wantonly failed to protect him after he had learned of his peril. Gamble v. Uncle Sam Oil Co. (1917) 100 Kan. 74, L.R.A. 1917D, 875, 163 Pac. 627. In that case, the evidence was held insufficient to sustain a finding that the driver of a motor truck, who knew that a boy was clinging to the truck, was chargeable with wilful and wanton neglect to protect him, where the testimony

failed to show that the driver knew that the boy had been unable to find support for his feet and was holding on entirely by his hands, and it did not appear that the driver knew that he was in danger, or that, if he saw him, there were any signs of distress upon his face.

It is a question for the jury whether the negligent conduct of the driver of a sight-seeing car amounted to wantonness and wilfulness which would impose liability for the death of a boy who was run over and killed while attempting to mount the running board of the car, where it is testified that he, with others, had long been in the habit of boarding the car at the point where the accident occurred, to the knowledge of the driver, who was in a position to be aware of the boy's presence, but who increased the speed of the car as the boy endeavored to get upon the running board, causing him to fall under the wheels. Madden v. Mitchell Automobile Co. (1917) 21 Ga. App. 108, 94 S. E. 92.

But, in an action by a boy who, after going to the assistance of a friend who had jumped on an automobile, and aiding him in getting off, was run over while standing in the road, when the automobile suddenly backed uphill a distance of 5 feet, it was held that the complaint should not be dismissed, since the unexpected sudden backing of the automobile without any warning called, at least, for some explanation. Grudberg v. Ehret (1913) 79 Misc. 627, 140 N. Y. Supp. 379. The court stated: "It makes no difference whether the friend was a trespasser on the automobile, or whether plaintiff came to his assistance or not. The plaintiff had a right to be in the public street."

The care which the operator of a car should exercise, before starting it, to ascertain whether children about it are in a dangerous position, was considered in Ostrander v. Armour & Co. (1916) 176 App. Div. 152, 161 N. Y. Supp. 961, where it is held that a chauffeur who, on finding several children playing about and on his motor truck, ordered them to get off, looked around to see that they had done so, and, hearing the call that they were off, started up his car, whereupon a child who was on the left or far side of the car fell off and was injured, is not wanting in reasonable care, unless he knew that the child was on the car, when he should have given her time to get off and should have waited until she did get off. The court remarks: "It is a care of serious moment imposed upon the busy teamster to make a search around his car lest a child too young for discretion, and undirected by parents, has tucked herself away in an obscure place, beyond the casual and convenient notice of the driver. The driver, by such rule, in responsibility supersedes guardians and other custodians in watchfulness of the children on each block where his business requires him to stop. An automobile is a legitimate vehicle on the street, and entitled to stop without accumulating children upon it. I am not convinced that it is the usual duty of a chauffeur to search for infantile trespassers ensconced on the far side of his car. In this case it seems that the children in that neighborhood were accustomed to play around the running board of the car, and when the man would come out they would get off. It seems to the driver that the circumstances required him to look on both sides of the car, and he says that he did so before starting, and another witness so testified. But there is evidence that when he looked the girl was on the left side. If he looked around the car, and did see the girl, he should have given her time to get off, and should have waited until she did get off. Farther than that, I see no grounds for suggesting that he was wanting in care."

The duty imposed in the preceding case upon a chauffeur about to start his car in the presence of children is less onerous than that imposed in the reported case (ZIEHM v. VALE, ante, 1381), holding that one who finds a child four and a half years of age playing about his automobile which he had left standing at the curb, and drives him from first one side of the car and then from the other, is not thereby relieved from further duty toward the child, but must exercise

reasonable care to avoid injury to him. In this case the operator of the car contended that he was not liable unless he actually knew that the child was on the running board of the car at the time he started it, or while he was running it forward. He took the position that after driving the child away from the car there devolved no further duty upon him, and that no obligation rested upon him to see that the child remained away. But both the trial court and the supreme court refused to apply the principle of nonliability as requested, and imposed upon the operator of the car the obligation to use ordinary care if the circumstances would apprise him, as an ordinarily prudent man, that a child of four and a half years, under childish impulses, would renew his attempt to get upon the running board of the automobile. Judge Wanamaker, in his concurring opinion, approves the decision reached in this case as tending to conserve child life, limb, and safety, rather than to conserve private property.

In Gamble v. Uncle Sam Oil Co. (1917) 100 Kan. 74, L.R.A. 1917D, 875, 163 Pac. 627, which was an action brought by a boy to recover for injuries sustained while trying to board a moving motor truck, the court refused to apply the attractive nuisance doctrine, and held that an ordinary motor truck moving along a public street cannot be regarded as an attractive or alluring vehicle to an intelligent boy about fifteen years of age, who is accustomed to the traffic of the street.

The principle that the owner of an automobile is not liable for an injury inflicted by a servant, while acting without the scope of his employment, was applied in Ostrander v. Armour & Co. (N. Y.) supra, holding that a chauffeur who uses his master's automobile truck for the purpose of transporting a barrel of apples for the accommodation of a friend is not acting within the course of his employment, and the master is not liable for injuries sustained by a child when the chauffeur started the machine after delivering the applies. "It is a common happening," observes the court, "that the master lends his servant his horse or his car for the latter's private use—not because the master is bound to do it, or that it is a perquisite of the servant. It is a mere disposition to oblige that the relation prompts. If a farmer should lend his hired man a team, or the latter should take it when he wanted it to plow his garden or to move his personal effects, it would not be thought that the man continued to be the servant in his conduct of the team. The principle does not change by the substitution of an automobile for horse and wagon. A master should not, for accommodating his servants, be burdened beyond his obligation if he loans his property to a neighbor." A. W. R.

KENAN, McKAY, & SPIER, Appt.,

v.

YORKVILLE COTTON OIL COMPANY, Respt.

South Carolina Supreme Court—March 23, 1918.

(— S. C. —, 96 S. E. 524.)

Sale — product of mill — estimated amount.

A contract for sale of season's output of the by-product of a mill, stated to be "about" a certain amount, is satisfied by delivery of the output of the mill operated in good faith, although it proves to be much less than the estimated amount.

[See note on this question beginning on page 1392.]

(Hydrick, J., dissents.)

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for York County granting a motion for nonsuit in an action brought to recover damages for alleged breach of a contract to deliver certain by-products of a mill. *Affirmed.*

The contract and evidence referred to in the opinion are as follows:

Atlanta, Ga., 7–19–1915.

Sold to Messrs. Kenan, McKay, & Spier, Atlanta, Ga.

For Account—The Yorkville Cotton Oil Company, Yorkville, S. C.

Amount—Season's output of cotton linters for season 1915–1916, about four hundred (400) bales, to be grade mill run, made from sound seed and free from country damage.

Price—Four and one-eighth cents (4 1-8c) per lb. f. o. b., Yorkville, S. C.

Shipment—For shipment in 25 to 50 bale lots as made.

Terms—Sight draft free of exchange with bill of lading attached. Sellers to pay brokerage.

Notice—We cut 60 to 70 pounds lint to ton of seed.

Peoples & Field, Brokers.

Accepted: Yorkville Cotton Oil Company, W. H. Fowler, Secy. and Treas.

George E. Spier, one of the plaintiffs, being duly sworn, testifies as follows:

Direct examination by Mr. Lewis:

Q. Mr. Spier, you are the Spier mentioned in the caption of this case here, as a member of this corporation Kenan, McKay, & Spier?

A. I am.

Q. (Hands witness papers). Will you please state what those papers are that I hand to you?

A. These papers consist of copies of bills of lading, original invoices, original detail weights, and original drafts, furnished Kenan, McKay, & Spier by the Yorkville Cotton Oil Company, covering shipments of a bill of 155 bales of linters.

Q. From what period to what period were those linters shipped to you?

A. They were shipped beginning October 12, 1915, at the rate of 25 bales per week up to and including November 24, 1915.

Q. Were any more linters shipped you after that?

A. No, sir. Not from this mill. (Papers offered in evidence marked Exhibits B 1 to 6, inclusive.)

Q. Mr. Spier, this invoice that I show you here, is that written as it was when it was received by you?

A. Yes, sir.

Q. And that was received in due course of mail?

A. Yes, sir. (Invoice marked Exhibit B 1, dated November 24, 1915.)

Q. Mr. Spier, will you state whether or not any other reason was ever given to the plaintiffs in this case why the defendant the Yorkville Cotton Oil Company refused to ship you linters further.

A. No reason given further, no other reason.

Q. Other than one?

A. Other than that one reason there.

Q. Mr. Spier, how long have you been connected with the oil-mill business as a purchaser of linters?

A. Since the fall of 1902.

Q. Fifteen years?

A. Yes, sir.

Q. That contract provides for the season of 1915–1916. State when the season commences and when it ends.

A. It has always been the custom of the trade that the season began September 1st and ended August 31st of the following year.

Q. As I understand in this case, you received no linters from the defendant after November 24, 1915?

A. None whatever.

Q. Mr. Spier, I believe you have already stated that they were delivering linters to you at the rate of about 25 or 50 bales per month?

A. No, sir; per week.

Q. Assuming that as a fair basis of capacity, what ought that mill to have delivered to you during the entire season?

Mr. Hart: I object. He don't know what the mill was manufacturing there. He don't know anything about it.

The Court: Yes, sir. That is a mere matter of calculation for the jury.

Mr. Lewis: I will not push the question.

Q. All the linters that were shipped you, you paid for?

A. Yes, sir.

Q. Did you stand ready to pay for the others as they should be shipped to you?

A. Yes, sir.

Q. And I believe you say none other were ever shipped?

A. None at all.

Q. You received 155 bales altogether?

A. Yes, sir.

Q. Mr. Spier, what is the weight of a commercial bale of linters?

A. Five hundred pounds, sir.

Q. Five hundred pounds.

Messrs. **Payne & Jones**, for appellant:

As the contract was for the sale of the "season's output of cotton linters, for the season 1915–1916, about four hundred (400) bales, to be grade mill run, made from sound seed, and free from country damage," the seller bound itself to operate its mill in good faith at normal capacity, within the season specified, with a view of producing and delivering to the buyer its "output."

Brawley v. United States, 96 U. S. 168, 24 L. ed. 622; Gwillim v. Daniell, 2 Cromp. M. & R. 61, 150 Eng. Reprint, 26, 1 Gale, 143, 5 Tyrw. 644, 4 L. J. Exch. N. S. 174; Loeb v. Winnsboro Cotton Oil Co. — Tex. Civ. App. —, 93 S. W. 515; Kellogg v. Norman, 74 N. Y. 596; Bautovich v. Great Southern Lumber Co. 129 La. 857, 56 So. 1026, Ann. Cas. 1913B, 848; Herren v. Gaines, 63 N. C. 72; White v. United States, 38 App. D. C. 131; Burt v. Garden City Sand Co. 237 Ill. 473, 86 N. E. 1055; Inman Bros. v. Dudley & D. Lumber Co. 76 C. C. A. 659, 146 Fed. 451; Marx v. American Malting Co. 95 C. C. A. 80, 169 Fed. 582; Dawson Cotton Oil Co. v. Kenan, McKay & Speir, 21 Ga. App. 688, 94 S. E. 1037; 9 Cyc. 329 (24); Lima Locomotive & Mach. Co. v. National Steel Castings Co. 11 L.R.A.(N.S.) 713, and note, 83 C. C. A. 593, 155 Fed. 77; Minnesota Lumber Co. v. Whitebreast Coal Co. 160 Ill. 85, 31 L.R.A. 529, 43 N. E. 774; Connersville Wagon Co. v. McFarlan Carriage Co. 166 Ind. 123, 3 L.R.A.(N.S.) 709, 76 N. E. 294; T. B. Walker Mfg. Co. v. Swift & Co. 43 L.R.A.(N.S.) 730 and note, 200 Fed. 529; Ontario Deciduous Fruit Growers Asso. v. Cutting Fruit Packing Co. 134 Cal. 21, 53 L.R.A. 681, 86 Am. St. Rep. 231, 66 Pac. 28; Russell v. Camp. 9 Ga. App. 694; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; Pengra v. Wheeler, 24 Or. 532, 21 L.R.A. 726, 34 Pac. 354; Dixon v. Breon, 22 Pa. Super. Ct. 347; Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762.

While, of course, the language "about four hundred (400) bales" was in the nature of an estimate of the probable amount that the mill could and should produce during the season, if operated at normal capacity, it was controlling to the extent of fixing within reasonable limitations the amount the buyer was required to take and the seller to make.

Loeb v. Winnsboro Cotton Oil Co. — Tex. Civ. App. —, 93 S. W. 515; Foote & D. Co. v. Southern Wood Preserving Co. 11 Ga. App. 165, 74 S. E. 1037; 35 Cyc. 207; Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; T. B. Walker Mfg. Co. v. Swift & Co. 43 L.R.A.(N.S.) 730, 200 Fed. 529.

Mr. **John A. Marion**, also for appellant:

The contract called for delivery of approximately 400 bales.

Leeming v. Snaith, 16 Q. B. 275, 117 Eng. Reprint, 884, 20 L. J. Q. B. N. S. 164, 15 Jur. 988; Brawley v. United States, 96 U. S. 168, 24 L. ed. 622; 36 Cyc. 206; Moore v. United States, 196 U. S. 163, 49 L. ed. 428, 25 Sup. Ct. Rep. 202; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Bass Dry Goods Co. v. Granite City Mfg. Co. 113 Ga. 1142, 39 S. E. 471; Tilden v. Rosenthal, 41 Ill. 385, 89 Am. Dec. 388; Hills v. Edmund Peycke Co. 14 Cal. App. 32, 110 Pac. 1088; Pine River Logging & Improv. Co. v. United States, 186 U. S. 284, 46 L. ed. 1167, 22 Sup. Ct. Rep. 920; Little Rock Cooperage Co. v. Gunnels, 82 Ark. 286, 101 S. W. 729, 12 Ann. Cas. 293.

The contract contemplated the operation of defendant's mill for the full season 1915–1916.

Newhall v. Appleton, 114 N. Y. 140, 3 L.R.A. 859, 21 N. E. 105; Smith v. Clews, 114 N. Y. 190, 4 L.R.A. 392, 11 Am. St. Rep. 627, 21 N. E. 160; 12 Cyc. 1086; Minnesota Lumber Co. v. Whitebreast Coal Co. 160 Ill. 85, 31 L.R.A. 529, 43 N. E. 774; 9 Cyc. 533, 586; Jennings v. Brown, 106 S. C. 455, 91 S. E. 723; Loeb v. Winnsboro Cotton Oil Co. — Tex. Civ. App. —, 93 S. W. 515; Burt v. Garden City Sand Co. 237 Ill. 473, 86 N. E. 1055; Kellogg v. Norman, 74 N. Y. 596; McCormick Harvesting Mach. Co. v. Jensen, 29 Neb. 102, 45 N. W. 160; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Wells v. Alexandre, 130 N. Y. 642, 15 L.R.A. 218, 29 N. E. 142; Horton v. Hall & C. Mfg. Co. 94 App. Div. 404, 88 N. Y. Supp. 73; Hickey v. O'Brien, 123 Mich. 611, 49 L.R.A. 594, 81 Am. St. Rep. 227, 82 N. W. 241; National Furnace Co. v. Keystone Mfg. Co. 110 Ill. 428; Ames-Brook Co. v. Ætna Ins. Co. 83 Minn. 346, 86 N. W. 344; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. 61 L.R.A. 402, 58 C. C. A. 220, 121 Fed. 298; Bautovich v. Great Southern Lumber Co. 129 La. 857, 56 So. 1026, Ann. Cas. 1913B, 848; H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co. 114 C. C. A. 89, 194 Fed. 69; Gwillim v. Daniell, 2 Cromp. M. & R. 61, 150 Eng. Reprint, 26, 1 Gale, 143, 5 Tyrw. 644, 4 L. J. Exch. N. S. 174.

The court erred in holding that the defendant operated its mill in good faith, and discharged itself from liability from further operation, and in not submitting this question to the jury.

Ingham Lumber Co. v. Ingersoll, 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002; Buffalo & L. Land Co. v. Bellevue Land & Improv. Co. 165 N. Y. 247, 51 L.R.A. 954, 59 N. E. 5; Law v. San Francisco Gas & E. Co. 168 Cal. 112, 142 Pac. 52, Ann. Cas. 1915D, 842; Harmony v. Bingham, 12 N. Y. 108, 62 Am. Dec. 142; Norton v. Woodruff, 2 N. Y. 154; Sturdyvin v. Atlanta & A. Air Line R. Co. 98 S. C. 125, 82 S. E. 275, 6 N. C. C. A. 515; Pinckney v. Atlantic Coast Line R. Co. 92 S. C. 528, 75 S. E. 964; Moore v. Marion Cotton Oil Mill, 100 S. C. 511, 85 S. E. 52.

Mr. **John R. Hart**, for respondent:

The words of estimate, such as "about," "season's output," etc., do not import a warranty to operate, and the certain and definite terms of the contract will govern.

H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co 114 C. C. A. 89, 194 Fed. 69, 225 U. S. 706, 56 L. ed. 1266, 32 Sup. Ct. Rep. 838; Wemple v. Stewart, 22 Barb. 161; Drake v. Vorse, 52 Iowa, 417, 3 N. W. 465; White v. United States, 38 App. D. C. 131; Inman Bros. v. Dudley & D. Lumber Co. 76 C. C. A. 659, 146 Fed. 449; Kellogg v. Norman, 74 N. Y. 596; Herren v. Gaines, 63 N. C. 72.

Gage, J., delivered the opinion of the court:

Action for breach of contract; order of nonsuit; appeal by the plaintiff.

The contract is a skeleton one, in writing, and was drawn by an Atlanta broker, mediately, for the plaintiffs on one side and the defendant on the other. Let the evidence of it be reported.

The question in the case is the meaning of the contract. Under it the defendant shipped to the plaintiffs 155 bales of linters, and that was confessedly the total output of the oil company for the season. The defendant says that was a performance of the contract. The plaintiff says that the defendant was bound by the contract to operate the oil plant in order to supply the plaintiff with 400 bales of linters; and the plaintiff sues for the failure of the defendant to furnish 245 other bales. And that is the issue to be decided. It is true that if the defendant agreed with the plaintiffs to sell to them 400 bales of linters at all hazards, then a failure to do so is a breach of the contract for which the defendant has rendered no lawful excuse. But the instant case is not of that character. It is manifest from the face of the contract, and it must have been so manifest to the plaintiffs, that the defendant's chief business is the crushing of cotton seed, and that the making of linters is a by-product of that business. It is altogether plain that the defendant did not, by express words, bind itself to operate the plant throughout the whole season. If, therefore, it was bound to do that, in order to produce 400 bales of linters, such an obligation rested in an implied contract to do so.

It is true that "whatever may fairly be implied from the terms or nature of an instrument is, in judgment of law, contained in it." 6 R. C. L. p. 856.

Bishop states the rule thus: "From an express undertaking, the law will also imply whatever the parties may be reasonably supposed to have meant, and what is essential to render the transaction fair and just." Bishop, Contr. p. 37.

It was said by a New York court that an implied agreement "is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect." Genet v. Delaware & H. Canal Co. 136 N. Y. 609, 19 L.R.A. 127, 32 N. E. 1082.

So the inquiry is, Did the cotton oil company reasonably intend to bind itself to operate its mill at all events in order to turn out a by-products. Its chief business was to crush seed and make cotton oil and cake. So much is not said in the testimony, but it is a matter of common knowledge, about which we will not profess ignorance. It took a ton of seed to make 60 to 70 pounds of "linters;" a bale of linters contained 500 pounds (see contract and testimony of Spier). The cotton oil company would therefore have had to crush about 3,000 tons of seed to produce 400 bales of linters. It is not to be reasonably supposed that the cotton oil company intended or would have bound itself, against all odds, to crush so much seed in order to supply a by-product of linters; for producing linters was but an incident to the business of crushing cotton seed. It is not sufficient that the buyers intended so much; the seller must also have reasonably intended it. So much for the implications of the contract, and we now turn to the expressions of it.

The books say "there can be no implication as against the express terms of the contract." 13 C. J. p. 559. And "the implication must be found in the language of the contract." Maryland v. Baltimore & O. R. Co. 22 Wall. 111, 22 L. ed. 714. And "there is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it." Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287. The expressions in the instant contract leave small room for implications. The rule by which to interpret a contract phrased like the instant one is well stated in Brawley v. United States, 96 U. S. 172, 24 L. ed. 624, a case cited by and relied upon by the appellants. The court there stated the rule in these words: "Where a contract is made to sell . . . certain goods, identified by reference to independent circumstances, such as . . . all that may be manufactured by the vendor in a certain establishment . . . and the quantity is named with the qualification of 'about' . . . the contract applies to the specific lot."

That opinion plainly makes for the respondent. The words in the instant case, "about 400 bales," are controlled and qualified by the more specific words "season's output," so that the buyer must have taken the season's output, even though it should measurably exceed 400 bales.

So much was decided in the Texas case cited also by the appellant; the controlling words there were held to be output, and not a suggested number of bales. Loeb v. Winnsboro Cotton Oil Co. — Tex. Civ. App. —, 93 S. W. 515. If the buyer must take the "output" though it exceeds the estimate, he must also be content with it though it falls short of the estimate. The buyer is bound to take the output, because he agreed to that; the seller is not bound to furnish more than the "output," because he has only agreed to furnish that much.

It is suggested by the appellant that the contract must be mutual. But that is not so where the parties have agreed otherwise, and where the nature of the agreement rebuts a notion of strict mutuality. Bishop, Contr. § 589. In the same case of Brawley v. United States, the court uses this language: "So, where a

manufacturer contracts . . . at a certain price all the articles he shall make in his factory for the space of two years, 'say 1,000 to 1,200 gallons of naphtha per month,' the designation of quantity is qualified not only by the indeterminate word 'say,' but by the fair discretion or ability of the manufacturer, always provided he acts in good faith. This was the precise decision in Gwillim v. Daniell, 2 Cromp. M. & R. 61, 150 Eng. Reprint, 26, where Lord Abinger says: 'The agreement is simply this, that the plaintiff undertakes to accept all the naphtha that the defendant may happen to manufacture within the period of two years. The words, "say from 1,000 to 1,200 gallons [per month]" are not shown to mean that the defendant undertook, at all events, that the quantity manufactured should amount to so much. If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here, it does not appear that in the ordinary course of his manufacture the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract.'"

The cases are numerous, and the contracts they construe are of great diversity, and the courts conclude variously; it would be an idle task to review a fraction of them. It is sufficient to say our judgment is against the view of the appellant, and with that of the circuit court. See Bautovich v. Great Southern Lumber Co. 129 La. 857, 56 So. 1026, Ann. Cas. 1913B, 848; Burt v. Garden City Sand Co. 237 Ill. 473, 86 N. E. 1056; Little Rock Cooperage Co. v. Gunnels, 82 Ark. 286, 101 S. W. 729, 12 Ann. Cas. 294.

Sale—product of mill—estimated amount.

A possible modification of this conclusion is suggested in the Brawley Case and the English case which it quotes. If the cotton oil company, for sinister reasons, had concluded not to operate its plant, it might not lawfully shelter itself from liability behind that act of bad faith. But the testimony does not make such a case, and there is no warrant to decide it. The appellant thinks that issue ought at least to have been sent to the jury. The testimony, though, leaves only one reasonable conclusion thereabout. The plaintiff proved that the reason the plant was not operated was for the lack of money and the inability to borrow it, and the plant would have been operated if money could have been had. There is not a suggestion to the contrary. It is contrary, too, to the reason of the case that the cotton oil company would forego crushing seed and making oil and cake in order to curtail its by-product of linters.

The judgment of the Circuit Court is affirmed.

Gary, Ch. J., and **Watts** and **Fraser**, JJ., concur. **Hydrick**, J., dissents.

Petition for rehearing denied.

ANNOTATION.

Validity and construction of contract for sale of season's output.

I. Validity, 1392.
II. Construction as regards duty of seller to operate plant and furnish amount estimated, 1393.
III. Construction as regards duty of buyer to accept output where it exceeds estimate, 1395.
IV. Miscellaneous matters of construction, 1396.

I. Validity.

By the great weight of authority, contracts for the sale of the entire output of a plant for a designated period of time are not invalid on the ground of a want of mutuality. The obligation imposed upon the seller to deliver what he actually produces is

sufficient consideration to support the agreement of the buyer to receive and pay for the actual output, although it is conceded that the contract does not impose upon the seller the obligation of actually operating his plant:

—Thomas-Huycke-Martin Co. v. Gray (1910) 94 **Ark.** 9, 140 Am. St. Rep. 93, 125 S. W. 659, holding that a contract for the sale of the mill cut of a certain sawmill was not invalid on the ground of want of mutuality; the court said that the obligation to purchase the lumber implied a corresponding obligation to sell and deliver it at the price named;

—Cohn v. Brown (1910) 7 Ga. App. 395, 66 S. E. 1038, holding that a contract for the sale of the output of a sawmill, estimated at a designated quantity, is not unilateral or so indefinite as not to be enforceable;

—Rozier v. St. Louis & S. F. R. Co. (1910) 147 **Mo.** App. 290, 126 S. W. 532, holding that an agreement for the sale of the entire output of a quarry for a stated period of time is not invalid on the ground of a lack of mutuality;

—Hadden v. Dimick (1866) 31 How. Pr. (**N. Y.**) 196, holding that a contract to sell all of the blankets manufactured by the seller for a certain period of time is not invalid for lack of mutuality.

Compare with Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co. (1908) 166 **Fed.** 191, holding to be void for want of mutuality a contract for the sale of all of the railroad ties which plaintiff produced for a designated period of time, the defendant agreeing to take all of such ties, and pay a designated price therefor.

Upon the point as to mutuality of a contract of this character, in Kenan, McKay, & Spier v. Home Fertilizer & Cotton Oil Co. (1918) — **Ala.** ——, 79 So. 367, the court said that the buyer's obligation to receive and pay for the articles actually made by the seller is predicated on the seller's obligation to deliver to the buyer all the articles made by the seller's plant. The seller having acted upon the buyer's promise to take his output, the buyer becomes bound to take all the seller produced in reliance upon the buyer's promise, and the seller likewise becomes bound to deliver the output of his plant. Certainty, consideration, and mutuality are all afforded and present in such circumstances.

II. Construction as regards duty of seller to operate plant and furnish amount estimated.

In construing contracts for the sale of the output of a manufacturing or producing plant for a designated period of time, it is to be remembered that, by the use of this language, the parties to the contract have expressly refrained from contracting for the sale of any specific quantity of goods, material, or commodity. In this regard, however, the contract is not ambiguous, for the language used is clear. The term "output" means the quantity of material put out or produced within a stated time. (See Century Dict.) The language of the contract being clear and free from ambiguity, there is no occasion to refer to extraneous facts and circumstances to explain any ambiguity therein. The only purpose of such a reference would be to import into the contract an additional provision as to the quantity of the product intended to be covered by the contract, thereby adding a provision that the parties apparently expressly refrained from including. And this is true notwithstanding that, in addition to the use of the term "output," the parties have included in the contract an estimate as to the amount of such output, since such an estimate is not intended as a warranty, and the fact that the parties have estimated the amount clearly indicates their intention not to contract with reference to any specific quantity:

—H. M. Pfann & Co. v. J. C. Turner Cypress Co. (1912) 114 C. C. A. 89, 194 **Fed.** 69, petition for certiorari denied in (1912) 225 **U. S.** 706, 56 L. ed. 1266, 32 Sup. Ct. Rep. 838, holding that an agreement for the sale of all the lumber manufactured by the seller during a certain period of time imposes upon the seller no obligation to continue to operate his plant, and, where he sells the same, he is not

liable to the buyer for a breach of the contract;

—Inman Bros. v. Dudley & D. Lumber Co. (1906) 76 C. C. A. 659, 146 Fed. 449, holding that a contract for the sale of the entire cut of a sawmill, in the absence of fraud, only required for its performance the delivery of the actual output, regardless of any estimate made at the time of the contract, and mentioned therein;

—Kenan, McKay, & Spier v. Home Fertilizer & Cotton Oil Co. (1918) — — Ala. —, 79 So. 367, holding that a contract by a cotton seed crushing plant to sell its entire output of linters for a certain period of time did not impose upon the seller the duty of operating the plant in order to produce any definite quantity of linters. The court said, that "the seller engaged to sell its 'make' of 'linters.' It did not obligate itself to make any 'linters.' There was no manifestation of an intent to so engage. The terms employed disclose that the seller's purpose was to sell 'what we make,' the season's make, no purpose to engage to sell a definite or even an estimated number of bales of 'linters.' It is not possible to imply an obligation to make an article from an assumption of the limited obligation to sell, not a definite number of an article, but simply, merely, what the seller makes. Where the seller engages to sell and deliver the output of his plant, and the buyer engages to take and pay therefor, the buyer is liable to the seller for the damages resulting from the refusal of the buyer to receive and pay for the make or output that the seller's plant has actually produced. . . . In such case, the certainty, as well as the mutuality, essential to support the contract is afforded by the act, the outlay of the seller in performing the contract to the extent at least of producing, as upon the promise of the buyer to receive and pay for, the article the contract describes;"

—Jones v. Lanier (1916) — Ala. —, 73 So. 535, holding that a contract for the sale of the entire output of a coal mine for a certain period of time did not impose upon the seller the duty of operating the mine during that time.

—Burt v. Garden City Sand Co. (1909) 237 Ill. 473, 86 N. E. 1055, affirming (1908) 141 Ill. App. 603, holding that a contract for the sale of the entire output of a cement factory, except a stated amount, is performed, if the seller actually delivers the output of the factory with the exception noted, and reference cannot be had to extraneous facts and circumstances to import into the contract a provision that the plant should be operated to its full capacity, and that the output should be what could reasonably be produced by the plant when running at its full capacity;

—Bautovich v. Great Southern Lumber Co. (1911) 129 La. 857, 56 So. 1026, Ann. Cas. 1913B, 848, holding that a contract for the sale of all an article produced by a certain plant during a specified time, estimated at a certain number of tons, is complied with by the delivery of the actual production of the plant, although it is much less than the amount thus estimated, there being no evidence of fraud or bad faith on the part of the seller;

—Kenan, McKay & Spier v. Yorkville Cotton Oil Co. (the reported case, ante, 1387), holding that a contract for the sale of the season's output of cotton linters, about 400 bales, only imposed upon the seller the obligation to deliver the quantity of linters actually produced within the specified period of time, and did not require the seller to operate his plant continuously during that period of time, the linters being a by-product of the plant;

—Gwillim v. Daniell (1835) 2 Cromp. M. & R. 61, 150 Eng. Reprint 26, 1 Gale, 143, 5 Tyrw. 644, 4 L. J. Exch. N. S. 174, holding that a contract for the sale of all of the naptha a seller might make for two years, "say from 1,000 to 1,200 gallons per month," does not obligate the seller to deliver more than he in good faith manufactures although the quantity is much less than he estimates;

—McConnel v. Murphy (1873) L. R. 5 P. C. (Eng.) 203, 28 L. T. N. S. 713, 21 Week. Rep. 609, holding that a

contract for the sale of all spars of certain dimensions manufactured by a designated person, "say about 600," does not obligate the buyer to deliver more than the actual amount of spars manufactured, which are of the required dimensions. The court said that the term, "say about," seemed to be employed for the purpose of showing that nothing absolute or definite in the way of the quantity was intended on the part of the seller.

Compare with Leeming v. Snaith (1851) 16 Q. B. 275, 117 **Eng.** Reprint, 884, 20 L. J. Q. B. N. S. 164, 15 Jur. 988, holding that a contract for the sale of all of the combing skin which the seller pulled in a certain period of time, "say not less than 100 packs," required the seller to deliver at least 100 packs.

And see on this point Herren v. Gaines (1868) 63 **N. C.** 72, holding that a contract for the sale of all the ginseng the seller had on hand and which he should collect during that season, estimated at a certain number of pounds, only bound him to deliver the amount he had on hand together with the amount he collected, although much less in amount than he estimated.

A contract to purchase all the coke manufactured by the seller for a certain period of time, the latter guaranteeing to produce a designated number of tons, with the proviso, however, that shipments might be suspended in the event of strikes, etc., is complied with if the seller furnishes all the coke he manufactures during the stated period, although the quantity does not equal the amount guaranteed, shipment, however, having been suspended because of strikes and other matters within the proviso. Hull Coal & Coke Co. v. Empire Coal & Coke Co. (1902) 51 C. C. A. 213, 113 **Fed.** 256.

It has been declared that the unexplained failure of the seller to operate its mill rendered it liable for breach of the contract to sell its output of linters for a certain period of time. Dawson Cotton Oil Co. v. Kenan, McKay & Spier (1918) 21 **Ga.** App. 688, 94 S. E. 1037. In this case, however, the question was presented on demurrer by the seller to a petition by the buyer to recover damages for a breach of the contract, and the petition expressly alleged that the seller closed down its mill wrongfully, and in bad faith, before the expiration of the season covered by the contract. Of course, the demurrer to the petition admitted the truth of this allegation, and the actual holding of the court was merely that as against this demurrer the petition stated a cause of action.

III. Construction as regards duty of buyer to accept output where it exceeds estimate.

Where the terms of the contract require the seller to deliver, and the buyer to receive and pay for, the entire output of a plant for a certain period of time, the buyer is thereby obligated to receive and pay for the output of the plant not only where it is less in quantity than the estimate, but also where it is greater in quantity. And this is true, even where the output is largely in excess of the estimate:

—Eustis Min. Co. v. Beer, S. & Co. (1917) 239 **Fed.** 976, holding that a contract for the sale of copper cinders, a by-product obtained from smelting ore, the contract covering all of the cinders produced during a certain period of time, estimated at a designated number of tons, obligated the buyer to accept all of the cinders produced during this period of time, although such production, owing to the demands of the war, was greatly increased;

—Swift & Co. v. Hafleigh & Co. (1917) 66 **Pa. Super. Ct.** 504, holding that under a contract for the sale of the entire output of a certain character of bones of a packing plant, estimated at a certain number of tons per month, it is the duty of the buyer to accept the output of the plant, although largely exceeding the number of tons estimated;

—Loeb v. Winnsboro Cotton Oil Co. (1906) — **Tex.** Civ. App. —, 93 S. W. 515, holding that the sale of the season's output of linters, estimated at a certain number of bales, obligates the buyer to take the entire output, although in excess of the estimated

amount. The court said that the excess was not so great that it could be said that the parties would not have made the contract, had such excess been known or contemplated.

In Kellogg v. Norman (1878) 74 N. Y. 596, a contract for the sale of "about" a specified quantity of oil cake of the seller's manufacture, to be delivered "about" a certain number of tons per month, "being all of the oil cake" made by the seller at his mill, was construed to impose upon the buyer the duty of taking the entire output of the mill for the period agreed upon, in the absence of evidence that the power of the mill was unduly urged, although the quantity was greatly in excess of the estimate. The court said that the estimate was merely expressive of expectation or conjecture, and not controlling.

IV. Miscellaneous matters of construction.

Under a contract for the sale of the output of an oil well, in arriving at the amount the seller is to turn over to the buyer, there is to be deducted the royalty and unmarketable stuff, but there should not be deducted a per cent that the seller paid for air pressure to operate the plant, in the absence of any showing that, at the time of the execution of the contract, the parties contemplated that air pressure should be used and should be paid for by deduction from the output. Crusel v. Tierce (1907) 118 La. 292, 42 So. 940.

Under a contract for the sale of all of the output of a factory making different kinds of handles, the refusal of the buyer to take one kind of handle entitles the seller to refuse to perform as to the other kinds. Laswell v. National Handle Co. (1910) 147 Mo. App. 497, 126 S. W. 969.

In Longfellow v. Huffman (1909) 55 Or. 481, 104 Pac. 961, however, upon the theory that the sale of the entire crop of lambs from a certain flock of sheep for two seasons was severable, it was held that where the buyer was to indorse the purchase price upon a note which he held against the seller, and he disposed of the note, thereby putting it out of his power to make such indorsement, this amounted to a breach of the contract on his part which entitled the seller to refuse to deliver to him the first season's crop of lambs; but it did not entitle the seller to refuse to deliver the crop of lambs the following season, where the buyer demanded the same and tendered the purchase price therefor.

In Campbell & C. Co. v. Weisse (1904) 121 Wis. 491, 99 N. W. 340, it is held that a contract for the sale of a season's output of 200 cords of bark, more or less, is severable, in the sense that the default of the buyer in paying for a portion of the bark does not relieve the seller of the duty of delivering the entire season's output. Upon the general question of the divisibility of a contract as affecting the right of the seller to rescind or refuse to make further deliveries, for default of the buyer in paying for deliveries made, see note appended to Stearns Salt & Lumber Co. v. Dennis Lumber Co. 2 A.L.R. —.

In Producers Coke Co. v. Hillman (1914) 243 Pa. 313, 90 Atl. 144, it is held that a contract for the sale of all the coke produced in a certain plant during a certain period of time is entire, in the sense that, where the seller refused to deliver his entire output, he could not recover for the portion which he did deliver.

A contract to take from a mine and make full settlement for the entire output therefrom for a certain period of time, not less than a designated number of tons annually, does not impose upon the buyer the duty of taking the output of the mines each month, although the surrounding circumstances would indicate that, if the coal was not taken from the mines as produced monthly, it would not be possible to operate the same. Shipman v. Saltsburg Coal Co. (1894) 10 C. C. A. 311, 17 U. S. App. 625, 62 Fed. 145.

In construing a contract for the sale of all of a certain designated stock of lumber the seller might make at a designated mill, with the exception of such lumber as might be required by him in a retail yard he operated at a designated place, parol evidence is admissible of the surrounding facts

and circumstances, and of conversation between the parties at the time of the execution of the contract, in order to show what was included in the exception; since the exception was ambiguous, and the evidence did not tend to vary the terms of the contract or import a new provision therein. Chicago Title & T. Co. v. Sagola Lumber Co. (1909) 242 Ill. 468, 90 N. E. 282.

In Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. (1907) 136 Iowa, 382, 113 N. W. 827, a contract for the sale of the coal mined, including substantially the entire output of a mine for a designated period of time, was breached by the seller, and in estimating the damages to the buyer therefrom, they were based upon the quantity of coal mined during the time covered by the contract. And this was also true as to McGrath v. Gegner (1893) 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502, in estimating the damages due to the failure of the seller to deliver to the buyer the output of his plant.

In Campbell & C. Co. v. Weissé (Wis.) supra, it was held that damages of the buyer for the failure of the seller to deliver its entire season's output of bark, 200 cords more or less, should have been based upon evidence as to the amount of bark the seller had at its plant during the season.

A. G. S.

PEOPLE OF THE STATE OF ILLINOIS
v.
ISAAC BOND, Plff. in Err.

Illinois Supreme Court — December 19, 1917.

(281 Ill. 490, 118 N. E. 14.)

Witness — impeachment — occupation.

1. For purpose of impeachment a witness may be asked as to his occupation.

[See note on this question beginning on page 1402.]

Appeal — conflicting evidence — effect.

2. A verdict in a criminal case will not be set aside on appeal merely because the evidence is conflicting.

Same — asking as to arrest.

3. A witness testifying as to an alibi for one accused of murder cannot, for purposes of impeachment, be asked if she had not been arrested and tried on a charge of keeping a house of ill fame.

Appeal — inadmissible evidence — prejudice.

4. It is not prejudicial error to ask a witness to an alibi, for purposes of impeachment, if she had not been arrested and tried for keeping a house of ill fame, if she admitted arrest, but stated that she was not found guilty.

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Clarence Darrow, Victor M. Yarros,** and **J. Gray Lucas** for plaintiff in error.

Messrs. **Edward J. Brundage,** Attorney General, **Maclay Hoyne** and **Edward C. Fitch** for the people.

Farmer, J., delivered the opinion of the court:

The plaintiff in error, Isaac Bond, colored, was indicted, tried, and convicted in the criminal court of Cook county on a charge of murdering Ida J. Leegson, a white woman, and his punishment was fixed at confinement in the penitentiary for life. A writ of error has been sued out to review said judgment.

Plaintiff in error insists the judgment should be reversed because the proof does not show him guilty be-

yond a reasonable doubt, and for the further reason that the court erred in admitting improper testimony.

Ida J. Leegson was an artist, art student, or teacher, and was also a practical nurse. She lived at 122 East Twenty-fifth street, in Chicago. On October 5, 1913, her dead body was found on the prairie in the neighborhood of Forty-eighth avenue and Seventy-first street. She had been ravished, and murdered by being choked. Her clothing was torn from her body and was scattered around for some distance. There were evidences of a fierce struggle and the body bore numerous bruises. Near the body there was a track made by a No. 11 shoe. Miss Leegson had caused an advertisement to be published in the Daily News on October 4, 1913, that she was a practical nurse, maternity cases preferred, and giving her telephone number. Some time after 2:30 o'clock P. M., October 4th, while Miss Leegson was absent from home, there was a telephone call for her, and the woman at whose house she was living answered it. A voice she recognized as that of a man inquired if there was a nurse at that place. Witness replied that the nurse was out, but would be back shortly, and suggested to the man that he leave his telephone address. He said his wife needed a nurse and said something about maternity; that he had come far; and that he would call another nurse, and if he could not get another would call again. Miss Leegson returned about fifteen minutes later, and shortly after her return the telephone rang. Miss Leegson answered it. The witness heard her say, "Fifteen dollars without washing and twelve dollars with washing." She said she would come within an hour, and repeated an address given her on the telephone. She repeated, "Go by Western to Seventy-first street." She said something to the person with whom she was talking over the telephone about a long walk after she should leave the car, and that she would have to bring a suit case. She left witness's home to keep the engagement, and the next day witness saw her dead body at an undertaker's rooms, where it had been taken after its discovery on the prairie.

The morning of October 5th a colored man pawned for a loan with Eli A. Nierman, a pawnbroker at 3020 South State street, a lady's watch upon which was a monogram. The pawnbroker inquired of the man as to the ownership of the watch. The colored man said it belonged to his sister, whose name was Ida Leegson, but that he did not know what the middle initial stood for. He said his own name was A. J. Leegson. The pawnbroker put the watch and the pin attached to it in an envelope and placed them in a safe. The next day he saw a report of the murder of Miss Leegson in the newspapers and notified the police he had taken in a watch with the name Leegson on it, and surrendered it to the police department. At the trial the woman at whose house Miss Leegson lived was shown the watch and the pin produced by the police department and identified them as the property of Miss Leegson. The pawnbroker identified them as the articles pawned to him by the colored man the morning of October 5th, which was the day the body was found.

Defendant denied his guilt and sought to prove that he was in Gary, Indiana, October 4th and 5th. He is a tall man about 6 feet 2 inches, and has large, square shoulders and apparently rather small legs for the size of his shoulders and body.

On the part of the prosecution, James E. Connolly, a car inspector for the Wabash railroad, testified that about 5 or 6 o'clock in the evening of October 4th he left his home and drove across the field to the Wabash yards. While driving he saw a colored man and a white woman on Seventy-first street, coming toward him. The man was large and powerful—about 6 feet tall. He

gave his impression and recollection of the clothing worn by them or a part of it. The man carried a hand satchel which resembled in color and shape the one shown him at the trial as Miss Leegson's. It was about dark when the witness saw the parties. He was driving east and they were walking west. The man kept his head down and witness could not see his face. He particularly noticed the man's shoulders and thought they were as square as he had ever seen, but the lower limbs were small and did not seem in proportion. It struck witness as unusual to see a colored man and a white woman there together.

Thomas Bursach testified he finished painting his residence, 5324 Hoyne avenue, on Saturday, October 4th, and while standing in front of his house, somewhere about 5 o'clock in the evening, a colored man came up to him. A white woman was with the colored man. The man was tall, not black but brown, and had a small black mustache. He stood within 4 feet of the witness and inquired where Fifty-fifth and Seeley streets were. The woman was about 12 feet away. Witness directed the colored man to the place he inquired for. He testified positively that he recognized defendant as the man he saw the evening of October 4th with the white woman. He had previously identified a picture of defendant shown him by a policeman as the picture of the colored man he saw with the white woman October 4th, and later saw and identified defendant at the coroner's inquest.

Willis H. Mays, special police officer for the Wabash railroad, testified he was stationed between Seventy-fifth street and Western avenue, in the Wabash yards, and that his duties were to patrol the yards. He worked between 6 in the evening and 6 in the morning. The night of October 4th while witness was patrolling the yards back and forth, he ran across a colored man. The man had his hands in his pockets and "was a great big fellow." Witness drew his revolver and inquired of the man where he came from and where he was going. The man said he had come from St. Louis and was going to Gary, Indiana. Witness made him put up his hands and searched him. He found three 10-cent pieces and a watch. The man told the witness a very good story, and the witness took him to the office, where he turned the light on and again questioned him. The man said he came on a freight train from St. Louis. Witness asked him what he was doing with a lady's watch in his pocket, and he said it was his dead sister's watch. After keeping him about thirty minutes witness told him to go about his business. There was a little three-pointed pin attached to the watch the colored man had. On being shown the watch and pin of Miss Leegson, the witness testified the pin resembled the one attached to the watch which he found on the colored man, but that he could not say as to the watch. The colored man was over 6 feet tall and had square shoulders. Witness looked at his face. He testified that to his best belief and knowledge defendant was the man he encountered in the Wabash yards the night of October 4th.

William Maher was a motoroman. On Sunday, October 5th, while driving his car, he saw near the corner of Sixty-third street and Forty-eighth avenue a tall colored man who was looking at the sign on the car. When the car stopped, the colored man boarded it and came out on the front platform where witness was. Witness remarked to the man about his being tall, and the man replied he was nearly 6 feet 2 inches. There was plenty of light at the time. The man asked witness if he was going down town, and witness told him he was not; that he connected with the Archer Limits car and the man could take that car. The man got off there. He was tall, weighed about 200 pounds, had heavy shoulders, a small black mustache, was

about forty years old, and was rather yellow or copper-colored. His legs seemed small in proportion to his body. Witness would not say defendant was the man who rode with him on the car, but testified he looked exactly like him and that he resembled him very much.

The pawnbroker with whom Miss Leegson's watch was pawned testified he could not positively identify anybody from what he observed at the time he received the watch from the colored man. He testified the man was tall, had a slight mustache, and was brown (not real black) and was from thirty-five to forty years of age.

Michael Binkowitz was a clerk in the pawnshop. He testified he was in the room when the colored man came in to pawn the watch. He was in a window, trimming it. There was some bargaining over the amount asked by the colored man which attracted the witness's attention, and he turned around and looked at the man. He testified positively defendant was the man who pawned the watch.

The foregoing is the material testimony for the prosecution to prove that the murder was committed by defendant. It must be regarded as conclusively proved that Miss Leegson was murdered the night of October 4th, and that a colored man committed the crime after luring her to the place where the body was found, on the pretext that he was taking her to someone desiring her services as a nurse.

Seven witnesses, all colored, testified that defendant was in Gary, Indiana, the night of October 4th, and some of them also testified he was there October 5th. They testified they were able to fix the date because on the night of October 4th there was a political parade in Gary, and some of them testified defendant was asked to take part in the parade, but declined, claiming that his feet were sore.

Defendant was a witness in his own behalf and testified he was forty years of age and that he wore No. 11 shoes. After leaving Tennessee, where he was born, he engaged for a time in railroading and other forms of labor. In 1910, at Cape Girardeau, Missouri, he killed a man in a difficulty over a poker game and ran away. He was captured in Chicago, returned to Missouri, was tried and convicted of manslaughter, and sentenced to the penitentiary. He was released from prison on August 2, 1913, came to St. Louis, and communicated with John Collins, of Gary, Indiana, who kept a saloon there, with a restaurant in the basement, where gambling also was carried on. Collins sent him money, and he went to Gary and worked in the basement of Collins's saloon until September 28, 1913, when he went to Chicago, where he stayed until October 1st, when he again returned to Gary. The restaurant in the basement of the Collins saloon was conducted by a man named Parker and a woman who testified at the trial that she was Parker's wife. Defendant testified to being in the restaurant frequently during the afternoon and night of October 4th and to seeing the Parkers there and other persons named at other places. He remembered the parade and that he did not go in it because he had sore feet. He testified to visiting different places in Gary the night of October 4th and to meeting a number of persons whom he named. October 5th he had breakfast at a restaurant in Gary and all day went back and forth between a place he called a "club" and the saloon. On Monday, October 6th, he went to Chicago and to the home of Mrs. Neiss to get some clothes he had left there on a previous visit. From there he went back to Gary. After arriving in Gary he was arrested and taken before the chief of police.

The abstract is very imperfect, but as we understand it the newspaper account of the murder, and the description of the man who pawned the watch of the murdered girl caused suspicion to be directed toward defendant, and for that rea-

son he was arrested and taken before chief of police Martin at Gary. He was there questioned by the chief and told the chief to call up certain places and persons for the purpose of establishing that he had been in Gary the last five or six days. Defendant had formerly been a deputy of Chief Martin. Defendant was detained about a half hour and then released. He remained in Gary until November, when he went to Chicago. On the morning of January 14, 1914, while in bed at the home of Mrs. Neiss, she came in and called his attention to an article in the newspaper mentioning his name in connection with the murder of Miss Leegson. He got up, dressed, and without waiting for his breakfast went to the pawnshop of Nierman and asked him to get an officer. An officer was called, who took defendant in custody. He was kept in custody and subsequently was indicted, tried, and convicted. He testified he had never heard of Miss Leegson; that he never called her on the telephone; that he was in no way connected with her murder, and knew nothing of it until he read of it in the paper.

Of the seven witnesses who testified defendant was in Gary October 4th and 5th, four were men and three women. If their testimony was true, defendant could not have committed the crime. By way of rebuttal one woman testified for the state that she roomed in a house kept by Mrs. Saunders; that defendant occupied a room just back of hers, with a door between them; that defendant did not stay in his room the night of October 3d, and he was away three or four or five days; that Mrs. Saunders wondered if he was coming back, and had nearly rented his room to another man before he returned. The stenographer who took down the statements of Collins, the saloon keeper, to Captain Halpin on January 14, 1914, testified Collins then said he could not say where defendant was October 3, 4, or 5; that he left town four or five days somewhere between the 1st and the 10th. A police officer of Gary testified he remembered October 4th; that he was around electioneering on that day and went to Collins's place four or five times and was down in the basement; that he was there both forenoon, afternoon, and evening, and did not see defendant either in the saloon or in the basement. The last time the witness visited the saloon and basement was about 11 o'clock P. M. Alma Smart, one of defendant's witnesses, testified positively to defendant's being in Gary October 4th and 5th, giving the hours, places, and circumstances under which she saw him. She roomed at the home of Oscar Middleton, and testified it was there she saw him at some occasions during those dates. In rebuttal, Oscar Middleton testified he kept roomers and that Alma Smart was one of his roomers; that about 11 o'clock in the evening of October 1st defendant came and asked for Alma Smart; that witness showed him to her room and did not again see him until 7 or 8 o'clock in the evening of October 6th; that he did not see him the 2d, 3d, 4th, or 5th; that witness stayed at home that week, and was at home all day Sunday, the 5th, but did not see defendant at any time that day. Alma Smart had testified that defendant was in her room part of the day Sunday, had breakfast there at 10 o'clock, and went to Chicago the next day, which would be October 6th, returning at night.

It is evident the jury did not believe the witnesses who testified that defendant was in Gary on October 4th and 5th, and a reviewing court cannot say from this record that they were of so reliable a character that the jury would not be warranted in disbelieving them. All of them were friends and associates of defendant, and some of them were contradicted by other witnesses. The testimony of the three witnesses for the state who identified defendant as being the man they saw in the vicinity of the

murder October 4th and the morning afterwards, when he came into the pawnshop to pawn the watch, was positive and unequivocal. The motorman on whose car the colored man rode the morning of the 5th testified defendant looked exactly like that man and resembled him very much. If these witnesses were worthy of belief, defendant was not in Gary the 4th and 5th of October, but was in the vicinity of the murder, and one of them testified that he was with a white woman, and another testified that it was he who pawned the murdered woman's watch. If the testimony of these witnesses was true, it warranted the verdict finding defendant guilty, and the jury must have believed it was true or defendant would not have been convicted. We have frequently said that it is the province of the jury to judge of the credibility of the witnesses, and that a verdict will not be set aside merely because the evidence is conflicting. Reviewing courts cannot usurp the functions of a jury by substituting their judgment for that of a jury in passing on the weight and credibility of conflicting testimony. People v. McCann, 247 Ill. 130, 93 N. E. 100, 20 Ann. Cas. 496; People v. Hohimer, 271 Ill. 515, 111 N. E. 599.

Appeal—conflicting evidence—effect.

On cross-examination, Alma Smart, a witness for defendant, was asked by counsel for the state if she had kept a house of ill fame at Gary and whether she had been arrested and tried on that charge. Witness answered she had not kept such a house; that she had been arrested, but was not found guilty or fined. Objections made by defendant to the questions which elicited those answers were overruled, and these rulings of the court are assigned as erroneous. The evident purpose of the questions asked the witness was to discredit her testimony by her answers. It is permissible to inquire of a witness as to his or her occupation. If a witness is engaged in an unlawful and disreputable occupation, in justice and fairness he should not be permitted to appear before the jury as a person of high character who is engaged in a lawful and respectable occupation. People v. White, 251 Ill. 67, 95 N. E. 1036. But the court should not have permitted the witness to be asked whether she had been arrested and tried on the charge of keeping a house of ill fame. She answered that she had been arrested, but was not found guilty or fined, and no attempt was made to contradict her statement. In view of her answers, we cannot see how defendant was prejudiced by the error, and upon a consideration of the whole record we are of opinion a reversal of the judgment would not be justified on account of that error. People v. Murphy, 276 Ill. 304, 114 N. E. 609.

Witness—impeachment—occupation.

Same—asking as to arrest.

Appeal—inadmissible evidence—prejudice.

The judgment of the Criminal Court is affirmed.

ANNOTATION.

Right to inquire of witness as to his or her occupation for purposes of impeachment.

Occupation as test of credibility or weight of testimony.

The right to inquire of a witness as to his occupation for purposes of impeachment is generally recognized, although subject to important limitations. The rule is based upon the theory that the occupation of a witness is one of the matters which will enable the jury to pass upon his credibility and to determine what weight ought to be given to his testimony. Henwood v. People (1914) 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916A,

1111 (holding witnesses may be asked on cross-examination as to their occupation and antecedents in order to enable the jury to pass upon their credibility); Cicero & P. Street R. Co. v. Priest (1899) 89 Ill. App. 304, affirmed in (1901) 190 Ill. 592, 60 N. E. 814 (holding a witness may be asked upon cross-examination if he was not engaged in the business of gambling, for the purpose of affecting his credibility); United States v. Duff (1881) 19 Blatchf. 9, 6 Fed. 45 (dictum to the effect that the occupation of a person may always be shown, as bearing upon his credibility).

In People v. White (1911) 251 Ill. 67, 95 N. E. 1036, the prosecution in a murder trial was permitted to show on cross-examination of a witness for the defense, for the purpose of enabling the jury to determine what weight ought to be given to his testimony, that he was a bartender and had been employed as such for eighteen months; that he had put in more time in working for gambling houses in the last fifteen years than in tending bar or running a saloon; that he had been employed in the gambling houses of the city, operating gambling tools and devices; that the greater part of his business had been running gambling devices in gambling houses or playing what is called "house money" in poker games, which meant that the saloon or gambling place furnished the money played for; that his business as a gambler frequently obliged him to be up all night as often as once or twice a week, and that frequently on Saturday and Sunday nights he would be up all night.

The case last mentioned is cited in People v. Schultz (1913) 260 Ill. 35, 102 N. E. 1045, which holds that defendant on trial for rape may be asked on cross-examination as to what work he has engaged in during the past two years.

The doctrine of People v. White (Ill.) supra, that if a witness is engaged in an unlawful and disreputable occupation, in justice and fairness he should not be permitted to appear before the jury as a person of high character, who is engaged in a lawful and respectable occupation, is stated in the reported case (PEOPLE v. BOND, ante, 1397), which holds that it is permissible to require a witness for the defense in a murder trial to state on cross-examination whether she had kept a house of ill fame at a specified place.

The principle that it will not be presumed that a witness who follows some disreputable vocation or calling for a living is as capable of telling the truth as one who pursues some legitimate or honorable vocation governs the following cases: McLeod v. State (1903) — Tex. Crim. Rep. —, 75 S. W. 522 (holding that occupation of witness may be shown to be that of gambling and running a gaming house); Flores v. State (1904) — Tex. Crim. Rep. —, 79 S. W. 808 (holding that the district attorney may properly show on the cross-examination of a witness that her vocation is that of keeping a dance house); Brittain v. State (1905) 47 Tex. Crim. Rep. 597, 85 S. W. 278 (holding that, in a prosecution for homicide, facts may be elicited from the defendant on cross-examination to show that her occupation was that of a prostitute); Roberts v. State (1918) — Tex. Crim. Rep. —, 201 S. W. 998 (holding that defendant on trial for perjury is entitled to show on the cross-examination of a witness for the state that the latter was employed in a disorderly house); Curtis v. State (1904) 46 Tex. Crim. Rep. 480, 81 S. W. 29 (holding defendant on trial for perjury, a conviction for which can only be sustained on the testimony of two credible witnesses, is entitled to show on the cross-examination of one of the two witnesses against him, and as affecting his credibility, that he had been in jail and had been working on the roads of the county as a convict under a conviction for an aggravated assault in whipping his wife).

It is permissible on cross-examination to ask a witness what business he is engaged in, and to elicit the fact that he sometimes loaned money to railroad men, even though it be calculated to prejudice a jury against him. Missouri, K. & T. R. Co. v. Calnon (1899) 20 Tex. Civ. App. 697, 50 S. W. 422.

But the refusal to permit inquiries on cross-examination as to the occupation of a witness is not erroneous, where the testimony sought to be elicited would not have shown that the employment was one involving moral turpitude. Atchison, T. & S. F. R. Co. v. Keller (1903) 33 Tex. Civ. App. 358, 76 S. W. 801 (holding that the refusal of the court to allow a witness to be asked whether the room which he was occupying ostensibly for the purpose of conducting a messenger service and insurance business was not really used for conducting a club for negroes was not erroneous, since there is nothing inherently wrong in conducting such a club); Carter v. State (1903) 45 Tex. Crim. Rep. 430, 76 S. W. 437 (holding that the refusal of the court, on the trial of an indictment for rape, to permit the defense to prove by the prosecutrix on cross-examination that she was employed by her father to assist in selling beer in his store, where disorderly characters, men and lewd women, gathered to drink beer at night, and to engage in lewd and disorderly conduct, and that the prosecutrix associated with them and drank beer with them and waited on them in the wine room, associating with them on terms of equality, is not reversible error, since the testimony was not of a character to impeach or discredit her as a witness, because she was engaged in her father's business and he had a right to command her services); American Metal Co. v. San Roberto Min. Co. (1918) — Tex. Civ. App. —, 202 S. W. 360 (holding that refusal of the court to permit counsel to develop on the cross-examination of a witness the fact that he was interested in the business of operating a race track, which was partially supported by betting on horse races, is not erroneous, since this discloses only a misdemeanor, and not an offense involving moral turpitude).

Similarly, a witness for the defense in a criminal trial should not be required to answer on cross-examination whether she had been convicted in a mayor's court for the offense of running a house of ill fame, in view of the fact that the provision of the Alabama Code relating to the credibility of witnesses as affected by a conviction for crime contemplates only conviction for violations of the state laws, and not conviction for violation of municipal ordinances. Huckabaa v. State (1912) 4 Ala. App. 68, 58 So. 684.

That a witness for the defense was required by the district attorney to state on cross-examination all the occupations and businesses which he had been following for the past three or four years is not erroneous, where it does not appear in the bill of exceptions what his answers were nor how the information elicited could in any way have injured him. Sexton v. State (1905) 48 Tex. Crim. Rep. 497, 88 S. W. 348.

In Burdette v. Com. (1892) 93 Ky. 76, 18 S. W. 1011 (holding a witness may be asked on cross-examination, for the purpose of impairing his credibility, as to specific facts tending to disgrace or degrade him, although collateral to the main issue), it is said, referring to 1 Greenleaf on Evidence, § 456, that there does not seem to be any good reason why a witness should be privileged from answering a question touching his present situation, employment, and associates, if they are of his own choice; as, for example, in what house or family he resides; what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons and the like; for although these may disgrace him, his position is one of his own seeking.

Defendant on trial for homicide, when introduced as a witness in his own behalf, may be properly asked if he was not a gambler; if he did not make his living that way; if he did not belong to and travel with a sleight-of-hand show, and whether he did not frequent the house of ill fame in which the killing occurred. Leslie v. Com. (1897) 19 Ky. L. Rep. 1201, 42 S. W. 1095. These inquiries come clearly within the rule laid down in the preceding decision.

The court should permit a witness to answer on cross-examination a query as to whom she lived with, since it is always competent to show the occupation and associates of a witness

for the purpose of discrediting her. Trabue v. Com. (1902) 23 **Ky.** L. Rep. 2135, 66 S. W. 718.

But, on the contrary, inquiries propounded on cross-examination in an attempt to disgrace the complaining witness in a trial for assault by proof of a mere collateral matter are held to have been properly excluded in Meehan v. State (1903) 119 **Wis.** 621, 97 N. W. 173, where the questions were whether the witness at one time ran a sporting house and whether he was still in the same business.

The rule permitting inquiry into antecedents of a witness by showing his occupation, social connections, manner of living, and such matters, and which is based on the presumption of law that every person to a large extent has the right and power of selecting his occupation, social connections, and manner of living, is recognized, and it is held in Slater v. United States (1908) 1 **Okla.** Crim. Rep. 275, 98 Pac. 110, not to justify an inquiry of a witness on cross-examination as to whether he had ever been arrested for crime, since indictment, arrest, or imprisonment before conviction are involuntary, so far as the witness is concerned.

The preceding decision was followed in Musgraves v. State (1910) 3 **Okla.** Crim. Rep. 421, 106 Pac. 544 (holding that defendant on trial for a violation of the prohibitory law may be asked on cross-examination if he did not "run a joint" at a certain place and time).

And it is held in Fowler v. State (1912) 8 **Okla.** Crim. Rep. 130, 126 Pac. 831, that it may be shown on the cross-examination of one on trial for homicide that he was engaged in the sale of intoxicating liquors.

It is competent to ask a witness on cross-examination as to his occupation and where he resides, although the facts disclosed have a tendency to disgrace the witness or affect his credibility. Thus, a witness whose deposition is taken in jail, where he is confined while awaiting trial, may be asked properly on cross-examination, where he is living and stopping, and what he is doing there. State v. Pugsley (1888) 75 Iowa, 742, 38 N. W. 498, 8 Am. Crim. Rep. 100.

Compare Slater v. United States (**Okla.**) supra, in which it is considered that the reasons which permit inquiries of a witness as to his occupation, because it is a matter largely of his own choice, "do not apply to indictments, arrests, or imprisonment before conviction, for the obvious reason that they are not matters of choice, but are involuntary, so far as the witness is concerned. When the reason for a rule of law ceases, the rule should fall with it." In State v. Pugsley (**Iowa**) supra, counsel contended that the object and purpose of the questions asked, and the evidence elicited in response thereto, was to disgrace the witness, cast suspicion on and weaken his evidence in chief, and that the mere fact that a person has been indicted and is confined in jail has no tendency to impair his credibility or to impeach his moral character. But the court was of the opinion that the right of legitimate cross-examination should not be denied because of the effect produced by it.

One who testified on her direct examination that she kept a restaurant in a certain place, and that the defendants lodged in her house the night the burglary with which they were charged was committed, may be properly asked on cross-examination, if she had been engaged in selling liquor part of the time she had lived in such place. State v. Davis (1900) 110 **Iowa**, 746, 82 N. W. 328.

The California Civil Code provides that a witness may not be impeached "by evidence of particular wrongful acts." The following cases depend upon this provision of the Code: People v. Hamblin (1885) 68 **Cal.** 101, 8 Pac. 687 (holding after the defendant, accused of murder, has testified to his being employed as doorkeeper at a certain place that was frequented by the deceased, it is improper to interrogate him on cross-examination and force an answer disclosing that such place was a gambling house, where he was engaged in the unlawful occupation of acting as doorkeeper, with a guilty knowledge of the nature of the

place); People v. Un Dong (1895) 106 Cal. 83, 39 Pac. 12 (holding that it is improper to ask a witness for the defense in a criminal trial on cross-examination, whether he is connected with a certain gambling house, where the question is not in response to anything called out on his direct examination, and could have been intended but for the purpose of discrediting him with the jury); ibid. (holding that questions asked the defendant on trial for assault, on cross-examination, as to whether he lived in a house of prostitution, and propounded under a claim of right to show the nature of his occupation or business, are improper in the highest degree, when not within the scope of his testimony in chief, and intended to degrade and injure him in the estimation of the jury); People v. Crandall (1899) 125 Cal. 129, 57 Pac. 785 (holding that it is not permissible on cross-examination to ask a female witness by a great variety of questions, if she did not live by prostitution, and to interrogate her in reference to particular times and places, and in reference to particular men, and as to whether she did not practice special modes of solicitation for immoral purposes); Re Kasson (1900) 127 Cal. 496, 59 Pac. 950 (holding that, in a proceeding to determine heirship, it is erroneous to permit a witness to be asked on cross-examination if she had not kept a house of prostitution at a certain place); Pyle v. Piercy (1898) 122 Cal. 383, 55 Pac. 141 (holding that a witness should not be forced to state, upon cross-examination, under objection, that she had been living with her husband prior to their marriage).

While it is entirely permissible to show upon cross-examination of a witness that he is general agent of a certain mineral water, yet it is not proper to impeach him by showing that, in the pursuit thereof, he made false statements as to the curative properties and medicinal value of the water. King v. Chicago, M. & St. P. R. Co. (1908) 138 Iowa, 625, 116 N. W. 719. The court remarked: "Testimony as to particular instances where he spoke an untruth in the pursuit of his occupation are inadmissible. Any other rule would open up all sorts of collateral inquiries; and from the standpoint of public policy, as well as to maintain directness of issue, impeachment should not be permitted by showing special instances of overstatement or of untruthfulness."

Questions as to the occupation of a witness, propounded on cross-examination, have been held to be properly excluded, when asked for the purpose of general impeachment of the witness other than by proof of his bad reputation for truth and veracity in general.

In State v. Fournier (1896) 68 Vt. 262, 35 Atl. 178, defendant's offer to show that one of the state's witnesses kept a house of ill fame and that another witness lived in it was held to be improper on this ground.

In Com. v. Williams (1904) 209 Pa. 529, 58 Atl. 922, it is held, for the same reason, that the court properly excluded a question asked on cross-examination of a witness for the state on the trial of an indictment for murder, as to whether she was running a sporting house at a certain place, which was accompanied by an offer to follow with the question "whether or not she was running a house of ill repute in which liquor was sold and drunk, contrary to law, and gambling was carried on, and to follow this further by showing by the witness herself that she is a married woman; that she does not live with her husband, and that she has not lived with him for many years, and to follow her back in her career for the purpose of identification and affecting her credibility, and show what she has been doing for the last dozen years or thereabouts."

Extent of cross-examination.

The extent to which the cross-examination of a witness as to his occupation will be allowed, for the purpose of discrediting him, rests in the sound discretion of the trial court. State v. Powers (1900) 72 Vt. 168, 47 Atl. 830.

Great latitude is allowed in the cross-examination of a witness touching his residence, occupation, and habits, so as to reflect light upon his credibility, and specific acts of immorality may be thus elicited which

could not be proved by other impeaching witnesses; yet this rule is not without its limitations. The trial court has a discretion as to how far a party may, with propriety, cross-examine a witness in a given case as to acts of immorality, and should not permit any needless or wanton abuse of the privilege. Little Rock Vehicle & Implement Co. v. Robinson (1905) 75 Ark. 548, 87 S. W. 1029. In this case counsel had asked a witness on cross-examination, "Are you not a kept woman?" to which she had answered in the negative. They excepted to the refusal of the court to permit further inquiry as to her recent acts, conduct, and habits of immorality, for the purpose of impeaching her credibility; but the supreme court regarded the exception as too general to show the precise questions counsel sought the opportunity to ask, or the facts they expected to elicit.

It has been held that the trial court, in the exercise of its discretion, may allow a witness to be asked on cross-examination, for the purpose of discrediting her, as to what names she had borne, what she had done, and as to whether she had been convicted of a crime, etc. Redsecker v. Wade (1914) 69 Or. 157, 134 Pac. 5, 138 Pac. 485, Ann. Cas. 1916A, 267.

But it is not permissible to seek to educe on cross-examination, for the purpose of discrediting a witness for the defense in a criminal trial, who has testified as to her occupation and employment by the defendant in a hotel, further testimony tending to prove that the defendant was of a criminal, degraded, or bad character, and to the effect that the hotel had been abated as a public nuisance, that its name had been frequently changed, and that the defendant had been convicted of running a disorderly house, where he did not take the witness stand or by any testimony make his character an issue. People v. Richardson (1917) 222 N. Y. 103, 118 N. E. 514. A. W. R.

R. A. O'BANNON

v.

INSURANCE COMPANY OF NORTH AMERICA, Plff. in Err.

Texas Supreme Court—November 27, 1918.

(— Tex. —, 206 S. W. 814.)

Insurance — sale of land — reservation of building — change of interest.

1. A sale of the land on which an insured building rests, with right of removal of the building, does not, prior to the time specified for removal, if the vendor remains in possession, effect a change of title or interest within a provision avoiding an insurance policy in case of change of title or interest of the subject of insurance.

[See note on this question beginning on page 1411.]

Same — sale of land — retention of building.

2. A provision avoiding an insurance policy if the subject of insurance be a building on grounds not owned by insured in fee simple refers to the time of issuance of the policy so that the policy would not be avoided by subsequent sale of the property with retention of title to the building.

ERROR to the Court of Civil Appeals to review a judgment affirming a judgment of the District Court for Grayson County in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Locke & Locke**, for plaintiff in error:

The effect of the provisions in the policy is such that the policy is void if, at the time of the fire, the ground on which the dwelling stood was not owned by the plaintiff in fee simple, or if the plaintiff's interest in the dwelling was not the sole and unconditional ownership thereof.

Hartford F. Ins. Co. v. Dorroh, — Tex. Civ. App. —, 133 S. W. 465; Ayres v. Hartford F. Ins. Co. 17 Iowa, 176, 80 Am. Dec. 553; Crescent Ins. Co. v. Camp, 64 Tex. 528; New Orleans Ins. Co. v. Gordon, 68 Tex. 149, 3 S. W. 718; Columbian Ins. Co. v. Lawrence, 2 Pet. 25, 49, 7 L. ed. 335, 344; Vance, Ins. 449, 450; Farmers' Ins. Co. v. Archer, 36 Ohio St. 608; Excelsior Foundry Co. v. Western Assur. Co. 135 Mich. 467, 98 N. W. 9, 3 Ann. Cas. 707.

A change occurred in the interest or title of the insured in the dwelling, whereby such interest or title became, and remained to the time of the fire, other than the unconditional ownership thereof. The title, if any, is conditional upon removal by the date stipulated.

McIntyre v. Barnard, 1 Sandf. Ch. 52; Saltonstall v. Little, 90 Pa. 422, 35 Am. Rep. 683; Adkins v. Huff, 58 W. Va. 645, 3 L.R.A.(N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246; Bunch v. Elizabeth City Lumber Co. 134 N. C. 116, 46 S. E. 24; Mengal Box Co. v. Moore, 114 Tenn. 596, 87 S. W. 415, 4 Ann. Cas. 1047; Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574; Strasson v. Montgomery, 32 Wis. 52; Reed v. Merrifield, 10 Met. 155; Howard v. Lincoln, 13 Me. 122; Pease v. Gibson, 6 Me. 81; Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001; Hicks v. Smith, 77 Wis. 146, 46 N. W. 133; Boisaubin v. Reed, 2 Keyes, 323; Golden v. Glock, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12; Hawkins v. Goldsboro Lumber Co. 139 N. C. 160, 51 S. E. 852; Williams v. Flood, 63 Mich. 487, 30 N. W. 93; Macomber v. Detroit, L. & N. R. Co. 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376; White v. Foster, 102 Mass. 375; Utley v. Wilcox Lumber Co. 59 Mich. 263, 26 N. W. 488; Bell County Land & Coal Co. v. Moss, 30 Ky. L. Rep. 6, 97 S. W. 354; Jackson v. Hardin, 27 Ky. L. Rep. 1110, 87 S. W. 1119; Chestnut v. Green, 120 Ky. 385, 86 S. W. 1122; McRae v. Stillwell, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; King v. Merriman, 38 Minn. 47, 35 N. W. 570; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862; Strong v. Eddy, 40 Vt. 547; Warren v. Leland, 2 Barb. 622; Webber v. Proctor, 89 Me. 404, 36 Atl. 631; Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470; Judevine v. Goodrich, 35 Vt. 19; Kellam v. McKinstry, 69 N. Y. 264; Null v. Elliott, 52 W. Va. 229, 43 S. E. 173; Bennett v. Vinton Lumber Co. 28 Pa. Super. Ct. 495; Johnston v. Shortreed, 12 Ont. Rep. 633; Steinhof v. McRae, 13 Ont. Rep. 546; St. Louis Cypress Co. v. Thibodaux, 120 La. 834, 45 So. 742; Clark v. Ingram-Day Lumber Co. 90 Miss. 479, 43 So. 813; Baxter v. Mattox, 106 Ga. 344, 32 S. E. 94; 2 Devlin, Real Estate, 3d ed. § 989a; Lodwick Lumber Co. v. Taylor, — Tex. Civ. App. —, 99 S. W. 192, 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238; Beauchamp v. Williams, — Tex. Civ. App. —, 115 S. W. 130; Montgomery County Development Co. v. Miller-Vidor Lumber Co. — Tex. Civ. App. —, 139 S. W. 1015; Carter v. Clark & B. Lumber Co. — Tex. Civ. App. —, 149 S. W. 278; Houston Oil Co. v. Boykin, — Tex. Civ. App. —, 153 S. W. 1176; Lancaster v. Roth, — Tex. Civ. App. —, 155 S. W. 597; North Texas Lumber Co. v. McWhorter, — Tex. Civ. App. —, 156 S. W. 1152.

Messrs. **Jones & Hassell** for defendant in error.

Greenwood, J., delivered the opinion of the court:

The defendant in error recovered a judgment against plaintiff in error, in an action on an insurance policy, which was affirmed by the court of civil appeals (— Tex. Civ. App. —, 170 S. W. 1055), and this writ of error is prosecuted to reverse those judgments.

The property insured was a one-story frame dwelling in the city of Sherman. On December 21, 1912, as the result of negotiations extending over about one year, defendant in error, who then owned the dwelling and the land on which it stood, conveyed the land, by warranty deed of himself and wife to the trustees of the Sherman independent school district, for a recited consideration of $9,000 in cash. The trustees contemporaneously delivered back to defendant in error a written acknowledgment that, un-

der the real contract between the parties, the buildings on the land were to be retained by defendant in error and wife, who were to have a reasonable time, but in no event to be longer than February 1, 1913, to remove the buildings from the land, and that only $4,500 of the purchase money had been actually paid, and the remaining $4,500 was to be paid on the removal of said buildings. While the policy of insurance was in force, on January 17, 1913, the house was destroyed by fire. At that time the house had not been removed from the land conveyed to the trustees, but arrangements had been made by defendant in error to have the work of removal begun on the Monday next following the date of the fire.

The insurance policy is in the form adopted for Texas by the state insurance board, being identical with the New York standard form.

The following are the provisions on which plaintiff in error relies to defeat the payment of the policy, to wit: "The entire policy . . . shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, . . . or if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise."

It is admitted that the insured was the unconditional and sole owner in fee simple of the land, including the dwelling, at the time of issuance of the policy; and, since the language of the policy clearly admits of the construction that the clauses forbidding that "the interest of the assured be other than unconditional and sole ownership," and that the building insured be "on ground not owned in fee simple," both relate to the time of issuance of the policy, we cannot doubt that this construction should be adopted in order to avoid the never-favored forfeiture. Dumphy v. Commercial Union Assur. Co. 107 Tex. 111, 174 S. W. 814; Bills v. Hibernia Ins. Co. 87 Tex. 551, 29 L.R.A. 706, 47 Am. St. Rep. 121, 29 S. W. 1063.

Insurance—sale of land—retention of building.

In the case of Parsons v. Lane (Re Millers & Mfrs. Ins. Co.) 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144, cited with approval in the able opinion of the court of civil appeals, it is said:

"The policy provides that 'this entire policy . . . shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on a ground not owned by the insured in fee simple.'

"There are some authorities which hold that this provision refers only to subsequent changes in the title, but they rest upon an unnatural construction of the language of the policy. The words used refer to the present, and not to the future, and the conditions relate to facts as they exist at the date of the policy."

The remaining clause relied on by plaintiff in error plainly relates to the future, and declares a forfeiture to follow "any change, other than by the death of an insured, in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard."

The property was still in the possession of defendant in error when the dwelling burned, but it is claimed that such a change had taken place in both his interest and title as to prevent his recovery.

Given a reasonable construction, there was no change of "interest" in the subject of this insurance. The supreme court of Kansas rightly interpreted the word "interest" when it said: "The word 'interest,' as used in the policy, is

Same—sale of land—reservation of building—change of interest.

not synonymous with title. It means some right different from title. It cannot mean a greater estate than title, since title, as there used, was intended to mean the entire estate. It must, therefore, have been used with the meaning generally attached to it, when used in contradistinction to title, as 'any right, in the nature of property, less than title.' Anderson's Law Dict. 562. 'In a narrower sense it was used, in the English common law of real property, to designate a right less than an estate.' 3 Century Dict, p. 3142. This, we think, is the sense in which it was used in the policy. In the interpretation of the policy this word is important. The form of the policy was intended to cover two classes of risks. There are large interests in real estate owned by persons who have neither title nor possession. The form of this policy is adapted to the insurance of such interests, as well as to the insurance of property where the insured is the owner of the title. Where the insured is the owner of only an interest in the estate, the word 'interest,' used in the forfeiture clause, has force, and any change in such interest would forfeit the policy; but where the insured is the owner of the title, the word 'interest' has no application. In the latter case, if any change takes place in the title, the policy is forfeited." Garner v. Milwaukee Mechanics' Ins. Co. 73 Kan. 127, 4 L.R.A.(N.S.) 656, 117 Am. St. Rep. 460, 84 Pac. 717, 9 Ann. Cas. 459.

We are equally sure there was no change of "title" within the reason of the language embodied in this policy.

Under the writings between defendant in error, joined by his wife, and the trustees, the title to the subject of insurance—i. e., the one-story frame dwelling—was in defendant in error at the date of the fire. Even where a forfeiture of the insured's title to certain buildings was expressly provided for, on failure to remove same by a fixed date, a United States circuit court sitting in Massachusetts refused to hold that there was any breach of this condition, upon the fire occurring prior to the expiration of the time allowed for the removal; the court declaring: "The land is not insured, and if the actual property covered by the risk conforms to these various conditions as to absolute ownership it would seem to be sufficient. The assured owned the buildings originally, and it had never parted with any interest in them. While it had conveyed the land upon which they were situated to the city of Boston, it had not parted with either the title or possession of the property insured. It had only agreed that, if the buildings were not removed within a certain time, they should be forfeited. So far as appears, the assured was preparing to remove them within the time stated, unless a further extension should be granted. Until the ownership was taken away by forfeiture or otherwise, it would seem to be complete." Washington Mills Emery Mfg. Co. v. Commercial F. Ins. Co. (C. C.) 13 Fed. 646.

On the same facts, the supreme court of Massachusetts reached the same conclusion, which it expressed in these words:

"It is not material whether the clause operates technically as an exception, or as an agreement detaching the buildings from the realty and making them personal property, which was to belong to and be at the disposal of the grantor. The buildings were not conveyed to the city, but remained the property of the plaintiff. It is not necessary to consider what would have been the rights of the parties after October 1, 1878 (the date for forfeiture of the insured's title for failure to remove the buildings), as the buildings were burned before that time." Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co. 135 Mass. 504.

It is settled law in this state that a fire insurance policy is not violated by a change of title "not of a nature calculated to increase the mo-

tive to burn, or diminish the motive to guard the property from loss by fire." New Orleans Ins. Co. v. Gordon, 68 Tex. 149, 3 S. W. 720; Home Mut. Ins. Co. v. Tompkins, 30 Tex. Civ. App. 404, 71 S. W. 813.

And, as observed by this court in Gordon's Case: "Vigilance in the care of the property is not likely to be diminished when the assured is the only one who can possibly suffer by its destruction."

We cannot hold otherwise than that the entire burden of the loss at the date of this fire fell on defendant in error, save as he was indemnified by the policy sued on.

There was no breach of any condition of the policy, and the judgments of the District Court and of the Court of Civil Appeals are affirmed.

Petition for rehearing denied.

ANNOTATION.

Conveyance with reservation of building as affecting insurance on building.

It will be noted that in the reported case (INSURANCE CO. OF NORTH AMERICA v. O'BANNON, ante, 1407), the court held that the provisions that the policy should be void "if the interest of the insured be other than unconditional and sole ownership," and that it should be void "if the subject of the insurance be a building on ground not owned by the insured in fee simple," referred to the ownership at the time the policy was issued, and were not violated where the insured was the owner at that time, although he subsequently conveyed the land, reserving the right to remove the insured building within a specified time, and also decided that, by reason of such conveyance, there was no violation of a further provision for a forfeiture of the policy in case of any change in the interest, title, or possession of the insured property, it appearing that at the time of loss the time limited for removal of the building had not expired. This opinion affirms the decision of the court of civil appeals, (1914) — Tex. Civ. App. —, 170 S. W. 1055.

The same state of facts, and like provisions, were involved in Fidelity-Phœnix F. Ins. Co. v. O'Bannon (1915) — Tex. Civ. App. —, 178 S. W. 731, which arose out of the same loss, and, following the decision of the court of civil appeals (1914) — Tex. Civ. App. —, 170 S. W. 1055, just referred to, there was held no violation of the provisions of the policy.

In Washington Mills Emery Mfg. Co. v. Commercial F. Ins. Co. (1882) 13 Fed. 646, the failure of the insured, upon renewing a policy, to disclose the fact that it had conveyed the land upon which the insured buildings were situated, under a contract giving it the right to remove the buildings within a stated time, which had not expired when the loss occurred, was held not to render the policy void under provisions thereof that if the interest of the insured should be any other than the entire, unconditional, and sole ownership, or, if the insured building stood on leased ground, it should be so represented to the insurer, otherwise the policy should be void, and that if the property should be sold, or transferred, or any change should take place in the title or possession, or if the interest of the insured should not be truly stated, the policy should be void, the view being taken that the provisions did not require the insured to give notice that he was not the owner of the land on which the building stood, unless he held it under a lease, and that he had not by his conveyance parted with either the title or possession of the property insured.

The same result was reached in Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co. (1882) 135 Mass. 503, which arose out of the same loss, the facts being substantially the same.

It will be noted that in the last two cases the conveyance which was claimed to avoid the insurance had

been made prior to the issuance or renewal of the policies; while in the O'Bannon Cases the conveyance of the land took place after the policies had gone into force. But one other case has been disclosed which involved a similar situation.

In the case referred to, Watts v. Phenix Ins. Co. (1910) 134 Ga. 717, 68 S. E. 479, the policy provided that it should be void "if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance, . . . whether by legal process or judgment, or voluntary act of the insured, or otherwise," and it appeared that, when the policy was issued, the insured was the sole owner of the land and building insured, but that subsequently, without the insurer's consent, he conveyed in fee an undivided half interest in the land upon which the insured building stood, but reserved full title to the building with the right to remove it. A loss having occurred while this status of affairs continued, it was held that the sale and conveyance constituted such a change in the interest of the insured in the building as avoided the policy. This conclusion is in conflict with that reached in the O'Bannon Cases, and it is unfortunate that no opinion appears in the Watts Case, other than the syllabus by the court.

The court in the reported case (INSURANCE CO. OF N. A. v. O'BANNON, ante, 1407) construed the word "interest," as used in the provision avoiding the policy if there was any change in the interest, title, or possession, as having no application where the insured was the owner of the title to the subject of the insurance, but as applying only where the insured was the owner merely of an interest in the insured property; and it would be interesting if the reasoning on which the decision in the Watts Case was reached were fully stated. J. T. W.

DELPHINE E. McLARREN, Appt.,

v.

EDMUND W. McLARREN.

District of Columbia Court of Appeals—May 1, 1916.

(45 App. D. C. 237.)

Divorce — corespondent as party — serving process.

1. A statute requiring the corespondent to be made a party to a divorce proceeding does not apply if the identity of the corespondent cannot be established, although the name under which he acted is known.

[See note on this question beginning on page 1414.]

Appeal — finding of facts by court.

2. A finding by the trial court sitting without a jury, of facts upon evidence given by witnesses before it, will not be disturbed on appeal unless a mistake of judgment is apparent.

Appeal — irrelevant evidence — effect.

3. The admission of irrelevant evidence is not reversible error, if the elimination of such evidence would leave abundant proof to sustain the decree.

APPEAL by defendant from a decree of the Supreme Court in favor of plaintiff in a suit for a divorce. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Victor H. Wallace** and **Percy Metzger** for appellant.

Messrs. **W. A. Coombe** and **Irving Williamson** for appellee.

Van Orsdel, J., delivered the opinion of the court:

This is a suit in equity brought by appellee Edmund W. McLarren, in the supreme court of the District of Columbia, to secure an absolute divorce from appellant, Delphine E., his wife. From a decree in plaintiff's favor, defendant wife has appealed.

The appeal presents no question of fact of sufficient importance as a precedent to justify an extended review of the evidence. It was tried in open court, with full opportunity in the trial justice to observe the demeanor of witnesses and to judge of their veracity. In such cases the finding of the trial justice on questions of fact has much the same sanctity as the verdict of a jury, and will not be disturbed on appeal unless a mistake of judgment is so apparent as to demand a reversal. The conclusion of the court below is in full accord with the evidence. Indeed, the record is such that if we were passing upon the issues of fact, unaided by the presumption in favor of the decree, we would have no hesitation in reaching the same conclusion.

Appeal—finding of facts by court.

Two questions of law are urged by counsel for defendant as grounds for reversal. It is insisted that error was committed in not requiring plaintiff, by proper process, to make one King a defendant. Section 983, D. C. Code (31 Stat. at L. 1347, chap. 854), provides that, "in all divorce cases where adultery is charged the person or persons with whom the adultery is charged to have been committed shall be made defendant or defendants and brought in by personal service of process or by publication as in other cases."

Plaintiff averred in his bill that defendant had "adulterous relations with a man whose true name and place of residence are to plaintiff unknown, and plaintiff charges the fact to be that defendant Delphine E. McLarren did, on or about the time mentioned, commit an act or acts of adultery with the unknown party mentioned, at Atlantic City, in the state of New Jersey, at a hotel known as the Hotel New Belmont. Plaintiff further alleges, avers, and so believes, that the defendant Delphine E. McLarren committed adultery at various times and places in the years 1911, 1912, 1913, and 1914, with divers other men unknown to plaintiff."

The evidence discloses that the person alleged to have had adulterous relations with defendant registered at the hotel in Atlantic City, on the occasion set forth in the bill, under the name of J. A. King. On the evidence adduced, the court below found "that the person using the name of J. A. King, and who is mentioned in said petition, is a person whose identity cannot now be established, and that he cannot be reached by service or publication, so that no purpose would be served by making him a defendant herein."

Undoubtedly, where the corespondent is available, or can be identified and located with reasonable certainty, the statute requires that he be made a party defendant and summoned as such. But, if the contention of counsel for defendant be carried to its logical conclusion, it would result in a miscarriage and failure of justice in any case where the corespondent could not be located or identified. It is easy to conceive of a case where the name of the party, real or fictitious, could not be ascertained, yet the proof of the fact be conclusive. The statute does not tie the hands of the court in such a case. Of course, in the present case, summons could have been issued and publication made against this fictitious person. But the law does not require a vain thing; neither does the statute demand such a useless and technical compliance with its terms. The ficti-

Divorce—corespondent as party—serving process.

tious name registered at the hotel furnished no clue to the identity of the real party, and only came into the case as an incident in connection with the location of defendant and her paramour in a certain room in the hotel. The record supports the finding of the court, and, in the absence of strong proof to the contrary, the presumptions in favor of such ruling would be regarded as conclusive.

Error is assigned on the admission of proof of other acts of adultery by defendant. In the presentation of plaintiff's case in chief, counsel offered proof of such acts. On objection, the court ruled that plaintiff should either amend his bill or confine his case to the Atlantic City transaction. Counsel adopted the latter course. When defendant was giving her testimony in chief, in response to questions of her counsel, she testified that "she was not found at this hotel in a room with J. A. King by the detectives, and did not commit adultery there with him or any other person. Has never committed adultery with any other person. Has never had improper relations with any other men as charged in the bill of complaint." On cross-examination she was questioned as to instances other than the one at Atlantic City, with other men, and, upon denial, rebutting evidence was introduced tending to prove the acts of adultery pointed out in her cross-examination. To this evidence counsel for defendant reserved an exception.

Appeal—irrelevant evidence—effect.

It is unnecessary to consider this exception, for had this evidence been eliminated there still remains abundant proof to sustain the decree. Hence, in no event could its admission in this case constitute reversible error.

The decree is affirmed, without costs.

ANNOTATION.

Necessity of serving process upon corespondent in divorce suit.

It has been stated that, as a general rule, the offending spouse is the only proper party defendant in an action for divorce. 9 R. C. L. 407. In fact it has been said that, in the absence of statute, the paramour cannot be joined as a party in a suit for divorce for adultery, the supporting argument being that such a person has no such interest in the result of the suit, or in the relief demanded, as to make it necessary or proper to join him as a party. 7 Enc. Pl. & Pr. 59. And that the person charged as particeps criminis with the defendant, in an act of adultery upon which a divorce suit is based, cannot intervene even to protect his character unless he is permitted to do so by statute, see 14 Cyc. 655.

However, in some jurisdictions, it has been expressly provided by statute that in divorce cases based upon adultery the corespondent must be made a party defendant by serving process upon him.

An instance of a statute of this character is afforded by the reported case (McLARREN v. McLARREN, ante, 1412), wherein D. C. Code, § 983 [31 Stat. at L. 1347, chap. 854], which provides that in all divorce cases where adultery is charged the corespondent or corespondents shall be made defendant or defendants, and brought in by personal service of process or by publication, as in other cases, is considered. In construing this statute the court held that it is only where the corespondent is available or can be identified and located with reasonable certainty that it is necessary to issue process against him, or to serve him with process by publication.

And in England it was expressly provided by the Matrimonial Causes Act of 1857 (20 & 21 Vict. chap. 85, § 28) that a husband, upon suing for divorce for adultery, "shall" make the alleged adulterer a corespondent to the petition, unless on special grounds, to be allowed by the court, he shall be

excused from so doing; and that, in case of a suit by a wife, the court "may" in its discretion direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

Under this statute, where the name and identity of the alleged adulterer are known, the petitioner in a suit by the husband must make such person a corespondent unless excused from so doing by the court. Payne v. Payne (1888) 60 L. T. N. S. (**Eng.**) 238; Cornish v. Cornish (1890) L. R. 15 Prob. Div. (**Eng.**) 131, 59 L. J. Prob. N. S. 84, 62 L. T. N. S. 667; Jones v. Jones L. R. [1896] P. (**Eng.**) 165, 65 L. J. Prob. N. S. 101, 75 L. T. N. S. 190; Slaytor v. Slaytor, L. R. [1897] P. (**Eng.**) 85, 66 L. J. Prob. N. S. 97, 77 L. T. N. S. 141; Saunders v. Saunders, L. R. [1897] P. (**Eng.**) 89, 66 L. J. Prob. N. S. 57, 76 L. T. N. S. 330, 45 Week. Rep. 583; Harrop v. Harrop, L. R. [1899] P. (**Eng.**) 61, 68 L. J. Prob. N. S. 58, 80 L. T. N. S. 171, 15 Times L. R. 144; Lowe v. Lowe, L. R. [1899] P. (**Eng.**) 204, 68 L. J. Prob. N. S. 60, 80 L. T. N. S. 575, 47 Week. Rep. 553, 15 Times L. R. 360. In fact, it has been said that the provision requires a corespondent unless the plaintiff satisfies the court that there ought not to be one. Quicke v. Quicke (1862) 2 Swabey & T. (**Eng.**) 419, 31 L. J. Prob. N. S. 28, 5 L. T. N. S. 690, 10 Week. Rep. 448; Tollemache v. Tollemache (1858) 28 L. J. Prob. N. S. (**Eng.**) 2 (holding that the statute is imperative). And this rule applies to and includes every man against whom adultery is alleged in the petition. Carryer v. Carryer (1865) 4 Swabey & T. (**Eng.**) 94, 34 L. J. Prob. N. S. 47, 11 Jur. N. S. 352, 13 L. T. N. S. 250, 13 Week. Rep. 507.

And where the alleged adulterer died before the divorce proceedings were commenced, it has been held that leave to dispense with making such deceased person a corespondent is necessary under the English statute. Slaytor v. Slaytor, L. R. [1897] P. (**Eng.**) 85, 66 L. J. Prob. N. S. 97, 77 L. T. N. S. 141; Tollemache v. Tollemache (1858) 28 L. J. Prob. (N. S.) (**Eng.**) 2. And this is true where the petitioner wishes to charge such adulterer, although adultery is also charged with another person, who is alive and has been served and made a corespondent. Slaytor v. Slaytor (**Eng.**) supra.

And where the alleged adulterer is a nonresident, so that the court has no jurisdiction over him, it has been held that the proper procedure under the English Act is to petition the court for leave to proceed without making such person a corespondent. Baker v. Baker, L. R. [1908] P. (**Eng.**) 257, 77 L. J. Prob. N. S. 96, 99 L. T. N. S. 313, 24 Times L. R. 493, 52 Sol. Jo. 413. And in such a case the court should give the petitioner permission to so proceed. Boger v. Boger, L. R. [1908] P. (**Eng.**) 300, 77 L. J. Prob. N. S. 151, 99 L. T. N. S. 881, 24 Times L. R. 744, 52 Sol. Jo. 552.

And under the English statute it has been held that it is necessary to obtain the leave of the court to proceed without making a corespondent a party, although the petition charges adultery with a person unknown. Tollemache v. Tollemache (**Eng.**) supra; Hunter v. Hunter (1858) 28 L. J. Prob. N. S. (**Eng.**) 3 (holding that, upon proof that the alleged adulterer is unknown, permission to proceed without making him a corespondent should be granted); Evans v. Evans (1859) 28 L. J. Prob. N. S. (**Eng.**) 20; Leader v. Leader (1863) 32 L. J. Prob. N. S. (**Eng.**) 136 (holding that the court could not dispense with a corespondent on the affidavit of the petitioner, alone, that the person alleged to have committed adultery was unknown, and that he must procure the affidavit of another person); Pitt v. Pitt (1868) L. R. 1 Prob. & Div. (**Eng.**) 464, 37 L. J. Prob. N. S. 24, 17 L. T. N. S. 671; Penty v. Penty (1882) L. R. 7 Prob. Div. (**Eng.**) 19, 51 L. J. Prob. N. S. 24, 47 L. T. N. S. 131, 30 Week. Rep. 384. And see also Jeffers v. Jeffers (1877) L. R. 2 Prob. Div. (**Eng.**) 90, 46 L. J. Prob. N. S. 80, 25 Week. Rep. 513; Barber v. Barber, L. R. [1896] P. (**Eng.**) 73, 65 L. J. Prob. N. S. 58; Jeffreys v. Jeffreys (1912) 28 Times L. R. (**Eng.**) 504, and Dobson v. Dobson, L. R. [1916] P. (**Eng.**) 110, 85 L. J. Prob. N. S. 150, 114 L. T. N. S. 565, 68 Sol.

Jo. 387. And such an order must be obtained, although there are other corespondents who have been served. Penty v. Penty (1882) L. R. 7 Prob. Div. (Eng.) 19, 51 L. J. Prob. N. S. 24, 47 L. T. N. S. 131, 30 Week. Rep. 384. And an affidavit by the petitioner is indispensable. Drinkwater v. Drinkwater (1889) 60 L. T. N. S. (Eng.) 398.

A number of English cases have involved the question of when, if at all, the court will grant leave to proceed without making a known "alleged adulterer" a party.

Thus, where the alleged adulterer was known, it has been held that the court will not excuse the petitioner from making him a party by serving citation upon him merely because the petitioner cannot prove his case against such corespondent. Jones v. Jones, L. R. [1896] P. (Eng.) 165, 65 L. J. Prob. N. S. 101, 75 L. T. N. S. 190. And in Cornish v. Cornish (1890) L. R. 15 Prob. Div. (Eng.) 131, 59 L. J. Prob N. S. 84, 62 L. T. N. S. 667, it was held that where the address and occupation of the alleged adulterer were known to the petitioner the former must be made a corespondent and citation served upon him, although there was no evidence against him except the respondent's confession. But to the direct contrary see Jinkings v. Jinkings (1867) L. R. 1 Prob. & Div. (Eng.) 330, 36 L. J. Prob. N. S. 48, 15 L. T. N. S. 512, wherein it was held that under § 28 a husband need not make the alleged adulterer a corespondent, where the only evidence against him was the wife's statement that she had committed adultery with him. And the Jinkings Case was followed, although with considerable reluctance, in Gill v. Gill (1889) 60 L. T. N. S. (Eng.) 712, 37 Week. Rep. 623. And again in Bagot v. Bagot (1890) 62 L. T. N. S. (Eng.) 612, the court followed Jinkings v. Jinkings (Eng.) supra. In Saunders v. Saunders, L. R. [1897] P. (Eng.) 89, 66 L. J. Prob. N. S. 57, 45 Week. Rep. 583, 76 L. T. N. S. 330, the court criticized the seeming attempt of the court in Jones v. Jones (Eng.) supra, to lay down a hard and fast rule, in cases of application for leave to proceed without making a known "alleged adulterer" against whom a case cannot be proven a party, and held that the matter lies in the discretion of the court and that each case must be decided on its special circumstances; and, applying the rule, reversed a ruling based on the Jones Case, without regard to the facts, to the effect that a corespondent could not be dispensed with even though a case could not be proven against him. And again in Edwards v. Edwards, L. R. [1897] P. (Eng.) 316, 67 L. J. Prob. N. S. 1, 77 L. T. N. S. 406, it was held that, where the court believed that no evidence could be obtained against an alleged adulterer, it could permit the petitioner to proceed without making him a corespondent; but it was also said that the right of a court to exercise its discretion arose in practically no other case where the alleged paramour was known.

And the fact that the wife was living in a brothel has been held a sufficient ground upon which to grant an application to proceed without making a corespondent. Hooke v. Hooke (1858) 1 Swabey & T. (Eng.) 183, 27 L. J. Mag. Cas. N. S. 61, 6 Week. Rep. 868. And a similar conclusion has been reached where the wife was alleged to be leading the life of a common prostitute. Peters v. Peters (1861) 3 Swabey & T. (Eng.) 264.

And in Tomkin v. Tomkin (1858) 1 Swabey & T. (Eng.) 182, 27 L. J. Prob. N. S. 54, it was held that where damages have been recovered in an undefended action for criminal conversation, there is no need to make the defendant therein a corespondent, since the alleged adulterer in such a case has had an opportunity of appearing and vindicating himself in accordance with the probable object of the statute. However, in Re Armitage (1858) 1 Swabey & T. (Eng.) 71, 27 L. J. Prob. N. S. 4, 4 Jur. N. S. 56, 6 Week. Rep. 222, it was held that the fact that a husband had recovered damages in an action for criminal conversation against the alleged adulterer did not form "special grounds," within the meaning of the statute, on which the

court would excuse the husband from making him a corespondent to a petition for a divorce.

In New York, the corespondent upon demanding the same must be served with process. Thus, by § 1757, subdivision 2, of the New York Code of Civil Procedure, in an action for divorce for adultery a copy of the pleadings "may" be served upon the corespondent by either party, and any corespondent named in any pleading may demand "a copy of the summons and complaint which must be served within ten days thereafter, and he may appear to defend" so far as the issues affect him. See Boller v. Boller (1906) 111 App. Div. 240, 97 N. Y. Supp. 609, and Stafford v. Stafford (1915) 170 App. Div. 172, 156 N. Y. Supp. 25. And that the New York statute entitles the corespondent to all the rights of a party in an action for absolute divorce, see Rixa v. Rixa (1901) 35 Misc. 227, 71 N. Y. Supp. 815, and Shaw v. Shaw (1913) 140 N. Y. Supp. 388, affirmed in (1913) 156 App. Div. 879, 141 N. Y. Supp. 425.

G. J. C.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appt.,

v.

GENERAL ELECTRIC COMPANY, Respt.

New York Court of Appeals—November 3, 1916.

(219 N. Y. 227, 114 N. E. 115.)

Carrier — delivery of cars — distribution to private tracks.

1. A railroad company performs its duty when it places cars consigned to a manufacturer on the plant's storage tracks connected by a spur with the railroad, and cannot, without discrimination forbidden by statute, make the manufacturer an allowance for taking the cars from the storage track to platforms for unloading and loading, and returning them to the storage track to be taken up by the railroad company for outgoing transportation.

[See note on this question beginning on page 1425.]

Same — recovery on quantum meruit.

2. A manufacturer cannot hold a railroad company liable on quantum meruit for the cost of transferring cars from place to place within his own plant, which is no part of the duty of the carrier to perform.

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, reversing a judgment of a Trial Term for Schenectady County in its favor, in an action brought to recover freight charges alleged to be due and unpaid. *Reversed.*

The material facts are stated in the opinion of the court.

Mr. Lewis E. Carr, with Messrs. Visscher, Whalen, & Austin, for appellant:

The contract on which the counterclaim of the defendant is based is an illegal one and therefore has in it no enforceable quality, because the service performed by the defendant is a plant service, outside of and beyond that included in and covered by the transportation rate, payment for which by a carrier and its exaction or receipt by a shipper or consignee are forbidden by law.

Hutchinson, Carr. 3d ed. § 115; 6 Cyc. 412 F; Grosvenor v. New York C. R. Co. 39 N. Y. 36; London & L. F. Ins. Co. v. Rome, W. & O. R. Co. 144 N. Y. 200, 43 Am. St. Rep. 752, 39 N. E. 79; People v. New York, L. E. & W. R. Co.

104 N. Y. 63, 58 Am. Rep. 484, 9 N. E. 856; People ex rel. Long Island R. Co. v. Public Service Commission, 170 App. Div. 435, 156 N. Y. Supp. 198; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, affirmed in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237; Solvay Process Co. v. Delaware, L. & W. R. Co. 14 Inters. Com. Rep. 246; Associated Jobbers v. Atchison, T. & S. F. R. Co. 18 Inters. Com. Rep. 313; Kaul Lumber Co. v. Central of Georgia R. Co. 20 Inters. Com. Rep. 455; Manufacturers R. Co. v. St. Louis, I. M. & S. R. Co. 21 Inters. Com. Rep. 315; Manufacturers R. Co. v. St. Louis, I. M. & S. R. Co. 28 Inters. Com. Rep. 120; Atchison, T. & S. F. R. Co. v. Kansas City Stock Yards Co. 33 Inters. Com. Rep. 98; Crane Iron Works v. United States, 209 Fed. 242; United States v. Baltimore & O. R. Co. 231 U. S. 274, 293, 58 L. ed. 218, 227, 34 Sup. Ct. Rep. 75; Tap Line Cases (United States v. Louisiana & P. R. Co.) 234 U. S. 1, 23, 58 L. ed. 1185, 1193, 34 Sup. Ct. Rep. 741; Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 307, 58 L. ed. 1319, 1326, 34 Sup. Ct. Rep. 814.

The defendant does not and will not suffer any discrimination if it is denied compensation for the service it performs and has performed outside of and beyond the storage and delivery tracks.

United States ex rel. Morris v. Delaware, L. & W. R. Co. 2 Inters. Com. Rep. 617, 40 Fed. 103; Little Rock & M. R. Co. v. St. Louis & S. W. R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 778; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 281, 282, 36 L. ed. 699, 705, 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 213, 219, 40 L. ed. 940, 945, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Lundquist v. Grand Trunk Western R. Co. 121 Fed. 917; United States ex rel. Northwestern Warehouse Co. v. Oregon R. & Nav. Co. 159 Fed. 978.

Mr. **Adelbert Moot**, with Mr. **Richmond D. Moot**, for respondent:

Plaintiff is liable to defendant on the counterclaim and the judgment should be affirmed.

Acme Realty Co. v. Schinasi, 215 N. Y. 501, L.R.A.1916A, 1176, 109 N. E. 577; Re McMillan, 218 N. Y. 69, 112 N. E. 573.

The tracks leading from plaintiff's railroad to the loading and unloading points in defendant's plant are part of the railroad for the purpose of making legal receipt and delivery of freight.

Coe v. Louisville & N. R. Co. 3 Fed. 775; McCoy v. Cincinnati, I. St. L. & C. R. Co. 13 Fed. 3; Union Lime Co. v. Chicago & N. R. Co. 233 U. S. 211–220, 58 L. ed. 924–929, 34 Sup. Ct. Rep. 522; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008.

The common law, as well as the statutes, requires the carrier to spot cars at points convenient for loading and unloading as part of their transportation.

Fenner v. Buffalo & State Line R. Co. 44 N. Y. 510; Ostrander v. Brown, 15 Johns. 42, 8 Am. Dec. 211; Gibson v. Culver, 17 Wend. 305, 31 Am. Dec. 297; New York C. & H. R. R. Co. v. Standard Oil Co. 87 N. Y. 486; Scheu v. Benedict, 116 N. Y. 510, 15 Am. St. Rep. 426, 22 N. E. 1073; Richmond v. Union S. Co. 8 Abb. N. C. 69, affirmed in 87 N. Y. 240; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 734, 31 L. ed. 287, 290, 8 Sup. Ct. Rep. 266; London & L. F. Ins. Co. v. Rome, W. & O. R. Co. 144 N. Y. 205, 43 Am. St. Rep. 752, 39 N. E. 79; Vincent v. Chicago & A. R. Co. 49 Ill. 33.

The flat Schenectady rate covers the spotting at points convenient for loading and unloading on all industrial sidings, including those of the defendant.

Associated Jobbers v. Atchison, T. & S. F. R. Co. 18 Inters. Com. Rep. 317; Re Car Spotting Charges, 34 Inters. Com. Rep. 614.

It has always been legal for a carrier to hire a shipper or consignee to render services or provide instrumentalities and facilities in connection with its transportation service.

Root v. Long Island R. Co. 114 N. Y. 306, 4 L.R.A. 331, 2 Inters. Com. Rep. 576, 11 Am. St. Rep. 643, 21 N. E. 403; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. ed.

83, 87, 32 Sup. Ct. Rep. 22; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 554, 50 L. ed. 585, 593, 26 Sup. Ct. Rep. 330.

Cardozo, J., delivered the opinion of the court:

The complaint is for freight charges of $618.53. The answer is a counterclaim for $114,880.73. The counterclaim, dismissed at the trial term, was sustained by the appellate division. Interest charges brought the judgment in favor of the defendant to $168,701.12. The facts are not in controversy. The defendant switched cars within its plant under an agreement that the service would be compensated by an allowance from the published rates. The validity of that agreement is the question to be determined.

In 1887, the defendant General Electric Company acquired a plant in the city of Schenectady. There were 11 acres of land and two buildings. The plant was close to the tracks of two railroads, the Delaware & Hudson, and the plaintiff, the New York Central Railroad. A siding ran from the tracks of the Delaware & Hudson into the plant and between the two buildings. Inbound and outbound freight transported over the plaintiff's road was carried over the siding. The Delaware & Hudson charged the defendant for this service $1 per car, and the defendant, upon making the payment, was reimbursed by the plaintiff. Those conditions continued till 1892. The plaintiff then laid a spur track of its own, and freight to and from the plant was transported over the spur without extra cost to the defendant. In placing the cars within the plant to be loaded and unloaded, the plaintiff had the benefit of a steam locomotive acquired by the defendant in 1891 for use between its buildings. The defendant insisted that for this service it was entitled to some allowance. Writing to the plaintiff in March, 1894, it said:

"The ground upon which we make claim for this allowance is that by the maintenance of our freight yards at Schenectady, we relieve you of the necessity of increasing your terminal facilities here, and moreover, we maintain a switching engine of our own, thereby relieving you of considerable extra labor which is customary for railroad companies to perform for consignees. In addition to this also, we load and unload all of our own freight, so that practically you do not have to bear the ordinary expenses of a terminal on business delivered to us." The plaintiff yielded to this claim. An agreement was made for an allowance of 1 cent per 100 pounds (or 20 cents per ton) "on all incoming and outgoing business, to cover cost of switching and loading and unloading the freight." This agreement was modified in 1904 by excluding enumerated commodities, and otherwise has remained unchanged. Since 1904 the plaintiff has transported its cars to and from agreed storage tracks which are within the defendant's yard. Two of the tracks are known as equipment and two as interchange tracks. The incoming cars are taken by the defendant from these storage tracks, distributed among its buildings, and unloaded. The outgoing cars are brought to the storage tracks by like agencies. At those tracks the plaintiff's services end for freight delivered and begin for freight received.

It is the work thus done by the defendant for which compensation is demanded. The plant, which began in 1887 with 11 acres and two buildings, now covers 180 acres, contains 140 buildings, and employs 15,000 men. Within this area, the defendant has laid 12 miles of standard-gauge tracks. They run along the sides of the plant and between the buildings. Six standard-gauge electric engines are used by the defendant in moving cars upon these tracks; five by day, and one by night. At times seven engines have been used. There are also 7 miles of narrow-gauge track, and nineteen motors, employed in shifting materials between the store-

houses, shops, and mills. All these tracks, the standard and the narrow gauge alike, cross one another at many points within the plant. Freight is loaded and unloaded at not less than eighteen separate buildings. About 100 cars enter the plant daily, and as many more leave it. The movement of these cars would be impossible without a co-ordinated system. The plant is accordingly divided into sections, and to each a separate engine is assigned. To do the work safely and expeditiously, these engines must be in constant use. In that way cars are moved from the platforms as soon as loaded or unloaded, transferred to the storage tracks, and made to give way to other cars which promptly take their places. Thus, the men are kept at work every hour of the day, and waste of labor is avoided. There is constant activity, day and night. The cars on the storage tracks must be sorted, distributed to their proper buildings, shunted, switched, loaded, unloaded, and returned. Other cars must distribute raw material and partly manufactured products among the appropriate shops and mills and storehouses in the vast system. To do this with safety and with order, the movement of all cars upon the interlacing lines within the plant must be subject to a single supervision. There is, therefore, a transportation master, who is one of the defendant's employees. The finding, well supported by the evidence, is that "the successful and economical prosecution of the business of the defendant requires that all such internal movements of cars, whether standard or narrow gauge, in and about its plant, should be under the direction and control of the defendant."

As early as 1903, the plaintiff had some misgiving about the legality of the deduction from its rates. It wrote in April, 1903, that the arrangement must be a tentative one and subject to readjustment on notice—"this on account of the fact that we are now confronted by the Elkins bill, under the provisions of which we are not exactly clear as to what can or cannot be done." In 1905, the plaintiff was indicted in the United States district court for the northern district of New York on the ground that the allowance was an unlawful rebate. Two juries disagreed, and the indictment was finally dismissed. After the finding of the indictment the plaintiff gave notice to the defendant in November, 1905, that it would make no further payments, and none have since been made. Soon afterwards Congress passed the Act of June 29, 1906, commonly known as the Hepburn Act, which provides: "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section." Under this section of the act the defendant in July, 1907, filed a petition with the Interstate Commerce Commission. It set out the rendition of service in switching and moving cars about its plant, alleged that these services were a part of the carrier's work of transportation, and asked the Commission to fix its compensation. On June 29, 1908, the Commission dismissed the petition (General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237). The ruling was that the service rendered by the petitioner, the present defendant, was not part of the transportation undertaken by the carrier. Its instrumentalities were characterized as plant facilities. In this

action, begun in 1910, the defendant has litigated anew the matters in controversy before the Commission in 1908. It does not claim compensation for the movement of material along the narrow-gauge system. It concedes this to be a plant facility. It insists, however, that an allowance must be made for the movement of cars from the storage tracks to points within the plant where they are loaded or unloaded, and for their subsequent return. There is a finding that 72 per cent of the total car movements within the plant are necessary for that purpose. Other operations, even on the standard-gauge tracks, are excluded from the claim. That the charge of 1 cent per 100 pounds is reasonable in amount is not disputed. The sole question is whether any charge is lawful. The trial judge, in a careful opinion, followed the ruling of the Interstate Commerce Commission, and held that the allowance was in effect an unlawful rebate. The appellate division reversed, and gave judgment on the counterclaim.

Transportation includes delivery. Under the plaintiff's published tariffs it does not include the work of loading and unloading (Official Classification, 38, Interstate Commerce Commission). But whatever is essential in order to complete delivery, the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due (Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; United States v. Baltimore & O. R. Co. 231 U. S. 274, 293, 58 L. ed. 218, 227, 34 Sup. Ct. Rep. 75). But no allowance is due for service rendered by the consignee after delivery has been made and transportation is at an end. An allowance in such circumstances would constitute an unlawful rebate. That is true of interstate shipments under the laws of Congress (Act to Regulate Commerce Feb. 4, 1887, 24 Stat. at L. 379, §§ 2, 3, 17, chap. 104, Comp. Stat. 1916, §§ 8564, 8565, 8586; Act of Feb. 19, 1903, 32 Stat. at L. 847, chap. 708, Comp. Stat. 1916, § 8597; Act of June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563). It is true of intrastate shipments under the laws of New York (Public Service Commissions Law [Laws 1907, chap. 429], §§ 31, 32).

The decisive question must, therefore, be whether the switching done by the defendant within its plant between the storage tracks and the platforms of its mills is work that the plaintiff was bound to do as a part of transportation. To put it in another form, the question is, Where does transportation begin and end? The published tariffs to Schenectady establish switching limits extending from Sandbank to Carmen and Stony Lane. Delivery within those limits is paid for when rates are collected to Schenectady. Since the limits embrace the defendant's plant, there is no dispute that delivery at the plant is covered by the rate. The difficult thing is to ascertain when delivery at the plant is made.

In the nature of things no inflexible formula can furnish a solution of that problem. The limits of place within which delivery is due will vary with varying conditions (Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 263, 57 L. ed. 1472, 1479, 33 Sup. Ct. Rep. 916). All that we can safely say is that there must be such a delivery as is customary and reasonable. There was a time, before the days of railroads, when a carrier by land was expected to make delivery at the consignee's home or place of business. That was because he could go there with his wagons (Fenner v. Buffalo & State Line R. Co. 44 N. Y. 505, 510, 4 Am. Rep. 709). With the days of railroads, delivery came to be expected at freight houses or other terminals. They are still the place of delivery where the factories and warehouses

of shippers and consignees do not connect with the tracks. In our own time, however, private sidings have become common and freight is carried over them between the railroad and the plant. Such carriage is commonly a part of the work of transportation (Vincent v. Chicago & A. R. Co. 49 Ill. 33; Coe v. Louisville & N. R. Co. 3 Fed. 775). In most cases the distances are short and the carrier's burden remains substantially the same, whether the cars are left upon the siding close to the main tracks or hauled along the siding until they reach the plant. In such circumstances it may be said with reason that delivery at the plant means delivery at the platform for loading and unloading. The practice of hauling cars to points along the spur convenient to shipper or consignee is known as "spotting," and is commonly and fairly regarded as part of the work of carriage.

The plaintiff has not withheld from the defendant the services incidental to carriage between the railroad and the plant. It has hauled the cars from the main line to storage tracks within the limits of the defendant's yard. Those storage tracks correspond to the spurs or sidings on which the practice of "spotting" had its origin. But the defendant asks us to say that hauling the cars to storage tracks is not complete delivery. It insists that the plaintiff must haul them farther, over an intricate system of interlacing tracks, and distribute them among the mills and warehouses. One building is used for shipments of street-car motors, another for slate and marble, another for pipe and copper, another for sand, coal, and fuel oil, another for pig iron, coal, and coke, another for wire and cable; others are used for other specific purposes; and still others for miscellaneous freight. The defendant says that the distribution among these buildings must be made by the plaintiff, without extra charge, in fulfilment of its duty of delivery under a contract of transportation.

We come back then to the test, which, vague as it is, remains the only safe one, and we ask ourselves whether, in the light of all the circumstances, such a form of delivery is customary or reasonable. That it is not customary is established, we think, by uncontroverted evidence. "Spotting" cars upon short and direct sidings is a service that has little kinship to these intricate maneuvers designed not to reach an industry, but to promote the convenient distribution of wares among the subdivisions of an industry. The difference may be one of degree, but here, as so often in the law, such differences are vital (Rideout v. Knox, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390; Continental Securities Co. v. New York C. & H. R. R. Co. 217 N. Y. 119, 125, 111 N. E. 484). We find, accordingly, that whenever these complicated shifts and transfers are made by shippers or consignees within their own plants, they are made at their own cost and without allowance from the carrier. That is true of the plant of the American Locomotive Works, the only other plant at Schenectady which involves these intramural operations. It is true of the plant of the Solvay Process Company at Syracuse. It is true of the plant of the Fleischmann Company at Peekskill. It is true of many other plants enumerated in the record.

The defendant's standard of delivery does not conform, therefore, to the standard of custom. We think it fails also when we test it by the standard of reason. A railroad's duty to carry is a duty to carry over its right of way. Private sidings, owned and maintained by shippers, do not constitute the right of way, and the use that the carrier may be compelled to make of them is subordinate and incidental to the fulfilment of its primary function of carriage along its route. Reasonable delivery may involve trifling

departures from the route, as where the carrier's engines, after switching cars upon a siding, move them a short distance to the doors or platforms of a factory. Industrial spurs, within the switching limits designated by the carrier, are to be regarded, indeed, for many purposes, as an extension of the terminals (Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 58 L. ed. 1319, 34 Sup. Ct. Rep. 814.) But reasonable delivery does not involve the carrier's co-operation in the division of labor and of functions between the sections of a gigantic plant. This network of tracks is and must be under unified control. Order and method must reign. Conflict between engines on the standard tracks and those on the narrow tracks must be avoided. Engines hauling cars for loading or unloading must not collide with engines hauling cars for other and unrelated purposes. The coming and going of cars must be accommodated, not to the exigencies of railroad operations, but to the centralized administration of all the parts of a vast and interdependent industry. If the plaintiff attempted to distribute its cars immediately upon arrival, and sent its engines into the streets that interlace the defendant's plant, it would in effect take possession of the works, and put the defendant out of business. That is conceded, indeed, in one of the opinions at the appellate division. The defendant has been able to distribute freight throughout its plant, without suspending its business and without peril to its 15,000 workmen, by the use of engines, not at irregular hours, but constantly, day and night; by subordinating the use of its tracks to the needs of a unified scheme and the dominion of a single will. All this the defendant may properly do, because that is its business. It cannot put that burden, however, upon the carrier. To adopt and maintain this elaborate system of operations on the defendant's private tracks is not to add a minor incident to carriage along the plaintiff's right of way. It is to subordinate the operation of the business of the carrier to the needs, the economies, the internal administration of the business of the shipper. The engines that move within this plant are not doing work that the plaintiff ought to do, or effectively could do. They are doing the defendant's work. They are "plant facilities."

Carrier—delivery of cars—distribution to private tracks.

This distinction between the instrumentalities of transportation and those of internal management was drawn by the Interstate Commerce Commission when the defendant's petition for an allowance was before it (General Electric Co. v. New York C. & H. R. R. Co. 14 Inters. Com. Rep. 237). It has been maintained in many other cases. In Solvay Process Co. v. Delaware, L. & W. R. Co. (14 Inters. Com. Rep. 246) it was applied to the switching of cars within the plant of the Solvay Process Company. In Crane Iron Works v. Central R. Co. 17 Inters. Com. Rep. 514, it was applied to like operations within the plant of the Crane Iron Works. The order of the Commission in that case was affirmed by the Commerce court (Crane Iron Works v. United States, 209 Fed. 238, 242); and the distinction drawn by the Commission in the General Electric Case and the Solvay Process Case, "between those operations which constitute a plant facility and the legitimate functions of a common carrier," was said "to express a sound and wholesome principle." In the Industrial R. Cases (29 Inters. Com. Rep. 212, 230, 34 Inters. Com. Rep. 596, 601) the Commission reaffirmed its previous rulings, and pointed out (29 Inters. Com. Rep. at 235) that they were in harmony with the prevailing practice in England and in Germany (see also: Kaul Lumber Co. v. Central of Georgia R. Co. 20

Inters. Com. Rep. 450, 455; Manufacturers R. Co. v. St. Louis, I. M. & S. R. Co. 21 Inters. Com. Rep. 304, 315; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558).

We do not have to limit ourselves, however, to the decisions of the Commission and the commerce court. We find the same distinction between plant facilities and true agencies of transportation in the decisions of the Supreme Court. Sometimes the application of the distinction by the Commission has been disapproved, but always the validity of the distinction has been assumed, and the General Electric and Solvay Process Cases have been cited to illustrate its meaning. This was done in the Tap Line Cases (United States v. Louisiana & P. R. Co. 234 U. S. 1, 23, 58 L. ed. 1185, 1193, 34 Sup. Ct. Rep. 741). Day J., writing for the court, explained the meaning of plant facilities by reference to the General Electric and Solvay Process Cases, and commenting on them, said: "These systems of internal trackage were not common carriers, and, however extensive, were intended to and did furnish service for the plants which owned and operated them." (See also opinion of the commerce court in that case, 209 Fed. 244, 257). Again, in the Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 310, 58 L. ed. 1319, 1327, 34 Sup. Ct. Rep. 814, Hughes, J., writing for the court, said that the receipt and delivery of goods at plants located upon spurs or sidetracks was sometimes a distinct service; and distinguished from the case before him "cases of an interior movement of plant traffic to and from various parts of the establishment, and of deliveries through a system of interior switching tracks constructed as plant facilities." (234 U. S. at 310). Spur tracks, which, though leading to a single plant, are in reality terminal facilities (234 U. S. at 310), are subject to one rule; spur tracks, which are in reality plant facilities, are subject to another.

The law has attempted "to shut the door to all contrivances in violation of its provisions against preferences and discriminations" (Southern R. Co. v. Prescott, 240 U. S. 632, 638, 60 L. ed. 836, 839, 36 Sup. Ct. Rep. 469). The door to all those abuses would be opened if a railroad could be made, without extra charge, to participate at its own expense in the internal management of the business of shippers and consignees. It is no answer to say that the maintenance of the storage tracks relieves the carrier of the necessity of increasing its own terminal facilities, which would be insufficient in their present form to accommodate the defendant's traffic. That is true, in greater or less degree, of every siding along the route. The carrier is helped because the factories are near the tracks. It is not bound to counterbalance the benefit by assuming expenses that normally would fall upon the customer. The Supreme Court, speaking of the Interstate Commerce Law, has said that it "does not attempt to equalize fortune, opportunities, or abilities" (Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. ed. 83, 87, 32 Sup. Ct. Rep. 22). That is as true when fortune and opportunities help the carrier as it is when they help the shipper.

We are asked in the opinion of the appellate division whether it can be "the policy of the nation to prevent the most economical production of manufactured goods, or to compel the defendant to cart its vast shipments from cars placed upon the plaintiff's own sidetracks remote from defendant's works" [167 App. Div. 735, 153 N. Y. Supp. 478]. The assumed alternative is an unreal one. The question is not whether switching within the plant shall cease. The question is, Who shall pay for it? To compel the plaintiff to pay by deduction from the regular rates for any service not a part of transportation is to prefer the

defendant over others (Armour Packing Co. v. United States, 209 U. S. 56, 72, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428). It is not the policy of the nation to place useless clogs upon commerce, but it *is* the policy of the nation that preferences shall be impossible.

The defendant makes the point that a recovery should in any event be allowed for services rendered in connection with intrastate shipments. This clearly is not so of shipments made since the enactment of the Public Service Commissions Law. But we think there can be no recovery even for earlier shipments (Root v. Long Island R. Co. 114 N. Y. 300, 4 L.R.A. 331, 2 Inters. Com. Rep. 576, 11 Am. St. Rep. 643, 21 N. E. 403). The defendant cannot build its rights upon the contract, for the contract did not fix the term of its duration, and the plaintiff has canceled it. If the defendant can recover at all, even for intrastate shipments, the basis of the recovery must be a quantum meruit. But, to warrant a recovery upon that basis, the work done by the defendant must be work which ought to have been done by the plaintiff as part of the task of carriage. We have already stated our reasons for the conclusion that this was not the true nature of the service. There is nothing, therefore, on which to build the implication by law of a promise of reimbursement.

Same—recovery on quantum meruit.

Other objections to the counterclaim have been argued by the plaintiff. The point is made that the allowance, if otherwise legal, ought to have been published (Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 261, 57 L. ed. 1472, 1478, 33 Sup. Ct. Rep. 916), and that the ruling of the Interstate Commerce Commission, dismissing the defendant's petition, is conclusive until annulled. The determination of those questions is not necessary in the disposition of this appeal.

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

Willard Bartlett, Ch. J., **Chase, Collin, Cuddeback** and **Pound**, JJ., concur.

ANNOTATION.

Duty of carrier to deliver goods on siding or private track of consignee.

This note deals with the duty of a carrier to deliver goods on a siding or private track of a consignee, and is confined solely to the obligation of the carrier in that respect. It excludes any discussion of the duty to deliver on a sidetrack belonging to the carrier or to another railroad company, or of the validity of a statute requiring a railroad to build a sidetrack to a private establishment, at its own expense.

It has been laid down generally that it is the duty of a carrier to place a car on the private sidetrack of the consignee. Lee v. Erie R. Co. (1916) 173 App. Div. 75, 158 N. Y. Supp. 730, wherein it was said: "It was a part of the implied contract duty of the defendant to place this car on the plaintiff's private track, and until it did so it had not performed its contract, and no freight or demurrage charges, although previously earned, were collectable. The contract of transportation by a common carrier includes placing the cars conveniently for loading and unloading. The incidental consignee can require the car to be placed at a convenient point for unloading, and a reasonable opportunity therefor. When the consignee, as in this case, has his own track, and requires the car to be placed thereon for unloading, it is the duty of the transportation company to comply with his requirement. This was not done in the present case, nor was the car ever

in a position where it could be conveniently unloaded. In New York C. & H. R. R. Co. v. General Electric Co. (1915) 167 App. Div. 726, at page 732, 153 N. Y. Supp. 482, it was said by this court, speaking through Mr. Justice Woodward: 'We believe it may be laid down broadly that transportation by railroad of carload lots, under present-day conditions, requires the convenient placing of the car for loading, and an equally convenient placing of the car for unloading, and that the mere question of whether the tracks are upon the property of the shipper or upon the right of way of the transportation company is of no consequence upon this point. Primarily it is the duty of the transportation company to afford sidings, and a convenient place of loading or unloading, and a proper placing of the cars. If the shipper furnishes the sidings, it does not relieve the transportation corporation of the duty of conveniently placing the cars.' "

Such a duty has been held in other cases to arise from custom. Arkansas Midland R. Co. v. Premier Cotton Mills (1913) 109 Ark. 218, 158 S. W. 148; Vincent v. Chicago & A. R. Co. (1868) 49 Ill. 33. In the case first cited, it was said: "The testimony shows that it was the custom of appellant to deliver carload shipments to appellee by spotting the cars on this spur track next to appellee's shed. This was an established custom recognized both by appellants and appellee. The place of unloading was within the limit of the station grounds at Barton, and the proof of these facts did not tend to vary or contradict the bill of lading, and was not, therefore, incompetent. A general custom of the business or a well-established usage at the place of delivery becomes a part of the contract, and governs as to the place, time, and mode of making the delivery." In Vincent v. Chicago & A. R. Co. (Ill.) supra, the court said: "The custom of delivering grain at the elevators to which it is consigned, and which are connected with the line by convenient sidetracks, has thus grown into one of the necessities of railway commerce, and the bill before us avers it is a custom from which no railway company has sought to depart, except the present appellee. If, then, the common-law rule requiring of common carriers an immediate delivery, when practicable, to the consignees, has been relaxed in regard to railways only from necessity, it is difficult to perceive why the rule should not be applied in its full force to transportation of this character. Here, the necessity of relaxation has not only ceased, but the railway is compelled to seek some other warehouse than its own freight depot, and to send its cars over a sidetrack to some private elevator. And where there are several elevators thus connected with the main line, in substantially the same mode, it is difficult to conceive how, as a question merely of common law, the railway company can be permitted to deliver grain to an elevator of its own selection, in place of that to which the property has been consigned.' And in Cahn v. Michigan C. R. Co. (1873) 71 Ill. 96, it was said, by way of dictum: "It is undoubtedly true that the prima facie obligation of a carrier with regard to delivery may be effected by a well-established and generally well-known custom and usage; but it must, to have that effect, be so uniformly acquiesced in by length of time that the jury will feel themselves constrained to say that it entered into the minds of the parties, and made a part of the contract."

In Carrizzo v. New York, S. & W. R. Co. (1910) 66 Misc. 243, 123 N. Y. Supp. 173, it was held that where a railroad had no facilities at a station for unloading cars except the consignee's own siding, the placing of cars on the railroad's storage track between two stations was not a delivery so as to entitle the carrier to demurrage, and that it was its duty to deliver cars on the private siding.

In Bianchi v. Montpelier & W. R. R. Co. (1918) — Vt. —, 104 Atl. 144, it appeared that a monument was boxed and marked, "Chas. Bianchi & Sons, St. Louis, Mo.," and the bill of lading read: "Consigned to C. Bianchi & Sons. Destination, St. Louis, Mo., L. H. Tieman switch on Mo. Pac." The

court in holding that the carrier was bound to deliver at the private switch, said: "The bill of lading stipulated the Tieman switch was the place of delivery. The contract was controlling in this respect, and the monument was delivered by the terminal carrier at that place accordingly. The facts found show that the Tieman switch is a private siding, built for the convenience of Tieman, who, by reason thereof, became responsible for freight charges on all shipments placed thereon. The fact that the railroad may put goods on that siding did not make it other than private in this instance, where the place of delivery was fixed by contract, with the making of which the terminal carrier had nothing to do. The bill of lading contains provision as follows: 'Property, . . . when received from or delivered on private or other sidings, wharves, or landings, shall be at the owner's risk until the cars are attached to and after they are detached from trains.' This provision is reasonable in the eye of the law, and not inconsistent with public policy; and the law presumes that the plaintiffs assented to and agreed to be bound by it."

In Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) (1914) 234 U. S. 294, 58 L. ed. 1319, 34 Sup. Ct. Rep. 814, it was held that the duty of a carrier to deliver a car on a private sidetrack, without additional charge, depends on the situation in each particular case. The court said: "It cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switch limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from that city, when the line-haul rate embraces a receiving and delivering service, for which the spur track is a substitute. It is said that carriers are bound to carry only to or from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which also various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system. It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question 'as portions of their terminals, making no extra charge for service thereto when the carrier receives the benfit of the line haul out or in.' It was added that while this general statement covered perhaps 10,000 cities and towns in the United States, the carriers before the Commission could name only three exceptions, to wit, the cities of Los Angeles, San Francisco, and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks, upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact, to be determined according to the actual conditions of operations." The same rule is applied in the reported case (NEW YORK C. & H. R. R. Co. v. GENERAL ELECTRIC Co. ante, 1417), wherein it is held that the switching in question involved an interior movement of traffic to various parts of a plant, which the carrier was not bound to make.

But in Brooks Mfg. Co. v. Southern R. Co. (1910) 152 N. C. 665, 68 So. 243, it was held that a railroad company is not compelled to transfer loaded cars from its own right of way and tracks to the private track of an individual or private corporation, and that a delivery on a private track must be a matter of agreement between the consignee and the railroad company. The court said: "A railroad company cannot be compelled to operate its engines on a private track belonging to a private corporation or individual, over which the railroad company has no control or supervision. . . . While the defendant was under no legal obligation to haul this car off its own tracks and onto the private tracks of plaintiff, yet it was its duty to place the car in a position for unloading, so that it may

be accessible for that purpose. Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading. Wall-Huske Co. v. Southern R. Co. (1908) 147 N. C. 408, 61 S. E. 277. What particular parts of the carrier's tracks and freight yards may be used for such purposes must, of necessity, be left to its discretion; but the car must be reasonably accessible and placed for delivery before transportation is fully ended." And in Gulf Compress Co. v. Alabama G. S. R. Co. (1911) 100 **Miss.** 582, 56 So. 666, it appeared that the complainant applied for an injunction requiring the railroad company to receive and deliver cotton at its warehouse and compress located on its private siding. It was held that the duty so to do could arise only from a contract. In denying the injunction, the court said: "Where a railroad company furnishes sufficient facilities of its own for the receipt and delivery of freight, there is at common law no duty resting upon it to receive or deliver freight upon a private siding or spur track Assuming, but not deciding, that a custom so to do can arise, of such character as to impose this duty upon railroad companies, the evidence in the case at bar is wholly insufficient to establish such a custom. At most, it simply shows that railroad companies do receive and deliver freight upon such spur tracks; but generally, not always, upon a contract or understanding mutually agreeable to the parties thereto. Receiving and delivering freight upon such spur track is, therefore, purely a matter of contract, to which either party may attach any condition desired; and since the contract which appellee offers to make with appellant with reference to such receipt and delivery of freight is identical with the contract entered into by it with all other compresses on its line, there is, of course, no discrimination in this regard by appellee against appellant." See also Detroit v. Michigan C. R. Co. (1909) 156 **Mich.** 121, 120 N. W. 592, wherein a similar view was expressed by way of dictum in connection with a holding that a railroad company was not bound to maintain a sidetrack, constructed by it, to a private industrial establishment. W. A. S.

KEYSTONE COLLIERIES
v.
EDMUND W. MUDGE, Doing Business as Edmund W. Mudge & Company, Appt.

Pennsylvania Supreme Court — January 8, 1917.

(256 Pa. 130, 100 Atl. 526.)

Judicial sale — collateral attack — grounds.

1. A sale under execution is not subject to collateral attack because the article sold was not specified in the posted notice of sale, and the sale was adjourned from the place stated in the notice to another place some distance away.

[See note on this question beginning on page 1431.]

Same — want of authority.

2. A sheriff's sale is subject to collateral attack for want of authority in the officers making the sale.

Same — irregularities — effect.

3. Irregularities in a sale under execution do not render it void unless there is want of conformity to statutory requirements.

APPEAL by defendant from a judgment of the Court of Common Pleas for Clarion County in favor of plaintiff in an action brought to recover possession of certain property. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Corbett & Rugh, Weil & Thorp, S. Leo Ruslander,** and **George K. Warn,** for appellant:

No fraud being charged, the trial court erred in setting aside the sheriff's sale for alleged irregularities in the conduct of the levy and sale.

17 Cyc. 1376; Barton v. Hunter, 101 Pa. 411; Mentz v. Hamman, 5 Whart. 154, 34 Am. Dec. 546; Freeman v. Caldwell, 10 Watts, 11; Flick v. Troxsell, 7 Watts & S. 67; Rice v. Groff, 58 Pa. 118; Philadelphia Sav. Fund Soc. v. Purcell, 24 Pa. Super. Ct. 205; Hartman v. Hefflefinger, 47 Pa. Super. Ct. 1.

Plaintiff is estopped from collaterally attacking or inquiring into the regularity and fairness of the sheriff's sale.

17 Cyc. 1269; Lusk's Appeal, 108 Pa. 157; Wilkinson's Appeal, 65 Pa. 189; Simons v. Kern, 92 Pa. 459; Morrison v. Baker, 9 Pa. Super. Ct. 637; Wilson v. Howser, 12 Pa. 115; Stewart v. Stocker, 1 Watts, 142.

The sheriff's sale was in fact regularly conducted and vested a good title in defendant.

2 Freeman, Executions, 2d ed. pp. 959, 963, §§ 288, 290; Henry v. Patterson, 57 Pa. 350; Klopp v. Witmoyer, 43 Pa. 225, 82 Am. Dec. 561; Bennett's Branch Improv. Co.'s Appeal, 65 Pa. 252; Sowers v. Vie, 14 Pa. 99; Phillips v. Brown, 74 Me. 549; Eads v. Stephens, 63 Mo. 92; Tinkom v. Purdy, 5 Johns. 345; Jewett v. Guyer, 38 Vt. 215; Russell v. Richards, 11 Me. 374, 26 Am. Dec. 532; Richards v. Holmes, 18 How. 143–147, 15 L. ed. 304–306; Shearer v. Peffer, 155 Pa. 501, 26 Atl. 658.

Messrs. **Theodore L. Wilson, A. A. Geary, Samuel Wilson,** and **S. F. Brush** for appellee.

Stewart, J., delivered the opinion of the court:

The appellant, a judgment creditor of the appellee in the sum of $2,446.56, caused execution to issue on the judgment he had obtained, and thereunder a levy was made by the sheriff, 31st of January, 1911, according to his return, "on all the steel and iron rails, mine equipments, coal cars, etc., belonging to the Keystone Collieries, a corporation, at their several mines known as Keystone, Standard, Monroe, and Jocelyn, and also all other personal property belonging to the defendants not herein mentioned, which said mines are situate in Toby and Madison townships, Clarion county, Pa." On February 8th following, the sheriff exposed to sale the property so levied upon, and sold, as one of the articles included in the levy, an air compressor weighing between 8 and 10 tons, and of the value of about $2,500, to the plaintiff in the execution, on the latter's bid of $25. The sheriff made the following return to the writ: "February 25, 1911, after due and public notice, property cried and sold, for $308.50, —$21.50 applied on costs, balance to debt and interest. Vide receipt on writ."

On March 17th following, the compressor having been delivered by the sheriff to the purchaser, the defendant in the execution, and here the appellee, caused a writ of replevin to issue, under and by virtue of which the sheriff delivered over the compressor to the plaintiff in the writ. The action in replevin was thereafter proceeded with, and resulted in a judgment for the plaintiff for the compressor and the sum of $300 as damages for the taking and retention, with interest and costs. The case was submitted to the court and was tried without a jury, agreeably to stipulation filed.

The assignments of error do not call for separate consideration. The case turns upon a single point: Did the facts found warrant the conclusion reached by the court that the sale of the compressor by the sheriff was invalid and void? The only findings of fact that need be referred to in this inquiry, since they alone have any bearing upon the question, are comprised in the fifth request submitted by the plaintiff, which received a qualified affirmance, and the seventh of the court's general

findings. The finding asked for by plaintiff was as follows: "The sale of personal property of the Keystone Collieries was advertised by the sheriff of said county to take place at the Jocelyn Mines, owned by the Keystone Colliery, on February 8, 1911, on which date, at the instance of the defendant therein, who was plaintiff in said writ, the said sheriff adjourned said sale to another place about 2½ miles distant, to wit, to the Monroe Mines, owned by the Keystone Collieries, and without any other or further notice immediately went to the Monroe Mines and sold the compressor aforesaid as the personal property of the defendant in the writ . . . for a price or sum not exceeding $25, which sum was grossly inadequate compared to the value of the said compressor. The value of the said compressor in place at the time of the said sale was in excess of $2,000."

The court's answer was: "Affirmed, except as to that part having reference to the adjournment of the sale, on which subject reference is made in the general findings."

The seventh of the court's general findings was as follows: "The only advertisement of the sale was that in the form of the handbill above mentioned, and the sheriff first made some sales at the Jocelyn Mines, and from there went to the Monroe Mines, and there sold the air compressor in question. Whether or not there was a formal adjournment of the sale to the Monroe Mines does not satisfactorily appear, but in effect there was; the parties in attendance at the sale going with the sheriff to the Monroe Mines."

So far as the findings show,—and to these we are limited,—the case stands free of fraud or collusion, and we have to consider only the legal effect (1) of the failure of the sheriff in his public notices of sale, the required number of which had been duly posted, to make special mention of the air compressor as an article to be sold, and (2) the sale of the compressor at another place than that announced in the advertisement. That we have thus correctly stated the considerations that influenced the mind of the trial judge is shown in the concluding part of his discussion of the facts, where he says: "While there appears to be a dearth of authority directly upon the question, the evidence and facts found lead necessarily and reasonably to the conclusions that the sale in question was not made in compliance with the requirements of the statute; that it was so conducted as to afford just reason for complaint; that notice thereof was not given as so required; and that the sale was practically without notice, either as to the partcular property and its nature and character which the sheriff intended to offer, or as to the time and place of sale."

His second legal conclusion derived from the facts found is: "The so-called sale of the said compressor by the sheriff was, under the facts found and hereinbefore indicated, void, and did not operate to vest the title thereto in the plaintiff in the execution as the purchaser at such sale."

Judicial sale—want of authority.

A sheriff's sale, in a collateral proceeding such as this was, is open to attack on one or other of two grounds,—fraud, or want of authority in the officers making sale. Shields v. Miltenberger, 14 Pa. 76. The attack here, as we have seen, was on the second ground exclusively. While the writ in the sheriff's hand was a sufficient warrant for his levy, it would not be a sufficient warrant for the sale, except as the sale was made in conformity with statutory requirements. Want of conformity to these, as said in the case cited above, touches the foundation of the proceeding and is enough to impeach the authority of the officer. But nothing short of nonobservance of a statutory requirement is sufficient to that end. Irregu-

Same—irregularities—effect.

larities may appear in the process of sale of which the defendant in the execution would have good reason to complain. Having regard to the nature and character of the property levied on, a fuller and more specific reference to these articles than appeared in the posted handbills might have attracted a larger attendance at the sale and possibly greater competition between bidders, and the sale might have proved more productive had it been concluded entirely at the one place announced in the handbills, and the adjournment over avoided; but such matters as these concern nobody but the parties to the execution, and nobody quite as much as the debtor whose goods were to be sold and applied in payment of its debt. When an execution debtor suffers prejudice from any such things, he may look to the court for relief if he seeks it, and, upon sufficient ground being shown, the court, having discretionary power over its own process, to the end that injustice and oppression may be prevented, will set aside the sale returned. Once, however, that opportunity which the law affords is neglected, and is allowed to pass unimproved, the sale is no longer voidable at the instance of the party claiming to be injured, and as to him it is valid beyond attack, except, as we have said, for fraud and want of authority in the officer. Pentz v. Clark, 100 Pa. 446.

In none of the findings is there any suggestion of fraud. There was evidently much in this sale that would have appealed strongly to the court for interference had this appellee assailed it directly, at the proper time and in the proper way; but what he could have done directly, and which he neglected to do, he may not now do indirectly in a wholly collateral proceeding. Neither of the things done or omitted to be done by the sheriff on the strength of which the court concluded against the validity of the sale was matter of legislative requirement, and therefore did not enter into the question of the sheriff's authority to make the sale.

Same—collateral attack—grounds.

The judgment is reversed.

ANNOTATION.

Grounds of collateral attack on judicial and execution sales.

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I. Scope.

This note relates to attacks on defects subsequent to the judgment or decree of sale; it presupposes that such judgment or decree is correct.

In view of the difference of opinion as to the meaning of collateral attack, it should be stated that this note does not include direct attacks upon the sale, whether made in the same proceeding or in another proceeding brought directly for the purpose of annulling or setting the sale aside. One or two cases of this kind, however, are cited, wherein it was held that the sale in question was not subject to attack in such proceedings for the assigned defect. These cases a fortiori are authority that purely collateral attacks are not allowable for such a defect.

In case of a collateral attack upon

a sale for a defect other than fraud, the inquiry should be first whether the defect renders the sale void. This note does not undertake to investigate this question as to any particular defect. Such an investigation would include the examination of the cases on confirmation and direct attack. It will be understood, therefore, that the cases herein cited in relation to any particular defect are simply examples of the principles that void sales are open to collateral attack and other sales are not (except for fraud), and that the cases are not cited as decisive of the question that the particular defect will make a sale void or voidable.

The subjects of an administrator or other trustee buying at his own sale, and of questions arising where a party has died after judgment but before the sale, are excluded.

For validity and effect of return of execution made after return day, see the note to Moorman v. Campbell, 2 A.L.R. —, and for judicial sale after return day of execution, see the note to Ireland v. Linn County Bank, 2 A.L.R. —.

II. General principles.

a. Statement.

Execution and judicial sales are open to collateral attack if they are void, and they may be in certain cases attacked collaterally for fraud. Assuming, as we do in this note, that the judgment on order of sale is correct, in the absence of fraud, the collateral attacker must point out a defect which nullifies the sale. There is much difference of opinion between the jurisdictions as to whether various defects are vital or are mere irregularities. There is a good deal of confusion in the language if not in the thought of many of the cases; we are apt to find such expressions as that the sale is not "so void" as to be subject to the particular attack, etc.

b. Effect of void sales.

A judicial or execution sale may be collaterally attacked if it is void.

United States. — Shriver v. Lynn (1844) 2 How. 43, 11 L. ed. 172; Smith v. Cockrill (1867) 6 Wall. 756, 18 L. ed. 973; Thompson v. Phillips (1830) Baldw. 246, Fed. Cas. No. 13,974; Hobart v. Upton (1872) 2 Sawy. 302, Fed. Cas. No. 6,548.

Alabama.—Doe ex dem. Davis v. McKinney (1843) 5 Ala. 719; Elmore v. Harris (1848) 13 Ala. 360; Doe ex dem. Cook v. Webb (1851) 18 Ala. 810; Pollard v. Cocke (1851) 19 Ala. 188; Hawes v. Rucker (1891) 94 Ala. 166, 10 So. 85.

Arkansas.—Hughes v. Watt (1870) 26 Ark. 228.

California. — Williams v. Young (1861) 17 Cal. 403.

Connecticut. — Loomis v. Storrs (1822) 4 Conn. 440; Morey v. Hoyt (1895) 65 Conn. 516, 33 Atl. 496.

Georgia.—Knight v. Morrison (1887) 79 Ga. 55, 11 Am. St. Rep. 405, 3 S. E. 689.

Illinois.—Bybee v. Ashby (1845) 7 Ill. 151, 43 Am. Dec. 47.

Indiana. — Armstrong v. Jackson (1822) 1 Blackf. 210, 12 Am. Dec. 225; Thacher v. Devol (1895) 50 Ind. 30; Wells v. Bower (1890) 126 Ind. 115, 22 Am. St. Rep. 570, 25 N. E. 603.

Iowa.—Burton v. Emerson (1854) 4 G. Greene, 393; Drefahl v. Tuttle (1875) 42 Iowa, 177.

Kentucky.—Patterson v. Carneal (1882) 3 A. K. Marsh. 618, 13 Am. Dec. 208; Addison v. Crow (1837) 5 Dana, 271; Spears v. Weddington (1912) 146 Ky. 434, 142 S. W. 679; Jackson v. Haake (1915) 163 Ky. 486, 173 S. W. 1127.

Maine.—Marr v. Boothby (1841) 19 Me. 150; Wakefield v. Campbell (1841) 20 Me. 393, 37 Am. Dec. 60.

Massachusetts.—King v. Goodwin (1819) 16 Mass. 63; Parker v. Nichols (1823) 7 Pick. 111; Macy v. Raymond (1830) 9 Pick. 285; Penniman v. Cole (1844) 8 Met. 496; Kennedy v. Duncklee (1854) 1 Gray, 65.

Michigan. — Ryder v. Flanders (1874) 30 Mich. 336.

Minnesota. — Babcock v. Cobb (1866) 11 Minn. 347, Gil. 247; Montour v. Purdy (1866) 11 Minn. 384, Gil. 278, 88 Am. Dec. 88; Kipp v. Bullard (1882) 30 Minn. 84, 14 N. W. 364; Cater v. Steeves (1905) 95 Minn. 225, 103 N. W. 885.

Mississippi.—Lehr v. Doe (1844) 3

Smedes & M. 468; Kane v. Preston (1852) 24 Miss. 133.

Missouri. — Strouse v. Drennan (1867) 41 Mo. 289; Maupin v. Emmons (1871) 47 Mo. 304; Wood v. Augustine (1875) 61 Mo. 46; Carder v. Culbertson (1889) 100 Mo. 269, 18 Am. St. Rep. 548, 13 S. W. 88.

Nebraska.—Dworak v. More (1889) 25 Neb. 735, 41 N. W. 778; Bachelor v. Korb (1899) 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485.

New Hampshire.—Adams v. Morrison (1826) 4 N. H. 166, 17 Am. Dec. 406.

New Jersey.—Den ex dem. Todd v. Philhower (1854) 24 N. J. L. 796; Philhower v. Todd (1857) 11 N. J. Eq. 312.

New York.—Wood v. Colvin (1842) 2 Hill, 566, 38 Am. Dec. 598; Carpenter v. Stilwell (1854) 11 N. Y. 61; Bates v. Ledgerwood (1891) 130 N. Y. 200, 29 N. E. 102.

North Carolina.—Barden v. M'Kinne (1825) 11 N. C. (4 Hawks) 279, 15 Am. Dec. 519; Doe ex dem. Murrell v. Roberts (1850) 33 N. C. (11 Ired. L.) 424, 53 Am. Dec. 419; Badham v. Cox (1850) 33 N. C. (11 Ired. L.) 456; Love v. Gates (1841) 24 N. C. (2 Ired. L.) 14; Den ex dem. Collais v. McLeod (1848) 30 N. C. (8 Ired. L.) 221, 49 Am. Dec. 376; Taylor v. Taylor (1880) 83 N. C. 116; Mebane v. Layton (1883) 89 N. C. 396; McCracken v. Adler (1887) 98 N. C. 400, 2 Am. St. Rep. 340, 4 S. E. 138.

Pennsylvania.—Porter v. Nealan (1804) 4 Yeates, 108; Gordon v. Camp (1846) 3 Pa. St. 349, 45 Am. Dec. 647; Hartman v. Hefflefinger (1911) 47 Pa. Super. Ct. 1.

South Carolina.—Stone v. Ebberly (1793) 1 Bay, 317; Sims v. Randall (1804) 2 Bay, 524.

Tennessee. — Rogers v. Cawood (1851) 1 Swan, 142, 55 Am. Dec. 729; Bank of Tennessee v. Beatty (1855) 3 Sneed, 305, 65 Am. Dec. 58; Hurst v. Liford (1872) 11 Heisk. 622.

Texas.—Towns v. Harris (1855) 13 Tex. 507; Silvan v. Coffee (1857) 20 Tex. 4, 70 Am. Dec. 371; Johnston v. Shaw (1870) 33 Tex. 585; Mitchell v. Ireland (1881) 54 Tex. 301; Sinclair v. Stanley (1885) 64 Tex. 67; Hill v. Newman (1887) 67 Tex. 265, 3 S. W. 271; Terry v. O'Neal (1888) 71 Tex. 592, 9 S. W. 673; Moody v. Moeller (1889) 72 Tex. 635, 13 Am. St. Rep. 839, 10 S. W. 727; Cain v. Woodward (1889) 74 Tex. 549, 12 S. W. 319; Flanary v. Wade (1908) 102 Tex. 63, 113 S. W. 8; Bailey v. Block (1911) 104 Tex. 101, 134 S. W. 323.

Wisconsin. — Herrick v. Graves (1862) 16 Wis. 157; Blackman v. Baumann (1868) 22 Wis. 611; Wilkinson v. Filby (1869) 24 Wis. 441; Blodgett v. Hitt (1871) 29 Wis. 169; Weld v. Johnson Mfg. Co. (1893) 84 Wis. 537, 54 N. W. 335, 998.

c. Effect of irregularities.

Judicial or execution sales cannot be attacked collaterally for mere irregularities.

Federal. — Griswold v. Connolly (1871) 1 Woods, 193, Fed. Cas. No. 5,833.

Alabama.—Ware v. Bradford (1841) 2 Ala. 676, 36 Am. Dec. 427; Love v. Powell (1843) 5 Ala. 58; Pollard v. Cocke (1851) 19 Ala. 188; Spragins v. Taylor (1872) 48 Ala. 520; White v. Farley (1886) 81 Ala. 563, 8 So. 215; Frey v. Fenn (1899) 126 Ala. 293, 28 So. 789.

Arkansas. — Jordan v. Bradshaw (1856) 17 Ark. 106, 65 Am. Dec. 419; Lawson v. Jordan (1857) 19 Ark. 297, 70 Am. Dec. 596; Feild v. Dortch (1899) 34 Ark. 399; Webster v. Daniel (1886) 47 Ark. 131, 14 S. W. 550.

California.—Fitch v. Miller (1862) 20 Cal. 353; Gregory v. Bovier (1888) 77 Cal. 121, 19 Pac. 232; Bechtel v. Wier (1907) 152 Cal. 443, 15 L.R.A. (N.S.) 549, 93 Pac. 75.

Georgia.—Ward v. Miller (1915) 143 Ga. 164, 84 S. E. 480.

Illinois.—Swiggart v. Harber (1843) 5 Ill. 364, 39 Am. Dec. 418; Phillips v. Coffee (1855) 17 Ill. 154, 63 Am. Dec. 357; Durham v. Heaton (1862) 28 Ill. 264, 81 Am. Dec. 275; McCormick v. Wheeler (1864) 36 Ill. 114, 85 Am. Dec. 388; Becker v. Quigg (1870) 54 Ill. 390; Miller v. McMannis (1882) 104 Ill. 421; Railsback v. Lovejoy (1886) 116 Ill. 442, 6 N. E. 504; Clark v. Glos (1899) 180 Ill. 556, 72 Am. St. Rep. 223, 54 N. E. 631.

Indiana.—Nelson v. Bronnenburg

(1881) 81 Ind. 193; Martin v. Prather (1882) 82 Ind. 535; Caley v. Morgan (1888) 114 Ind. 350, 16 N. E. 790; Ribelin v. Peugh (1890) 126 Ind. 216, 25 N. E. 1103; Boos v. Morgan (1891) 130 Ind. 305, 30 Am. St. Rep. 237, 30 N. E. 141.

Iowa.—Sprott v. Reid (1852) 3 G. Greene, 489, 56 Am. Dec. 549; Johnson v. Carson (1852) 3 G. Greene, 499.

Kansas.—Watts v. Cook (1880) 24 Kan. 278; Pracht v. Pister (1833) 30 Kan. 568, 1 Pac. 638; Rounsaville v. Hazen (1885) 33 Kan. 71, 5 Pac. 422; Dickens v. Crane (1885) 33 Kan. 344, 6 Pac. 630; Trowbridge v. Cunningham (1901) 63 Kan. 847, 66 Pac. 1015.

Kentucky. — Coleman v. Trabue (1812) 2 Bibb, 518; Guelot v. Pearce (1897) 18 Ky. L. Rep. 1004, 38 S. W. 892; Calloway v. Craig (1906) 122 Ky. 447, 92 S. W. 320.

Maine.—Ludden v. Kincaid (1858) 45 Me. 411.

Maryland.—Estep v. Weems (1834) 6 Gill & J. 303; Miles v. Knott (1842) 12 Gill & J. 442.

Massachusetts.—Perkins v. Fairfield (1814) 11 Mass. 227.

Michigan.—Palmer v. Oakley (1847) 2 Dougl. 433, 47 Am. Dec. 41; Hoffman v. Buschman (1893) 95 Mich. 538, 55 N. W. 458; Rhode v. Hassler (1897) 113 Mich. 56, 71 N. W. 461; Brown v. O'Donnell (1900) 123 Mich. 100, 81 N. W. 961; Brown v. Hannah (1908) 152 Mich. 33, 115 N. W. 980.

Mississippi. — Minor v. Natchez (1845) 4 Smedes & M. 602, 43 Am. Dec. 488; Cockerel v. Doe (1849) 12 Smedes & M. 117.

Missouri.—McNair v. Hunt (1838) 5 Mo. 301; Rector v. Hartt (1844) 8 Mo. 448, 41 Am. Dec. 650; Reed v. Austin (1846) 9 Mo. 722, 45 Am. Dec. 336; Landes v. Perkins (1848) 12 Mo. 238; Norton v. Quimby (1870) 45 Mo. 388; Waddell v. Williams (1872) 50 Mo. 216; Bouldin v. Ewart (1876) 63 Mo. 330; Norman v. Eastburn (1910) 230 Mo. 168, 130 S. W. 276; Lewis v. Whitten (1892) 112 Mo. 318, 20 S. W. 617; Gorman v. Stanton (1878) 5 Mo. App. 585.

Nebraska. — Gillespie v. Switzer (1895) 43 Neb. 772, 62 N. W. 228; Link v. Connell (1896) 48 Neb. 574, 67 N. W. 475.

New York.—Jackson ex dem. Carman v. Rosevelt (1816) 13 Johns. 97.

North Carolina.—Oxley v. Mizle (1819) 7 N. C. (3 Murph.) 250; Den ex dem. Huggins v. Ketchum (1839) 20 N. C. 550 (4 Dev. & B. L. 414); McGlawhorn v. Worthington (1887) 98 N. C. 199, 3 S. E. 633.

Ohio.—Terrill v. Auchauer (1862) 14 Ohio St. 80; Mauarr v. Parrish (1875) 26 Ohio St. 636; Herbst v. Bates (1885) 9 Ohio Dec. Reprint, 444.

Oregon.—Eddy v. Coldwell (1892) 23 Or. 163, 37 Am. St. Rep. 672, 31 Pac. 475.

Pennsylvania. — Lockhart v. John (1847) 7 Pa. 137; Hinds v. Scott (1849) 11 Pa. 19, 51 Am. Dec. 506; Shields v. Miltenberger (1850) 14 Pa. 76; McCormick v. Sypher (1913) 238 Pa. 191, 85 Atl. 1096; KEYSTONE COLLIERIES v. MUDGE (reported herewith) ante, 1428.

South Carolina.—Turner v. M'Crea (1817) 1 Nott. & M'C. 11; Ingram v. Belk (1846) 2 Strobh. L. 207, 47 Am. Dec. 591; Manning v. Dove (1857) 10 Rich. L. 395; Ward v. Cohen (1871) 3 S. C. 338; Lyles v. Haskell (1891) 35 S. C. 391, 14 S. E. 829.

Tennessee.—Lee v. Crossna (1845) 6 Humph. 281; Johnson v. Evans (1903) 1 Tenn. Ch. App. 603.

Texas.—Sydnor v. Roberts (1855) 13 Tex. 600, 65 Am. Dec. 84; Hancock v. Metz (1855) 15 Tex. 205; Ayres v. Duprey (1864) 27 Tex. 593, 86 Am. Dec. 657; Hill v. Newman (1887) 67 Tex. 265, 3 S. W. 271; Morris v. Hastings (1888) 70 Tex. 26, 8 Am. St. Rep. 570, 7 S. W. 649; Maverick v. Flores (1888) 71 Tex. 110, 8 S. W. 636; Sykes v. Speer (1908) — Tex. Civ. App. —, 112 S. W. 422; Odum v. Menafee (1895) 11 Tex. Civ. App. 119, 33 S. W. 129; Moore v. Johnson (1896) 12 Tex. Civ. App. 694, 34 S. W. 771; Smith v. Olsen (1900) 23 Tex. Civ. App. 458, 56 S. W. 568; Taylor v. Doom (1906) 43 Tex. Civ. App. 59, 95 S. W. 4; Ayres v. Patton (1908) 51 Tex. Civ. App. 186, 111 S. W. 1079; First Nat. Bank v. South Beaumont Land & Improv. Co. (1910) 60 Tex. Civ. App. 315, 128 S. W. 436.

Wisconsin.—Mariner v. Coon (1863) 16 Wis. 466.

Irregularities cannot be brought up collaterally to affect a sale made under valid execution. Byers v. Fowler (1851) 12 **Ark.** 218, 54 Am. Dec. 271.

A sale under a voidable execution is not open to collateral attack. Caley v. Morgan (1887) 114 **Ind.** 350, 16 N. E. 790.

A sale which is not void cannot be collaterally attacked. Feild v. Dortch (1899) 34 **Ark.** 399; Clark v. Glos (1899) 180 **Ill.** 556, 72 Am. St. Rep. 223, 54 N. E. 631; Calloway v. Craig (1906) 122 **Ky.** 447, 92 S. W. 320.

A title under sheriff's sale on a valid judgment cannot be attacked collaterally where there is no fraud. McClendon v. Kemp (1866) 18 **La.** Ann. 162; Anderson v. Carroll (1871) 23 **La.** Ann. 175; Doherty v. Leake (1872) 24 **La.** Ann. 224; Gillis v. Carter (1877) 29 **La.** Ann. 698.

The purchaser of goods at a constable's sale, suing in replevin, is not bound to prove the regularity of the proceedings of the constable under the execution; these matters should be objected to before the justice. Pennington v. Chandler (1852) 5 Harr. (**Del.**) 394.

"The jurisdiction of the court under whose order the sale was made over the subject-matter appears on the face of the proceedings, and its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally." Thompson v. Tolmie (1829) 2 Pet. (**U. S.**) 169, 7 L. ed. 385, quoted and followed in Dupuy v. Bemiss (1847) 2 **La.** Ann. 509.

"Objections to mere irregularity in the proceedings will not be heard to impeach a judgment. Nothing, in fact, will be allowed collaterally to invalidate a title acquired under it, but jurisdictional defects which appear in the record." Lyles v. Haskell (1891) 35 **S. C.** 391, 14 S. E. 829.

In Shields v. Miltenberger (1850) 14 **Pa.** 76, cited in the reported case (KEYSTONE COLLIERIES v. MUDGE, ante, 1428), the court said: "The absence of authority or the presence of fraud utterly frustrates the operation of the sale as a means of transmission of title, and avoids it from the beginning. Either may, therefore, be insisted on, even after the formal acknowledgment of the conveyance; but mere irregularities, whether of omission or commission, which do not render the officer powerless, or taint the transaction with turpitude, may be cured by the tacit acquiescence of those who ought to speak in time."

In Rigg v. Cook (1847) 9 **Ill.** 336, 46 Am. Dec. 462, the court said: "If the court had jurisdiction of the case, and the officer authority to make the sale, the errors of the one, and the irregularities of the other, are to be inquired into and corrected directly, and not collaterally."

In an action by a purchaser against the execution debtor, the court said: "The levy may have been excessive; the land may have sold for a sum greatly less than its value; plaintiff in error may have had ample personal property subject to execution to satisfy the judgments, and have been deprived of an opportunity to point it out for levy, and he may have requested the officer to sell the land in small quantities; but, without something more, all these facts, if proved, would present no defense to this action." Crain v. Hogan (1891) — **Tex.** —, 16 S. W. 1019.

In Blood v. Light (1869) 38 **Cal.** 649, 99 Am. Dec. 441, the court said: "He is only required to show a sale, and the authority of the officer to make it; the judgment and execution prove the latter, and the deed the former. He is bound to see that there is a judgment which is not void, and an execution which is regular upon its face; but as to all the acts of the officer under the execution which precede the sale, he may rely upon the legal presumption that they have been duly performed; that the officer has found no personal property; that he has seized upon the land which he is about to sell, and that he has advertised the sale as required by law."

"The errors or mistakes in a judicial sale, where the nullity is not a matter of public interest, but entirely in a matter of private interest, cannot

be corrected or examined into collaterally." Whitaker v. Ashbey (1891) 43 La. Ann. 117.

III. Various illustrations.

In practice the attacks on matters subsequent to the judgment are usually directed to the property, the writ, the officer, oaths and bonds, appraisement, notice of sale, time, place, and sales in mass.

a. Satisfied judgments.

While the matter of the judgment is beyond the scope of this note, it may be said that an execution sale upon a satisfied judgment is void and subject to collateral attack. Loomis v. Storrs (1822) 4 Conn. 440; Knight v. Morrison (1887) 79 Ga. 55, 11 Am. St. Rep. 405, 3 S. E. 689; Drefahl v. Tuttle (1875) 42 Iowa, 177; King v. Goodwin (1819) 16 Mass. 63; Kennedy v. Duncklee (1854) 1 Gray (Mass.) 65; Wood v. Colvin (1842) 2 Hill (N. Y.) 566, 38 Am. Dec. 598; Carpenter v. Stilwell (1854) 11 N. Y. 61; Den ex dem. Murrell v. Roberts (1850) 33 N. C. (11 Ired. L.) 424, 53 Am. Dec. 419; Finley v. Gaut (1874) 8 Baxt. (Tenn.) 148 (stating the rule); Terry v. O'Neal (1888) 71 Tex. 592.

In ejectment by an execution purchaser it was held, where there had been an execution levied on slaves and real property and it did not appear what disposition had been made of the slaves, that it ought to have been left to the jury to say how far the levy on the slaves was sufficient to satisfy the execution. Doe ex dem. Shelton v. Hamilton (1852) 23 Miss. 496, 57 Am. Dec. 149.

Some cases, however, protect innocent purchasers under satisfied judgments. Boren v. M'Gehee (1838) 6 Port. (Ala.) 432, 31 Am. Dec. 695; Prewitt v. Jewell (1846) 9 Mo. 732; Shaeffer v. Child (1838) 7 Watts (Pa.) 86; Dean v. Connelly (1847) 6 Pa. 239; Kezar v. Elkins (1879) 52 Vt. 119.

A sale to the judgment creditor under a satisfied judgment is absolutely void and may be attacked collaterally. Weston v. Clark (1866) 37 Mo. 568.

Where the appellate court ordered a reversal unless the appellee would consent to a reduction of the amount of damages, an execution issued on the judgment before such consent is filed is void, and a sale thereunder is void and open to collateral attack. Flanary v. Wade (1908) 102 Tex. 63, 113 S. W. 8.

The effect of sales pending appeals is not included.

b. The property.

An execution sale of a third person's property is utterly void and subject to collateral attack. Stone v. Ebberly (1793) 1 Bay (S. C.) 317.

An execution sale of a stranger's property where there is no estoppel is void and may be collaterally attacked. Spears v. Weddington (1912) 146 Ky. 434, 142 S. W. 679; Johnston v. Shaw (1870) 33 Tex. 585.

So, a chancery sale of lands not in suit is void and subject to collateral attack. Shriver v. Lynn (1844) 2 How. (U. S.) 43, 11 L. ed. 172, where, after a sale directed by a decree, the trustee named therein made a further sale without authority of other land not in suit, which was afterwards confirmed by the chancellor.

The execution sale may be collaterally attacked by the execution debtor when he had no legal title to the land at the time of the levy and sale (Dworak v. More (1889) 25 Neb. 735, 41 N. W. 777); and against ejectment by the execution purchaser it may be shown that the execution debtor had no legal title to the land sold (Bates v. Ledgerwood Mfg. Co. (1891) 130 N. Y. 200, 29 N. E. 102). Thus, the execution defendant may defend ejectment by showing that he had no interest which could be sold under execution (Doe ex dem. Davis v. McKinney (1843) 5 Ala. 719; Elmore v. Harris (1848) 13 Ala. 360; Doe ex dem. Cook v. Webb (1851) 18 Ala. 810); or that he never owned the property (Hill v. Newman (1887) 67 Tex. 265, 3 S. W. 271).

In Badham v. Cox (1850) 33 N. C. (11 Ired. L.) 456, where, at the time of the return of the fi. fa., the debtor had no interest in the land subject to execution sale, it was held that a sale under a venditioni exponas was void although the debtor acquired the legal title while the sheriff had the latter

writ in his hands; and therefore the purchaser could not recover in ejectment.

If the land sold on execution is homestead the sale is void and may be collaterally attacked by the execution debtor. Hughes v. Watt (1870) 26 **Ark.** 228; Kipp v. Bullard (1882) 30 **Minn.** 84, 14 N. W. 364; Mebane v. Layton (1883) 89 **N. C.** 396; McCracken v. Adler (1887) 98 **N. C.** 400, 2 Am. St. Rep. 340, 4 S. E. 138; Herrick v. Graves (1862) 16 **Wis.** 157. The wife may defend against ejectment upon a title through execution sale on a judgment against her husband, on the ground that the property sold was homestead. Williams v. Young (1861) 17 **Cal.** 403.

But it is not a ground of collateral attack that, in a suit against a man and wife, the levy and notice of sale by mistake described the property as that of the wife. Morris v. Hastings (1888) 70 **Tex.** 26, 8 Am. St. Rep. 570, 7 S. W. 649.

Description.

To preserve the sale from collateral attack the description of the lands must be sufficiently clear.

For example, it may be stated that the following descriptions have been held insufficient on collateral attack—

—a description merely of lot, block, county, and state, omitting the name of the town, Herrick v. Ammerman (1884) 32 **Minn.** 544, 21 N. W. 836;

—"and also all other the lands, tenements, and hereditaments whereof the said (name)" was seised within a certain county, Jackson ex dem Livingston v. De Lancey (1816) 13 Johns. (N. Y.) 537, 7 Am. Dec. 403.

So the following levies were held insufficient on collateral attack:

"Levied on 8,000 acres of land, lying in four tracts, April 28, 1810" (Pound v. Pullen (1832) 3 Yerg. (**Tenn.**) 338); "on all of the lands" of the execution defendant "lying on Queen's creek" (Doe ex dem. Huggins v. Ketchum (1839) 20 N. C. 550 (4 Dev. & B. L. 414)); a levy on land of Erwin as on 1,950 acres of land in Henderson county, part of a tract of 2,500 acres located by Damet Gilchrist" (Brigance v. Erwin (1852) 1 Swan (**Tenn.**) 375, 57 Am. Dec. 779); a levy on "part of" a tract, not specifying the part (Langley v. Jones (1873) 33 **Md.** 179).

A sale of lot 7 was held void and open to collateral attack when the levy was: "Levied on lot No. ——, in the town of Greenville, with its improvements;" and the purchaser could not recover the land. Brown v. Dickson (1841) 2 Humph. (**Tenn.**) 395, 37 Am. Dec. 560.

c. The writ.

Time of issuing.

A sale upon an execution issued before the statutory time which must first elapse after judgment is void and open to collateral attack. Penniman v. Cole (1844) 8 Met. (**Mass.**) 496.

On the contrary, it was held in House v. Robertson (1896) — **Tex.** Civ. App. —, 34 S. W. 641, that a sale could not be collaterally attacked because the execution was prematurely issued.

The issuance of an execution on a dormant judgment cannot be collaterally attacked by a stranger. Brevard v. Jones (1874) 50 **Ala.** 221; Parks v. Coffey (1875) 52 **Ala.** 32; Doe ex dem. Cooper v. Harter (1849) 1 **Ind.** 427; Doe ex dem. Cooper v. Harter (1850) 2 **Ind.** 252; Jackson ex dem. M'Crea v. Bartlett (1811) 8 Johns. (**N. Y.**) 361; Jackson ex dem. Livingston v. De Lancey (1816) 13 Johns. (**N. Y.**) 537, 7 Am. Dec. 403; Vastine v. Fury (1816) 2 Serg. & R. (**Pa.**) 426; Boggess v. Howard (1874) 40 **Tex.** 153 (disapproving Johnston v. Shaw (1870) 33 **Tex.** 585).

Nor can an execution upon a dormant judgment be collaterally attacked by the debtor or one claiming under him. Howard v. Corey (1899) 126 **Ala.** 283, 28 So. 682; Gillespie v. Switzer (1895) 43 **Neb.** 772, 62 N. W. 228; Link v. Connell (1896) 48 **Neb.** 574, 67 N. W. 475; Jackson ex dem. Carman v. Rosevelt (1816) 13 Johns. (**N. Y.**) 97 (obiter); Eddy v. Coldwell (1892) 23 **Or.** 163, 37 Am. St. Rep. 672, 31 Pac. 475; Hinds v. Scott (1849) 11 **Pa.** 19, 51 Am. Dec. 506; Bryan v. Jones & L. Steel Co. (1913) 238 **Pa.** 191, 85 Atl. 1089; Sydnor v. Roberts (1855) 13 **Tex.** 600, 65 Am. Dec. 84; Hill v. Newman (1887) 67 **Tex.** 265, 3 S. W. 271; Maverick v. Flores (1888) 71 **Tex.** 110, 8 S. W. 636; Odum v.

Menafee (1895) 11 Tex. Civ. App. 119, 33 S. W. 129; Taylor v. Doom (1906) 43 Tex. Civ. App. 59, 95 S. W. 4; Mariner v. Coon (1863) 16 Wis. 466.

Validity.

It is conceded that a valid sale upon execution requires a valid writ.

A purchaser cannot recover on a sale without a valid writ. Love v. Gates (1841) 24 N. C. (2 Ired. L.) 14.

A forged execution will support no title. Silvan v. Coffee (1857) 20 Tex. 4, 70 Am. Dec. 371.

Where the statute prescribes the writ, a sale without such writ is void and open to collateral attack. Armstrong v. Jackson (1822) 1 Blackf. (Ind.) 210, 12 Am. Dec. 225; Porter v. Neelan (1804) 4 Yeates (Pa.) 108.

Where, in an attachment suit, the plaintiff elected to rely upon an execution, but the clerk issued a venditioni exponas, whereas he had power only to issue the writ prescribed in the judgment, the sale is void, and the creditor-purchaser cannot recover the property from the debtor. Hurst v. Liford (1872) 11 Heisk. (Tenn.) 622.

Where the statute required the clerk, in issuing new executions, to authorize and command levies upon additional property if the former levy was deemed insufficient, and the clerk issued a vend. exp. omitting the command to levy upon additional property, a sale of additional property is void and the creditor-purchaser cannot recover the property (Maupin v. Emmons (1871) 47 Mo. 304), nor can the creditor-purchaser defend the title (Wood v. Augustine (1875) 61 Mo. 46).

In Taylor v. Taylor (1880) 83 N. C. 116, it was held that where an execution issued from the superior court of one county to the sheriff of another county without the seal of the court, that the sale thereunder was a nullity and open to collateral attack.

In Den ex dem. Collais v. McLeod (1848) 30 N. C. (8 Ired. L.) 221, it was held that an execution calling for interest when the judgment did not give it was void and the sale was open to collateral attack.

On the other hand, the purchaser at a sheriff's sale will get a good title though the writ be irregular, if it be not void. Oxley v. Mizle (1819) 7 N. C. (3 Murph.) 250.

Thus, there can be no collateral attack on account of a technical defect in the writ (Griswold v. Connolly (1871) 1 Woods, 193, Fed. Cas. No. 5,833), or a clerical error therein (Railsback v. Lovejoy (1886) 116 Ill. 442, 6 N. E. 504) as misdescribing the date of the judgment (Ward v. Miller (1915) 143 Ga. 164, 84 S. E. 480; Sprott v. Reid (1852) 3 G. Greene (Iowa) 489, 56 Am. Dec. 549), or failure to state the amount of the judgment and the costs (Sykes v. Speer (1908) — Tex. Civ. App. —, 112 S. W. 422), or omitting the name of a defendant (Lee v. Crossna (1845) 6 Humph. (Tenn.) 281).

It cannot be objected collaterally that the scire facias does not correctly follow the judgment as to the cause of action nor correctly describe the judgment; nor that the sale took place after it was stayed by order. Swiggart v. Harber (1843) 5 Ill. 364, 39 Am. Dec. 418.

While an execution against a town, not running in terms against the real estate of nonresidents, is defective, the court will amend it when collaterally attacked where it appears that the person objecting suffers nothing other than what he would have suffered had the execution been in proper form. Caldwell v. Blake (1879) 69 Me. 459.

In Lawson v. Jordan (1858) 19 Ark. 297, 70 Am. Dec. 596, the court said: "It appears that, under some of the executions, lands were sold under a fi. fa. clause in the ven. ex.; but that was only an irregularity in the process, which could be taken advantage of alone by the judgment debtor himself, on a direct proceeding for the purpose, and consequently could not be made a question of among his creditors on a distribution, or on a collateral proceeding. The process was not void."

In Durham v. Heaton (1862) 28 Ill. 264, 81 Am. Dec. 275, it was held that the fact that the execution was for a sum greater than the judgment is a mere irregularity and cannot be raised by a stranger collaterally.

d. Officers.

A sale by an officer under a writ

directed to another officer is void, and open to collateral attack.

A sale of personal property by the constable of a township under an execution directed to the constable of another township is a nullity and open to collateral attack. Gordon v. Camp (1846) 3 Pa. St. 349, 45 Am. Dec. 647.

Where an execution was directed to the sheriff of K. county, but was delivered to the sheriff of P. county, and executed by a sale of land, and the creditor bought, he could not recover the land of the debtor. Bybee v. Ashby (1845) 7 Ill. 151.

But where, at the time of the sale, there seems to have been some uncertainty as to the county in which the land was situated, after a lapse of years it was held that the authority of the selling sheriff could not be collaterally attacked. Ford v. Wright (1880) 2 Posey Unrep. Cas. (Tex.) 235.

A sale by a sheriff after his term of office expired, on a levy made before it expired, is void and open to collateral attack. Bank of Tennessee v. Beatty (1855) 3 Sneed (Tenn.) 305, 65 Am. Dec. 58.

So is a sale under execution showing on its face that the sheriff is a beneficiary. Knight v. Morrison (1887) 79 Ga. 55, 11 Am. St. Rep. 405, 3 S. E. 689.

So is a sale when the executing sheriff is the execution creditor, even though he assigns his interest before the sale. Den ex dem. Collais v. McLeod (1848) 30 N. C. (8 Ired. L.) 221.

On the other hand, a ward may not recover land sold at her guardian's sale on the ground that the guardian was a minor. She cannot thus collaterally attack the sale. Johnson v. Johnson (1916) — Okla. —, 159 Pac. 1121.

Where a decree of foreclosure directed a sale under the directions of "a master in chancery of this court," it was held that the mortgagor, if he objected to D., one of the masters who made the sale, ought to have moved to have D. excepted in the decree, and that any objection to D. thereafter, even in the same proceeding, was collateral. D., when appointed master, was clerk of the court and son of one of the judges who made the appointment, and the appointment contained no special reason, although the statute forbade the appointment of the clerk unless the judge assigned special reasons in the appointment, and also forbade the employment in any office or duty of a person related to a judge of the court within the degree of first cousin. Seaman v. North Western Mut. L. Ins. Co. (1898) 30 C. C. A. 218, 58 U. S. App. 643, 86 Fed. 493.

Where a third party brings trespass for the removal of a shop from his premises, the defendants may offer execution and return without showing that the constable making the sale was duly qualified. Doty v. Gorham (1828) 5 Pick. (Mass.) 487, 16 Am. Dec. 417.

e. Oaths and bonds.

The effect of the failure of statutory oaths and bonds depends upon the idiosyncrasy of the jurisdiction.

It has been held that the failure of an executor to take the oath required by law before fixing on the time and place of sale made the sale wholly void and open to collateral attack. Parker v. Nichols (1829) 7 Pick. (Mass.) 111.

Where the statute provides that guardians' sales shall not be avoided on account of any irregularity, provided it shall appear that the guardian "took the oath prescribed," etc., it was held that the purchaser could not defend his title where the guardian did not take the oath "before fixing on the time and place of sale," as required by the statute, although he did take the oath before the sale. Blackman v. Baumann (1868) 22 Wis. 611.

It was similarly held where the guardian took no oath at all. Wilkinson v. Filby (1869) 24 Wis. 441.

It has been held that the failure of a guardian to give the special statutory sale bond rendered his sale void and open to collateral attack. Jackson v. Haake (1915) 163 Ky. 486, 173 S. W. 1127; Ryder v. Flanders (1874) 30 Mich. 336; Bachelor v. Korb (1899) 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485 (bond given but not approved).

It was held in Weld v. Johnson Mfg. Co. (1893) 84 Wis. 537, 54 N. W. 335, 998, that the failure to give a bond on guardian's sale renders the sale void

and open to collateral attack when the statue provides that "in case of an action relating to any estate sold by" a guardian in which the ward or any person claiming under him "shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear" that the guardian "gave a bond," etc.

On the other hand, it has been held that the failure of the guardian to give such a statutory sale bond did not render his sale open to collateral attack. Watts v. Cook (1880) 24 **Kan.** 278; Mauarr v. Parrish (1875) 26 **Ohio** St. 636.

So it has been held that the failure of an administrator to give a bond on his sale did not open the sale to collateral attack. Perkins v. Fairfield (1814) 11 Mass. 227; Lockhart v. John (1847) 7 **Pa.** 137. So where the money has been fully accounted for. Foster v. Birch (1860) 14 **Ind.** 445. So where the court by oversight failed to require it. Frothingham v. Petty (1902) 197 Ill. 418, 64 N. E. 270.

It was held in Marcy v. Russ (1790) 1 Root (**Conn.**) 176, that one not the debtor cannot object because the execution was taken out against a nonresident without giving the bond required by the statute.

f. Appraisals.

A disregard by the United States marshal of the state statute requiring on executions an appraisement and a sale for two thirds of the appraised value renders the marshal's sale void, and the purchaser cannot defend his title. Smith v. Cockrill (1867) 6 Wall (**U. S.**) 756, 18 L. ed. 973.

So it has been held that the creditor purchasing at execution sale cannot recover the property when he buys for less than the required half of the appraisement. Harrison v. Doe (1826) 2 Blackf. (**Ind.**) 1.

But it has been held that the title of the execution purchaser, if a third party, cannot be collaterally attacked for want of an appraisement. Allen v. Parish (1827) 3 **Ohio,** 187.

A deed showing on its face that land of minors was sold for their education for less than the required three fourths of its appraised value is void on its face, and they may recover the land. Carder v. Culbertson (1889) 100 **Mo.** 269, 18 Am. St. Rep. 548, 13 S. W. 88.

So it has been held that a guardian's sale was open to collateral attack because not preceded by an appraisal, as required by the statute. Strouse v. Drennan (1867) 41 **M** [illegible] also been held that a similar omission did not render an administrator's sale open to such an attack. Davis v. Martin (1902) 51 C. C. A. 27, 113 **Fed.** 6.

g. Notice of sale.

In most jurisdictions defects in notice of sale are mere irregularities and do not render the sale open to collateral attack.

Failure to give personal notice of sale to the defendant in execution is a mere irregularity, and he cannot raise it collaterally. White v. Farley (1886) 81 **Ala.** 563, 8 So. 215.

The sale is not subject to collateral attack for defect in the notice or method of advertisement of sale. Ware v. Bradford (1841) 2 **Ala.** 676, 36 Am. Dec. 427; Love v. Powell (1843) 5 **Ala.** 58; McCormick v. Wheeler (1864) 36 **Ill.** 114, 85 Am. Dec. 388; Rounsaville v. Hazen (1885) 33 **Kan.** 71, 5 Pac. 422; Palmer v. Oakley (1847) 2 Dougl. (**Mich.**) 433, 47 Am. Dec. 41; Minor v. Natchez (1845) Smedes & M. (**Miss.**) 602, 43 Am. Dec. 488; Davis v. Magnes (1911) 58 **Or.** 69, 113 Pac. 1 (as stating the rule); KEYSTONE COLLERIES v. MUDGE (reported herewith) ante, 1428; Turner v. M'Crea (1817) 1 Nott & M'C. (**S. C.**) 11; Ward v. Cohen (1872) 3 **S. C.** 338, Manning v. Dove (1857) 10 Rich. L. (**S. C.**) 395; Morris v. Hastings (1888) 70 **Tex.** 26, 8 Am. St. Rep. 570, 7 S. W. 649; Smith v. Olsen (1900) 23 **Tex.** Civ. App. 458, 56 S. W. 568.

"If the sheriff's sale under which appellee claims was not advertised as required by statute, such irregularity will not defeat appellee's title, notwithstanding the inadequate price for which the land sold," and is not subject to collateral attack. Moore v. Johnson (1896) 12 **Tex.** Civ. App. 694, 34 S. W. 771.

In Evans v. Robbertson (1887) 92 **Mo.**

192, 1 Am. St. Rep. 701, 4 S. W. 941, the court expressed the opinion that "even if the sheriff should have failed to put up the required notice at the front door of the courthouse, his failure to do so, at best, would have been an irregularity which, although it might have afforded grounds for setting aside the sale in a direct proceeding for that purpose by the parties interested, could not affect the title of an innocent purchaser without notice in a collateral proceeding."

The execution defendant cannot defend against a purchaser on the ground that the sale was not advertised according to the statute. Minor v. Natchez (1845) 4 Smedes & M. (Miss.) 602, 43 Am. Dec. 488; Manning v. Dove (1857) 10 Rich. L. (S. C.) 395.

In Sheaver v. Peffer (1893) 155 Pa. 501, 26 Atl. 658, it was held that exception to the advertisement of sale as defective in description cannot be taken collaterally by the execution debtor, who already had been defeated on that point in the main action.

But there are cases holding that defects of notice render the sale subject to collateral attack. Thus it was held in Philhower v. Todd (1857) 11 N. J. Eq. 312, that an execution sale not advertised was open to collateral attack; Den ex dem. Todd v. Philhower (1854) 24 N. J. L. 796, that if due advertisement of sale did not appear by the recitals in the sheriff's deed, there must be proof aliunde of such advertisement.

So, in Blodgett v. Hitt (1871) 29 Wis. 169, it was held that a sale was void and subject to collateral attack by the heirs where it affirmatively appeared that the notice of an administrator's sale did not state the place of sale nor, except inferentially, the time.

In Hobart v. Upton (1872) 2 Sawy. 302, Fed. Cas. No. 6,548, it was held that a ward may recover his land sold by his guardian where it does not appear that it was sold at auction after notice, these being two of the things specified by the statute, which, if appearing, shall save the sale from being avoided for irregularities.

h. Time of sale.

For the general subject of sales after return day of execution, see the note to Ireland v. Linn County Bank, 2 A.L.R. —.

A sale after the return day of the execution is open to collateral attack. Hawes v. Rucker (1891) 94 Ala. 166, 10 So. 85; Lehr v. Doe (1844) 3 Smedes & M. (Miss.) 468; Kane v. Preston (1852) 24 Miss. 133; Barden v. M'Kinne (1826) 11 N. C. (4 Hawks) 279, 15 Am. Dec. 519; Sims v. Randall (1804) 2 Bay (S. C.) 524; Roger v. Cawood (1851) 1 Swan (Tenn.) 142, 55 Am. Dec. 729; Towns v. Harris (1855) 13 Tex. 507; Mitchell v. Ireland (1881) 54 Tex. 301; Cain v. Woodward (1889) 74 Tex. 549, 12 S. W. 319.

The debtor may recover the land of the creditor when the sale was made after the return day of the execution. Williamson v. Williamson (1876) 52 Miss. 725; Smith v. Mundy (1850) 18 Ala. 182, 52 Am. Dec. 221.

When the statute required personal property to be sold at the end of twenty-one days after posting notice of sale, a sale at the end of twenty-two days gave the purchaser no title. Moray v. Hoyt (1895) 65 Conn. 516, 33 Atl. 496.

An execution sale after the lien has expired is void and may be collaterally attacked. Thompson v. Phillips (1830) Baldwin, 246, Fed. Cas. No. 13,974; Wells v. Bower (1890) 126 Ind. 115, 22 Am. St. Rep. 570, 25 N. E. 603.

But in Wheaton v. Sexton (1819) 4 Wheat. (U. S.) 506, 4 L. ed. 626, it was held that a sale might be made after the return day of the writ if the levy was made before the return day, the court saying: "The purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return."

Where the statute limits all sale licenses to administrators to one year, and the deed is not delivered within

the year, the sale is void and open to collateral attack. Marr v. Boothby (1841) 19 Me. 150.

This is so even though the sale was made within the year. Macy v. Raymond (1830) 9 Pick. (Mass.) 285.

In a case where the objection was that an execution sale had taken place before the statutory time, the court, while holding that the statute had been followed, also said: "It is the well-known and established rule of law in Missouri and elsewhere, that a judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally, except in case of fraud, in which the purchaser was a participant." Griffith v. Bogert (1855) 18 How. (U. S.) 158, 15 L. ed. 307.

Where the statue prescribes the days of sale, a sale on a nonstatutory day without the debtor's consent is void, and the purchaser cannot recover the property. Mayers v. Carter (1882) 87 N. C. 146; Loudermilk v. Corpening (1888) 101 N. C. 649, 8 S. E. 117.

i. Place.

A sale not at the statutory place is a nullity and open to collateral attack.

Thus is true of an execution sale by the United States marshal not in the county where the land is, where the statute requires that sales must be in the county. Pollard v. Cocke (1851) 19 Ala. 188; Thacher v. Devol (1895) 50 Ind. 30; Moody v. Moellar (1889) 72 Tex. 635, 13 Am. St. Rep. 839, 10 S. W. 727.

A sale by the United States marshal before the Federal courthouse door instead of before the county courthouse door is a nullity and open to collateral attack. Sinclair v. Stanley (1885) 64 Tex. 67.

It will be seen that in the reported case (KEYSTONE COLLERIES v. MUDGE, ante, 1428) it is held that an adjournment of the sale to another place was no more than a mere irregularity, and not subject to collateral attack.

But it was held in Lansburgh v. McCormick (1915) 140 C. C. A. 296, 224 Fed. 874, that a judicial sale held as ordered by the court in a certain city, and not, as required by the Federal statute, on the premises or at the courthouse door of the county where the land was situated, was not open to collateral attack by a party; at least, after rights of third persons were involved.

j. Sales in mass.

It is the general rule that execution sales in mass instead of in several parcels are merely voidable, and cannot be collaterally attacked. Gregory v. Bovier (1888) 77 Cal. 121, 19 Pac. 232; Brown v. O'Donnell (1900) 123 Mich. 100, 81 N. W. 961; Hoffman v. Buschman (1893) 95 Mich. 538, 55 N. W. 458; Rector v. Hartt (1844) 8 Mo. 448, 41 Am. Dec. 650; Bouldin v. Ewart (1876) 63 Mo. 330; Den ex dem. Huggins v. Ketchum (1839) 20 N. C. 550 (4 Dev. & B. L. 414).

"While the sheriff is required to divide real estate to be sold under execution when it is susceptible of division, and to sell only so much thereof as is sufficient to satisfy the execution, and if he fails to do so the sale is irregular and may be set aside in a direct proceeding for that purpose, yet the sale is not void, and cannot be questioned in a collateral proceeding for such irregularity. Bouldin v. Ewart (1876) 63 Mo. 330." Lewis v. Whitten (1892) 112 Mo. 318, 20 S. W. 617. Followed in Norman v. Eastburn (1910) 230 Mo. 168, 130 S. W. 276.

In Jones v. Kokomo Bldg. Asso. (1881) 77 Ind. 340, the court expressed the opinion that such a sale was voidable, not void. And in Nelson v. Bronnenburg (1881) 81 Ind. 193, the court said: "It may therefore be considered as settled in Indiana, that such sales are voidable, but not void, and that is the general rule throughout the United States. See the cases cited in Freeman, Executions, § 296. It follows that such a sale cannot be set aside against an innocent vendee of the original purchaser, unless such vendee had notice of the irregularity in the sale." The court reviews the earlier cases in Indiana, showing that the former rule was to the contrary.

There are some cases holding that a sale in mass is a vital defect, rendering the sale open to collateral attack.

In Tennessee it is held that an execution sale in mass is so open, par-

ticularly when the property was worth much more than the judgment, and the judgment creditor was the purchaser. Mays v. Wherry (1872) 2 Baxt. (Tenn.) 133; Brien v. Robinson (1899) 102 Tenn. 157, 52 S. W. 802.

The act of the sheriff in selling on execution more land than necessary has been held void as to the excess, and open to attack in ejectment. Patterson v. Carneal (1882) 3 A. K. Marsh (Ky.) 618, 13 Am. Dec. 208; Addison v. Crow (1837) 5 Dana (Ky.) 271.

In Klopp v. Witmoyer (1862) 43 Pa. 219, 82 Am. Dec. 561, it was held that an execution sale in bulk of the stock of a lumber and coal yard was void and subject to collateral attack. But in Smith v. Meldren (1884) 107 Pa. 348, it was held that a sale of chattels in bulk was not necessarily void.

In Johnson v. Evans (1903) 1 Tenn. Ch. App. 603, it was held that a sale in chancery cannot be collaterally attacked because the property was not sold in parcels.

Failure to follow the direction of the court upon a foreclosure sale of two parcels of mortgaged land, to sell first the land primarily liable, and selling the parcels en masse, does not render the sale void and subject to collateral attack, since the court might, in the first instance, have authorized such a method of sale. Bechtel v. Wier (1907) 152 Cal. 443, 15 L.R.A.(N.S.) 549, 93 Pac. 75.

So, in Brown v. Hannah (1908) 152 Mich. 33, 115 N. W. 980, it was held that an administrator's sale in mass when the order directed a sale in parcels is merely irregular, and not open to collateral attack.

In a sale by an assignor in bankruptcy the court said: "Assuming that it is to be assimilated to a sale under a decree in equity, silent as to the manner of sale, I am not aware that it has ever been held that such a sale could be attacked collaterally and held absolutely void, because not made in parcels." Smith v. Scholtz (1877) 68 N. Y. 41.

But in Wakefield v. Campbell (1841) 20 Me. 393, 37 Am. Dec. 60, it was held that a sale by an administrator for an amount greater than he was authorized to raise, was void, and that the purchaser could not recover the property.

And in Adams v. Morrison (1827) 4 N. H. 166, 17 Am. Dec. 406, it was held that "when an executor or administrator, acting under a license from the judge of probate authorizing him to raise a particular sum by the sale of real estate, sells and conveys an entire tract of land for an entire sum of money exceeding in amount the sum he is authorized to raise, the whole sale is void," and the heir may recover the property.

k. The price.

It is a general rule that a judicial or execution sale cannot be collaterally attacked for inadequacy in the price. Boyd v. Wyley (1853) 18 Fed. 355; Howard v. Corey (1889) 126 Ala. 283, 28 So. 682; Worthington v. Miller (1901) 134 Ala. 420, 32 So. 748; Stuart v. Allen (1869) 16 Cal. 473, 76 Am. Dec. 551; Elston v. Caston (1884) 101 Ind. 426, 51 Am. Rep. 754; Bouldin v. Ewart (1876) 63 Mo. 330; Sumner v. Sessoms (1886) 94 N. C. 371; Hopkins v. King (1918) — Tex. Civ. App. —, 204 S. W. 360.

In Smith v. Olsen (1900) 23 Tex. Civ. App. 458, 56 S. W. 563, it was held that inadequacy of price was not a ground of collateral attack where the price was not grossly inadequate, while in Smith v. Perkins (1891) 81 Tex. 152, 26 Am. St. Rep. 794, 16 S. W. 805, it was held that fraud, as implied from gross inadequacy of price, cannot be set up collaterally.

But in Sherry v. Nick of the Woods (1849) 1 Ind. 575, it was held that a sale for a nominal price might be collaterally attacked.

And in Thibodeaux v. Thibodeaux (1904) 112 La. 906, 36 So. 800, where one of the heirs, having bought an undivided share at the administrator's sale, brought a partition suit, it was held that it was ground of defense that he purchased for an inadequate price; but that if the defendants had brought the partition suit they would not have been able to attack the sale in this collateral manner.

l. Miscellaneous.

A sale is void and subject to collateral attack where it is conducted by the sheriff according to a repealed statute. Burton v. Emerson (1854) 4 G. Greene (Iowa) 393.

A levy on unmortgaged property before a foreclosure sale is void, and a sale of such property at the same time with the mortgaged property is void and open to collateral attack. The deficiency must be first determined. Bailey v. Block (1911) 104 Tex. 101, 134 S. W. 323.

On ejectment by the trustee in bankruptcy against a woman who had purchased land at a sale where her husband was execution debtor, she, having purchased the real estate in dispute after the insolvency of her husband, and within one month of his adjudication in bankruptcy, was required to show "that she acquired the same without notice of his insolvency, or reasonable cause of inquiry." Mencke v. Rosenberg (1902) 202 Pa. 131, 90 Am. St. Rep. 618, 51 Atl. 767.

A sale cannot be collaterally attacked on account of a mere clerical error (Phillips v. Coffee (1855) 17 Ill. 154, 63 Am. Dec. 357; Becker v. Quigg (1870) 54 Ill. 390), nor because notice of the levy was not given to the defendant (Love v. Powell (1843) 5 Ala. 58), nor because the report of sale was not made under oath (Spragins v. Taylor (1872) 48 Ala. 520), nor because a master in chancery did not report his sale and have it confirmed (Miller v. McMannis (1882) 104 Ill. 421), nor because the execution issued to a constable on a justice's judgment was returned before the return day thereof, where the interests of third parties were concerned (Whitman v. Taylor (1875) 60 Mo. 127; Ables v. Webb (1904) 186 Mo. 233, 105 Am. St. Rep. 610, 85 S. W. 383).

A party to the suit cannot thereafter attack the sale for the omission from the suit of another party. Nickels v. Mineral Develop. Co. 31 Ky. L. Rep. 1224, 104 S. W. 1033.

In an action by the purchaser to try title, the judgment debtor cannot object that the purchase money has not been paid. Hairston v. Hairston (1803) 1 Brev. (S. C.) 305, where apparently the land sold for less than the judgment.

A third party cannot object that the purchaser at a judicial sale was one of the appraisers. Reno v. Hale (1890) 28 Neb. 646, 44 N. W. 996.

A purchase at the sale by an appraiser is merely voidable, and not void, and not subject to collateral attack, notwithstanding the statute provides that "no sheriff or other officer making the sale of property, either personal or real, nor any appraiser of such property, shall, either directly or indirectly, purchase the same; and every purchase so made shall be considered fraudulent and void." Terrill v. Auchauer (1862) 14 Ohio St. 80.

"The validity of proceedings under such an execution [issued out of a circuit court on a transcript of a judgment of a justice of the peace] cannot be assailed collaterally, for reasons outside the record, no want of jurisdiction appearing, or other cause invalidating the judgment." Sachse v. Clingingsmith (1888) 97 Mo. 406, 11 S. W. 69.

IV. Fraud.

It is not intended to discuss the question whether the interest in his own sale of an administrator, guardian, or other trustee makes the sale voidable or void, but it may be said that it is generally held that such a circumstance does not make the sale void.

"Any trick or device of a purchaser which prevents a fair sale is a fraud on creditors, and if by means of it he gets the property at less than it otherwise would have sold for, he does not obtain a good title, and it may be defeated by a subsequent sale of the property on the judgment of another creditor." Barton v. Hunter (1882) 101 Pa. 406.

Collusive fraud between purchasing creditor and debtor will vitiate the sale. McMichael v. McDermott (1851) 17 Pa. 353, 55 Am. Dec. 560.

An execution sale of personal property, fraudulently brought about by the debtor and the purchaser and his assignees, as to a creditor defrauded,

is void. Crary v. Sprague, (1834) 12 Wend. (N. Y.) 41, 27 Am. Dec. 110.

The plaintiff cannot recover the property in ejectment if the lessors of the plaintiff purchased it at an execution sale under an agreement to stifle competition, known to the sheriff. Smith v. Greenlee (1829) 13 N. C. (2 Dev. L.) 126, 18 Am. Dec. 564.

So, on ejectment by the execution purchaser, who was the agent of the execution creditor, fraud between the purchaser and the sheriff may be shown. Hayden v. Dunlap (1813) 3 Bibb. (Ky.) 216.

In ejectment by the execution purchaser against the heir at law, the jury were instructed that if the sheriff and the execution purchaser acted fraudulently, the sale was void; but that the purchaser ought not to be prejudiced by the fraud of the sheriff alone. Denn v. Lecony (1790) 1 N. J. L. 39.

In Myers v. Sanders (1838) 7 Dana (Ky.) 507, it was held that the fraud of the sheriff, in combination with the execution plaintiff and purchaser, to restrict notice so as to reduce the number of bidders, makes the sheriff's deed not void but voidable; but the defrauded party may avoid it by proof when it is set up to defeat his recovery of the thing conveyed.

The purchaser cannot hold the property against ejectment by the owner when the former fraudulently stifled bidding by stating that he was buying the property for the owner (McKennan v. Pry (1837) 6 Watts (Pa.) 137); or when he fraudulently misrepresented the property, so as to enable him to purchase at a low price (Gilbert v. Hoffman (1833) 2 Watts (Pa.) 66, 26 Am. Dec. 103).

Where the purchaser at sheriff's sale of property of an estate received the deed, but never paid the purchase money, it was error to charge the jury that they must find that a deed from such purchaser was valid unless he participated in a fraud; as, if he was the agent of the fraudulently acting defendant, the administrator, in purchasing the property, he was not a bona fide purchaser. Swayze v. Burke (1838) 12 Pet. (U. S.) 11, 9 L. ed. 980.

Where a purchaser at an execution sale read certain deeds to himself for the purpose of obtaining the property at a reduced price, it was held that it was a question for the jury whether such conduct was with such a fraudulent intent as to enable the deed to the purchaser to be collaterally attacked at law. Costillo v. Thompson (1846) 9 Ala. 937.

Where there is no bid for personal property except that of the creditor, made beforehand to the constable, the sale is void and open to collateral attack. Ricketts v. Unangst (1850) 15 Pa. 90, 53 Am. Dec. 572.

It has, however, been held in North Carolina that if there is no collusion between the creditor-purchaser and the sheriff, the execution defendant cannot resist ejectment, although the creditor-purchaser stifled bidding (Hill v. Whitfield (1855) 48 N. C. (3 Jones, L.) 120); and that a subsequent creditor cannot object collaterally to a sale at which the earlier judgment creditor bought, having, by collusion with the execution debtor, stifled bidding (Crews v. First Nat. Bank, (1877) 77 N. C. 110). In Den ex dem. Harry v. Graham (1834) 18 N. C. (1 Dev. & B. L.) 76, 27 Am. Dec. 226, it was held that a stranger to the execution cannot object collaterally that the purchaser at the sale suppressed bidding by fraud.

In Spivey v. Harrell (1888) 101 N. C. 48, 7 S. E. 693, it seems to be considered that fraud outside the record is not to be alleged in defense of an action by the purchaser to recover the land; but the fraud, if any, seems indefinitely alleged.

In Pentz v. Clark (1882) 100 Pa. 446, it was stated that an arrangement between the execution purchaser and the execution debtor that the sale should be for the latter's benefit does not, of itself, make the sale absolutely void. It would be voidable by a creditor defrauded, but was good between the parties thereto.

In Oram v. Rothermel (1881) 98 Pa. 300, it was held that it was error to instruct the jury that the purchase of a judgment by another judgment creditor at a judicial sale, with an under-

standing or agreement that the former should not bid, rendered a sale to the latter absolutely void, without regard to the fact whether a fraud was contemplated or committed. "This instruction was too broad. It withdrew from the jury the question whether an actual fraud was committed."

Fraud as implied from gross inadequacy of price cannot be set up collaterally. Smith v. Perkins (1891) 81 **Tex.** 152, 26 Am. St. Rep. 794, 16 S. W. 805.

Where a deputy sheriff sold personal property to himself on an execution, he took no title. Woodbury v. Parker (1847) 19 **Vt.** 353, 47 Am. Dec. 695.

For fraud in relation to confirmed sales, see infra. V.

V. Confirmed sales.

The confirmation of a sale is an adjudication that the order of sale was executed agreeably to law. Voorhees v. Jackson (1836) 10 Pet. (**U. S.**) 449, 9 L. ed. 490.

It is a general rule that where the sale has been confirmed, matters between the decree and the sale cannot be collaterally attacked. Sumner v. Moore (1839) 2 McLean, 59, **Fed.** Cas. No. 13,610; Seelye v. Smith (1887) 85 **Ala.** 25, 4 So. 664; Fish v. Smith (1900) 73 **Conn.** 377; Paine v. Spratley (1870) 5 **Kan.** 525; Stetson v. Freeman (1886) 35 **Kan.** 523, 11 Pac. 431; Caldwell v. Bigger (1907) 76 **Kan.** 49, 98 Pac. 1095; Carter v. Hyatt (1907) 76 **Kan.** 304, 91 Pac. 61; Clark v. Tandy (1917) 101 **Kan.** 328, 167 Pac. 1039; Dawson v. Litsey (1874) 10 Bush (**Ky.**) 408; Morton v. Carroll (1891) 68 **Miss.** 699, 9 So. 896 (stating the rule); Schroeder v. Pehling (1906) 20 **S. D.** 642, 129 Am. St. Rep. 952, 108 N. W. 252; Casey v. Smith (1915) 36 **S. D.** 36, 153 N. W. 918.

An order confirming a sale of real estate, where the court has jurisdiction, cures all defects and irregularities in the proceedings after judgment, and cannot be attacked collaterally. Wilcox v. Raben (1888) 24 **Neb.** 368, 8 Am. St. Rep. 207, 38 N. W. 844.

But where a sale in foreclosure was confirmed as made to A, it was held that it might be subsequently shown (apparently in the same action) that the mortgagor was the purchaser, who assigned his bid to A, as this did not impeach the judgment of confirmation. Bagby v. Warren Deposit Bank (1899) 20 **Ky.** L. Rep. 1357, 49 S. W. 177.

In Pennsylvania the acknowledgment of the sheriff's deed is a judicial act and concludes all irregularities in the process and sale. Cock v. Thornton (1885) 108 **Pa.** 637; Mencke v. Rosenberg (1902) 202 **Pa.** 131, 90 Am. St. Rep. 618, 51 Atl. 767; Jackson v. Gunton (1904) 26 **Pa.** Super. Ct. 203.

As some of the courts phrase it, a confirmed sale cannot be collaterally attacked for irregularities. May v. Logan County (1887) 30 **Fed.** 250; Doe ex dem. Saltonstall v. Riley (1856) 28 **Ala.** 164, 65 Am. Dec. 334; Meikel v. Borders (1891) 129 **Ind.** 529, 29 N. E. 29; Hotchkiss v. Cutting (1869) 14 **Minn.** 537, Gil. 408 (stating the rule); Larimer v. Wallace (1893) 36 **Neb.** 444, 54 N. W. 835; Link v. Connell (1896) 48 **Neb.** 574, 67 N. W. 475; O'Brien v. Gaslin (1886) 20 **Neb.** 347, 30 N. W. 274; Dixon v. Peacock (1914) 43 **Okla.** 87, 141 Pac. 429.

"The order of confirmation gives to the sale the judicial sanction of the court, and when made it relates back to the time of the sale and cures all defects and irregularities, except those founded on want of jurisdiction or fraud." Connor v. McCoy (1909) 83 **S. C.** 165, 65 S. E. 257.

The confirmation of a sale made by a guardian under the orders of the probate court is conclusive where the record does not show affirmatively that the jurisdiction did not attach. Butler v. Stephens (1890) 77 **Tex.** 599, 14 S. W. 202.

Thus, after a confirmed sale it has been held that there cannot be a collateral objection that the sale was under a dormant judgment (Sumner v. Moore (1839) 2 McLean, 59, **Fed.** Cas. No. 13,616); that the decree was not recorded (McGregor v. Kellum (1905) 50 **Fla.** 581, 39 So. 697); that there was a failure to give notice of sale (Matheson v. Hearin (1856) 29 **Ala.** 210); or that it was not sufficiently given (Robertson v. Howard (1912) 229 **U. S.** 256, 57 L. ed. 1175, 33 Sup. Ct.

Rep. 854; Doe ex dem. Saltonstall v. Riley (1856) 28 Ala. 164; Averill v. Jackson City Bank (1897) 114 Mich. 20, 72 N. W. 15; Bland v. Muncaster (1852) 24 Miss. 62, 57 Am. Dec. 162; Crowell v. Johnson (1873) 2 Neb. 146; Wilcox v. Raben (1888) 24 Neb. 368, 8 Am. St. Rep. 207, 38 N. W. 844; Bresee v. Snyder (1913) 94 Neb. 384, 143 N. W. 219; Schroeder v. Pehling (1906) 20 S. D. 642, 129 Am. St. Rep. 952, 108 N. W. 252; Brazee v. Schofield (1883) 2 Wash. Terr. 209, 3 Pac. 265); that the officer making the sale was not properly appointed (Eaton v. White (1864) 18 Wis. 518); that the statutory appraisement was made before the order of sale (Noland v. Barrett (1894) 122 Mo. 181, 43 Am. St. Rep. 572, 26 S. W. 692); that there was an error in the appraisement (Watson v. Tromble (1891) 33 Neb. 450, 29 Am. St. Rep. 492, 50 N. W. 331); or that it was defective (Wilcox v. Raben (1888) 24 Neb. 368, 8 Am. St. Rep. 207, 38 N. W. 844); that there was no such appraisement before the sale (Robertson v. Howard (1912) 229 U. S. 254, 57 L. ed. 1174, 33 Sup. Ct. Rep. 854; Day v. Thompson (1881) 11 Neb. 123; Neligh v. Keene (1884) 16 Neb. 407, 20 N. W. 277); that an administrator's sale was private and for less than the required three-fourths of the appraised value (Smith v. Black (1910) 231 Mo. 681, 132 S. W. 1129); that a guardian's sale was at the wrong place (Brown v. Christie (1863) 27 Tex. 75, 84 Am. Dec. 607); that an administrator's sale and the report of it were made by an agent (Harris v. Shafer (1893) — Tex. Civ. App. —, 21 S. W. 110); that more land than was necessary was sold (Gibson v. Lyon (1885) 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; Dawson v. Litsey (1874) 10 Bush (Ky.) 408); that a sale was in mass when the order directed it to be in parcels (Osman v. Traphagen (1871) 23 Mich. 80); that the price was inadequate (McHany v. Schenk (1878) 88 Ill. 357); or that the statutory and ordered notice for the hearing in confirmation was not fully given (Eaves v. Mullen (1910) 25 Okla. 679, 107 Pac. 433).

In Christy v. Springs (1902) 11 Okla. 710, 69 Pac. 864, it was held that a confirmed sale under execution could not be collaterally attacked because the execution was wrongly addressed to the sheriff of K county when it was executed by the sheriff of C county, to whom it should have been addressed.

A sale of attached property, confirmed by the court, may not be collaterally attacked because the vend. ex. did not specify the property sued for, or because the officer sold the property without authority, or without giving the notice required by the statute. Stout v. Brown (1897) 64 Ark. 96, 40 S. W. 701.

An order of a referee in bankruptcy confirming a trustee's sale of the bankrupt's interest in real estate is sufficient to validate the sale as against collateral attack because of such irregularities as the alleged lack of appraisement, and error in the description of the property in the published notice. Robertson v. Howard (1912) 229 U. S. 254, 57 L. ed. 1174, 33 Sup. Ct. Rep. 854.

An administrator's sale is not subject to collateral attack because confirmed at the same term. Sims v. Gray (1877) 66 Mo. 613, overruling Strouse v. Drennan (1867) 41 Mo. 289 (guardian's sale), and other earlier cases, and in effect also Speck v. Wohlien (1855) 22 Mo. 210.

Where, after the order for a guardian's sale but before the sale, the guardian married, which revoked her appointment, but her sale was confirmed, and a subsequently appointed curator made the deed, the wards could not recover the land. Carr v. Spannagel (1877) 4 Mo. App. 284.

Where the statute provided that the court, in ordering a guardian's sale, should provide for a reasonable notice thereof, but might order a private sale of land appraised at not exceeding $1,000, where the court ordered a private sale of land appraised at more than $1,000, and confirmed the sale, it was held that the sale was not void on collateral attack. Eliason v. Bronnenberg (1896) 147 Ind. 248, 46 N. E. 582.

In Cargile v. Ragan (1880) 65 Ala. 287, it was held that a party to the

suit, who is silent when the sale is confirmed, cannot thereafter collaterally object to the time or place of sale; and in Davis v. Magnes (1911) 58 **Or.** 69, 113 Pac. 1, it was held that when an execution defendant appears on confirmation, neither he nor his grantee can object thereafter.

The confirmation of a sale by executors selling under a power in a will, finding that they properly sold without notice, is an adjudication not subject to a collateral attack. Bagley v. San Francisco (1912) 19 **Cal. App.** 255, 125 Pac. 931.

It may be noted that it has been held that after confirmation of a guardian's sale it cannot be attacked for want of a guardian's bond, even in an action to set the sale aside. Bunce v. Bunce (1882) 59 Iowa, 533, 13 N. W. 705; Hamiel v. Donnelly (1888) 75 **Iowa,** 93, 39 N. W. 210.

But in Doe ex dem. Hudgens v. Jackson (1874) 51 **Ala.** 514, it was held that confirmation is not sufficient to pass an infant's title without a decree directing the title to be conveyed, and an actual conveyance.

Sometimes the statute declares the effect of confirmation. In Dolph v. Barney (1874) 5 **Or.** 191, the court said: "After the order has been made confirming the sale, the regularity thereof cannot be questioned, for it is provided by § 293, subdivision 4, of the Code, that 'an order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit, or proceeding whatever.'" And in Mathews v. Eddy (1872) 4 **Or.** 225, it was stated that the confirmation of the sale "may be regarded as a final adjudication touching the regularity of all proceedings taken in the execution of final process."

On the other hand, a sale not directed by the decree derives no validity from confirmation and is open to collateral attack. Shriver v. Lynn (1844) 2 How. (**U. S.**) 43, 11 L. ed. 172.

In Minnesota it is held that a confirmed sale may be collaterally attacked when the record is silent or wanting in material particulars as to the essentials mentioned in the statute providing that "in case of an action relating to any estate sold by an . . . administrator or . . . in which an heir . . . shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings if it appears: (1) That the executor, administrator or guardian was licensed to make the sale by the probate court having jurisdiction. (2) That he gave a bond which was approved by the probate court. (3) That he took the oath prescribed in this chapter. (4) That he gave notice of the time and place of sale, as in this chapter prescribed, if such notice was required by the order of license. (5) That the premises were sold in the manner required by the order of license, and the sale confirmed by the court, and that they are held by one who held them in good faith." Consequently, where the files of the newspaper in which the notice of sale was ordered to be published showed no publication of it, the sale was held void on collateral attack, although the order of confirmation recited the publication. Cater v. Steeves (1905) 95 **Minn.** 225, 103 N. W. 885.

So, the confirmed sale was held open to collateral attack when no bond was found on the files. Babcock v. Cobb (1866) 11 **Minn.** 347, Gil. 247. So, the sale may be collaterally attacked in regard to the notice of sale. Montour v. Purdy (1866) 11 **Minn.** 384, Gil. 278, 88 Am. Dec. 88 (where presumably the sale was confirmed, but that does not seem clear from the report, and it seems that the early statute did not include confirmation among the requisites). But the omission of seals from the bond is not a vital defect. Buntin v. Root (1896) 66 **Minn.** 454, 69 N. W. 330.

It was held in Cooper v. Sunderland (1856) 3 **Iowa,** 114, 66 Am. Dec. 52, that a confirmed guardian's sale without the oath required before the sale was void and subject to collateral attack when the statute provided: "In case of an action relating to any estate sold by a guardian under

the provisions of this chapter, in which the award, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of irregularity in the proceedings, provided it shall appear" that the guardian "took the oath prescribed."

Fraud.

It has been held that a party to the action may not attack a confirmed sale collaterally for fraud (Ebner v. Heid (1905) 2 **Alaska,** 600); that a confirmed sale cannot be collaterally impeached for fraud in an independent proceeding brought to recover the land (Murray v. Southerland (1899) 125 N. C. 175, 34 S. E. 270); and that proceedings in partition cannot be collaterally impeached for fraud where there is an order confirming the sale (McLead v. Appelgate (1890) 127 **Ind.** 349, 26 N. E. 830). In McKeighan v. Hopkins (1883) 14 **Neb.** 361, 15 N. W. 711, it was held that an order of confirmation of a foreclosure sale is not the subject of collateral attack, but that if there appears to be fraud, the mortgagor may have leave to file a bill to redeem.

On the other hand, it was held in Rhoades v. Selin (1827) 4 Wash. C. C. 715, **Fed.** Cas. No. 11,740, that in ejectment by heirs against the purchaser at an administrator's sale, his fraud in the purchase might be shown although the sale had been confirmed.

B. B. B.

W. W. CARPENTER, Plff. in Err.,

v.

TRINITY & BRAZOS VALLEY RAILWAY COMPANY.

Texas Supreme Court—March 29, 1916.

(108 Tex. 52, 184 S. W. 186.)

Carrier — free transportation of child — offense.

1. Taking a child upon a train without having procured a ticket for it, under the belief that it was entitled to free transportation, is not a penal offense under the statute forbidding a railway to give free transportation, making it an offense for any person to seek to travel on a pass, and providing punishment for anyone who uses such free ticket, free pass, free transportation, frank, or privilege over a railway.

[See note on this question beginning on page 1451.]

Appeal — erroneous instruction — prejudicial error.

2. It is prejudicial error in an action by a passenger to recover damages for charging her with a penal offense in taking a child on the train without a ticket to charge the jury untruly that the law declares it to be an offense for a person subject to the payment of fare to avoid its payment on a train.

ERROR to the court of Civil Appeals to review a judgment affirming a judgment of the District Court for Hill County in favor of defendant in an action brought to recover damages for harsh treatment to which plaintiff was alleged to have been subjected while a passenger on defendant's train. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Collins & Cummings** for plaintiff in error.

Messrs. **Morrow & Morrow** for defendant in error.

Phillips, Ch. J., delivered the opinion of the court:

This was an action for damages on account of certain treatment to

which it was alleged that plaintiff's wife was subjected while a passenger upon a train of the defendant railway company. According to her testimony upon the trial, she boarded the train at Hillsboro, accompanied by her little daughter, who was five years and ten months old, for the purpose of going to Mexia. She had a ticket for herself but none for the child, because she did not think fare would be charged for the latter, on account of her age. This explanation was made to the defendant's conductor when he demanded a ticket for the child. In the course of the conversation which ensued, the conductor, according to her statement, spoke to her harshly, saying that he would put the child off the train unless her fare was paid, and that she, the mother, was guilty of a penitentiary offense in getting on the train without a ticket for the child. She paid for the child's passage, and, with the child, proceeded on her journey.

The trial court advised the jury in the charge that at the time of the occurrence "the law declared it to be an offense, punishable by fine, for a person subject to the payment of a fare to avoid the payment of such fare on a railway passenger train." In this connection the charge further instructed the jury that the conductor "had the right, in a reasonable, courteous, and respectful manner, to explain to Mrs. Carpenter that such was the law, and if he did so in a reasonably courteous and respectful manner, the defendant would not be liable, even though she may have become excited and nervous therefrom, as alleged in the petition." The correctness of this charge is the only question we shall consider.

On the first appeal of the case it was held by the honorable court of civil appeals for the fifth district that the act of the thirtieth legislature, chapter 42, Acts of 1907, did not make it an offense for one to merely attempt to ride upon a railway passenger train without the payment of fare. 55 Tex. Civ. App. 627, 119 S. W. 335. On the second appeal a different view was expressed (— Tex. Civ. App. —, 132 S. W. 837); and this latter ruling was adhered to on the present appeal. An examination of the act convinces us that the first view of the court on the question was correct, and accordingly, that the charge was erroneous. The first section of the act makes it an offense for a railway company, or any officer, agent, or employee thereof, to knowingly carry any person "free of charge," or to give to any person, etc., "a free pass, frank, a privilege or a substitute for pay or a subterfuge which is used or which is given to be used instead of the regular fare or rate for transportation." By § 3 it is likewise made an offense for any person to "present, or offer to use in his own behalf, any permit or frank, whatsoever, to travel, pass or to convey any person . . . which has been issued to any other person," or, knowing that he is not entitled thereto under the provisions of the act, to apply to any railway company, officer, agent, lessee, or receiver thereof for any free pass, frank, privilege, or a substitute for pay given or to be used instead of the regular fare or rate for transportation. By § 6, any person, other than those excepted by the provisions of the act, is made punishable "who uses any *such* free ticket, free pass or free transportation, frank or privilege over any railway or transportation line." This latter section is the only provision in the act which, by any construction, can be said to have the effect of making it an offense for one to merely seek to ride on a railway train without the payment of fare; but it is manifest that it does not do so in terms. The specific act which it denounces as a crime is the use of a free ticket, a free pass, or free transportation for the purpose of carriage on a railway train by one in possession of such evidence of the right to such car-

riage. It does not, in terms, purport to deal with an attempt to ride without paying fare by one who makes no effort to use some token or evidence of the right to be transported. If such an act is within its intendment, it is only by inference. It is not made penal by the plain import of the words of the law. Article 9 of the Penal Code 1911 (Vernon's Anno. Penal Code 1916, art. 9) provides: "No person shall be punished for an offense which is not made penal by the plain import of the words of a law."

The rule governing the scope to be given a penal act is thus stated by Mr. Sutherland in his work on Statutory Construction, § 521: "To constitute the offense, the act must be both within the letter and spirit of the statute defining it. Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms. 'Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law.' "

Further, in § 520, the same author says: "Nothing is to be regarded as included within them [penal statutes] that is not within their letter as well as their spirit; nothing that is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature."

If it was the purpose of the legislature to make it a crime for a person to merely seek to ride upon a railroad train within this state without the payment of fare, no difficulty would have been experienced in so writing the law in plain terms. It is at least doubtful that this was the intention of the legislature in the enactment of this statute, since in this section it is only persons who attempt to use free passes or free tickets, or other evidence of right to transportation, that are dealt with. Whatever may have been the legislative purpose in this particular, it is manifest that the terms of the law do not make it an offense to merely board a train, without attempting to use some character of free transportation, and seek to ride without paying fare. We cannot do otherwise than take the statute as we find it and be governed by its terms as written. We are not at liberty to extend its scope by implication.

Carrier—free transportation of child—offense.

The charge of the court was, in our opinion, clearly prejudicial to the plaintiff. Its plain effect was to justify the conduct of the conductor if it was found by the jury as a fact that he told plaintiff's wife she was guilty of a penitentiary offense in boarding the train without a ticket for the child as she testified he did at the time he demanded a ticket for her. She had committed no crime in so doing, under the written law of the state; and, if he made the statement, she was subject to no such accusation.

Appeal—erroneous instruction—prejudicial error.

The judgments of the Court of Civil Appeals and the District Court are reversed, and the cause is remanded to the District Court.

ANNOTATION.

Carriers: attempt to have child transported without paying fare.

I. Rights of child as passenger, 1452.
II. Right to eject custodian for failure to pay child's fare, 1452.
III. Ejection of child as ejection of custodian, 1453.
IV. Return of unearned portion of custodian's fare, 1454.
V. Abusive language toward custodian, 1454.

I. Rights of child as passenger.

A child who is permitted by the conductor to travel free of charge, or for whom no fare is demanded, is entitled to the rights of a passenger. Ball v. Mobile Light & P. Co. (1905) 146 **Ala.** 309, 119 Am. St. Rep. 32, 39 So. 584, 9 Ann. Cas. 962; Southern R. Co. v. Herron (1915) 12 **Ala.** App. 415, 68 So. 551; Southern R. Co. v. Lee (1907) 30 **Ky.** L. Rep. 1360, 10 L.R.A.(N.S.) 837, 101 S. W. 307; Littlejohn v. Pittsburg R. Co. (1889) 148 **Mass.** 478, 2 L.R.A. 502, 20 N. E. 103; Rawlings v. Wabash R. Co. (1902) 97 **Mo.** App. 515, 71 S. W. 534; St. Louis & S. F. R. Co. v. Fitts (1914) 40 **Okla.** 685, L.R.A. 1916C, 348, 140 Pac. 144.

Thus, where the conductor made some inquiry about the fare of the child, when the person in charge of him said that she had often traveled with him, but that she had never paid any fare for him, whereupon the matter was dismissed, the child was entitled to the same right and protection as if his fare had been paid. Southern R. Co. v. Lee (1907) 30 **Ky.** L. Rep. 1360, 10 L.R.A.(N.S.) 837, 101 S. W. 307.

In Rawlings v. Wabash R. Co. (1903) 97 **Mo.** App. 515, 71 S. W. 534, where a boy about four years of age was allowed to recover damages for exposure when he was carried past his destination, he having been put on board by his father with an older sister for whom full fare was paid, the court said: "In view of the general custom of railroad carriers to permit small children like the plaintiff to ride on their cars free of charge when accompanied by some older person who pays fare, it is reasonable to presume that plaintiff was a passenger in good faith; especially so as no objection was made to him as a passenger for want of prepayment of such fare, and no demand and refusal to make such payment was shown. This entering the car under the circumstances constituted him a passenger with all the rights as such."

And in Southern R. Co. v. Herron (1915) 12 **Ala.** App. 415, 68 So. 551, where a mother carrying plaintiff, a small child, paid the regular fare to her destination, and no other fare was demanded for the child, the court said: "Under these circumstances, and especially in view of the custom of railroads to carry children of this age, when accompanied by an adult passenger paying fare, free of charge, which is a matter of common knowledge, and of which the courts will take knowledge without proof, the plaintiff was a passenger, and the defendant owed her the same duty as it would had the mother paid fare for carrying the plaintiff."

A child who was subject to half fare was a passenger when boarding a train accompanied by his parents, although no half-fare ticket had been purchased for him, there being no evidence that the parents were acting in bad faith in not securing a ticket for the child, Norfolk & W. R. Co. v. Groseclose (1891) 88 **Va.** 267, 29 Am. St. Rep. 718, 13 S. E. 454, 7 Am. Neg. Cas. 51.

So, although a carrier was entitled to half fare for the carriage of a child over three years of age, where a mother carrying a child three years and two months old purchased a ticket for herself only, and no question was asked by the carrier's servant as to the age of the child, and there was no intention on the part of the mother to defraud the company, the child was a passenger, and entitled to recover for injuries received through the negligence of the carrier. Austin v. Great Western R. Co. (1867) L. R. 2 Q. B. (**Eng.**) 442, 36 L. J. Q. B. N. S. 201, 16 L. T. N. S. 320, 15 Week. Rep. 863.

In an action by a child for personal injuries received while being carried on a street car, it is competent to show a general custom on the part of the carrier not to charge fare for children of plaintiff's age. Ball v. Mobile Light & P. Co. (1905) 146 **Ala.** 309, 119 Am. St. Rep. 32, 69 So. 584, 9 Ann. Cas. 962.

II. Right to eject custodian for failure to pay child's fare.

If a custodian refuses to pay the fare of a child who is subject to payment of fare, both may be ejected, though the custodian tenders his own fare. Philadelphia, W. & B. R. Co. v. Hoeflich (1884) 62 **Md.** 300, 50 Am.

Rep. 223, 8 Am. Neg. Cas. 348; Braun v. Northern P. R. Co. (1900) 79 **Minn.** 404, 49 L.R.A. 319, 79 Am. St. Rep. 497, 82 N. W. 675, 984; Lake Shore & M. S. R. Co. v. Orndorff (1897) 55 **Ohio** St. 589, 38 L.R.A. 140, 60 Am. St. Rep. 716, 45 N. E. 447; Warfield v. Louisville & N. R. Co. (1900) 104 **Tenn.** 74, 78 Am. St. Rep. 911, 55 S. W. 304; Ft. Worth & D. C. R. Co. v. Gribble (1907) 46 **Tex.** Civ. App. 78, 102 S. W. 157; Fleck v. Missouri, K. & T. R. Co. (1916) — **Tex.** Civ. App. —, 191 S. W. 386.

So, when a woman passenger having a ticket for herself refused to pay fare for her nine-year-old son, who was of paying age, she was no longer a passenger, and was not entitled to the protection of a passenger, but the company owed her only the duty of reasonable or ordinary care not to injure her in removing her and the child from the train. Ft. Worth & D. C. R. Co. v. Gribble (1907) 46 **Tex.** Civ. App. 78, 102 S. W. 157; Williamson v. Chicago, R. I. & G. R. Co. (1909) 57 **Tex.** Civ. App. 502, 122 S. W. 897.

And in Fleck v. Missouri, K. & T. R. Co. (1916) — **Tex.** Civ. App. —, 191 S. W. 386, where a mother was ejected for refusal to pay fare for her son, the court said: "Her refusal to pay fare for her son justified the conductor and auditor in ejecting her from the train. The boy was taken on the train by her and was in her care and charge. The railroad company could not lawfully transport him without charge and neither could it put him off the train and leave him with no one to care for him."

And the right of the conductor to expel both the custodian and the child for nonpayment of fare for the child is not affected by the fact that both parties are minors. Harrington v. Louisville & N. R. Co. (1900) 104 **Tenn.** 74, 78 Am. St. Rep. 911, 55 S. W. 304.

While a conductor would have a right to expel from the train a person in charge of a child upon refusal to pay the child's fare, because, under such circumstances, the law would imply an agreement on the part of the custodian to pay the fare of the child, nevertheless, where a child boarded the train with her father and older sister, the father taking a seat in another part of the train, he was the person responsible for the child's fare, and if the conductor knew, or the circumstances were such as to put him on inquiry, that the father of the child was on the train, he had no right to eject the older sister for refusal to pay the child's fare. Philadelphia, W. & B. R. Co. v. Hoeflich (1884) 62 **Md.** 300, 50 Am. Rep. 223, 8 Am. Neg. Cas. 348.

And where a mother refuses to pay the half fare rightfully demanded for a child, the employees of the carrier are authorized to eject the child from the train, and to prevent the mother from interfering with such ejection. Beckwith v. Cheshire R. Co. (1886) 143 **Mass.** 68, 8 N. E. 875.

III. Ejection of child as ejection of custodian.

Ejection of a child of tender years is in effect ejection of the parent or other custodian. Gibson v. East Tennessee, V. & G. R. Co. (1837) 30 **Fed.** 904; Braun v. Northern P. R. Co. (1900) 79 **Minn.** 404, 49 L.R.A. 319, 79 Am. St. Rep. 497, 82 N. W. 675, 984.

Thus, in Braun v. Northern P. R. Co. (**Minn.**) supra, the court, in holding that ejection of a child of tender years from a railroad train for failure of the parent in charge to pay its fare, whether rightful or wrongful, is in effect the ejection and removal of such parent, so that the unearned portion of the latter's fare must be returned to him, said: "The reason for the rule that the expulsion of the child operates as an expulsion of the parent is the same whether applied to a case where the child may be lawfully and rightfully removed, or to a case where such removal is wrongful. The reason for the rule is found in the laws of humanity and nature. It is the parent's duty to care for and protect his child. There is an inseparable bond of unity between them. And to hold that where the child is forcibly removed and ejected from a railroad train in a strange city among strangers, whether rightfully or wrongfully, the act of the parent in following the child is purely voluntary

on his part, and that such removal of the child is not in effect the removal of the parent, would do violence to the sacred relations existing between parent and child and the laws of humanity and nature. In such case the departure of the parent from the train is not voluntary in the sense that it is of his own choosing or of his own free will. On the contrary, the act of the railroad company in removing the child is the inducement,—the cause,—and it would be unreasonable to say that, under such circumstances, the parent left the train of his own free will."

And where a conductor wrongfully demanded full fare for a boy who was entitled to ride for half fare, the ejection of the boy was the same thing as the ejection of the mother, as it was unreasonable to ask her to leave the child under the circumstances and proceed on her own ticket, about which there was no dispute, although the conductor offered to take that course; and the company would be liable for her ejection. Gibson v. East Tennessee, V. & G. R. Co. (**Fed.**) supra.

But in Cox v. Los Angeles Terminal R. (1895) 109 **Cal.** 100, 41 Pac. 794, where a ten-year-old girl, accompanied by two younger sisters, offered two fares for the three, and was told it was insufficient and one of them would have to get off, and she chose to take the money back and get off the car with her sisters, her leaving the car was held to be a voluntary act, for which the carrier was not liable.

IV. Return of unearned portion of custodian's fare.

If the parent's fare has been paid, the unearned portion must be returned or tendered as a condition to the right of removal of the parent (Lankford v. Southern R. Co. (1914) 165 **N. C.** 653, 81 S. E. 998, 6 N. C. C. A. 1060; Lake Shore & M. S. R. Co. v. Orndorff (1897) 55 **Ohio** St. 589, 38 L.R.A. 140, 60 Am. St. Rep. 716, 45 N. E. 447); or as a condition of the removal of the child, since the removal of the child, whether right or wrong, is in effect a removal of the parent (Braun v. Northern P. R. Co. (1900) 79 **Minn.** 404, 49 L.R.A. 319, 79 Am. St. Rep. 497, 82 N. W. 675, 984).

So, in Lake Shore & M. S. R. Co. v. Orndorff (1897) 55 **Ohio** St. 589, 38 L.R.A. 140, 60 Am. St. Rep. 716, 45 N. E. 447, the court, in sustaining the right of plaintiff to recover for ejectment without returning the remaining value of her ticket, said: "True, she was in the wrong in refusing to pay fare for the boy, but the company was also in the wrong in retaining the unused value of her ticket, and in ejecting her before returning or offering to return to her such value, either in money or stop-over check. Her wrong did not warrant the company in expelling her from the train without returning to her the remaining value of her ticket. The expulsion was therefore unlawful, and the company became liable to respond in damages."

V. Abusive language toward custodian.

In the reported case (CARPENTER v. TRINITY & B. VALLEY R. Co. ante, 1449) there seems to be no question as to the right of action because of the abusive conduct of defendant's conductor in wrongfully telling a passenger that she was committing a penitentiary offense in attempting to have her child carried free, the only question being as to whether she had in fact committed such an offense under the statute in question.

In Huffman v. Southern R. Co. (1913) 163 **N. C.** 171, 79 S. E. 307, it was held that plaintiff was entitled to recover punitive damages for the abusive language of defendant's conductor and his conduct toward her because she had failed to purchase a ticket for her nine-year-old child, for whom the conductor had a right to demand fare.

In Texas & P. R. Co. v. Tarkington (1901) 27 **Tex.** Civ. App. 353, 66 S. W. 137, a carrier was held liable to a woman passenger for the act of its conductor, who, after directing her to procure a ticket for her child, which she did, and after she had entered the train, used abusive language toward her which inferred a charge of dishonesty in attempting to get on the train without a ticket for the child.

In Pittsburgh, C. & St. L. R. Co. v. Dewin (1877) 86 Ill. 296, 8 Am. Neg. Cas. 172, where parents purchased two tickets, and attempted to have themselves and six children transported thereon, only one of the children being entitled to be carried free, and upon the conductor's threatening to eject the children for whom no fare was paid, the entire family left the train, it was held, in an action on behalf of the child who was entitled to ride free, that the conductor did no more than his duty; and, there being no evil motive apparent nor any circumstances of aggravation, and no actual damages being proved, the plaintiff was not entitled to a recovery; and even if, as was claimed, the conductor used violent language toward the parents, that would be no ground for the recovery of a judgment in favor of the infant.. R. L. S.

WESTERN ASSOCIATION OF SHORT LINE RAILROADS
v.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

UNITED RAILROADS OF SAN FRANCISCO
v.
SAME.

California Supreme Court (In Banc) —December 14, 1916.

(173 Cal. 802, P.U.R.1917C, 178, 162 Pac. 391.)

Public service corporation — regulation — trucks and busses.

Constitutional authority to the Public Service Commission to establish rates for the transportation of freight and passengers by railroad and other transportation companies applies to lines of motor trucks and busses operating on the highways of the state between the different municipalities for the common carriage of freight and passengers.

[See note on this question beginning on page 1460.]

APPLICATIONS for writs of mandamus to compel the respondent Commission to regulate, within the law, the transportation business of certain common carriers. *Judgment modified.*

The facts are stated in the opinion of the court.

Messrs. **William M. Abbott, William M. Cannon, Clarence M. Oddie, and Morrison, Dunne, & Brobeck,** for petitioners:

Every common carrier is a constitutional utility, subjected by the organic law to such regulation by the Railroad Commission as may be provided by the legislature. The word "such" relates to and limits the word "regulation" to that kind of regulation enjoined in the act of the legislature.

Ventura County v. Clay, 112 Cal. 65, 44 Pac. 488; Greene v. San Antonio, — Tex. Civ. App. —, 178 S. W. 6; Taylor v. Goodwin, L. R. 4 Q. B. 228, 48 L. J. Mag. Cas. N. S. 104, 40 L. T. N. S. 458, 27 Week. Rep. 489.

The Commission has jurisdiction to regulate the transportation companies in question.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148; Greene v. San Antonio, — Tex. Civ. App. —, 178 S. W. 6; Kitchin v. Wood, 154 N. C. 565, 70 S. E. 995; Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; Express Cases, 117 U. S. 20, 29 L. ed. 800, 6 Sup. Ct. Rep. 542, 628; Calhoun v. Memphis

& P. R. Co. 2 Flipp. 442, Fed. Cas. No. 2,309; Georgia R. & Power Co. v. Jitney Bus Co. (Ga.) P.U.R.1915C, 928; Gallagher v. McKeague, 125 Wis. 116, 110 Am. St. Rep. 821, 103 N. W. 233; Misch v. Russell, 136 Ill. 22, 12 L.R.A. 125, 26 N. E. 528; Jacksonville R. Co. v. O'Donnell (Ill.) P.U.R.1915C, 853; Ex parte Dickey, 76 W. Va. 576, L.R.A.1915F, 840, P.U.R.1915E, 93, 85 S. E. 781; Smith v. Nunnelly (W. Va.) P.U.R.1915E, 183; Re Automobile Traffic, P.U.R.1915C, 945.

Messrs. **Douglas Brookman** and **Max Thelen,** for respondent:

The Constitution of California does not vest in the Railroad Commission jurisdiction to regulate jitneys.

Railroad Comrs. v. Market Street R. Co. 132 Cal. 677, 64 Pac. 1065.

Henshaw, J., delivered the opinion of the court:

Petitioner, Western Association of Short Line Railroads, is a corporation, organized to promote the best interests of the short independent railroads, steam and electric, operating in the state of California and in other states. Fifteen of such California railroads are members of this corporation. It made application to the respondent Commission to regulate, within the law, the transportation business of the so-called Wichita Transportation Company, which company admitted that it was engaged as a common carrier in the business of transporting freight in motor trucks on the public highways of the state of California, between the city of San Diego, in San Diego county, and the city of El Centro, in Imperial county, as well as to intermediate and other points in this state. The United Railroads of San Francisco, petitioner, made like request of respondent Commission for regulatory orders governing the conduct of the Peninsula Company, and showed that petitioner was operating an interurban electric car line, extending from Fifth and Mission streets, in San Francisco, to the city of San Mateo; it was so operating under franchises obtained from the proper authorities; that the Peninsula Company was regularly operating and maintaining a system of automobile busses, carrying from sixteen to twenty passengers each, running upon regular schedule from the point of departure of petitioner's cars in San Francisco to their terminus in San Mateo, and making return trips from San Mateo to San Francisco in like manner, and upon a route paralleling as closely as possible the line of the petitioner's electric railway; that in so operating they charged for the service the identical through fare charged by the petitioner, and similar lesser fares for intermediate points; that the Peninsula Company was a common carrier, a public utility, and a transportation company within the meaning of the law, power to regulate which and the duty to regulate which were conferred by law upon the Railroad Commission.

The Railroad Commission declined to entertain jurisdiction of these petitions, upon the ground that the law had not vested in it jurisdiction so to do. Mandate was then sought from this court, and the single question thus presented is that indicated: Does the Constitution, or do the legislative enactments of the state, vest the power of regulation over such transportation companies in the Railroad Commission?

In denying these applications the Railroad Commission filed an elaborate opinion, in which the question of power was discussed under two heads: First, the question of the constitutional grant of power; second, the question of the legislative grant of power. Application for mandate before this court was in the first instance denied, it appearing to the court that the Commission had reached and expressed a satisfactory conclusion upon both propositions. Subsequently, this alternative writ of mandate was issued for further consideration of the first proposition, namely, whether or not the Constitution has conferred upon the Commission regulatory powers over transportation companies such as have herein been described.

It is not and will not be ques-

tioned but that, if the Constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant. The language of the Constitution in dealing with these very powers places this beyond peradventure when it declares (§ 22, art. 12) that "no provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution."

See Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 653, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822.

We agree with the construction placed by the Commission upon the legislative enactments, and with its conclusion that the legislature inadvertently failed or deliberately declined to make a specific grant of power to the Railroad Commission to regulate the affairs of these classes of transportation companies. We need not here repeat the convincing reasoning of the Commission in this behalf, since doubtless its views will find expression in its own official reports, and it is sufficient for the purposes of this determination to express our concurrence in and with them.

We take up, then, the single consideration of the constitutional grant of power. It is found in § 22, art. 12, of the Constitution as it was amended in 1911. The section creates the Railroad Commission and defines its powers. In so doing it declares: "Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said Commission, than the rates, fares and charges which are specified in such tariff."

It is not questioned but that the Peninsula Company and the Wichita Transportation Company are public transportation companies, are common carriers, and are public utilities within the definition of § 23, art. 12, of the Constitution. As little will it be questioned but that, if the quoted language of § 22 stood alone as a subject of construction, it would be unhesitatingly held, in the present day, as it is held in construing similar language in other states, that it conferred upon the Railroad Commission regulatory powers over all transportation companies, therein including transportation companies of the classes under consideration. Exempli gratia, in Georgia R. & Power Co. v. Jitney Bus Co., the Georgia statute conferred jurisdiction upon the Railroad Commission over "all common carriers—railroads and express corporations or companies within this state," and its Railroad Commission held this to be a grant of power to regulate automobile busses and trucks carrying passengers and property for hire. P.U.R.1915C, 928. Again, the Illinois Public Utilities Commission had, under § 8 of that state's act (Laws 1913, p. 464) been given "general jurisdiction over all public utilities," and a "public utility" was defined to be "every corporation that now or hereafter may own, etc., for public use any plant, equipment or property to be used for or in connection with the transportation of persons." Here, again, the Illinois Public Utilities Commission held this grant to confer upon it jurisdiction over such automobile passenger and freight carriers. Jacksonville R. Co. v. O'Donnell, P.U.R.1915C, 853. Therefore, we repeat that one would have no hesitancy in declaring that the language of the Constitution in conferring

upon the Railroad Commission power of regulatory control over "railroads and other transportation companies" embraced within its grant companies of the nature we are considering. And we interrupt our argument here to say that, while the problem is to be resolved solely under the determination of the existence or nonexistence of the power in the Railroad Commission, no reason appears why such power should not have been conferred upon it, and multitudinous reasons exist why it should have been conferred. These automobile stage companies carry passengers to great distances, over many and devious roads. It is a part of common knowledge that one may travel by this method at least from San Diego to Sacramento, and doubtless further—a distance of over 600 miles. Thousands of passengers are thus carried over mountains and plains. Aside from the mere matter of the regulation of fares, every consideration suggests the desirability, if not the need, of safety regulations touching the care and upkeep of the machines, the skill and prudence of the chauffeurs, etc. And touching the movement of freight, while in many instances these truck companies parallel railroads, in others they enter unrestricted and uncontrolled, into new territory. Modern transportation has unquestionably reached the point where it is no more an answer to the farmer who thinks that the rates of the auto truck which passes his farm are extortionate, to say that he may haul his own product, than it would be to make him the same answer if he were complaining of a railroad extortion. And, moreover, it is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a percentage of which revenues goes by way of taxes to the support of the state.

But returning to the fundamental questions: The nonexistence of the power in the Railroad Commission to supervise these corporations is found and declared by the Railroad Commission to rest upon the construction of the phrase "other transportation companies" given to it by this court in Board of Railroad Com'rs v. Market Street R. Co. 132 Cal. 677, 64 Pac. 1065. It is said, and truly, that § 22, art. 12, of the Constitution, amended as it was in October, 1911, and embodying as it does the precise language contained in the section before amendment, will be held to have been amended and reenacted in the light of the construction which this court had put upon that language. In 1901, § 22, so far as concerns the quoted language, stood identically as it does to-day. In that year the Railroad Commission made demand upon the Market Street Railway Company of San Francisco to produce its books, records, and papers and submit itself to the regulatory powers of that Commission as defined by the Act of 1880 (Stat. 1880, p. 45). The Market Street Railway Company resisted this demand. The Railroad Commission brought action in the superior court to enforce it. The railway company prevailed and the Commission appealed, contending that it was given authority by virtue of § 22, art. 12, of the Constitution. Before this court the question for determination was stated to be: "Do the words '*railroad and other transportation companies*' include a street railway company in a municipality, engaged in the business of carrying passengers on street railroad cars?"

This was the sole proposition presented to this court for determination. Mr. Justice Temple, in dissenting, held that from the context the meaning of "other transportation companies" was so plain as to deprive a court of the power to construe it. But the view of the majority of this court was that the words called for construction. So construing them, this court held, for reasons not calling for repetition, as they are fully set forth in the opinion, that "other transportation com-

panies" did not embrace within its meaning "street railway companies carrying passengers for hire within the municipal limits." But the decision, upon fundamental and familiar principles, decided nothing more than that this particular character of transportation company was not embraced within the purview of the language of the Constitution. Thus, it is said that the language of the Constitution "is inconsistent with the idea that the entire people of the state (through the State Railroad Commission) were interested in the rates for carrying passengers within the corporate limits of a town or municipality;" and it is further declared, arguendo; "Companies engaged in draying, running freight wagons, delivery wagons, delivering parcels, teaming, or running elevators, are engaged in the business of 'transportation;' but it surely could not be contended that they are subject to the jurisdiction of the 'Railroad Commission.' The people of the state would not have agreed to pay the salaries and expenses of the railroad commissioners, selected from different geographical sections of the state, for the purpose of regulating the charges of the 'United Carriage Company' of San Francisco. Yet it is a transportation company."

This language is convincing in establishing the unquestioned fact that this court had in contemplation this, because all such transportation companies of whatsoever kind, operating exclusively within a municipality; and good reason appears for this because all such transportation companies were subject to license fees and police regulations imposable upon them by the municipal authorities.

All, therefore, that was actually decided in the Market Street Case was that the Market Street Railway and other street railways of its character were not embraced within the meaning of the phrase "other transportation companies," as employed in the Constitution. The most that was inferentially declared in the obiter above quoted was that other transportation companies operating wholly within the limits of a municipality were not within the contemplation of the Constitution. Further than this the decision did not go, and further than this it should not be carried. It results, therefore, that the adjudication relied on by the Railroad Commission in no wise determines the question presented. That question is at large. It may be thus put: Did the Constitution in the language quoted exclude by necessary or even by fair construction control over transportation companies of the character here presented? Assuredly, nothing in the language of the grant excludes them, and no legitimate construction upon the phrase so oft quoted demands their exclusion. It must be and therefore is held that the Constitution has granted regulatory powers over such corporations to the Railroad Commission by virtue of § 22, art. 12, of the Constitution, and it follows therefrom that mandate should issue to the Railroad Commission in accordance with the prayers of the petitioners.

Public service corporation—regulation—trucks and busses.

It is adjudged accordingly.

We concur: **Angellotti**, Ch., J.; **Shaw**, J.; **Melvin**, J.; **Lorigan**, J., **Sloss**, J.; **Lawlor**, J.

A petition for rehearing having been filed, the following **Per Curiam** response was handed down, January 11, 1917:

We think that the opinion already filed in these cases sufficiently and clearly enough indicates the view of this court as to the extent of the jurisdiction of the Railroad Commission as to such transportation companies as those involved in these proceedings. In view of what is said in the opinion, it is manifest that the writ of mandate ordered issued by the judgment is too broad in its terms, and requires the exercise of jurisdiction not conferred by § 22 of article 12 of the Constitu-

tion. It was not intended to require the assumption by the Railroad Commission of jurisdiction of any matter not fairly covered by the provisions of that section.

The proceedings before the Railroad Commission involve substantially only matters relating to the rates to be charged by the transportation companies that were defendants therein, and for all practical purposes it is necessary only to grant relief in that particular respect.

It is ordered that the opinion heretofore filed be modified by striking out the words "in accordance with the prayers of the petitioners," at the end of said opinion, and inserting in lieu thereof the words "to exercise such powers."

It is ordered that the judgment heretofore given be modified to read as follows: "It is ordered that a peremptory writ of mandate issue to the Railroad Commission requiring the Commission to make its order that the defendants in the proceedings referred to pending before said Commission, viz., the 'Wichita Transportation Company,' and the 'Peninsula Rapid Transit Company,' forthwith file with the Commission their schedules of rates, fares, charges, and classifications, and further that the Commission assume the jurisdiction over these companies which is conferred by § 22, art. 12, of the Constitution."

ANNOTATION.

Jurisdiction of Public Service Commission over carriers transporting by motor trucks or busses.

Notwithstanding the fact that there is considerable diversity of phraseology in the constitutional provisions and statutes creating public service commissions and defining their powers, it is generally ruled that the jurisdiction of such commissions includes carriers transporting either passengers or goods, or both, by motor trucks or busses; at least, where such transportation is over regular routes, and for the accommodation of the public at fixed rates. And in fact in a number of jurisdictions the question has been the subject of express legislation.

Thus, in Arizona, under § 2, art. 15, of the Constitution, which provides that private corporations engaged in carrying persons or property for hire shall be deemed public service corporations, and the Public Service Corporation Act, which defines the powers of the Corporation Commission as to the fixing of rates, and is broad enough to include individuals, the Arizona Corporation Commission has held that it has jurisdiction over individuals and associations, whether incorporated or otherwise, operating automobiles for hire. Re Automobile Traffic (1915; Ariz.) P.U.R.1915C, 945. And the jurisdiction of the Commission over a company operating a motor bus line was also exercised in Re Automobile Traffic (1916; Ariz.) P.U.R. 1916C, 789.

And in Terminal Taxicab Co. v. Kutz (1916) 241 U. S. 252, 61 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765, it was held that a company authorized by its charter to let and operate automobiles and taxicabs and to carry passengers and goods by such vehicles, "but not to exercise any of the powers of a public service corporation," was a common carrier, within the meaning of the Act of Congress of March 4, 1913 (37 Stat. at L. 938, chap. 150), which required every public utility to obey the lawful orders of the Commission, and defined the term "public utility" as embracing every "common carrier;" which phrase in turn was declared to include every corporation "controlling or managing any agency or agencies for public use for the conveyance of persons or property, within the District of Columbia, for hire," and hence subject to the jurisdiction of the Public Utilities Commission, of the Dis-

trict of Columbia, as a "public utility," in respect of its exercise of its contract rights to solicit livery and taxicab business from persons passing to or from trains at a certain railroad station, and of its exclusive right, under contract with certain hotels, to solicit taxicab business from guests. But it was held that the part of its business which consisted in furnishing automobiles from its central garage on individual orders could not be regarded as a public utility, and the rates charged for such service were not open to inquiry by the Commission. The conclusion was that an injunction could not issue against the taking of jurisdiction by the Commission, which could lawfully require the giving of information regarding the rates charged for its railroad terminal and hotel trade, but that the Commission should be enjoined from inquiring into the company's rates at its garage, or exercising jurisdiction over the same. And again in Re Jurisdiction of Commission (1915; **D. C.**) P.U.R.1915E, 642, it was expressly held that persons, firms, or corporations, operating any public motor vehicle for hire along defined routes in the District of Columbia, were subject to the jurisdiction of the Public Utilities Commission of the District of Columbia. And in such cases, it has been held that the jurisdiction of the Commission cannot be defeated on the ground that the Commission had not assumed jurisdiction over other similar concerns, where there is nothing to impeach the good faith of the Commission, which alleged that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act. Terminal Taxicab Co. v. Kutz (**U. S.**) supra, affirming on this point (1915) 43 App. **D. C.** 120.

So, it has been held that the Georgia Railroad Law of 1907, which conferred upon the State Railroad Commission general jurisdiction over and supervision of "all common carriers," applies to all persons or corporations operating automobiles or "jitney busses" over fixed routes and at fixed rates. Georgia R. & Power Co. v. Jitney Bus Co. (1915; **Ga.**) P.U.R.1915C, 928. It was also said in this case that the authority extended to the Railroad Commission did not necessarily include taxicabs, etc., having no fixed routes or charges.

And in Illinois, under the Public Utilities Act of 1913, which gives the Illinois Public Utilities Commission jurisdiction over all public utilities regularly transporting persons or property for hire, "between points within this state," it has been held that jitney bus lines over designated routes, at fixed rates and on regular schedules, are public utilities, and subject to regulation and control by the Commission (Jacksonville R. Co. v. O'Donnell (1915; **Ill.**) P.U.R.1915C, 853); but that its jurisdiction does not extend to taxicabs not operated over specified routes under schedule, or between definite points. Newcomb v. Yellow Cab Co. (1916; **Ill.**) P.U.R. 1916B, 983.

And in Pennsylvania, under the Public Service Company Law of 1913 (Laws 1913, pp. 1375, 1376) which subjects public service companies, common carriers, and conveyers of passengers to the jurisdiction of the Pennsylvania Public Service Commission, and defines the term "public service company" as including all "stage-line corporations" and "common carriers," and "all persons engaged for profit in the same kind of business," and the term "common carriers" as including any and all common carriers, whether corporations or persons engaged for profit in the conveying of passengers or property, or both, between points within this commonwealth, etc., it has been held that individuals operating automobiles for the transportation of the public for hire, along regular and fixed routes, for a uniform fare, are subject to the jurisdiction of the Commission. Scranton R. Co. v. Walsh (1916; **Pa.**) P.U.R.1916D, 18; Scranton R. Co. v. Owens (1916; **Pa.**) P.U.R. 1916D, 25 (abstract); Scranton R. Co. v. Wilson (1916; **Pa.**) P.U.R.1916D, 25 (abstract); Allegheny Valley Street R. Co. v. Greco (1916; **Pa.**) P.U.R.1917A, 723. And jurisdiction over auto bus lines was assumed by the Pennsylvania Public Service Commission in the following additional cases; South-

ern Pennsylvania Traction Co. v. Hartel (1917; Pa.) P.U.R.1917C, 627; Southern Pennsylvania Traction Co. v. Pavillard (1917; Pa.) P.U.R.1917C, 631 (abstract); Southern Pennsylvania Traction Co. v. Powers (1917; Pa.) P.U.R.1917C, 631 (abstract); Southern Pennsylvania Traction Co. v. Hartel (1917; Pa.) P.U.R.1917C, 631 (abstract); Southern Pennsylvania Traction Co. v. Rich (1917; Pa.) P.U.R. 1917C, 631 (abstract); Re Griffith (1917; Pa.) P.U.R.1917C, 631 (abstract). The jurisdiction so conferred is not affected as to motor lines within a city by a subsequent statute (Act of June 1, 1915), authorizing cities to regulate and license certain motor vehicles. Wilkes Barre R. Co. v. Parsons (1916; Pa.) P.U.R.1917E, 371 (abstract). And it has been held that the Pennsylvania Commission will not pass upon the constitutionality of the act conferring jurisdiction upon it. Allegheny Street R. Co. v. Greco (1916; Pa.) P.U.R.1917A, 723.

So, in West Virginia, under § 3 of chap. 8 of the Acts of 1915, which declares that the jurisdiction of the state Public Service Commission "shall extend to and include common carriers, railroads, . . . engaged in the transportation of freight and passengers, . . . all other public service corporations and all persons, associations, corporations and agencies employed or engaged in any of the businesses hereinbefore enumerated," and broadly provides that the words "public service corporations" shall include all persons, associations, etc., engaged in any business enumerated in the act, "or in any other public service business, whether above enumerated or not, whether incorporated or not" —it has been held that the Commission has jurisdiction over the operation of jitney busses operated in the state over regular routes, on schedule, for a uniform fare, and carrying indiscriminately all persons desiring to ride. Smith v. Nunnelly (1915; W. Va.) P.U.R.1915E, 177. And see also Re Charleston Interurban R. Co. (1916; W. Va.) P.U.R.1916F, 338.

And in California, under the provisions of the Constitution (art. 12, § 22, as amended in 1911), creating a railroad commission and giving it power to establish rates for the transportation of passengers and freight by railroads and "other transportation companies," it has been held that the Commission has jurisdiction over lines of motor trucks and busses operating on the highways of the state between cities and other points, for the common carriage of passengers and freight. This was the ruling in the reported case (WESTERN ASSO. v. RAILROAD COMMISSION, ante, 1455), which reversed the decisions of the California Railroad Commission in Western Asso. v. Hackett (1915) 8 Cal. R. C. 220, P.U.R.1915F, 997, and United R. Co. v. Peninsula Rapid Transit Co. (1915; Cal.) P.U.R.1915F, 1012, in both of which it was held that the Commission did not have jurisdiction over carriers of the character under consideration. And jurisdiction by the California Railroad Commission over motor carriers was again assumed and exercised in Calistoga & C. L. Stage Line v. White Transp. Co. (1918; Cal.) P.U.R.1918E, 821, and Peninsula Rapid Transit Co. v. Friend (1918; Cal.) P.U.R.1918E, 793 (abstract).

The California legislature, in 1917, enacted a statute (Laws 1917, chap. 213) which expressly conferred exclusive jurisdiction upon the California Railroad Commission with respect to auto and motor truck and bus lines operated for the transportation of passengers and freight by corporations, associations, and individuals, over public highways, between fixed termini, or over a regular route and not wholly within the limits of incorporated cities. Re Transportation Cos. (1917; Cal.) P.U.R.1918B, 297, holding that, when such transportation is conducted wholly within the limits of an incorporated city, the municipality has exclusive jurisdiction, and that, where the transportation is not so confined, regulation is vested in the state Railroad Commission. But under this statute, the transportation, in order to confer jurisdiction, must be between fixed termini or over a regular route. Thus, in Lawrence v. Hellman (1917; Cal.) P.U.R.1918B, 526, abstract, the California Railroad Commission held that an automobile

operated for hire, not between fixed termini or over a regular route, was not a transportation company as defined by the California statute, and that it was not necessary to file schedules and rates of fare under the statute.

So, in Maryland, the Public Service Commission Law expressly defines the term "common carrier," as used in the act, as including all automobiles, transportation companies, and all persons and associations, whether incorporated or otherwise, operating automobiles or motor cars or motor vehicles for public use in the conveyance of passengers or property in the state. See Re Automobiles & J. Busses (1915; Md.) P.U.R.1915C, 365, and Re Automobiles & J. Busses (1915; Md.) P.U.R.1915C, 925.

And in Wisconsin, chap. 546 of the Laws of 1915 declares jitney busses to be common carriers, in consequence of which they have been held to be subject to the jurisdiction of the Wisconsin Railroad Commission. See Re Wisconsin Gas & E. Co. (1918; Wis.) P.U.R.1918E, 752.

And in New York, § 25 of the Transportation Corporations Law, for two years prior to the enactment of chap. 667 of the Laws of 1915, expressly provided that any person or corporation owning or operating a jitney bus line or motor vehicle line or route over state highways, for the transportation of passengers or freight for hire, was a common carrier, and subject to the Public Service Commission Law, requiring certificate of convenience and necessity. See Public Service Commission v. Hurtgan (1915) 91 Misc. 432, P.U.R.1916A, 547, 154 N. Y. Supp. 897 and Public Service Commission v. Booth (1915) 170 App. Div. 590, P.U.R. 1916A, 955, 156 N. Y. Supp. 140, in both of which jurisdiction was assumed over motor bus lines. But the Law of 1915 repealed the provisions as to state highways, and limited the jurisdiction of the Commission to automobile bus lines operated in streets, avenues, and public places in cities. See Re Becraft (1916; N. Y.) P.U.R. 1916B, 820; Re Bartholomew (1916; N. Y.) P.U.R.1916C, 87 (holding that the Commission cannot exercise jurisdiction over bus lines confined to rural state highways); and Re Troy Auto Car Co. (1916; N. Y.) P.U.R.1917A, 703, where jurisdiction was assumed over a bus line wholly within a city. However, it has been held that this limitation does not preclude the Commission taking jurisdiction over bus lines, partly within a city and partly outside, in their entirety; at least, where it appears that suburban travel over a part of the line is not properly accommodated, unless the same may be continued over the city streets. Re Becraft (N. Y.) supra. And see also Re Gaiser (1918; N. Y.) P.U.R.1918E, 927. G. J. C.

NORTHLAND PINE COMPANY, Respt.,
v.
MELIN BROTHERS et al., Appts.

Minnesota Supreme Court — February 23, 1917.

(136 Minn. 236, 161 N. W. 407.)

Receiver — action to enforce — mechanics' lien.

1. A receiver may be appointed in an action to foreclose a mechanics' lien, providing there is a sufficient showing that it is necessary to the protection or preservation of the property.

[See note on this question beginning on page 1466.]

Same — sufficiency of evidence.

2. The showing in this case was not sufficient to justify the appointment of a receiver.

Headnotes by BUNN, J.

APPEAL by defendants from a judgment of the District Court for Hennepin County granting a motion for appointment of a receiver, in an action brought to foreclose a mechanics' lien. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Harlan P. Roberts** and **E. Luther Melin**, for appellants:

Plaintiff is a general and simple contract creditor, and, having not yet reduced its claim to judgment, should have no standing in equity for the appointment of a receiver.

Dodge v. Pyrolusite Manganese Co. 69 Ga. 665; Adee v. Bigler, 81 N. Y. 349; Hulse v. Wright (Ohio) 61; Barrie v. Miller, 104 Ga. 312, 69 Am. St. Rep. 172, 30 S. E. 840; Virginia-Carolina Chemical Co. v. Provident Sav. L. Assur. Co. 126 Ga. 50, 54 S. E. 929; State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; Veit v. Collins, 39 Misc. 39, 78 N. Y. Supp. 763; Waples-Platter Co. v. Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200; Cahn v. Johnson, 12 Tex. Civ. App. 304, 33 S. W. 1000; New Birmingham Iron & Land Co. v. Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828; Hollins v. Brierfield Coal & I. Co. 150 U. S. 373, 37 L. ed. 1114, 14 Sup. Ct. Rep. 127; Cates v. Allen, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; Rockel, Mechanics' Liens, 198; Nash v. Burchard, 87 Mich. 85, 49 N. W. 492; Seibert v. Minneapolis & St. P. R. Co. 52 Minn. 246, 53 N. W. 1151; Schlecht's Appeal, 60 Pa. 172; Welch v. Emerson, 95 Pa. 251; National F. Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; High, Receivers, ¶ 406.

Plaintiff could not secure the appointment of a receiver on anticipated grounds.

Chadron Bkg. Co. v. Mahoney, 43 Neb. 214, 61 N. W. 594; High, Receivers, § 6, p. 12; Baker v. Backus, 32 Ill. 79; Hamilton v. Accessory Transit Co. 3 Abb. Pr. 255; Twitty v. Logan, 80 N. C. 69; Levenson v. Elson, 88 N. C. 182; Oil Co. v. Petroleum Co. 6 Phila. 521; Kean v. Colt, 5 N. J. Eq. 365; Uhl v. Dillon, 10 Md. 500, 69 Am. Dec. 172; McGoldrick v. Slevin, 43 Ind. 522; Young v. Frier, 9 N. J. Eq. 465; Hubbard v. Hubbard, 14 Md. 356; Lancaster v. Asheville Street R. Co. 90 Fed. 129; Rich v. Levy, 16 Md. 74; Blondheim v. Moore, 11 Md. 365; Crawford v. Ross, 39 Ga. 44; Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co. 96 Ala. 472, 38 Am. St. Rep. 109, 11 So. 439; Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 484; Dunston v. Hoptonic Co. 83 Mich. 372, 47 N. W. 322; Provident Life & T. Co. v. Keniston, 53 Neb. 86, 73 N. W. 216; Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927.

Mr. **Elijah Barton**, for respondent:

A receiver can be appointed in an action to foreclose a mechanics' lien.

Rockel, Mechanics' Liens, § 263; Webb v. Van Zandt, 16 Abb. Pr. 314, note; Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398, 645; Lowell v. Doe, 44 Minn. 144, 46 N. W. 297.

Whether a receiver should or should not be appointed in a given case is a matter resting in the sound discretion of the court.

Bean v. Heron, 65 Minn. 64, 67 N. W. 805; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537.

Bunn, J., delivered the opinion of the court:

This action was brought to foreclose a mechanics' lien for lumber, cement, and other building materials furnished by plaintiff at the request of defendant Melin Brothers, Incorporated, for the construction of certain flat buildings upon lots in Minneapolis owned by defendant E. Luther Melin. Upon the complaint and an affidavit plaintiff moved for the appointment of a receiver to take charge of the property, to manage the same, together with the improvements thereon, for the benefit of all persons having valid mechanics' lien claims against said property. After a hearing the court appointed a receiver under a $5,000 bond to take possession of and manage the property, including the improvements and the material on the premises furnished for the erection of the buildings, "in such manner as will best conserve the interests of all persons having" valid liens against the property, until such time as the court might otherwise order. Defendants Melin Brothers, Incorporated, and E. Luther Melin, appeal from the order.

Two questions are presented: (1) Can a receiver be appointed

under any circumstances in an action to foreclose a mechanics' lien? (2) If so, did the circumstances in this case justify the appointment of a receiver? We dispose of these questions in the order stated.

1. In this state, while the lien itself is purely a creature of statute, an action to enforce it is an ordinary civil action, proceeding according to the usual course of the law, and governed by the same rules of practice and procedure as any other similar action, except as expressly modified by the statute itself. Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398, 645. Equitable principles are applicable in enforcing the lien. Ness v. Davidson, 49 Minn. 469, 52 N. W. 46. It has been held in a few cases in other states that a receiver of the rents and profits cannot be appointed in a mechanics' lien action, in the absence of a statute authorizing such appointment. Stone v. Tyler, 173 Ill. 147, 50 N. E. 688; Meyer v. Seebald, 11 Abb. Pr. N. S. 326, note (contra, Webb v. Van Zandt, 16 Abb. Pr. 314, note); Pratt v. Tudor, 14 Tex. 37. These cases are manifestly not in point, as the receiver in the case at bar was not to take the rents or profits, but merely to conserve the property and the material on hand, pending the action. We hold that the court had the power to appoint a receiver for these purposes, if the facts showed that it was necessary for the protection or preservation of the property.

Receiver—action to enforce mechanics' lien.

2. The appointment of a receiver to take possession of property pendente lite is a matter resting largely in the discretion of the court. This discretion is not an arbitrary discretion, but one to be exercised as an auxiliary to the attainment of the ends of justice. Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537. A receiver will be appointed only under circumstances requiring summary relief, or where the court is satisfied that there is imminent danger of loss, and where there is no remedy at law. Bacon v. Engstrom, supra.

The complaint alleged that the unpaid claims for labor and material furnished for and used in the construction of the buildings amounted to over $55,000; that there was a first mortgage of $6,000 on the property, and a second mortgage of $450, both prior to the lien claims, and that there was no equity in this property over and above the mortgages and lien claims. It alleged that the six flat buildings are in various stages of construction; the walls of two of them are up and the roofs on, but no windows are in, and no plastering has been done. The walls of another of the buildings are up one story, and the walls of the other three are up about one-half story. A large amount of material for the completion of the buildings is now lying upon the premises, and will greatly deteriorate in value if permitted to remain there in its present condition, and the buildings will rapidly depreciate in value if allowed to remain in their present unfinished and unprotected condition. It is then alleged that defendants, E. Luther Melin and Melin Brothers, Incorporated, are both insolvent, and unable to proceed further with the construction of the buildings, and have ceased work thereon, and that unless someone is appointed by the court at once to take possession of the property, with authority to protect and manage the same, the lien claimants will suffer irreparable injury and loss. In addition to the verified complaint, there was an affidavit of the attorney for another lien claimant, the substance of which is that the affiant is morally certain that, unless a receiver is appointed, the security of the lien holders will be greatly impaired, and they will suffer great loss. The affidavit also states that the Melins are unable to proceed further with the erection of the buildings. This is the entire showing made on behalf of the plaintiff. It was met by the verified answer of E. Luther Melin, denying

his insolvency, and alleging that work on the buildings has never ceased; that no materials are lying around the premises deteriorating in value; and that the buildings are not deteriorating or depreciating in value, but that work thereon is gradually being pushed forward under competent and efficient management and control. An affidavit of Melin reiterated his ability to pay his debts in full, and to manage and complete the buildings without interference. The affidavit of the superintendent of construction, in charge of work on the buildings, was to the effect that work on the buildings had been going on continuously, was being gradually pushed forward, and that there were no materials on the premises that were depreciating in value.

We are forced to the conclusion that the showing made by plaintiff, rebutted as it was by the answer and opposing affidavits, was wholly insufficient to warrant the summary and drastic relief of a receivership. As said by Mr. Justice Hallam in Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537: "The showing" to warrant the granting of an application for the appointment of a receiver, "must be clear, strong, and convincing." "Such an application will not be granted in a doubtful case." When we consider how little a receiver could do to help out the lien claimants, and how much he could do to embarrass the owners of the property, and what expense might be incurred, it is difficult to escape the conclusion that the order was inadvertently made.

Same—sufficiency of evidence.

Order reversed.

ANNOTATION.

Right to appointment of receiver in action to enforce mechanics' lien.

The cases involving the right to the appointment of a receiver in an action to enforce a mechanics' lien are very few.

The reported case (NORTHLAND PINE CO. v. MELIN BROS. ante, 1463) holds that in proceedings to enforce a mechanics' lien the court has the power to appoint a receiver pendente lite to conserve the property, subject to the lien, if the facts show that such an appointment is necessary. The court distinguishes such cases from those where in the appointment of a receiver of the rents and profits of the property burdened with the lien is desired.

The rule seems to be, however, that a complainant in a mechanics' lien action is not entitled to the appointment of a receiver of the rents and profits pendente lite, in the absence of a statute authorizing such an appointment. Meyer v. Seebald (1871) 11 Abb. Pr. N. S. (N. Y.) 326, note. Compare Webb v. Van Zandt (1863) 16 Abb. Pr. (N. Y.) 314, note. Thus, in Meyer v. Seebald (N. Y.) supra, the court said: "The application [for the appointment of a receiver of the rents, issues, and profits of the premises covered by the lien] raises a novel question under the Mechanics' Lien Law. I cannot find any precedent for it, and the determination of it must depend upon the character and extent of the right which the lienor acquires by filing his notice of lien. If he have any claim to the property, or legal or equitable interest in it and right to the property covered by the lien he is entitled, in a proper case, to a receiver of the rents pendente lite. . . . My view is that the lienor has a lien of no higher character than a judgment, the sale under it, however, not being subject to the debtors, or his creditors' statutory right to redeem. There is a mortgage, it appears, on these premises, the holder of which, if it be overdue, is entitled to the rents, issues, and profits of these premises. The lienor has but the right to a sale of the 'right, title, and interest' of the owner at the time the lien notice was filed. The motion for receiver and in-

junction is, therefore, denied, and the preliminary injunction dissolved."

This, apparently, was the law in Illinois prior to the enactment of the Mechanics' Lien Law of that state, which became effective in 1895 (Laws 1895, p. 231). Stone v. Tyler (1898) 173 Ill. 147, 50 N. E. 688, wherein the court said: "Section 40 of the Act of 1895, after repealing the Mechanics' Lien Laws, and the amendments thereto, theretofore existing, contains at its close the following proviso: 'Provided, that this section shall not be so construed as to affect any rights existing or actions pending at the time this act shall take effect.' . . . The language of the proviso in question clearly indicates that it was the intention of the legislature that the Act of 1895 should apply only to future cases, and should not have a retroactive operation. It follows that the present proceeding, being an action pending when the law of 1895 went into force, must be governed by the old law of 1874. The Mechanics' Lien Law of 1874, together with the amendments thereto passed in 1887, did not authorize the appointment of a receiver. In the absence of any statutory provision authorizing it to be done, the complainant, in an action for the foreclosure of a mechanics' lien, is not entitled to a receiver of the rents and profits of the property pendente lite." The law of Illinois, however, embodied in the aforesaid Act of June 26, 1895, provides that: "The court shall have power to appoint receivers for the property on which liens are sought to be enforced, in the same manner, for the same causes, and for the same purposes as in cases of foreclosure of mortgages," etc. Stone v. Tyler (Ill.) supra.

A statute of Minnesota, relating to the foreclosure of mechanics' liens, provides that "if, in any case, the sale be not confirmed, the court may direct a resale, or, if deemed best, may appoint a receiver to lease or otherwise handle the property, under its direction, in the interests of all persons concerned." Under the authority of that act it was held in Dezurick v. Iblings (1918) 139 Minn. 480, 167 N. W. 116, an action to foreclose mechanics' liens on certain property, that the court had the power on the petition of the complainants, to appoint a receiver of the property "to take possession of and to lease or otherwise handle the same in the interest and for the benefit of all concerned, and according to their respective rights, to collect the rents and retain the same until authorized by order of the court to pay the same to the parties entitled thereto."

J. V. B.

E. FOUGERA & COMPANY, Respt.,
v.
CITY OF NEW YORK et al., Appts.

New York Court of Appeals — October 15, 1918.

(224 N. Y. 269, 120 N. E. 642.)

Constitutional law — police power — registration of ingredients of patent medicines.

1. Requiring the registration of a statement of the ingredients of patent or proprietary medicines with the health department as a condition to the sale of such medicines is within the police power.

[See note on this question beginning on page 1476.]

Stipulation — purpose of legislation — effect.

2. The courts are not bound by stipulations of the parties as to the purpose of legislation.

Constitutional law — self-crimination — disclosing ingredients of patent medicines.

3. Requiring vendors of patent medicines to file with the health department

a statement of the ingredients of such medicines does not, although the purpose is to secure information on which to base prosecutions for violation of law, violate the constitutional provision against self-crimination.

Statute — false statement — meaning.

4. A statute providing punishment for false statements of the curative effect of a patent medicine means a statement wilfully false.

Municipal corporation — construction of ordinance — separable provisions.

5. Providing punishment for a false statement of the curative effect of the ingredients of patent medicines does not affect the provision of the ordinance requiring a statement of such ingredients to be filed with the board of health.

Commerce — patent medicine — power of state.

6. A state may require the filing with the board of health of a statement of the ingredients of patent medicines sought to be sold within its limits, although they are imported from foreign countries.

Health — power of board — prohibiting sale of medicine.

7. A municipal board of health has not, under statutory authority, to publish "additional provisions for the security of life and health," power to prohibit the sale of existing stocks of patent medicines imported from foreign countries unless a statement of their ingredients is filed with the board, if those having such medicines for sale do not know and cannot learn their ingredients.

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, First Department, entered upon an agreed statement of facts, restraining them from enforcing certain sections of the Sanitary Code, and the regulations adopted by the Board of Health to carry them into effect. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Messrs. **Terence Farley** and **John F. O'Brien**, with Mr. **William P. Burr**, for appellants:

If the provisions of the Sanitary Code can be justified as a valid exercise of the police power, they do not deprive plaintiff, without due process of law, of any of its proper rights.

State Board of Pharmacy v. Matthews, 197 N. Y. 353, 26 L.R.A.(N.S.) 1013, 90 N. E. 966; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Crescent Mfg. Co. v. Wilson, 233 Fed. 282; People v. William Henning Co. 260 Ill. 554, 49 L.R.A. (N.S.) 1206, 103 N. E. 530; State v. Snow, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777; State v. Holton, 148 Iowa, 724, 126 N. W. 1125; State v. Sherod, 80 Minn. 446, 50 L.R.A. 660, 81 Am. St. Rep. 268, 83 N. W. 417; People v. Windholz, 92 App. Div. 569, 86 N. Y. Supp. 1015; People v. Abramson, 137 App. Div. 549, 122 N. Y. Supp. 115; People v. Kibler, 106 N. Y. 321, 12 N. E. 795; People v. Girard, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; People v. Biesecker, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534, 61 N. E. 990; People v. Bowen, 182 N. Y. 1, 74 N. E. 489.

Plaintiff was not deprived of the equal protection of the laws by the sections in question.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; People v. St. John, 178 N. Y. 617, 70 N. E. 1104, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; State v. Sherod, 80 Minn. 446, 50 L.R.A. 660, 81 Am. St. Rep. 268, 83 N. W. 417; Freadrich v. State, 89 Neb. 343, 34 L.R.A.(N.S.) 650, 131 N. W. 618; State v. Stevenson, 109 N. C. 730, 26 Am. St. Rep. 595, 14 S. E. 385; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Wise v. Morgan, 101 Tenn. 273, 44 L.R.A. 548, 48 S. W. 971; Dutton v. Knoxville, 121 Tenn. 25, 130 Am. St. Rep. 748, 113 S. W. 381, 16 Ann. Cas. 1028.

The provisions of the Sanitary Code do not conflict with those of the Federal Food and Drugs Act of 1906.

Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

The provisions of the Sanitary Code are not in conflict with the commerce clause of the Constitution, as they are admittedly police regulations, and, manifestly, only apply to proprietary or patent medicines which are "held,

offered for sale, sold, or given away, in the city of New York."

Savage v. Jones, supra; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; McDermott v. State, 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315; Crossman v. Lurman, 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; People v. Schmidt, 218 N. Y. 256, 112 N. E. 755; Powell v. Pennsylvania, 127 U. S. 678, 22 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; People v. Niagara Fruit Co. 75 App. Div. 11, 77 N. Y. Supp. 805, 173 N. Y. 629, 66 N. E. 1114.

In determining whether provisions of a law are within the purview of the police power, it is not necessary that the court find that certain facts existed which justified the legislation. If such a state of facts can be reasonably presumed to exist, the court is bound to presume that they existed, and that the law was passed for that reason.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511; People v. Charles Schweinler Press, 214 N. Y. 395, L.R.A.1918A, 1124, 108 N. E. 639, Ann. Cas. 1916D, 1059; Klein v. Maravelas, 219 N. Y. 383, L.R.A.1917E, 549, 114 N. E. 809, Ann. Cas. 1917B, 273; People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. Rep. 143, Ann. Cas. 1917B, 927; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

Mr. **Charles M. Russell**, for respondent:

The disclosure ordinance attempts to destroy an existing property right and is void.

Wynehamer v. People, 13 N. Y. 378; Re Townsend, 39 N. Y. 171; People ex rel. Appel v. Zimmerman, 102 App. Div. 104, 92 N. Y. Supp. 497; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965; People ex rel. Isaacs v. Moran, 206 N. Y. 670, 99 N. E. 1115, reversing 150 App. Div. 226, 134 N. Y. Supp. 931; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The provisions of § 117 of the Sanitary Code, requiring registration with the department of health, or the labeling of the container with the ingredients contained therein, is in fatal conflict with the Constitutions, in denying to plaintiff the right to sell its products without first surrendering, without due process of law or just compensation, its property to the board of health, including a sample of the product and the essential secrets of the formula under which it is manufactured.

Vance v. W. A. Vandercook, 170 U. S. 455, 42 L. ed. 1106, 18 Sup. Ct. Rep. 674; Scott v. Donald, 165 U. S. 100, 41 L. ed. 645, 17 Sup. Ct. Rep. 265; New York v. Campagnie Generalé Transatlantique, 107 U. S. 62, 27 L. ed. 384, 2 Sup. Ct. Rep. 87; 2 Story, Eq. Jur. ¶ 952; Champlin v. Stoddart, 30 Hun, 300; Tabor v. Hoffman, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12; G. F. Harvey v. National Drug Co. 75 App. Div. 103, 77 N. Y. Supp. 674; Gilman v. Tucker, 128 N. Y. 203, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Moxie Nerve Food Co. v. Beach, 35 Fed. 465; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The equal protection of the laws is denied to the plaintiff by the provisions of §§ 116 and 117 of the Sanitary Code.

People v. Ringe, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; Hauser v. North British & M. Ins. Co. 206 N. Y. 4 5, 42 L.R.A. (N.S.) 1139, 100 N. E. 52, Ann. Cas. 1914B, 263; Yick Wo v. Hopkins, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064; Soon Hing v. Crowley, 113 U. S. 703, 22 L. ed. 1145, 5 Sup. Ct. Rep. 730; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; Dobbins v. Los Angeles, 195 U. S. 237, 49 L. ed. 175, 25 Sup. Ct. Rep. 18; Holden v. Hardy,

169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 107, 46 L. ed. 107, 22 Sup. Ct. Rep. 30; Wynehamer v. People, 13 N. Y. 396; Munn v. Illinois, 94 U. S. 141, 24 L. ed. 89; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

Ordinances so indefinite as to allow of an interpretation making harmless acts criminal, employing unnecessary means, inviting and allowing of maladministration, and placing unusual and unnecessary restrictions upon one lawful occupation in the interest of another, cannot be sustained as reasonable.

Lawton v. Steele, 152 U. S. 133–136, 28 L. ed. 385–388, 14 Sup. Ct. Rep. 499; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Equitable Trust Co. 96 N. Y. 388; Frank L. Fisher Co. v. Woods, 187 N. Y. 96, 12 L.R.A.(N.S.) 707, 79 N. E. 836; People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 135, 21 L.R.A.(N.S.) 735, 88 N. E. 17; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Lochner v. New York, 198 U. S. 64, 49 L. ed. 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Ives v. South Buffalo R. Co. 201 N. Y. 295, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

The provisions of the sections in question, as amended, and the regulations provided therefor, are void, in that it appears, from the terms thereof, that they have no reasonable relation to the public health or public welfare.

Stubbe v. Adamson, 220 N. Y. 459, 116 N. E. 372; Carthage v. Frederick, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; People ex rel. Knoblauch v. Warden, 216 N. Y. 162, 110 N. E. 451; New York v. Dry Dock E. B. & B. R. Co. 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; People v. Biesecker, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534, 61 N. E. 990; Schoellenberger v. Pennsylvania, 171 U. S. 1, 14, 43 L. ed. 49, 54, 18 Sup. Ct. Rep. 757; Crossman v. Lurman, 192 U. S. 189 196, 48 L. ed. 401, 404, 24 Sup. Ct. Rep. 234; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

A manufacturer of patent medicines is forced by the ordinances to become a witness against himself as a prerequisite to selling his product in New York city, in contravention of the Constitution of New York.

James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Hauser v. North British & M. Ins. Co. 152 App. Div. 91, 136 N. Y. Supp. 1015, affirmed in 205 N. Y. 455, 42 L.R.A.(N.S.) 1139, 100 N. E. 52, Ann. Cas. 1914B, 263; People ex rel. Ferguson v. Reardon, 197 N. Y. 236, 27 L.R.A.(N.S.) 141, 134 Am. St. Rep. 871, 90 N. E. 829.

In the absence of a standard established by the ordinance, for deviation from which punishment may be provided, there can be no criminal prosecution.

McChord v. Louisville & N. R. Co. 183 U. S. 498, 46 L. ed. 291, 22 Sup. Ct. Rep. 165; Gordon v. Butler, 105 U. S. 557, 26 L. ed. 1169; United States v. Johnson, 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627; Seven Cases v. United States, 239 U. S. 510, 60 L. ed. 411, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190; People v. Briggs, 193 N. Y. 459, 86 N. E. 522; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 876; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 919; United States v. Reese, 92 U. S. 219, 220, 23 L. ed. 565.

Sections 116 and 117, as amended, are unauthorized, illegal, and void in so far as they purport to prohibit the "having" or "holding," within the city of New York, of patent medicines, not complying with the specific regulations of the board of health, and are in contravention of the Constitution of the United States, vesting in Congress, only, the power to regulate commerce with foreign nations.

Henderson v. New York, 92 U. S. 273, 23 L. ed. 549; Wilcox Silver Plate Co. v. Green, 72 N. Y. 20; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; E. W. Bliss Co. v. United States Incandescent Gaslight Co. 149 N. Y. 300, 43 N. E. 859; Gray v. Walton, 107 N. Y. 254, 14 N. E. 191; Hatch v. Standard Oil Co. 100 U. S. 134, 25

L. ed. 557; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Scott v. Donald, 165 U. S. 95, 41 L. ed. 643, 17 Sup. Ct. Rep. 265; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 472, 473, 24 L. ed. 530, 531; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

The sections, as amended, and the regulations adopted by the board of health therefor, are void, in contravention of the Constitution of the United States, vesting in Congress the power to regulate commerce among the several states.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 472, 24 L. ed. 530; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465–493, 31 L. ed. 700–709, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 17; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; Southern R. Co. v. Reid, 222 U. S. 435, 56 L. ed. 259, 32 Sup. Ct. Rep. 140; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Mobile County v. Kimball, 102 U. S. 700, 28 L. ed. 240; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 559, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Lindsay & P. Co. v. Mullen, 176 U. S. 147, 44 L. ed. 408, 20 Sup. Ct. Rep. 325.

Congress having assumed jurisdiction over what shall constitute misbranding or adulteration, as to the label of a patent medicine, the attempt of the board of health to do likewise as to the identical merchandise over which Congress has assumed jurisdiction is in violation of the Constitution of the United States, giving to Congress exclusive jurisdiction over the subject-matter.

McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Southern R. Co. v. Reid, 222 U. S. 435, 56 L. ed. 259, 32 Sup. Ct. Rep. 140; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Corn Products Ref. Co v Weigle, 221 Fed. 988; Seven Cases v. United States, 239 U. S. 515, 60 L. ed. 415, L.R.A. 1916D, 164, 36 Sup. Ct. Rep. 190; Charleston & W. C. R. Co. v. Varnville Furniture Co. 237 U. S. 604, 59 L. ed. 1140, 35 Sup. Ct. Rep. 715, Ann. Cas. 1916D, 333; Adams Exp. Co. v. Croninger, 226 U. S. 506, 57 L. ed. 320, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Erie R. Co. v. New York, 233 U. S. 683, 58 L. ed. 1153, 52 L.R.A.(N.S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306; Rast v. Van Deman & L. Co. 240 U. S. 362, 60 L. ed. 688, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; Chrosciel v. New York C. & H. R. R. Co. 174 App. Div. 175, 159 N. Y. Supp. 924; Southern R. Co. v. Railroad Commission, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304.

Cardozo, J., delivered the opinion of the court:

In a controversy submitted on an agreed statement of facts, judgment has been rendered, permanently enjoining the enforcement of §§ 116 and 117 of the Sanitary Code adopted by the board of health of the city of New York. Those sections provide, in substance, that there shall be no sale of patent or proprietary medicines in the city of New York unless "the names of the ingredients of every such medicine to which the therapeutic effects claimed are attributed, and the names of all other ingredients, except such as are physiologically inactive, shall be registered in the department of health." There is an exception where medicines are prescribed by a physician. The names of the ingredients, when registered, are to be "regarded as confidential, and shall not be open to inspection by the public, or by any persons other than the official custodian of such records in the department of health, such persons as may be authorized by law to inspect such records, and those duly authorized to prosecute or enforce the Federal statutes, the laws of the state of

New York, both criminal and civil, and the ordinances of the city of New York, but only for the purpose of such prosecution or enforcement." With the names there must be filed a copy of all advertising matter sold or distributed in connection with the medicine. Any proprietary or patent medicine shall be deemed to be misbranded if the names of its ingredients are omitted or misstated. Medicines are also to be deemed misbranded if the package or label contains "any statement, design, or device, regarding the drug or its ingredients, or regarding its or their action on diseased conditions, which statement, design or device shall be false or misleading in any particular." Misbranding may also result from other acts and omissions, not now important. In addition to misbranding, the ordinance prohibits and defines adulteration. One who violates the ordinance may be punished as for a misdemeanor, and is also liable to a penalty of $50, to be recovered in a civil action. New York City Charter (Laws 1901, chap. 466), § 1222.

Constitutional law—police power—registration of ingredients of patent medicines.

The plaintiff is engaged in the importation and sale, both wholesale and retail, of proprietary and patent medicines. The names of many of the medicines are stated in the record. For some the plaintiff is the exclusive importer and sole distributer in the United States. A large stock of drugs was on its shelves when the ordinance was passed. It does not know the names of the ingredients, and cannot ascertain them. They are secrets closely guarded by the foreign manufacturers. In these circumstances, it insists that the ordinance is void. There have been two lines of attack. The ordinance is said in the first place to infringe rights secured to the plaintiff by the state and the Federal Constitutions. If not subject to that criticism, it is said to go beyond the scope of the powers which the legislature has delegated to the city's local officers. Most of the objections to the ordinance we reject as inadequate. For the moment, we put aside the consideration of its effect upon existing stores of merchandise. We deal with it at the outset in its relation to merchandise to be acquired in the future.

The argument is made that the ordinance is an arbitrary exercise of the power of government. We do not think so. Its purpose and effect are well within the limits of the police power. The purpose is the preservation of the public health and safety. Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; State v. Aslesen, 50 Minn. 5, 8, 36 Am. St. Rep. 620, 52 N. W. 220; State Bd. of Pharmacy v. Matthews, 197 N. Y. 353, 26 L.R.A.(N.S.) 1013, 90 N. E. 966. The form of protection is publicity. There must be disclosure of the truth to responsible officials, who will prevent or punish the sale of fraudulent or noxious compounds. If that is not a legitimate public aim, we are at a loss to know where one may be found. It is not important that the ordinance fails to compel disclosure to all the world. Laws are not invalid because they fall short of the maximum of attainable efficiency. Disclosure to all the world, as in Savage v. Jones, supra, might make the protection more complete, but it would also make the hardship more severe. Something less, therefore, has been exacted. Disclosure is to be made to the health officers of the city and to them only. If fraud or other wrong is discovered, then and then only exposure will result. "No man has a constitutional right to keep secret the composition of substances which he sells to the public as articles of food." State v. Aslesen, supra. If that is true of food, it is even more plainly true of drugs. A danger exists, and the only question is whether the means of correction are appropriate. We cannot say that the means have no relation to

the end. The public health is safeguarded by disclosure to public officers charged by law with its protection. We are not called upon to approve the wisdom of the ordinance. We stop when we satisfy ourselves that it has a reasonable relation to the end to be attained.

It is said that the effect of the ordinance is to compel the dealers in patent medicines to give evidence against themselves, in violation of § 6 of article 1 of the Constitution of the state. The basis of that argument is a stipulation in the record "that the admitted object of defendants in the enactment of said Revised Sanitary Code and regulations is to secure information on which to base prosecutions for violations of law, if in their opinion the facts disclosed in accordance therewith shall so warrant."

We are not bound by stipulations in respect of the purpose of legislation. Laws are not to be declared invalid upon the consent of parties. We must determine their purpose and tendency for ourselves. But if the stipulation were to be accepted as accurate, the result would not be changed. The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. He is simply notified of the conditions upon which he may do business in the future. He makes his own choice. To such a situation, the privilege against self-accusation has no just application. People v. Rosenheimer, 209 N. Y. 115, 46 L.R.A.(N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161; Ex parte Kneedler, 243 Mo. 632, 641, 40 L.R.A.(N.S.) 622, 147 S. W. 983, Ann. Cas. 1913C, 923; People v. Henwood, 123 Mich. 317, 82 N. W. 70; Wigmore, Ev. § 2264.

Stipulation—purpose of legislation—effect.

Constitutional law—self-crimination—disclosing ingredients of patent medicines.

It is said again that prosecution may follow if any statement in respect of the curative action of the drug is false, and that to permit this is to inflict punishment for mere error of opinion. American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33. We have no doubt, however, that the word "false," as used in the ordinance, means wilfully false or fraudulent. If this construction is adopted, the objection vanishes. Seven Cases v. United States, 239 U. S. 510, 60 L. ed. 411, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190. Wilful fault is generally, though not invariably, the determining mark of crime. Whart. Crim. Law, 11th ed. § 151; Tenement House Department v. McDevitt, 215 N. Y. 160, 168, 109 N. E. 88, Ann. Cas. 1917A, 455. We will not assume that less was intended, where the result of exacting less would be to render a law invalid. But the objection, in any event, is premature. The provision assailed is separable from those which say that a statement of the ingredients must be filed, and that the omission to file it will be punished. The defect, if it exists, does not reach the whole law.

Statute—false statement—meaning.

Municipal corporation—construction of ordinance—separable provisions.

Other objections are based upon a supposed conflict between the ordinance and the Federal Constitution. It is said that, if applied to transactions of interstate or foreign commerce, the act is an infringement of the exclusive power of Congress. We think this objection is answered by Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715. The ordinance is an exercise of the police power of the state for the protection of the lives of its inhabitants. Savage v. Jones, supra; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Hall v. Geiger-Jones Co. 242 U. S.

539, 558, 61 L. ed. 480, 492, L.R.A. 1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; People v. Schmidt, 218 N. Y. 256, 112 N. E. 755. Such legislation may be permitted, though it affects incidentally interstate or foreign commerce, until Congress has disclosed a purpose to supersede the police power of the states, and to take exclusive possession of the field. It is said that Congress has disclosed that purpose by the adoption of the Food and Drugs Act (Act June 30, 1906, chap. 3915, 34 Stat. at L. 768, Comp. Stat. 1916, §§ 8717–8728; Act Aug. 23, 1912, chap. 352, 37 Stat. at L. 416, Comp. Stat. 1916, § 8724. To that objection, Savage v. Jones, supra, again supplies the answer. It was there held that there is nothing in the Food and Drugs Act which curtails the power of the states "to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients." See also Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501. It is true that there are some requirements of this ordinance which merely repeat prohibitions of the Food and Drugs Act. That is true, for illustration, of the definition of adulterated products. If prosecution is attempted for the violation of those requirements as a result of any transaction of interstate or foreign commerce, the question will have to be determined whether the state can thus add to the penalties of the Federal Law. But such provisions, if we assume them to be invalid, are separable from the others. Robert Dollar Co. v. Canadian Car & Foundry Co. 220 N. Y. 270, 280, 115 N. E. 711; Com. v. Kimball, 24 Pick. 362, 35 Am. Dec. 326. The dominant scheme of the ordinance is disclosure of ingredients. That disclosure may be compelled, and the failure to make it punished, without trespassing upon the field which has been occupied by Congress.

Commerce—patent medicine—power of state.

One other objection to the ordinance is yet to be considered. We think it points to a real defect, though one that amendment may correct. The ordinance does not except existing stores of merchandise in the hands of druggists or other dealers, who do not know the ingredients and cannot state them. That is the plaintiff's plight. Before the adoption of the ordinance, it had imported large quantities of drugs; it does not know the ingredients, and the foreign manufacturer will not reveal them. In effect, therefore, an absolute prohibition is laid upon the sale of its existing stock. Between absolute prohibition and a condition impossible of fulfilment, the distinction may be nominal. A different case would be presented if the ingredients were known. The dealer then would have himself to blame if he refused to state them. A different case would also be presented if he had acquired the stock after the ordinance was in force. He would then have made the purchase with knowledge of the restriction. That is not the situation in which the Fougera Company finds itself. It is not at fault and it has had no warning. It has bought drugs which, from their long years of use, may fairly be presumed to be ligitimate articles of commerce. Without warning and without fault, its right of property has been forfeited. There must be many others in a like predicament.

Health—power of board—prohibiting sale of medicine.

We do not need to say that there is no power, even in the legislature, to work this forfeiture. On the one side stand such cases as Wynehamer v. People, 13 N. Y. 378; People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965, and People ex rel. Isaacs v. Moran, 206 N. Y. 670, 99 N. E. 1115; on the other, such cases as Halter v. Nebraska, 205 U. S. 34, 40, 51 L. ed. 696, 700, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525; Rast v. Van Deman & L. Co. 240 U. S. 342, 363, 60 L. ed. 679, 689, L.R.A. 1917A, 421, 36 Sup. Ct. Rep. 370,

Ann. Cas. 1917B, 455; Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 34 L.R.A.(N.S.) 671, 55 L. ed. 297, 31 Sup. Ct. Rep. 265, and Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. See also Freund on the Police Power, §§ 537, 538. Where the line is to be drawn will have to be determined when the question arises. At present, the question is not here. What is before us now is not an act of the legislature. It is an ordinance of the department of health. The ordinance has been adopted under a general grant of power (N. Y. City Charter, § 1172) to publish "additional provisions for the security of life and health in the city of New York." We are satisfied that this grant of power was not intended to embrace the prohibition of all traffic in existing stores of merchandise. Stubbe v. Adamson, 220 N. Y. 459, 116 N. E. 372; Fire Department v. Gilmour, 149 N. Y. 453, 52 Am. St. Rep. 748, 44 N. E. 177; Haynes v. Cape May, 50 N. J. L. 55, 13 Atl. 231; Merrill v. Monticello, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; People ex rel. Olean v. Western New York & P. Traction Co. 214 N. Y. 526, 528, 108 N. E. 847. It would be different if only noxious merchandise were affected. But the ordinance is not so limited. It strikes the good and the bad alike. The board of health is a subordinate agency of local government. Wide powers of regulation it doubtless has. N. Y. City Charter, supra; General City Law (Laws 1913, chap. 247), § 20, subd. 13. But the power to regulate is not always equivalent to the power to destroy. Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, L.R.A. 1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; Adams v. Tanner, 244 U. S. 590, 594, 61 L. ed. 1336, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973. Authority more specific must be found before a great mass of property, commonly reputed useful, may be declared contraband altogether, and excluded from the field of commerce.

The defect is so far-reaching, it is so deeply wrought into the substance of the law, that there is no opportunity to sever the good from the bad. United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644, and cases cited; People ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Butts v. Merchants' & M. Transp. Co. 230 U. S. 126, 136, 57 L. ed. 1422, 1426, 33 Sup. Ct. Rep. 964; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 530, 51 L. ed. 298, 305, 27 Sup. Ct. Rep. 153; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; People ex rel. Isaacs v. Moran, 206 N. Y. 670, 99 N. E. 1115. To do that, we should have to rewrite the ordinance. It does not classify or except or excuse. People v. Beakes Dairy Co. 222 N. Y. 416, 432, 119 N. E. 115. It touches all who sell. It does not err in some minor incident, or in its effect upon a few. Its fault is inherent in its scheme, and extends to many. There must be few druggists who can state the composition of every patent medicine upon their shelves. Even in such circumstances, the courts wait before pronouncing a law void until someone within the range of the illegal provision has set their processes in motion; but, when such a one has invoked their aid, they do not say that an inseparable law is void as to him and valid as to others. They strike it down altogether. People ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736. If less is ever done, it is only where the result of severance is to leave the substance unimpaired. Robert Dollar Co. v. Canadian Car & Foundry Co. supra. There can be no severance here that does not mutilate and destroy.

On the ground that the ordi-

nance in its application to merchandise previously acquired fails to save the rghts of dealers unable to comply with its requirements, we hold that the board of health has exceeded the powers delegated to it.

The judgment should be affirmed, without costs to either party.

Hiscock, Ch. J., and **Cuddeback** and **Hogan**, JJ., concur. **Chase, Collin**, and **McLaughlin**, JJ., being of the opinion that the ordinance and regulations have a relation to the public health too remote to constitute them constitutionally valid, concur in the result only.

ANNOTATION.

Power to compel disclosure of ingredients or formula of patent or proprietary medicine.

Requiring the disclosure of the formula of a patent or proprietary medicine is regarded as a proper exercise of the police power in the reported case (E. FOUGERA & CO. v. NEW YORK, ante, 1467) the only objection to the regulation sustained by the court being as to its application to compounds purchased and held in stock by the dealers, prior to its passage.

In Savage v. Jones (1912) 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, involving the validity of a statute providing for the inspection and analysis of concentrated live stock foods, and requiring the filing with the state chemist of an affidavit containing, among other information, the ingredients from which the feeding stuff is compounded, and the minimum percentage of crude fat or crude protein and the maximum percentage of crude fiber contained in such article, the manufacturer contended that his article was a proprietary or patent medicine and not a food, but the pleading was such that the question was raised as to the constitutionality of the statute when construed as applying to the compound in question as a food. As to the claim that the disclosure to competitors of the proportion of the ingredients and the manner of combination would seriously injure the business of the manufacturer, the court, in sustaining the validity of the law, said: "The bill complains of the injury to manufacturers if they are forced to reveal their secret formulas and processes. We need not here express an opinion upon this question, in the breadth suggested, as the statute does not compel a disclosure of formulas or manner of combination. It does demand a statement of the ingredients, and also of the minimum percentage of crude fat and crude protein, and of the maximum percentage of crude fiber, a requirement of obvious propriety in connection with substances purveyed as feeding stuffs." R. L. S.

J. O. McKINNEY, Respt.,

v.

CHARLES J. HINDMAN et al., Appts.

Oregon Supreme Court (In Banc) —December 11, 1917.

(86 Or. 545, 169 Pac. 93.)

Estoppel — statement after acquisition of title by stranger.

1. A statement by one claiming title to real estate, made to another after the latter has purchased a title from a stranger, that the former will waive his claim, does not, although acted upon to the extent of making improvements on the property, amount to an estoppel to claim the title.

[See note on this question beginning on page 1482.]

Adverse possession — grant by state.

2. Adverse possession for the statutory period under a grant from the state vests title in the grantee.

Evidence — burden of proof — estoppel.

3. To constitute an estoppel, conduct should be clearly established by a preponderance of the evidence.

APPEAL by defendants from a decree of the Circuit Court for Crook County in favor of plaintiff in an action brought to quiet title to certain real estate. *Reversed.*

Statement by **Burnett, J.:**

This is a suit to quiet title to the northwest quarter of the southwest quarter of section 3, township 15 south, range 10 east, Willamette meridian, in Crook county, of which the plaintiff alleges himself to be the owner and in possession. The complaint is traversed by the answer of Charles J. Hindman and Martha Hindman, his wife. For an affirmative defense they allege the following: "That the defendant Charles J. Hindman is the owner in fee simple to the premises described in plaintiff's complaint; that he and his predecessors in interest herein during the period of more than thirty years last past, and openly, notoriously, peaceably, adversely, uninterruptedly, exclusively, and continuously, under a claim of right thereto, and under a deed from the state of Oregon, with notice and knowledge to all and everybody, and adversely to all the world, been in possession of the said premises; that this defendant, Charles J. Hindman, has, in good faith, improved the said premises by fencing, clearing, and cultivating said premises; that he has secured a valuable water right sufficient to irrigate 23½ acres of said premises, which water right, as confirmed by the board of control, dates from 1871."

This quoted new matter of the answer is denied by the reply, which further avers: "That the defendants ought not to be permitted to deny the title of the plaintiff to the real property described in plaintiff's complaint herein, nor ought the defendants to be permitted to assert any right, title, or interest to said premises in themselves to said premises; nor ought the defendants to be permitted to assert or claim title to said premises by adverse possession; for the reasons that the defendants have admitted to plaintiff since he came into the possession of said premises and prior thereto that they, the defendants, had no title or claim to said premises, and that the plaintiff and his predecessors in title and interest were the owners thereof, and the defendants have asserted no title to said premises, and recognized the plaintiff as the true owner thereof, and by their acts have led this plaintiff to believe that they had no right, interest, or title to said premises, and intended to claim none thereto, in reliance upon which acts and representations of said defendants, and with the knowledge of said defendants, this plaintiff procured title to said premises from the true owners for a valuable consideration and at an expenditure of a large sum of money, and has placed valuable improvements thereon, and acquired title to 80 acres of land adjoining said premises, the value of which depends upon plaintiff's title to the premises mentioned herein, and plaintiff has sowed valuable crops thereon and otherwise altered his position in reliance upon the representations and acts of said defendants, and he would be irreparably and irrevocably injured and damaged should he be deprived of the premises described in the complaint herein."

The testimony was taken before a referee, upon consideration of which the circuit court made findings of fact, reached a conclusion of law that the defendants were estopped from asserting any title in

the realty mentioned, and entered a decree in favor of the plaintiff, quieting his title. The answering defendants appealed.

Mr. W. B. Daggett, for appellants:

Having gained title by adverse possession, defendants are not by their conduct, acts, and representations, estopped from claiming title to the said premises.

Swift v. Mulkey, 17 Or. 532, 21 Pac. 871; Spath v. Sales, 70 Or. 269, 141 Pac. 160; Sharpe v. Catron, 67 Or. 368, 136 Pac. 20; Joy v. Stump, 14 Or. 361, 12 Pac. 929; Rowland v. Williams, 23 Or. 515, 32 Pac. 402; Gardner v. Wright, 49 Or. 609, 91 Pac. 296; State v. Portland General Electric Co. 52 Or. 502, 95 Pac. 722, 98 Pac. 160; Falls City Lumber Co. v. Watkins, 53 Or. 212, 99 Pac. 884; McCall v. Powell, 64 Ala. 254; Behrens v. Germania F. Ins. Co. 64 Iowa, 19, 19 N. W. 838; Straus v. Minzesheimer, 78 Ill. 492; Crossan v. May, 68 Ind. 242; Garlinghouse v. Whitwell, 51 Barb. 208; Mayo v. Cartwright, 30 Ark. 407; Neal v. Gregory, 19 Fla. 356; Mason v. Philbrook, 69 Me. 57; Sulphine v. Dunbar, 55 Miss. 255; Rice v. Dewey, 54 Barb. 455; Knouff v. Thompson, 16 Pa. 357; Kingman v. Graham, 51 Wis. 232, 8 N. W. 181; Columbia Land & Invest. Co. v. Van Dusen Invest. Co. 50 Or. 59, 11 L.R.A.(N.S.) 287, 91 Pac. 469; Northwestern Mut. L. Ins. Co. v. Amerman, 119 Ill. 329, 59 Am. Rep. 799, 10 N. E. 225; Davidson v. Young, 38 Ill. 152; Wolf v. Zimmerman, 127 Ind. 486, 26 N. E. 173; Dodge v. Pope, 93 Ind. 480; Krug v. Davis, 101 Ind. 75; Jones v. Parker, 67 Tex. 76, 3 S. W. 222; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674; Mason v. Harper's Ferry Bridge Co. 28 W. Va. 639; Edwards v. Dickson, 66 Tex. 613, 2 S. W. 718; McNeely v. South Penn Oil Co. 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508; Bolter v. Garrett, 44 Or. 304, 75 Pac. 142; Marshall v. Williams, 21 Or. 268, 28 Pac. 139.

Mr. Lake M. Bechtell, for respondent:

In setting up the question of adverse possession, every presumption is to be made in favor of the legal title, and all the elements must be proved. Altschul v. O'Neill, 35 Or. 202, 58 Pac. 95; Washburn v. Cutter, 17 Minn. 361, Gil. 335; Jasperson v. Scharnikow, 15 L.R.A.(N.S.) 1191, note.

Intention of occupant is a material element in determining whether or not possession is adverse in the sense that the true owner is ousted.

Beale v. Hite, 35 Or. 179, 57 Pac. 322, 58 Pac. 102; Jasperson v. Scharnikow, 15 L.R.A.(N.S.) 1205, note; Thomas v. Spencer, 66 Or. 359, 133 Pac. 822; Springer v. Young, 14 Or. 285, 12 Pac. 400.

The principle of equitable estoppel applies.

2 Boone, Real Prop. pp. 634–636, § 253; House v. McCormick, 57 N. Y. 310; Winchell v. Edwards, 57 Ill. 41; Snyder v. Charleston & S. Bridge Co. 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616, 10 R. C. L. 693; Rogers v. Portland & B. Street R. Co. 100 Me. 86, 70 L.R.A. 574, 60 Atl. 713; Bloch v. Sammons, 37 Or. 600, 55 Pac. 438, 62 Pac. 290; Herman, Estoppel 2d ed. p. 419; Knauf & T. Co. v. Elkhart Lake Sand & G. Co. 153 Wis. 306, 48 L.R.A. (N.S.) 756, 141 N. W. 701; Ford v. Loomis, 33 Mich. 121; Bigelow, Estoppel, 2d ed. 480; 16 Cyc. 765; Burdick v. Michael, 32 Mich. 246; Gregg v. Wells, 10 Ad. & El. 90, 113 Eng. Reprint, 35, 2 Perry & D. 296, 8 L. J. Q. B. N. S. 193; Curtis v. LaGrande Hydraulic Water Co. 20 Or. 34, 10 L.R.A. 484, 23 Pac. 808, 25 Pac. 378; Morrison v. Winn, 18 Utah, 15, 54 Pac. 761; 2 Boone, Real Prop. p. 253 a; Fisher v. Mossman, 11 Ohio St. 42; Odlin v. Gove, 41 N. H. 477, 77 Am. Dec. 773; Woods v. Wilson, 37 Pa. 379; Foster v. Bigelow, 24 Iowa, 379; 1 Story Eq. § 389; Chapman v. Chapman, 59 Pa. 214; Crest v. Jack, 3 Watts, 238, 27 Am. Dec. 353.

Mr. Justice **Burnett** delivered the opinion of the court:

1. The parties agreed before the referee that the plaintiff's paper title was deraigned from a United States patent covering the land in dispute, issued to the Willamette Valley & Cascade Mountain Wagon Road Company under date of February 10, 1894, and recorded in the county records November 26, 1895, his immediate grantor being the Oregon & Western Colonization Company by deed of July 28, 1915, recorded August 9, of that year. It was also stipulated that the defendant Samuel M. W. Hindman received a deed from the state of Oregon covering the land, dated October 30, 1884, and recorded on No-

vember 20th of the same year, and that thereafter Charles J. Hindman obtained a sheriff's deed for the premises on execution against Samuel, dated February 5, 1902, and recorded March 17th of the same year. It appears in evidence practically without dispute that Samuel M. W. Hindman, the father of the defendant, entered upon the land in question in the late autumn of 1870; that it was a tract selected as swamp land by the state authorities, and that he purchased the same from the state of Oregon, taking the deed of October 30, 1884, as stated; that he remained in possession of the realty, cultivating and draining it, and occupied it as his own until succeeded by his son under the sheriff's deed already noted, and the latter in turn continued in occupancy until 1912. On April 5th of that year the Oregon & Western Colonization Company having come into the title of the Willamette Valley & Cascade Mountain Wagon Road Company, contracted to sell the whole southwest quarter of section 3 to Berta Schonleber. On February 15, 1913, the plaintiff purchased the estate of Mrs. Schonleber under her contract, and entered into possession of the land, assuming the obligation of her covenant. It is clear that the deed from the state of Oregon to the answering defendants' predecessor in interest constituted color of title. In that respect the instrument is valuable only as showing the extent of the holding of the Hindmans, and to relieve them from the necessity of strictly proving the boundaries of their actual tenancy. In other words, by the color of title they are excused from establishing exact possessio pedis. It has been decided many times in this state that where one holds the exclusive possession of land under color of title, claiming adversely against the whole world to be the owner thereof for ten years continuously, he becomes vested with the fee-simple title. Caufield v. Clark, 17 Or. 473, 11 Am. St. Rep. 845, 21 Pac. 443; Dunnigan v. Wood, 58 Or. 119, 112 Pac. 531; Stout v. Michelbook, 58 Or. 372, 114 Pac. 929; Parker v. Wolf, 69 Or. 446, 138 Pac. 463. The evidence clearly establishes that the Hindmans come within the reason of this rule, and that if nothing else were shown, they became the owners of it on account of having held possession of the land for so long a period. The plaintiff's predecessors in estate could have begun ejectment against the Hindmans at least upon the issuance of the patent on February 10, 1894, but no steps were taken against them until this suit to quiet title. They consequently became vested with the fee-simple title, as stated by the precedents noted.

Adverse possession—grant by state.

2. It is contended, however, that the defendants are estopped to claim any title on account of their conduct. It becomes necessary, therefore, to rehearse some of the testimony. The plaintiff, as a witness in his own behalf, declares that he became acquainted with the land in 1906, when he was visiting in that country, and that Mr. Hindman had showed it to him and stated that he himself owned the property. The plaintiff says he bought the land of the Schonlebers February 15, 1913, and took possession immediately. He states that they had never cultivated it to his knowledge; that when he bought he understood Hindman had a claim against the property; that he interviewed him later in the spring, and that the latter seemed to think the company should have given him the preference in acquiring its title.

He was then asked this question by his counsel:

State generally what your relations were with Mr. Charles J. Hindman and Martha Hindman, S. M. W. Hindman, relative to this land, and your occupancy of the same, and the improvements thereon,—anything in connection with that.

He answered: Well, in connection with this talk, at the time Mr. Hindman told me he had a deed from the state leading back several years for that land under Swamp Act, I believe, and of course in the conversation I simply remarked to him then, "Well, there is no occasion for us to have any trouble in connection with this matter. We will be friends, and if you consider you have a claim there, I would ask you, as a favor to bring it to an issue at once, or as soon as you can." Mr. Hindman simply stated that he would see his attorney in relation to the matter and would later advise me as to what he would do. And after we talked, a week or ten days, he drove up to the store and called me out of my place of business and simply stated, he says, "Mack, I have decided to drop that matter," and he says, "You can go ahead."

Q. Did he say he had no title to the land?

A. No, sir, he didn't say that directly; he thought that possibly he might beat the case, but went on to state it would be a long drawn out and expensive proposition and didn't feel justified in doing it.

On cross-examination, in speaking of his purchase from Mrs. Schonleber, he testified as follows:

Q. Did she tell you anybody else claimed the premises?

A. No, she didn't.

Q. Did you ask her about Hindman when she offered to sell to you, didn't you inquire if Hindman owned these premises?

A. No, sir.

Q. Yet, Mr. Hindman told you six years before that he owned the land?

A. Yes, I knew he claimed the premises.

On cross-examination the defendant Hindman, as a witness in his own behalf, testified thus:

Q. Isn't it a fact you came to Mr. McKinney since he has been there and told him you were not going ahead to claim any title to this land?

A. No, sir, I didn't.

Q. You do not remember of any such conversation?

A. Not that effect. I told him several times if I could hold that land I was going to do it.

Q. You knew he was going ahead and use this land?

A. I knew he was plowing a ditch and put it in there I think two years.

Q. You didn't claim title during that time?

A. I told him whenever I got around to it and could find out what I could do in regard to it I would do so.

Q. You never did anything?

A. No, never was able to both financially and physically.

Q. Did you not know that Mr. McKinney was depending on what you said and what you were doing to give him exclusive (title) of the land?

A. No, he told me he was depending on the road company and they was going to defend that title to the finish.

3. McKinney, for himself, on the one hand, and Hindman for himself, on the other, gave practically all the evidence on the question of estoppel. On this branch of the case the issue is whether the conduct of Hindman amounts to an estoppel, and further, whether estoppel is sufficiently proved. The two witnesses are strongly at variance with each other in their statements. Conduct amounting to an estoppel should be clearly established by a preponderance of the testimony. As to that, we conclude that the plaintiff has not made any stronger case than the defendants. The former contends substantially that Charles J. Hindman waived his title to the land and permitted the plaintiff to go ahead with his improvement; while Hindman maintains that, owing to ill health and insufficient finances, he was un-

Evidence—burden of proof—estoppel.

able to take active measures, but that he always informed the plaintiff of his purpose to hold the land if he could. Considering the two witnesses of equal credibility, the plaintiff fails to make out a preponderance of the testimony.

4. Again, the question is about the title to the land. Out of the plaintiff's own mouth we learn that he knew of Hindman's claim and had known it for several years; that, equipped with this knowledge, and without consulting Hindman, he acquired the title of Mrs. Schonleber and assumed her contract to buy the land, thus committng himself to the process of acquiring title without any inducement whatever from the defendants. It is clear that the plaintiff was not thus far influenced to act by anything that Hindman said or did. By the least inquiry he could have ascertained the extent of the latter's claim and would have discovered a state of facts conferring upon the defendant the fee-simple title to the land. He now relies upon what Hindman said to him after he had contracted to buy the land. In other words, he undertakes to devest the latter of title to realty by his verbal utterances. In Dechenbach v. Rima, 45 Or. 500, 78 Pac. 666, Mr. Justice Bean says: "Estoppel in pais arises from misrepresentation or concealment of a material fact, and rests on the ground that it would be a fraud in a party to assert what his previous conduct has denied, when others have acted on the faith of that denial. Such an estoppel can rarely arise unless it has reference to a present or past state of things, or relates to an intended abandonment of an existing right; and it has no application to a mere breach of a promise or covenant relating to the future."

The plaintiff is charged with a knowledge of the law that ordinarily the title to real property cannot be acquired except by deed, and that a contract for the sale of land is void unless the same or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged. In the case last cited the contention of the defendant against an action of forcible entry and detainer was that he bought out a previous tenant on the assurance of the plaintiff (landlord) that the latter would make him a lease of the property for three years. The opinion goes on to say: "The only contention is that in making such purchase he [defendant] relied on the verbal promise of the plaintiff that, if he would buy the business, the plaintiff would thereafter execute to him a lease of the premises for more than one year. This contract was void by the Statute of Frauds, and is therefore void for all purposes. It conferred no right upon the defendant and created no obligation on the part of the plaintiff."

The doctrine of that case is applicable to this. As respects the title to the land, which is the only thing here in question, the plaintiff appears to have acted independently of anything stated by Hindman, and to have embarked upon his enterprise and committed himself irrevocably to it before he consulted Hindman in any particular. Not having been influenced as to the acquisition of title by any conduct on the part of the holder of the title by prescription, the latter is not estopped to assert the truth. All that seems to have been done by the plaintiff after his conversation with Hindman was to expend about $150, as he says, "in connection with building and equipping a ditch and dam site on Squaw creek for part of the land it covers and fencing and plowing; the cultivation and handling of that land, crops and so forth."

How much of this, if any, was permanent improvement, does not appear. Neither is it disclosed that he lost anything on account of it. His venture of irrigating and farm-

ing Hindman's land may have been profitable, but certainly cannot amount to an estoppel as against the latter. In short, the plaintiff has not made out by a preponderance of proof his contention about the statements upon which he relies. Further, whatever they may have been, they were made after the plaintiff had embarked upon the purchase of the land, to which course the conduct of Hindman did not influence him. The decree of the Circuit Court, therefore, must be reversed; and one here entered quieting the title of the property in the defendant Charles J. Hindman. Reversed. Decree rendered.

Estoppel—statement after acquisition of title by stranger.

ANNOTATION.

Estoppel to assert title to real property by conduct subsequent to contract between third persons.

It is a familiar principle that one of the necessary elements of an equitable estoppel is that the party relying on it must have been misled to his injury by the conduct or representations of the one against whom it is sought to be invoked. Accordingly, admissions made after a transaction is complete, which they did not invite or influence, do not ordinarily operate as an estoppel, but are mere evidence of the facts admitted, subject to contradiction or explanation. Compare the remark in the reported case (McKINNEY v. HINDMAN, ante, 1476) that "whatever they [defendant's representations] may have been, they were made after the plaintiff had embarked upon the purchase of the land, to which course the conduct of Hindman did not influence him."

At the same time a disclaimer of title after a contract for the sale of real property had been entered into, or a silence under circumstances creating a duty to speak, may operate to the prejudice of the vendee by causing him to lose the opportunity of obtaining indemnity from his vendor, or to alter his position by laying out money in permanent and valuable improvements, and so constitute the basis of an estoppel.

The inquiry in each case must be, first, whether the conduct in question was such, assuming the other elements of estoppel to exist, as to create an estoppel; second, whether, under the circumstances, the representation or failure to speak has operated to the vendee's prejudice.

It is not enough to create an estoppel that the purchaser of property has omitted to rescind; he must show that he has been or will be injured by his omission to act. Stutsman v. Thomas (1872) 39 **Ind.** 384.

A question likely to arise in the class of cases under discussion is whether the fact that the vendee has gone on and completed his payments under the contract subsequently to the occurrence forming the basis of the alleged estoppel may be considered as such an alteration of his position in reliance thereon as to supply the necessary element of prejudice. Although it is doubtless true that the doctrine of estoppel has no application in cases where the representations which have claimed to give rise to it tend only to induce the party to do some act he is already legally bound to do (see Western Land Asso. v. Banks (1900) 80 **Minn.** 317, 83 N. W. 192, infra), yet if the conduct of the claimant has deprived the vendee of the opportunity to obtain indemnity from his vendor, there may be an estoppel.

In Eareckson v. Rogers (1910) 112 **Md.** 161, 75 Atl. 513, the owner of premises covered by a mortgage upon which interest was in arrears, and who had given a note for the amount of the unpaid interest, sold it under a contract to another, who bought subject to the principal of said mortgage, with interest from the time possession was taken by him, up to which time the mortgagor was to pay the interest on the mortgage. Before com-

pleting his payments the purchaser learned of the unpaid interest, and, seeing the mortgagee thereafter, asked him what he had done about the claim, and he replied, "that is all right." He explained to the mortgagee that he had not then taken his deed, and asked him if it would be all right; he replied "certainly." Thereafter, and sometime before the mortgagee asserted his claim, the original mortgagor died. The purchaser testified that if he had known, when he had the conversation above mentioned with the mortgagee, that there was any claim for interest in arrears on the mortgage, or any lien on the property therefor, he would not have settled with his vendor and taken his deed without settling the mortgagee's claim. It was held that as the conduct of the mortgagee had induced the purchaser to pay for the property supposing that the overdue interest was not a lien on it, he was estopped to enforce payment of the same as a lien under the mortgage.

In Baron v. Ward (1915) 144 Ga. 472, 87 S. E. 396, it appeared that A executed to B a security deed conveying a number of lots of land as security for a loan, which was duly recorded. Subsequently, A sold one of the lots to W who did not have actual notice of the security deed. A reported the sale to B, stating that B could either take t he purchase price and credit the note, or let the note continue for the original amount. B replied that he would release the lot and did not care for any part payment, but would allow the note to continue in force for the full amount. On the strength of this statement A told W the lot was free from all encumbrances and liens, and believing and relying on the statement by A, W paid A, the agreed purchase price for the lot. Under these circumstances it was held that B would be estopped, as against W, from asserting against the lot a lien based on the security deed.

In Dickerson v. Colgrove (1879) 100 U. S. 578, 25 L. ed. 618, it appeared that the owner of land died leaving a daughter and a son as his only heirs at law; that subsequently the daughter and her husband conveyed by warranty deed the entire premises to a third person, who, thereafter, learning of the existence of the son, who lived in a distant state, caused a letter to be written to him to learn whether he made any claim to the premises; that the son thereupon addressed a letter to his sister, wherein he disavowed in strong terms the intention ever to assert such a claim, and the contents of this letter subsequently came to the knowledge of the sister's grantee, who thereafter conveyed to the defendant by warranty deed. About nine years thereafter the son quitclaimed his undivided one-half interest in the premises to other parties, who thereafter conveyed to the plaintiff, who instituted a suit after the daughter's grantee and persons claiming under him had been in possession eighteen years and eleven months. Under these circumstances it was held that, as the daughter's grantee had been lulled into security and had taken no measure to perfect his title nor to procure any redress from his grantors, who had conveyed and been paid for the whole of the property while they owned but the half, there had been such a change of position in reliance upon the son's letter as to create an equitable estoppel.

A decision which, although not involving title to real property, may be of interest in this connection, is Goeing v. Outhouse (1880) 95 Ill. 346, in which the question was whether a landlord was entitled to enforce his lien for rent as against the purchaser of the tenant's part of a crop raised on the leased premises. It appeared that the purchaser, after buying the half interest in the crop, went to the landlord's house and told him that he had bought such interest, and the landlord said that that was all right, that he was satisfied, and that he had settled with the tenant. It was contended that as this conversation was after the purchase, no waiver could be predicated upon it, but it appearing that the purchaser had not paid the tenant for the crop at the time of this conversation, it was held to be

a case where the doctrine of estoppel by conduct and waiver would apply.

In Western Land Asso. v. Banks (1900) 80 Minn. 317, 83 N. W. 192, it appeared that the plaintiff, who was the owner of a tract of land, and who had theretofore conveyed to a railroad company a right of way across the same, caused it to be platted and lots to be laid out with reference to such right of way, a lot so conveyed to defendant being bounded thereby on the southeast. The railroad track was constructed upon and extended along an avenue until it reached said lot, when it departed from a direct line and passed upon what would have been included in the lot had the railroad track continued upon the avenue. By reason of this diversion of the road from the street to and upon the adjacent land, said railroad right of way was between said lot and the avenue. After defendant had entered into a contract to purchase such lot, she learned that some other person was laying claim thereto, and called upon plaintiff's agent, in order to ascertain the facts with respect to such claim. At this time the agent represented to her and induced her to believe that the line of the lot so contracted to be sold to her would extend to the street or avenue as soon as the railroad tracks should be removed. She claimed to have relied upon such representations in completing the purchase of the lot, and insisted that plaintiff should be estopped from asserting title to the strip of land occupied by the railroad as against her; but the court held that as, at the time the defendant made the contract for the purchase of the lot, she knew the conditions surrounding it,—the fact that the railroad tracks extended between the same and the avenue, that the railroad company was in the actual possession of the tracks in question, and, as the records informed her, that it held a legal title thereto,—there was no estoppel, the court saying: "The evidence conclusively shows that defendant was in no way prejudiced by the representations, conceding that they were made. They were not made as a part of the transaction resulting in the contract of purchase. They were not made for two months thereafter. There can be no question but that such contract was valid, and obligatory upon both parties. It was in the usual form of such contracts, and signed, as required by statute, by the party making the sale, plaintiff herein. Plaintiff could have enforced the contract against her, and she could have enforced it against plaintiff. The doctrine of estoppel has no application in cases where the representations which are claimed to give rise to it tend only to induce a party to do some act he is already legally bound to do. 11 Am. & Eng. Enc. Law. 439; Organ v. Stewart (1875) 60 N. Y. 420; King v. Duluth, M. & N. R. Co. (1895) 61 Minn. 482, 63 N. W. 1105; Gulf, C. & S. F. R. Co. v. Gordon (1888) 70 Tex. 80, 7 S. W. 695. And, as defendant was legally bound to complete the purchase of the lot under the terms of the contract, she was in no way prejudiced by the falsity of the representations, and no estoppel arises in her favor. Injury resulting from a reliance on the representations must be shown in all cases."

In Rainey v. Hines (1897) 120 N. C. 376, 27 S. E. 92, A and B having agreed to exchange lands, B, without obtaining a deed, sold the land to X, who gave notes and a mortgage on the land as security. B transferred the notes and mortgage to Y, who foreclosed the mortgage, but, before the sale, went to A, who was not a party to the foreclosure suit, and inquired whether he had any claim against the land; and upon his assurance that he had no claim, and upon his advice to "go ahead and sell the land," caused it to be sold and bought it in, though he knew that both B and X were insolvent and that B had never had a deed from A. It was held that, as no injury had resulted to Y from the representations of A, A was not estopped from bringing suit to recover possession of the land and for a sale thereof to reimburse himself for expenditures he had been compelled to make in clearing the title to the land which he had taken in exchange from B.

In Quaschneck v. Blodgett (1916) 32 N. D. 603, 156 N. W. 216, where,

after entering into a contract to sell certain land, the vendee under which went immediately into possession, the vendor gave a mortgage thereon, it was held that the vendee was not estopped from questioning the validity of such mortgage because of his having paid certain instalments of interest thereon, where it appeared that these interest payments were made at his vendor's request, who credited the same upon the contract, and also that they were made while tentative negotiations were pending with a view to the vendee's assuming such mortgage in consideration of his vendor's deeding to him certain other property in settlement; one of the essential elements constituting an estoppel, namely, that the party relying thereon has suffered prejudice by the act of the other party, being wholly lacking.

Although the case is not within the scope of this note, the reader may be interested to know that it has been held that one who has been induced to buy land by another's disclaimer of title may avail himself of the defense of estoppel against the assertion of such title, even though, at the time of such assertion, he may not have fully paid for the land. Mayer v. Ramsey (1876) 46 Tex. 371. E. S. O.

CHARLES W. MORSE et al., Plffs. in Err.,

v.

TILLOTSON & WOLCOTT COMPANY.

United States Circuit Court of Appeals, Second Circuit—June 10, 1918.

(253 Fed. 340.)

Contract — condition which law would imply.

1. An acceptance which in terms is conditioned on what the law implies is a good acceptance, since it introduces nothing new into the contract.

[See note on this question beginning on page 1508.]

Same — meeting of minds — provision as to title.

2. A provision in an acceptance of an application for loans on vessels to make the advance when the lender's attorney advises him that the title is good does not introduce a new term which prevents a meeting of minds or the formation of a contract enforceable against the borrower, although the abstract is never furnished or the title passed upon.

Promoter — liability on contract.

3. Persons who negotiate a loan for a corporation to be formed, and who cancel the contract after the formation of the corporation without its authority, are bound personally on the contract.

Appeal — general exception — sufficiency.

4. Objections to a lack of definiteness in instructions is not open on appeal if the exception included other matters as well as such objections, without calling the court's attention specifically to the want of definiteness.

Pleading — impossibility of performing contract.

5. Impossibility of performance of a contract must be pleaded to be relied upon as a defense to an action for its breach, except so far as the fact of such impossibility may bear upon the question whether or not a contract was in fact entered into.

ERROR to the District Court of the United States for the Southern District of New York, to review a judgment in favor of plaintiff in an action brought to recover damages for alleged breach of a contract to purchase notes of a corporation to be organized by defendants. *Affirmed.*

Statement by **Rogers,** Circuit Judge:

The plaintiffs in error, defendants below, will be hereinafter referred to as defendants, and the defendant in error, plaintiff below, will be referred to as plaintiff. The plaintiff is a corporation organized under the laws of the state of Ohio, with its place of business in the city of Cleveland. The defendants are citizens of the state of New York and residents of the southern district thereof.

The action is for breach of contract. The complainant alleges that the plaintiff agreed to purchase notes of a corporation to be organized by defendants, which notes were to amount to $555,084, for the price of $518,000, and it alleges that the defendants undertook that the transaction should be carried out by the corporation, and afterwards repudiated the agreement.

The answer is a general denial, except it states that "there were negotiations between the plaintiff and the defendants, for the purpose of agreeing, if possible, upon a contract under which the plaintiff was to make a loan upon the credit of some or all of the ships named in the complaint; but the plaintiff and the defendants failed to agree upon the terms of such loan, and no contract was entered into between the plaintiff and the defendants with respect thereto."

The case was tried before Judge Grubb and a jury, and a verdict was returned for the plaintiff in the sum of $31,416, with interest at 6 per cent from March 16, 1916. The assignment of errors covers 27 printed pages. The complaint states three causes of action.

The first cause of action as stated in the complaint is that in the months of January and February, 1916, the defendants negotiated with the plaintiff for a loan to be made by it to the United States Steamship Company, or another corporation which was then being or had already been organized by the defendants and certain associates of the defendants, for the purpose of owning the steamships Huron, William Castle Rhodes, St. Paul, and Minneapolis, said loan to be evidenced by notes secured by mortgage upon said vessels; it was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation, amounting to $280,000, in consideration of a loan by the plaintiff to such corporation of $266,000, bearing interest at 6 per cent per annum, and secured by blanket mortgage upon said four vessels; that it was further agreed that the notes should mature in the amount and at the dates specified; that it was further agreed that the said notes should be executed by said United States Steamship Company, or other corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed securing same by such corporation, covering all of said vessels, and that there should be proper insurance covering the period of transit to the coast, rebuilding and refitting of the said ships upon arrival at the coast, and for all subsequent operations; that defendants repudiated their agreement on March 16, 1916, and plaintiff has been prevented by the defendants from making such loan to the said United States Steamship Company, or any other company owning and operating said steamships; that the plaintiff has been damaged in the sum of $14,000, being the profit or commission that would have been earned by it upon said loan.

The second cause of action as stated in the complaint, repeating the previous allegations, alleges that during the pendency of the negotiations the defendant applied for a further loan to be made on the security of three other vessels, to wit, McCullough, Owego, and Chemung, said loan to be evidenced by notes secured by mortgage upon said vessels; that it was thereupon agreed between the plaintiff and defendants that the plaintiff should pur-

chase notes of such corporation, or other corporation which was then being or had already been organized by the defendants for the purpose of owning the said steamships, amounting to $450,000, in consideration of a loan by the plaintiff to such corporation of $412,500, bearing interest at the rate of 6 per cent per annum and secured by blanket mortgage upon said three vessels; that it was further agreed that the said notes should mature in the amount and at the dates specified; that it was further agreed that the said notes should be executed by said United States Steamship Company or another corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed securing same by such corporation, covering all of said vessels, and that there should be proper insurance covering all the operations of said steamships; that in the course of the negotiations the steamship Chemung was sold, and, with the consent of the plaintiff, the stipulated notes were reduced by $175,000, making the net amount of the notes $275,000, and the net amount of the loan $252,084, yielding a profit or commission to the plaintiff of $22,916; that on March 16, 1916, the defendants repudiated their agreement and refused to complete the transaction, and the plaintiff has been damaged in the sum $22,916, together with the legal services and expenses incurred in the drafting of the mortgage of $443, making a total of $23,359.

The third cause of action as stated in the complaint, repeating the previous allegations, is that in the months of January and February, 1916, the defendants negotiated with the plaintiff for a loan to be made by it to the United States Steamship Company, or another corporation which was then being or had already been organized by the defendants and certain associates of the defendants, for the purpose of owning the steamships Huron, William Castle Rhodes, St. Paul, Minneapolis, McCullough, Owego, and Chemung, said loan to be evidenced by notes secured by mortgage upon said vessels. It was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation, of which the defendants should procure the execution, amounting to $730,000, in consideration of the loan by the plaintiff to such corporation of $678,500, bearing interest at 6 per cent per annum, and secured by blanket mortgage upon said vessels; that it was further agreed that the said notes should mature in the amount and at the dates specified. It was further agreed that the said notes should be secured by the said United States Steamship Company, or another corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed covering all of said vessels, and that there should be proper insurance covering the period of transit to the coast, rebuilding and refitting upon arrival at the coast of such ships as were upon the Great Lakes, and proper insurance for all of said vessels for their subsequent operations; that in the course of the negotiations the steamship Chemung was sold, and with the consent of the plaintiff the amount of the stipulated notes was reduced by $175,000, making the net amount of said notes $555,000, and the net amount of said loan $518,084; that the plaintiff has been damaged in the sum of $37,359, being the amount of the profit and commission which it would have earned upon said loan as reduced, as aforesaid, together with legal services and expenses incurred in the drafting of the mortgage of $443.

The plaintiff has obtained a verdict in the sum of $31,416 with interest at 6 per cent from March 16, 1916, and judgment has been entered in the sum of $33,810.51.

Argued before Rogers and Hough, Circuit Judges, and Learned Hand, District Judge.

Messrs. **Beck, Crawford, & Harris** and **Joseph W. Goodwin** for plaintiffs in error.

Messrs. **Everett, Clarke, & Benedict** for defendant in error.

Rogers, Circuit Judge, delivered the opinion of the court:

The action is upon a contract which, if made, was made by letters, by telephone communication, and by conversations. The existence of the contract was denied by defendants, who, admitting the negotiations, claimed that they never reached the stage where both parties agreed to the substantial terms, and the question whether the contract existed was therefore submitted to the jury under appropriate instructions. The parties began their negotiations on January 28, 1916, in Cleveland, Ohio, and on that day a letter was drawn up and signed by Mr. Tillotson, as president of the Tillotson & Wolcott Company, the plaintiff herein. The last paragraph of the letter read: "An acknowledgment of this letter will be considered an acceptance, and we will then proceed to have the appraisal and classification made."

At the end of the letter there is indorsed thereon on the following day the words: "Accepted January 29th, 1916. B. G. Higley,"—the latter being one of the defendants herein. The important portions of the letter are as follows:

"Referring to our conversation of this afternoon, we understand that you and your associates have recently purchased four steamers, formerly owned by the Mutual Transportation Company, for the sum of $560,000, the steamers being the Huron, the William Castle Rhodes, the St. Paul, and the Minneapolis, and that you propose to make such changes as are necessary to fit them for the ocean trade. . . . We further understand that these boats are to be placed under a new corporation and that you desire to borrow 50 per cent of their sound value as determined by appraisers of our selection and meeting with your approval, and for this purpose we will want Mr. Horatio N. Herriman of this city, or some representative of the American Ship Building Company.

"We are willing to make you a one year loan, to be dated February 1, 1916, payable with interest at the rate of 6 per cent per annum, payable semiannually, at the Guardian Savings & Trust Company, Cleveland, trustee, and to pay you ninety-five and accrued therefor—subject to the following conditions: (1) The mortgage is to be the usual marine form, and is to provide that full fire and marine and P. & I. insurance be carried. (2) The vessels are to receive Lloyd's classification before the loan is made. (3) All excess earnings, pending the payment of the loan, are to be deposited with the trustee. In order to save you interest, we are willing to have the mortgage provide that all or any part of the bonds may be called at 101 at any time after three months by giving thirty days' notice. (4) All proceedings incident to the issuance of the mortgage are to be under the supervision of Messrs. Goulder, White, & Gray of Cleveland, who will give us their opinion.

"We understand that your corporation will be affiliated with or a part of United States Steamship Company, recently organized under the laws of the state of Maine, and United States Steamship Company, organized under the laws of the state of New York. It is mutually agreed that we shall have the right to name a Cleveland director."

A few days after this letter was signed Tillotson learned that Charles W. Morse, the defendant, was associated with Higley in the enterprise, although Morse's name was not in the list of his associates as given in the above letter of January 28th. Thereafter most of the correspondence and telephone communications that Tillotson had concerning the matter were with Morse or his office, and there were a good many letters, a good many telephone messages, and some telegrams. On February 3d Higley gave a letter to a Mr. Sherman and a Mr. White, the president and treasurer of the several corporations which he stated had entered into contract for the

purchase of the steamships named, and he added: "They have the authority to execute necessary papers for obtaining mortgages on each of the several ships. We would thank you, if you could arrange to give them a check for 50 per cent of the valuation of each boat, you to be protected by bill of sale pending completion of mortgage. If you wish this all in one company, we have organized the United States Steamship Company of New York, and the matter can be arranged in a like manner through that corporation. I believe we have conformed to all you require in this matter and hope you will expedite the same."

On the same day Higley wrote a second letter which was as follows: "Confirming your letter of the 28th of January, the separate paragraphs contained therein regarding the four Lake boats: The first condition is all right. The second condition, we will need the loan before the Lloyds classification is made, but will not put the vessel to sea until it is classified. We believe that all other conditions are correct. Regarding the three other boats, the McCullough, Chemung, and Owego, the above conditions do not apply."

On February 4th Morse telegraphed Tillotson that he wanted to arrange loan Monday morning and "can give you bill of sale of each ship pending legal matters and insurance." And thereupon Tillotson wrote Higley: "It would be impossible for us to effect a loan on Monday for several reasons: (1) The trust deed and bonds could not be prepared so soon. (2) We have not yet received the details of the insurance policies. As I stated to you while you were here, this insurance matter is almost the most important thing pertaining to the loan. We must have a policy that is absolute in its terms and one which will meet the approval of our counsel. . . . It will be necessary, in our judgment, to have one mortgage on the three boats, and so, in order to save time, it may be best to use the United States Steamship Company of New York organization."

On February 18th Tillotson wrote Morse as follows: "Our position has been the same from the very first time that we talked to Mr. Higley, which was over two weeks ago. In order to hasten events, at your and Mr. Higley's request, Mr. House and I visited New York a week ago Wednesday; and in each instance we have maintained the same position, that we must have fleet mortgages, one on the Chemung, Owego, and McCullough, the other on the four other boats. Had the insurance been obtained, the papers could have been prepared before this and our money would have been forthcoming. In order to save time, now, we strongly recommend that you cause the company to be organized, with the men whose names you gave us while we were in New York as officers and directors; let this company take over the McCullough and the Owego, and the Chemung later when she is ready. Upon the approval of our counsel of the companies and the policies of the proceedings incident to the organization of your company, we will advance the proportion of funds required and later the proposition of the Chemung. This can all be done by Monday or Tuesday, and it is the only feasible way to do it. We had hoped that you would send someone here to-day authorized to act for you, in order to facilitate matters for you."

On the same day Morse wrote the complainant, stating that they had organized the United States Steamship Company, which would operate the vessels, and giving the names of the persons who had consented to serve on the board of directors and who were to be elected the next day. The letter continues: "We are sending to you to-night Mr. Hexamer, of Parsons & Company, who will hand you this letter and give you all the information regarding insurance. We can't see where we could need anything more, but pending these affairs we would like

to have $87,500 deposited to-morrow, and we will give you bill of sale from the Erie Railroad Company direct to you or anybody you may name for the ship, which guarantees title. If it is not direct from them, they must guarantee the title, as that is the agreement with us. We can fix the Owego at your convenience. The four Lake boats, Huron, Minneapolis, St. Paul, and William Castle Rhodes, we would like to take over next week and have you advance on the same. The Salvage Association will send a man to-morrow to Buffalo to get a valuation on the four ships that are there. For these four ships we paid $560,000, and we presume you will lend $280,000 on the four, which, with the $450,000 on the other boats, makes $730,000 altogether."

On February 21st Tillotson wrote Morse: "Your letter of February 17th was just received this morning. There are two things that I do not seem to be able to impress upon you. Our requirements are: First. That the issue is to be a fleet issue; that is, one mortgage of $450,000 on the three boats. We must know promptly what the name of the company will be which is to make the mortgage. Second. That the vessels must be insured to their full insurable value. Mr. Hexamer reports that he can probably place very close to the appraised value on each boat. Three weeks have elapsed since we first discussed this matter with Mr. Higley, and the bonds should have been out long before this. Mr. Hexamer has Mr. Goulder's requirements—one of them being that you will have to get the abstracts at once and send them on for approval. With the title established, the mortgage can probably be drawn within two or three days, and we will take one temporary typewritten bond pending the printing of the definite bonds. Full insurance must accompany; the insurance policies must be ready when the mortgage is ready for record."

On February 26th Morse wrote Tillotson: "We would like to borrow on these ships, on each ship or on the four ships together, as you prefer, one half of whatever they are valued at, not to exceed $70,000 on each ship, as we paid for them $140,000 apiece. We have already settled for the Owego and the McCullough, and made a payment on the Chemung, so we feel no hurry about these ships. The price we paid for the Owego is $325,000, for the McCullough $175,000, and for the Chemung $325,000. The Chemung will not be finished until the 1st of April. If you want to lend 50 per cent on these three ships for one year at 6 per cent and 5 per cent commission, we would take the money on all seven. We would agree to deposit with you monthly from the earnings of the vessel one twelfth of the amount of the loan with the right to take the bonds up. The four Lake boats we would like determined on Tuesday and we would like you to pay the money over right away. The three Erie boats that are here you can arrange at your convenience. We would prefer not to issue bonds, except possibly to the Trust Company on loan. But you can do as you like. The insurance as you know is already provided for. The organization of the company is fixed as we have before written you, and if you do not sell bonds you can take the name of the steamships in anybody's name which you may designate, or you can take it in the name of the steamship company we have organized and take a mortgage back with a note of the company."

In reply Tillotson wrote Morse on February 28th: "We have explained to your counsel that it would be impossible for us to advance money on any boats until our counsel has seen the abstracts on them and the mortgage has been prepared. We have been ready for two weeks to make the loan, which has been the result of so much telephone conversation and correspondence. Mr. Eaton knows exactly what is required. We will pay you, as heretofore indicated, $412,500 for $450-

000 of bonds on the Chemung, Owego, and McCullough, payable on or before one year after date. The mortgage is to be in the usual marine form and is to provide for full insurance, as detailed to Mr. Eaton, and a sinking fund of one sixth of the next maturing interest and one twelfth of the principal to be deposited with the trustee each month; the payments into the sinking fund for principal to be used, if you desire, for retiring all or any part of the bonds upon thirty days' notice at 101. We assume that the four Lake boats can be sent through the canal, and that they can be fully insured pending their arrival at some point for reconstruction. With this assumption, and the assurance that the necessary changes are to be made and paid for, in order that the boats can be classified, so as to receive full marine insurance for coastwise trade, and Mr. Goulder or his firm advise us that the title is good, we will advance up to $280,000 on bonds at 92 and interest, assuming, of course, that your estimates of value are sustained. While the Guardian Saving & Trust Company will, I think, if necessary, advance the money pending the preparation of the mortgage, it is only a question of a few days when this can be done. Mr. House assures me that he very much prefers to have it done in the usual order. It is, of course, understood that all other details of the proposal submitted to Mr. Higley, including the payment of costs incident to the issue, etc., are to be carried out."

On March 7th Tillotson wrote Morse: "You can imagine our surprise when we learned from Mr. Eaton that the Chemung had been sold and that you were reducing the amount of bonds by $175,000. This action is entirely agreeable to us provided we do not lose thereby, and we, of course, shall expect that the $15,000, or thereabouts, which was the discount on $175,000 bonds against the Chemung, be paid to us."

On March 16th, Eaton, one of the attorneys for defendants, wrote the plaintiff company as follows: "On my return to New York after my conversation with you yesterday, I find that it is impossible for us to meet the conditions imposed by the Guardian in connection with the proposed loan about which we have been negotiating, and we are therefore reluctantly obliged to accede to your suggestion that the proposition be canceled. This is a matter of regret to Mr. Morse, as I realize it is to you, but under the circumstances there is nothing further that can be done."

In reply to the above, Mr. Milligan, the vice president of the plaintiff company, wrote: "We have your letter of March 15th, signed by Mr. Eaton, to the effect that you are obliged to cancel your sale of bonds to us. In view of the fact that Mr. Tillotson had this matter in charge, your letter will be referred to him upon his return from the South this week."

And on March 21st Morse wrote Milligan: "Your favor of the 20th at hand. We know of no sale of bonds to you which you mention in your letter, and we know of no cancelation on our part. We surely tried hard enough to do business with you and regret very much that we could not."

If a contract existed, it evidently was intended that it should be canceled by the letter of March 16th. Milligan, to whom the letter was addressed, had his attention called to the statement that defendants were "reluctantly obliged to accede to your suggestion that the proposition be canceled," and he was asked when on the stand whether he had made any such suggestion. And his reply was: "Absolutely not." The writer of the letter of cancelation testified that in an interview in Cleveland, on March 2d, with the president of the plaintiff company, the latter said to him that the whole matter was in quite unsatisfactory shape, and "that they did not seem to be making any progress at all toward bringing the transaction to a close, and he added that that was

the more unsatisfactory to him because he did not suppose that he had any definite contract with Mr. Morse in regard to it." But the president of the company was then recalled to the stand and asked whether he had ever made any such statement, and denied absolutely that he ever did. He was then asked, "How certain are you that you did not make such a statement?" The answer was, "I am very positive, sir." There was here a disputed question of fact, and evidence which justified the jury, if they believed it, in concluding that the contract, if one existed, was canceled by the defendants.

The defendants assert that the minds of the parties never met, that one of the conditions of the agreement was that the attorneys for the plaintiff were to be furnished with abstracts of title to the ships and that they were to examine them, and that the deal was not to be consummated until the title was approved. In the letter dated February 28, 1916, written by the president of the plaintiff corporation, the writer stated that, when the attorneys "advise us that the title is good, we will advance up to $280,000 on bonds at 92 and interest." And there is no evidence in the case that, when defendants, on March 16th, canceled the agreement, the plaintiff's counsel was satisfied that the titles were good or that he had rendered any opinion on that subject. It will no doubt be conceded that an offer to sell implies that the title is marketable. And if an offer to sell is made by A and accepted by B, subject to the title being found good upon examination, it hardly seems that the words "subject to the title being found good" import any new term into the acceptance, so as to prevent a meeting of the minds upon the offer as made.

Contract—meet-of minds—provision as to title.

In Hussey v. Horne-Payne, L. R. 8 Ch. Div. 670 (1878), an offer was made to sell land for a specified sum of money, and the offer was accepted "subject to the title being approved by our solicitors." The defendants afterwards declined to complete the sale, the title not yet having been approved, and the plaintiff claimed specific performance. The vice chancellor had held that the offer had been unconditionally accepted, and the demurrer was overruled. The case was carried to the court of appeal, where it was reversed, and the demurrer was sustained. In his opinion Jessel, M. R., said: "The expression 'subject to the title being approved by our solicitors' appears to me to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by anyone, either by his solicitor, or his conveyancing counsel, or anyone else. All that he is entitled to require is what is called a marketable title, or as it is sometimes called, a good title. Therefore, when he puts in 'subject to the title being approved by our solicitors,' he must be taken to mean what he says; that is, to make it a condition that solicitors of his own selection shall approve of the title."

The case was carried to the House of Lords (L. R. 4 App. Cas. 311), where it was affirmed, but upon different ground. The House of Lords did not agree with the court of appeal upon the point upon which that court decided the case. Upon that point the Lord Chancellor (Earl Cairns) declared that he was disposed to look upon the words "subject to the title being approved by our solicitors" as meaning "nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course, that would be subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to."

The thing sold in that case happened to be land; but the decision

would have been the same, had it been bonds or ships.

Counsel for defendants, however, in this connection rely upon Ft. Edward v. Fish, 86 Hun, 548, 33 N. Y. Supp. 784 (1895), which was afterwards affirmed by the court of appeals (156 N. Y. 363, 50 N. E. 973). In that case the plaintiff, the water commissioners of the village, had entered into an agreement with defendant to sell to him certain water bonds, which they were to issue, for less than par. The agreement contained a provision stating that it was not to be binding on the party of the second part unless certain attorneys, which it named, "approve of the regularity and validity of said bonds in writing." The attorneys in question telegraphed the commissioners: "Think that the present board of trustees must reorganize as water board and give new bonds before bonds can be issued."

The water commissioners, regarding this as an adverse opinion from the attorneys as to the regularity and validity of the bonds, telegraphed to defendant that they withdrew from the agreement. They then sold the bonds to the state comptroller. This was on July 28, 1893, and on August 4, 1893, the defendant notified the water commissioners that the clause in the contract requiring the approval of the attorneys was for his benefit, and that he waived such approval and demanded delivery of the bonds or payment of damages. The court held that the contract to sell the bonds for less than par was illegal and void. The court, however, added that, when the plaintiff on July 28th was informed by the attorneys of their refusal to approve the bonds, the "plaintiff then (if not before) was freed from any obligation to defendant under the contract." "On that date defendant was not bound to take the bonds. It follows that plaintiff was not bound to deliver them." The court admitted that the provision requiring the approval of the bonds was for the benefit of defendant and probably might have been waived by him. "But he did not make such waiver," said the court, "until after plaintiff, as it lawfully might, had acted on the assumption that the contract was at an end. The waiver was too late."

We do not challenge the correctness of the conclusion reached, and the case may easily be distinguished from the case at bar in important particulars, only one of which it is necessary to mention. It is evident that no contract at any time existed in the New York case between these parties, for the writing expressly declared that "this agreement is not to be binding on the party of the second part unless [the attorneys] approve of the regularity and validity of said bonds in writing."

As the attorneys named never approved the bonds, of course the party of the second part never was bound; and, if the party of the second part was not bound, the part of the first part was not bound. There is a clear difference between an agreement to sell "subject to the approval" of title by counsel and an agreement which declares that the entire writing is not to be binding unless a certain thing happens which never happens. Hussey v. Horne-Payne was not referred to in the opinion in Ft. Edward v. Fish. But, if we are wrong in thinking that any real distinction exists between Hussey v. Horne-Payne and Ft. Edward v. Fish, we prefer to follow the former in its application to the facts of this case. An acceptance which in terms is conditioned on what the law implies is a good acceptance, as it introduces nothing new into the contract. See Anglo-American Provision Co. v. Prentiss, 157 Ill. 506, 42 N. E. 157; Ottumwa Brick & Constr. Co. v. Ainley, 109 Iowa, 386, 80 N. W. 510; Hubbell v. Palmer, 76 Mich. 441, 43 N. W. 442; 1 Page, Contr. p. 78.

Same—condition which law would imply.

The plaintiff does not claim that the writing of January 28th was a completed draft of the contract.

It is not pleaded as such. The transaction was difficult and complicated, and a number of items remained to be gone over and agreed upon, and they were not all definitely settled until the mortgage agreement was drawn. The plaintiff contends that when that was drawn every doubtful or disputed point had been resolved and finally determined, and nothing remained to be added to it or subtracted from it. The writing of January 28th between Tillotson and Higley was that the plaintiff should purchase bonds to be secured by a mortgage on the four boats known as the Lake boats, and that this mortgage was to be drawn under the direction and approval of certain specified attorneys of Cleveland. In the interview on March 2d between the plaintiff's attorney, Mr. White, and defendants' attorney, Mr. Eaton, of Boston, Mr. Tillotson said: "Now we have agreed upon all the details of this loan, and we want you [White] to get right busy and draw the mortgage, and Mr. Eaton [representing defendants] is out here for the purpose of getting these details cleaned up and out of the way just as fast as possible."

He also at that time declared that the agreement was to put all the boats under one mortgage. All this was said without Mr. Eaton's contradiction. And White and Eaton worked together for several days, and drew up the mortgage, and it contained all the terms, securing notes to the amount of $730,000, which was reduced afterwards to $555,000, because of the sale of the Chemung. Mr. White had been employed for seventeen years in the business of drawing such mortgages, and had drawn 200 or 300 of them. He testified that there were no unusual terms in the mortgage as finally agreed upon. He was asked on the stand whether Mr. Eaton objected to any provisions as unusual. He answered: "No; there was, of course, in framing the language, some discussion as to just the wording, or verbiage, or things of that kind; but the drawing of the mortgage from the start to the finish was simply a friendly collaboration, without any differences."

Mr. White was asked whether Mr. Eaton called up his principals during the course of these four or five days of negotiations. His answer was: "Mr. Eaton used the long distance phone a number of times. He would, of course, retire to another room, and I had no means of knowing with whom he conversed, except as he would come back and say that he had received word of something or other, and then we would go on working with the mortgage."

Then he was asked: "Did he make decisions after going to the telephone which he was not able to make before going to the telephone?"

To which he replied: "I don't know whether he was able to before or not; but when we were discussing the different phrases of the mortgage, I know he would go to the telephone, and then come back, and we would go on, and those points would be arranged, but whether he received authority from anyone I don't know."

And Mr. Eaton, when on the stand, admitted that he was talking over the telephone with Mr. Morse in New York. After these two attorneys had completed the mortgage, Mr. Eaton said that Mr. White told him that he (White) wanted "to go over it with Mr. Tyler, who had had a great deal of experience with these mortgages for Mr. Tillotson, and I told him of course I would want to take it back to Mr. Morse and to Mr. Blodgett [Eaton's partner] at my end of the line.

Mr. Morse was asked on his direct examination whether he ever authorized Mr. Eaton to make any contract in his behalf, and he answered: "I told him to go to Cleveland and to stay there until he got the money."

The jury could draw their own conclusions from such a reply. The mortgage, however, was taken to

New York and submitted to Morse, and some days later there was a meeting in New York, at which two of the plaintiff's attorneys and Morse and other of Morse's associates were present. One of these attorneys was asked at the trial what, if any, objection was raised by Morse or any of his associates as to the terms of the mortgage agreement. He replied, "Absolutely none." He afterwards corrected himself, by saying that Morse wanted to have individual mortgages given, instead of a fleet mortgage; but that was not consented to, as being contrary to what had been originally agreed upon. And the jury was instructed with unusual particularity as to the circumstances under which they would be authorized, if reasonably satisfied from the evidence, to find that the minds of the parties had met upon the terms of the mortgage.

This court is of the opinion that the defendants were not prejudiced by the instructions, and that there was sufficient evidence to warrant the verdict which was reached. It is evident that the jury did not accept all that Mr. Eaton and Mr. Morse testified to; but that was their privilege. Mr. Eaton's testimony in certain particulars was flatly contradicted by others; and Mr. Morse admitted on the stand that he had been convicted of a crime. The mortgage as drawn by the respective attorneys was not in the nature of an offer submitted by one party to another, and which was not responded to by the offeree. The offer had been made and accepted prior thereto, with certain details left open, which had been determined when the mortgage was drawn.

The action was brought upon the theory that a contract had been made between the plaintiff and the defendants for a loan upon the credit of the ships named in the complaint, and that the use of the corporate form for executing the mortgage on the ships was for the convenience of defendants, so that they should not have to assume any personal liability. That seems to have been the theory of defendants themselves, when the answer to the complaint was filed; for after stating that there were negotiations between themselves and the plaintiff, for the purpose of agreeing, if possible, upon a contract, it declares that they failed to agree, and no contract was entered into.

But at the argument in this court the defendants advanced the proposition that the contract was a contract of promotors, which the defendants were making as agents for a corporation then in existence, whose name was disclosed to the plaintiff, and that therefore the plaintiff could not recover. They still adhered, however, to their contention that the negotiations did not result in any meeting of the minds. We find it quite impossible to concur with counsel in the view that defendants were acting as agents for a principal, disclosed or undisclosed. They acted for themselves, as clearly appears from the letter of January 28th. Unless defendants were bound by that letter, there was no obligor on the promise to the plaintiff, for at that time the corporation which was to take over the boats had not been agreed upon. But before March 16th, when the contract was canceled, it had been determined what corporation should take over the boats, and the cancelation was made by Eaton, who does not pretend that he had been authorized formally or informally by the corporation to cancel. The inference is that Eaton was acting for Morse, and neither Eaton nor Morse could have been acting at that time as a promoter for the corporation, for it was already formed, and neither could have been acting for the corporation, for it never gave either authority to represent it in the matter. Moreover, where two or more persons agree that a corporation shall do a certain thing, which they can compel it to do, because they hold a majority of the

Promotee— liability on contract.

stock, or otherwise, the corporation is not bound by their agreement, but they bind themselves individually, unless it is expressly agreed that the other party is looking to the corporation, and not to the promoters. See Harrill v. Davis, 22 L.R.A.(N.S.) 1153, 94 C. C. A. 47, 168 Fed. 187; Fentress v. Steele, 110 Va. 578, 66 S. E. 870.

In the brief submitted by defendant's counsel upon the argument in this court, and upon the oral argument, stress is laid upon the fact that the judge instructed the jury to say whether there was a meeting of the minds "as to each material stipulation in the contract," and again as to the "substantial terms of the contract." If this were error, the question cannot be raised in this court, for it was not properly excepted to at the time. The exception taken was to a statement which included the matter now objected to, along with other matter, without directing the court's attention specifically to the point now made. The objection was, "I take an exception to your Honor's remarks." Under the circumstances it was not sufficient. We may call attention, however, to the fact that the court in the charge directed attention specifically throughout the charge to the essentials of an agreement to sell something in the future, and as to what the minds of the parties must have met in agreement upon. What more the court should have said upon that point to a jury whose province it was to determine whether a contract existed is not apparent to us; but, if it was to counsel, it was his duty at the time to call the attention of the judge specifically to it, which he did not do.

Appeal—general exception—sufficiency.

One of the assignments of error relates to that portion of the charge to the jury in which it was said: "As I understand it, the impossibility of performance with reference to the insurance feature is not made a matter of defense to the action, except as it reflects on the matter of evidence as to whether the parties did agree on the contract as it is claimed by the plaintiff, and therefore the question in the main would be whether or not there was a meeting of the minds between the two parties as to each material stipulation in the contract."

We are unable to see error in the above statement. It is said that the agreement was impossible of performance, inasmuch as it was impossible to insure during the war, in the manner specified, vessels intended to be used in the trans-Atlantic service. There was some evidence that the insurance required could not be obtained, and there was also evidence that it could be; a marine insurance agent testifying as follows: "There has been no time since the war broke out when such an insurance could not be secured in accordance with the claims specified in that article 3."

Impossibility of performance may or may not discharge from the obligation of a contract, according to circumstances; and where performance is possible when the contract is made, and becomes impossible subsequent to the making, it is very generally held that the promisor is not discharged. But impossibility of performance does not appear to have been pleaded, and so could not have been relied upon as a defense to the action, except in the particular referred to in the charge. As respects that phase of the subject, there was a question of fact for the jury.

Pleading—impossibility of performing contract.

There are other assignments of error, which we have considered, but do not find it necessary to prolong this opinion by considering in detail.

Judgment affirmed.

Petition for rehearing denied.

PHŒNIX IRON & STEEL COMPANY, Plff. in Err.,
v.
WILKOFF COMPANY.

United States Circuit Court of Appeals, Sixth Circuit—August 5, 1918.

(253 Fed. 165.)

Contract — condition which law would imply — effect.

1. Placing in an acceptance of a tender of option to buy, a condition requiring agreement as to inspection, to which the buyer would have been entitled by law without mention, constitutes a new offer which must be accepted to complete the contract.

[See note on this question beginning on page 1508.]

Definition — "being understood."

2. The words, "it being understood," in the acceptance of a proposition to contract, mean provided or on condition it is so agreed.

Sales — right to inspect — Sales Act.

3. The right to inspect at the loading point is not necessarily conferred by the provision of the Uniform Sales Act that, where a seller tenders goods to buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether or not they are in conformity with the contract.

Appeal — failure to assign error.

4. Alleged error in the rejection of evidence cannot be considered on appeal, if no assignment of such error is made.

Pleading — custom — necessity.

5. A custom relied on to constitute one element of a contract must be pleaded.

ERROR to the District Court of the United States for the Eastern Division of the Northern District of Ohio (D. C. Westenhaver, Judge) to review a judgment in favor of defendant in an action brought to recover damages for alleged breach of a contract of sale. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Warrington and Knappen, Circuit Judges, and Cochran, District Judge.

Messrs. **Hine, Kennedy, & Manchester,** for plaintiff in error:

Plaintiff's counter telegram constituted an unqualified acceptance of the option of the defendant.

Horgan v. Russell, 24 N. D. 490, 43 L.R.A.(N.S.) 1150, 140 N. W. 99; Turner v. McCormick, 56 W. Va. 161, 67 L.R.A. 853, 107 Am. St. Rep. 904, 49 S. E. 28; Swiger v. Hayman, 56 W. Va. 127, 107 Am. St. Rep. 899, 48 S. E. 839, 3 Ann. Cas. 1030.

The buyer, at common law, had the right of inspection at the place where the goods were delivered to the buyer.

Williston, Sales, § 480; 35 Cyc. 226; Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349; Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. 97 Md. 1, 62 L.R.A. 795, 54 Atl. 634; Brownlee v. Bolton, 44 Mich. 218, 6 N. W. 657.

Mr. **Stephen S. Conroy** also for plaintiff in error.

Messrs. **Harrington, De Ford, Heim, & Osborne,** for defendant in error:

The claimed acceptance was conditional, qualified, and not in accordance with the terms of the offer, and as a result thereof there was not that meeting of minds which is absolutely essential to the formation of a contract.

Scott v. Davis, 141 Mo. 213, 42 S. W. 717; Minneapolis & St. L. R. Co. v. Columbus Rolling Mill Co. 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. Rep. 168; Phenix Ins. Co. v. Schultz, 25 C. C. A. 453, 80 Fed. 337; James v. Darby, 40 C. C. A. 341, 100 Fed. 224; Myers v.

Trescott, 59 Hun, 395, 13 N. Y. Supp. 54; Strange v. Crowley, 91 Mo. 287, 2 S. W. 421; Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Potts v. Whitehead, 23 N. J. Eq. 514; Four Oil Co. v. United Oil Producers, 145 Cal. 623, 68 L.R.A. 226, 79 Pac. 366; Glenn v. S. Birch & Sons Constr. Co. 52 Mont. 414, 158 Pac. 834; Ames & F. Co. v. Smith, 65 Minn. 304, 67 N. W. 999; Elliott, Contr. § 38; Eliason v. Henshaw, 4 Wheat. 225, 228, 4 L. ed. 556, 557; Tilley v. Cook County (Tilley v. Chicago) 103 U. S. 161, 26 L. ed. 376; Sidney Glass Works v. Barnes, 86 Hun, 374, 33 N. Y. Supp. 508; Hutcheson v. Blakeman, 3 Met. (Ky.) 80; Weaver v. Burr, 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743; Oriental Inland Steam Co. v. Briggs, 4 De G. F. & J. 191, 45 Eng. Reprint, 1157, 31 L. J. Ch. N. S. 241, 8 Jur. N. S. 201, 5 L. T. N. S. 477, 10 Week. Rep. 125; Hunkins-Willis Lime & Cement Co. v. Los Angeles Warehouse Co. 155 Cal. 41, 99 Pac. 369; Benjamin, Sales, § 39; Mechem, Sales, §§ 226 et seq.

Where there is an offer to sell "discard billets," a contract is not formed by an acceptance agreeing to purchase "billets."

1 Mechem, Sales, § 238; Jenness v. Mount Hope Iron Co. 53 Me. 20; Carter v. Bingham, 32 U. C. Q. B. 615; Jordan v. Norton, 4 Mees. & W. 155, 150 Eng. Reprint, 1382, 1 Horn & H. 234, 7 L. J. Exch. N. S. 281, 6 Eng. Rul. Cas. 142; Hutchison v. Bowker, 5 Mees. & W. 535, 151 Eng. Reprint, 227, 9 L. J. Exch. N. S. 24; Four Oil Co. v. Union Oil Producers, 145 Cal. 623, 68 L.R.A. 226, 79 Pac. 366; Young's Market Co. v. Pioneer Produce Co. 113 C. C. A. 146, 192 Fed. 822; Brophy v. Idaho Produce & Provision Co. 31 Mont. 279, 78 Pac. 493; Johnson v. Corbett, 95 Md. 746, 53 Atl. 570; Warner Elevator Co. v. Guthrie, 12 Ohio C. C. 183, 1 Ohio C. D. 128, 57 Ohio St. 672, 50 N. E. 1135; Corcoran v. White, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525; Porter v. Gossell, 112 Ark. 380, 166 S. W. 533; W. C. Sterling & Son Co. v. Watson & B. Co. 193 Mich. 11, 159 N. W. 381; Kirwan v. Byrne, 9 Misc. 76, 29 N. Y. Supp. 287; Benjamin, Sales, § 227 et seq. and notes; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462.

The provision in the claimed acceptance, relating to the inspection of the goods, amounted to a qualification or modification of the offer contained in the option.

Egger v. Nesbitt, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385; Carr v. Louden, 25 Ky. L. Rep. 1984, 79 S. W. 211; Martin v. Northwestern Fuel Co. 22 Fed. 596; A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co. 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670; Sheffield Furnace Co. v. Hull Coal & Coke Co. 101 Ala. 446, 14 So. 672; Silberman v. Clark, 96 N. Y. 522; Mechem, Sales, § 795; Williston, Sales, 280; Marine Ins. Co. v. Walsh-Upstill Coal Co. 68 Ohio St. 483, 68 N. E. 21; Shumaker v. Pearson, 67 Ohio St. 333, 65 N. E. 1005.

In case of a conflict between a local custom and a statutory regulation, the latter will control.

Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452; Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430; Thomas v. Guarantee Title & T. Co. 81 Ohio St. 432, 26 L.R.A.(N.S.) 1210, 91 N. E. 183, 2 N. C. C. A. 80.

Where the parties have construed an instrument as not constituting a contract, the court will follow the construction which they have placed upon it.

Kling v. Bordner, 65 Ohio St. 86, 61 N. E. 148; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; District of Columbia v. Gallaher, 124 U. S. 508, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; Vaccine Co. v. Redman, 20 Ohio N. P. N. S. 17; Toledo Traction, Light & P. Co. v. Smith, 205 Fed. 643.

Messrs. **Wilson & Wilson** also for defendant in error.

Cochran, District Judge, delivered the opinion of the court:

The plaintiff in error was plaintiff and the defendant in error defendant below. The action was to recover $202,500 as damages for breach of contract. The defendant denied the existence of the contract, and this was the sole issue in the case apart from that as to amount of damages. On trial before a jury verdict was rendered for defendant, pursuant to peremptory instruction given, after plaintiff had introduced the evidence on which it relied to establish the contract, and upon the ground that such evidence did not establish it. Judgment dismissing the petition was entered thereon, and it is therefrom that this writ

has been sued out. Seven errors are assigned, but each in a different way raises the single question as to the correctness of the peremptory instruction.

The alleged contract related to one of two kinds of discard billets, made in the manufacture of high explosive shells. Such billets are cut-offs from billets rolled from ingots. Two are made from the top of each billet. The first is imperfect, in that it contains pipes and seams caused by the passage from the top of the ingot of gases formed by the hot steel. The second is apparently perfect, i. e., free from pipes and seams, and is made to insure that all imperfect steel has been eliminated. The remaining part of the billet is alone used in the manufacture of the shells. It was the latter kind of discard billets which was the subject-matter of the alleged contract.

The plaintiff and defendant are each engaged in buying and selling iron and steel products, and one in New York city and the other at Youngstown, Ohio. Plaintiff's claim was that the contract sued on arose from a telegram and confirming letter sent Monday evening, August 14, 1916, by defendant to it, granting an option, and a counter telegram sent Wednesday morning, August 16th, by it to defendant, accepting the option. It is not necessary to quote the confirming letter, as it contains nothing additional except a specification of the sizes of the billets, nor the formal parts of the telegrams. Defendant's telegram was as follows: "For consideration of $1, receipt of which is hereby acknowledged, we hereby give you option, providing we receive your acceptance not later than Wednesday evening next, to purchase from us 15,000 tons discard billets free of pipes and seams, price $26.50 gross ton f.o.b. cars Youngstown, size of billets as confirmed by letter this evening."

Plaintiff's counter telegram was as follows: "We accept option, and hereby purchase from you 15,000 tons billets on basis of terms and specifications of option given us, it being understood that we have the right to have our inspector at loading point as material is shipped. Acknowledge receipt of this message."

These two telegrams and defendant's confirming letter were filed as exhibits with the plaintiff's petition and no reason occurs why the question as to whether a contract was thereby constituted might not have been raised by and determined upon demurrer to the petition. Subsequent telegrams, which passed between the parties down to August 22d, were introduced in evidence by plaintiff. They had no tendency to help out its case. Nor does it claim that they did. On the contrary, defendant claims that they show that the plaintiff as well as defendant did not regard that a contract had resulted from the previous communications. As it is not necessary to determine this, those telegrams, except one sent by defendant to plaintiff Wednesday evening the 16th upon receipt of plaintiff's telegram, are not quoted. That telegram was as follows: "Billets on hand ready to ship. Your message satisfactory provided you make inspections Thursday or Friday of this week. If billets satisfactory will then sign contract. Wire when your inspector will be here." Inspection was made on Friday of the billets thus referred to, and they were rejected.

The question as to the correctness of plaintiff's claim depends on whether its counter telegram was an absolute acceptance of the offer made by defendant's telegram and confirming letter. If it was not—if it was only a qualified acceptance thereof—no contract arose therefrom; for it is trite in the law that, in order for a contract to arise from the acceptance of an offer, the acceptance must be absolute and unqualified. The reason for this is thus stated in Wald's Pollock on Contracts, 3d ed. by Williston, p. 43: "For unless and until there is

such an acceptance on the part of terms proposed on the other part, there is no expression of one and the same common intention of the parties, but at most expressions of the more or less different intentions of each party separately; in other words, proposals and counter proposals."

The question, therefore, whether, in any given case, an acceptance of an offer constitutes a contract may be viewed as one of identity. Do the offer and the acceptance each express one and the same intention, i. e., an assent to one and the same thing?

Without doubt plaintiff's telegram on its face was a qualified, and not an absolute, acceptance of defendant's offer. It contained two sentences. The second called for an acknowledgment of its receipt. The first begins, it is true, by stating unqualifiedly that plaintiff accepted the option, and thereby purchased 15,000 tons billets "on the basis of terms and specifications of option;" but this statement was immediately followed by the words, "it being understood that we have the right to have our inspectors at loading point as material is shipped," a matter of which defendant's communications made no mention. The word "understood" is synonymous with "agreed." 39 Cyc. 672, note 90. And the words, "it being understood," mean provided, or on condition it is so agreed. The plaintiff in error practically concedes this. Its contention is that, even though this is so, yet the acceptance was, in reality, an absolute and unqualified acceptance. It attempts to make this out in this way. It maintains that had its telegram said nothing as to the right of inspection therein specified, as defendant's communications did, and hence its telegram been really as well as on its face an absolute acceptance, it would, under the contract thus formed by law, have had such right of inspection. This being so, notwithstanding its acceptance was expressly made conditional on its being so agreed, it was in reality an absolute and unqualified acceptance. It bases its position that in that contingency it would have had such right on subdivision 2 of § 8427 of the General Code of Ohio, a part of which is known as the Williston Sales Act, in force also in New York, which provides as follows, to wit: "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

Definition—"being understood."

It cites and relies on the cases of Turner v. McCormick, 56 W. Va. 161, 67 L.R.A. 853, 107 Am. St. Rep. 904, 49 S. E. 28, and Horgan v. Russell, 24 N. D. 490, 43 L.R.A. (N.S.) 1150, 140 N. W. 99, in support of its contention that, on the basis that in such contingency it would have had such right, its acceptance was in reality absolute and unqualified. These two cases were both option cases. In each the option and the acceptance were in writing. In each also, though the writing of the optionee began with an absolute acceptance, it was not limited thereto. In the Turner Case the acceptance was followed by a request, and in the Horgan Case by a demand of something not within the option, and which, therefore, the optionee would not have been entitled to had the writing been limited to the absolute acceptance. In other words, the request in the one case, and the demand in the other, went beyond what the optionee would in that contingency have been entitled to. It was held in each case that a contract had been formed notwithstanding such request or demand. It was so held on the ground that the request in the one case, and the demand in the other, though contained in the same writing as the acceptance, had no relation thereto, and hence did not qualify it, but

related solely to the matter of performance of the contract formed by the absolute acceptance, which the optioner might comply with or not as he saw fit, just as much so as if the request or demand had been made subsequent to and not simultaneous with the acceptance. Possibly the correctness of the decision in the Horgan Case is not so certain as that in the Turner, on the idea that an agreement to do a certain thing and a demand of the contrary are mutually exclusive, and not to be conceived of as parts of the same act. It is not entirely clear that plaintiff in error limits these two cases to a support of its contention as thus stated. Possibly it thinks that support therein can be found for the position that its telegram should be interpreted as meaning that it accepted defendant's offer absolutely, and requested, as the statute authorized, that it might make the inspection specified. Of course, if such was the true meaning of the telegram, then those cases are authority for the position that a contract was thereby formed, and that whether or not plaintiff was entitled to make such inspection,—more so, it would seem, if it was so entitled than if it was not. But those cases are no support whatever for the position that such was the true meaning of the telegram. No such meaning can be extracted from it without treating it vilely. The true meaning of the telegram is that the option was accepted, provided or on condition that it was agreed that plaintiff should have such right. And this case has to be disposed of on this basis. Nor do they afford any support to the contention that, notwithstanding such was the true meaning of the telegram, it amounted to an absolute and unqualified acceptance of defendant's option on the ground that, had it said nothing as to the right of inspection therein specified, as defendant's communications did, and hence its telegram been on its face as well as in reality an absolute acceptance, it would, under the contract thus formed, have, by law, had such right. A decision that an absolute acceptance of an option, followed in the same writing by a request or demand of something not within the option, and to which the optionee is not entitled, creates a contract, is not an authority for holding that one is created when the acceptance is on its face qualified by being made conditional on its being agreed that the optionee shall have a right not mentioned in the option, if he would have had such right by virtue of the law had he absolutely accepted the option, on the ground that in such a case the acceptance, though such is its character on its face, is in reality an absolute acceptance. In one particular the question is the same in each instance. It is a question of interpretation. But they differ as to what is the subject-matter of interpretation. In the former instance it is the acceptance. According to its true meaning, is it absolute or qualified? Does the presence of the request or demand in the same writing as the acceptance cut it down from what it is in terms, i. e., an absolute acceptance, to a qualified one, whereas, in the latter instance, it is assumed that the acceptance is on its face qualified, and the subject of interpretation is the option? According to its true meaning, is it broad enough to include the qualification in the acceptance, so that in reality both, i. e., the option and the acceptance, express one and the same intention, i. e., an assent to one and the same thing? This is made plain by the two illustrations with which plaintiff in error attempts to enforce its contention.

Suppose, it suggests, that it had said in its counter telegram, "It being understood that said discard billets shall be free from pipes or seams," or that the option had been for 15,000 bushels of wheat, and to the acceptance thereof had been added, "It being understood that there shall be 60 pounds in each bushel of wheat." Clearly, in each

case there would have been a contract entered into. This, because, though the acceptance had been on its face qualified, there was in reality no qualification in that the condition was within the option. What the defendant offered in the one case was "discard billets free from pipes and seams," and what in the other it would have offered was 15,000 times 60 pounds of wheat, for a bushel of wheat consists of 60 pounds thereof. In fact, therefore, each party expressed one and the same intention, i. e., an assent to one and the same thing.

But these illustrations, whilst they bring out clearly the question we have here, and make plain that the decisions relied on have no bearing on that question, cannot be said to conclude it. It calls for further consideration. We have given so much space to these two decisions because plaintiff in error is possessed of the idea that they are conclusive of this case, when in fact they have nothing to do with it.

To repeat, then, the question before us is this: If an optionee expressly qualifies his acceptance by making it a condition thereof that it is to be agreed that he is to have a right to which he would have by law been entitled had his acceptance been absolute, there being no reference to such right in the option, is the acceptance in reality absolute, in that the option and the acceptance each express one and the same intention, i. e., an assent to one and the same thing, and that therefore a contract has been formed? In determining this question there is a dearth of authority bearing upon it. Counsel's research and our own have yielded none.

The case of Hussey v. Horne-Payne, L. R. 4 App. Cas. 311, 48 L. J. Ch. N. S. 846, 41 L. T. N. S. 1, 27 Week. Rep. 585, 6 Eng. Rul. Cas. 155, is cited on behalf of plaintiff in error as having to do therewith, and it is claimed that it is favorable to its contention. There the subject-matter of the negotiations was certain real estate. In the course thereof the seller by letter offered the property at a certain price. In the answer thereto the buyer accepted the offer, adding, "subject to the title being approved by our solicitors." There had been negotiations preceding the sending of these letters, and in them the subject of how the price should be payable, in case agreement should be had as to the amount of it, had been considered, without any conclusion being reached, and, after their sending, this matter was further considered, with like result. The buyer thereupon brought suit for specific performance, claiming that a contract had resulted from the two letters, under which the price was payable upon performance by the seller. In the court of original jurisdiction, i. e., before the vice chancellor, this claim was sustained. On appeal to the court of appeals the decree was reversed on the ground that the acceptance was not absolute, but qualified, in that the words, "subject to the title being approved by our solicitors," in the acceptance, added a new term to the contract not contained in the offer. It interpreted these words to mean nothing more than "provided a good title is shown, but provided our solicitors so determine," thus making them arbiters of that question. On appeal to the House of Lords this decision was affirmed, but not on this ground. It was affirmed on the ground that the two letters should not be considered apart from the entire negotiations, and, considering the entire negotiations, the parties had never come to a concluded agreement. It differed with the court of appeal as to the ground upon which it placed its decision. It construed the added words, though not without some doubt, to mean "provided a good title is shown," and assumed that, so construing them, a contract had been entered into apart from the consideration upon which it based its decision. As to the correctness of this assumption there cannot be the slightest doubt. According to

a true interpretation of the seller's offer, the qualification of the acceptance was within its meaning. What the seller offered to convey to the purchaser was a good title to the real estate which was the subject-matter of the negotiation, so that the offer and the acceptance expressed one and the same intention, i. e., an assent to one and the same thing. It was as if the purchaser had said, out of abundant caution: "I understand your offer to mean that I am to have a good title to the real estate, and if my understanding is correct I accept your offer." As such was the true meaning of the offer, a contract would have resulted from the acceptance, had it not been for the consideration on which the House of Lords based its decision. Possibly this case is authority here for the position that, if the right of inspection specified by plaintiff in its acceptance was one which it would have had by law had it accepted defendant's option absolutely, and if, further, the acceptance had been made on condition simply that plaintiff should have such right, a contract would have been entered into. We are not disposed to say that it is not. If in such contingencies a contract would have been entered into, it must have been on the ground that, according to a true interpretation of defendant's option, such condition was within it, i. e., plaintiff was to have such right; so that it is true to say that the offer and acceptance each expressed one and the same intention, i. e., an assent to one and the same thing, to wit, that plaintiff was to have such right. In other words, it must be worked out in some way that the option expressed the intention that the plaintiff was to have the right of inspection at the loading point as the material was shipped. Possibly it can be worked out in this way. By the option defendant offered to sell plaintiff material of the character therein described. Thereby it expressed the intention that, if the option was accepted, it should be under obligation to deliver material of such description, and that plaintiff should not be under obligation to accept material tendered unless it was, and, as plaintiff could not determine whether such was the case without an inspection, that it should have the right of inspection. As to the place of inspection, it expressed the intention that plaintiff should have such right at such place as the law allowed. This is the extent to which it can be said that the expression of intention as to this matter went. It cannot be said that the option expressed directly the intention that plaintiff should have the right of inspection at the loading point as the material was shipped. This cannot be said on the idea that defendant is presumed to have known the law that it would have the right of inspection at such place. That one is presumed to know the law is a pure fiction, and a fiction has no place in a search for reality.

Whether, in the two contingencies named, a contract would have been formed on the basis of the reasoning suggested, we do not find it necessary to determine. This is so because neither of these contingencies exists in this case. Take the second one first. It is that plaintiff in its counter telegram conditioned its acceptance on its having the right to make the inspection therein specified. Such was not the condition set forth in the telegram. It was that it should be agreed that it should have such right. It called for an assent on defendant's part that it should have such right. Plaintiff did not interpret defendant's communications as contemplating that it should have such right. Hence, it called for an assent on defendant's part thereto and made its acceptance conditional thereon. The second sentence of plaintiff's telegram is to be accounted for on this basis. An acknowledgment of receipt thereof,

Contract—condition which law would imply—effect.

without more, would have been an assent on defendant's part to the condition. Had the second sentence been omitted it would not have been otherwise. The telegram would still have called for an assent on defendant's part, which possibly would have been given by mere silence.

Defendant so interpreted plaintiff's counter telegram in its response thereto, whereby it postponed the matter of entering into a contract with plaintiff until the inspection should be had.

That an acceptance of an option making no mention of the optionee's having a certain right which he would have as a matter of law if the option should be accepted absolutely, conditional on the optioner's agreeing that he should have such right, is a qualified acceptance, and such as to prevent the formation of a contract, unless the optioner thereafter in some way agrees thereto, would seem to be clear. By reason thereof it cannot be said that the option and the acceptance express one and the same intention, i. e., an assent to one and the same thing. They differ as to what shall be the form of the contract. It is the intention of the option that the form thereof shall be as therein set forth, whereas it is that of the acceptance that it shall embrace a term expressly giving the optionee such right. Such an acceptance in such a case is in effect a rejection of the option because of its form, i. e., it does not expressly embrace such a term in it. A difference as to the form of a contract is just as effective to prevent the entering into of a contract as one as to substance.

Nor is the right of inspection which plaintiff stipulated for in its acceptance the same right which it would have had had it made no mention thereof and accepted the option absolutely, and that even though the statute relied on by plaintiff in error applies in such a case as we have here. Apart from this statute, how does the matter stand? Had plaintiff so accepted the option, would it have had the absolute right to inspect the material at the loading point, i. e., the point of shipment, as it was shipped? Williston on Sales, § 480, says: "The place of inspection is prima facie the place where the goods are delivered to the buyer."

He continues: "The contract may, however, provide for inspection at some other place, and the nature of the contract may be such that, even in the absence of express provision, the law will hold some other place than that of delivery to be the point for inspection."

The reason why in such a case the law will so hold he thus sets forth: "The chief ground for such an implication seems to be that a reasonable examination cannot readily be made at the place of delivery."

He then gives an instance where such an implication is made: "It is on this ground that, where goods are shipped to the buyer, inspection need not be made on delivery to the carrier, though title passes at that moment, and the carrier becomes bailee for the buyer."

In note 69 to § 473 he gives a list of cases where it has been held that, in such a case, the buyer has the right of inspection on the arrival of the goods at their destination.

In Burdick on Sales, § 198, it is said: "Although the place of inspection, in the absence of special agreement or custom, is presumably the place of delivery, yet the circumstances may show that such a place would be an unreasonable one, or that the parties did not contemplate an inspection there."

He cites, as an instance where the circumstances show that the place of delivery would be an unreasonable one, or that the parties did not contemplate an inspection there, the case of Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349, which is one of the cases cited by Williston in note to § 470, and was a case of the ordering of goods of a specific quality by a dis-

tant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, which is one of the most frequent commercial transactions, and the nature of that involved here.

These extracts from these authors assume that the place of delivery to the carrier on behalf of the buyer is properly characterized as place of delivery to the buyer, or place of delivery simply, and lay down that the prima facie or presumptive rule that the place of inspection is at the place of delivery to the buyer has no application to such a delivery to him because of the unreasonableness of such a place of inspection in such a case. In Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69, it is said that in such a case the buyer has "no opportunity to inspect the goods" until they reach their destination.

Mechem on Sales sets forth no prima facie or presumptive rule on the subject. In vol. 2, § 1377, he says: "The place of inspection, in the absence of a contrary intention, must ordinarily be the place at which acceptance is due—as distinguished from the place of receipt where they are separate—the place at which the buyer is finally bound to accept or reject the goods."

This covers a case of delivery to a carrier on behalf of the buyer, and lays down that in such a case the place of inspection "must ordinarily" be at the destination of the goods, which is the place at which acceptance is due. In support of it he cites Pierson v. Crooks, supra, and Holt v. Pie, 120 Pa. 425, 14 Atl. 389, another of the cases cited by Mr. Williston in connection with that of Pierson v. Crooks.

Now, neither one of these authors deals with the question whether the buyer in such a case ever has a right of inspection at any other place than at the destination of the goods, as, for instance, at the place of delivery to the carrier on behalf of the buyer, and, if so, under what cirumstances such right can be exercised. In Williston on Sales, § 473, it is said: "It is often said in such cases that delivery to the carrier is delivery to the buyer, and it may be urged that the buyer should exercise his right of inspection before such delivery to him, and that if he fails to do so he waives his right; but whether or not the buyer is entitled to inspect the goods at the point of shipment, it is clear that the delivery to the carrier, and the transfer of the property thereby to the buyer, do not preclude a right of examination when the goods reach their destination."

He thus refers to the question whether the buyer has the right of inspection at the point of shipment, but passes it by without expressing any opinion on it. In § 480, above quoted, however, he says that inspection need not be made on delivery to the carrier, which implies that though it need not be so made it may be. Mechem, in saying that the place of inspection "must ordinarily" be the place at which acceptance is due, i. e., the destination of the goods, would seem to imply that it is not always limited thereto.

In Pierson v. Crooks, supra, Judge Andrews said: "Where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier, to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination."

In saying that the right "continues" until then, he implies that it exists before then.

In the case of Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. 97 Md. 1, 62 L.R.A. 795, 54 Atl. 634, where a seller in Baltimore contracted to sell a buyer in New Orleans a quantity of canned tomatoes, "f.o.b. Baltimore," "terms cash," "buyer to give shipping instructions when requested by the seller," it was held that the buyer had no right to refuse payment for the goods until he had received and

inspected them to see if they conformed to the contract, because he had agreed to pay cash for them on delivery to the carrier. It was said: "There was no reason why the goods might not have been inspected at the seller's place of business in Baltimore, rather than at the destination of the goods."

In that case, however, opportunity to inspect the goods after they reached their destination was not a condition precedent to the buyer's obligation to pay therefor, because he had agreed to pay cash on delivery to the carrier. And this was so whether or not he had the right to inspect at the seller's place of business in Baltimore.

These are all the references to the right of buyer, in such a case, to inspect before the goods reach their destination, to which our attention has been called or that we have found. The rule that in such a case the buyer has a right of inspection at the place where acceptance is due, i. e., the destination of the goods, views the matter from the standpoint of the buyer. It is unreasonable that he should not have the right of inspection at such place. And this is so, ordinarily at least, because he has no reasonable opportunity of making an inspection at the point of shipment or elsewhere. To a degree it favors the buyer over the seller. The seller incurs the risk of having the goods, if rejected, on his hands at a distance from his place of business. Of course he can avoid this by seeing that the goods are of the description called for by the contract. But, in view of this, it is open to claim that the buyer should not also have the right of inspection at the point of shipment if the existence of such right there will be injurious to the seller, particularly if his right of inspection at the place where the goods are destined is a condition precedent both to his obligation to pay for the goods or the freight for their transportation, which it ordinarily is and was, at least as to the price, under the option here. Williston on Sales, §§ 473, 478. An absolute right to inspect the goods at the point of shipment may be injurious to the seller in delaying him in shipping the goods, if not otherwise.

In Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349, Judge Andrews, in arguing against the seller's right to limit the buyer's right of inspection to the point of shipment said: "It would be a most embarrassing inconvenient rule, more injurious even to the dealer or manufacturer than to the purchasers, if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered."

But at least the right of inspection at the point of shipment, if it exists at all in such a case as we have here, is not an absolute right. The buyer, if he desires to exercise such right, must first notify the seller and request that he be permitted to make such inspection. In the absence thereof, the seller is under no obligation to notify the buyer of his intention to make shipment and to hold it up until the buyer has an opportunity to be present. To this extent, at least, the buyer does not have an absolute right to inspect at the point of shipment.

Sale—right to inspect—Sales Act.

Coming, then, to the statute on which plaintiff in error relies, it may be a question whether it has any application to the case we have here. It applies "when the seller tenders delivery of goods to the buyer." In a sense, a delivery of goods to a carrier on behalf of a buyer is a delivery to the buyer. In the previous section it is provided that it shall be "deemed to be a delivery of the goods to the buyer." But it is not a delivery to the buyer in the same sense that a delivery to the buyer himself or to his servant is a delivery to him, and in previous sections of this Sales Act we find references to a delivery

to the buyer, to a carrier, and to other bailees in the same connection, in which instances, of course, the words "delivery to the buyer" do not include a delivery to the carrier or other bailee on behalf of the buyer. But, assuming that this provision of the statute does apply here, it is not an absolute right of inspection which it confers. The seller is bound to afford the buyer a reasonable opportunity to examine the goods, only on request of the buyer that he be permitted to make such inspection. There is the same qualification of the right to make inspection at the point of shipment which we have found is the least qualification thereof in the absence of the statute. What the plaintiff stipulated for in his telegram was not the right, on request, to make inspection at the loading point as the material was shipped, but the absolute right to do so. Giving the defendant's option the broadest interpretation possible, it can be made to mean no more than that the plaintiff should, on request, have the right to make inspection at the loading point as the material was shipped. The plaintiff, by his counter telegram, in effect rejected this, and stipulated that he should have the right of inspection, irrespective of any request from it. This necessitated that defendant before making shipment should notify plaintiff that it was about to do so, and give it a reasonable opportunity to be present and inspect, and would involve delay on defendant's part. If the plaintiff had accepted defendant's option absolutely, and any portion of the material was loaded when the option was sent, and had been started moving immediately on receipt of the acceptance, plaintiff would have lost the opportunity of inspecting it at the loading point without any ground of complaint of defendant. This would not have been the case had a contract been formed by the acceptance as it was. Defendant could not have shipped a pound without first notifying plaintiff and giving him reasonable opportunity to inspect it. It is true that, if his absolute acceptance had been followed by a request that he be permitted to inspect the material at the loading point, he could have prevented shipment of any portion without his first having such opportunity. But plaintiff's acceptance was not followed by such a request. He stipulated for an agreement that he should have the right of inspection absolutely, when defendant had made him no such offer. It must be held, therefore, that the lower court did not err in giving the peremptory instruction.

On the trial the plaintiff offered to introduce evidence tending to show that at the time of the negotiations there was an established custom in and about Youngstown that, in a transaction involving the sale of discard billets, the purchaser had the right to have an inspector at the loading point, and that such custom was known to the parties. The court, upon objecton by defendant, refused to permit the introduction of such evidence. Plaintiff in error urges that the judgment of the lower court should be reversed because of this refusal. There are two grounds why it should not be. Such refusal is not assigned as error. **Appeal—failure to assign error.** As heretofore stated, seven errors are assigned, but each in a different way raises the single question as to whether the giving of the peremptory instruction was erroneous. The only error which it can be claimed covered this refusal is the sixth. It is in these words: "That said court erred in refusing and denying to this plaintiff the right to introduce its complete proof on all the issues in this cause, and in refusing to allow, and not allowing, the jury to determine said issues."

This assignment has no reference to the refusal of the court to permit the plaintiff to introduce such evidence as to custom, but merely to its action in giving the peremptory instruction after the plaintiff

had introduced its evidence bearing on the existence of the contract, without hearing its evidence as to damages. Usually a court hears all the evidence bearing on both the right of recovery and the amount thereof, and, if it thinks that the defendant is entitled to a peremptory instruction, gives it at the close of all such evidence. This course was not pursued in the lower court, and that properly so. After hearing all the evidence introduced by plaintiff bearing on its right of recovery, it gave the peremptory instruction. Plaintiff intended by this assignment to raise the question whether the giving of the instruction was not premature, and nothing else. It filed a motion for new trial. It did not urge the refusal to permit the introduction of this evidence as a ground of the motion. The third ground was: "That the decision of the court in stopping the further trial of said case and directing the jury to bring in a verdict for the defendant is contrary to law."

It is this same question that is raised by the sixth assignment of error.

But the lower court properly refused to permit the introduction of this evidence. If the existence of any such custom would have made a contract out of the communications which passed between the parties, it should have been alleged in plaintiff's petition. It was not. The petition based its claim that there was a contract solely on these communications. As no contract arose out of them, considered apart from any such custom, the petition was bad and subject to demurrer. A fact essential to make a petition good should be alleged.

Pleading—custom—necessity.

Perceiving no error, the judgment of the lower court is affirmed.

Petition for rehearing denied.

ANNOTATION.

Acceptance of offer with condition which law would imply.

That an acceptance of an offer is not rendered insufficient to consummate a contract, by a condition which would be implied by law, is recognized by a number of authorities. Morse v. Tillotson & W. Co. (1918) 253 **Fed.** 340; Ryder v. Johnson (1907) 153 **Ala.** 482, 45 So. 181; Bennett v. Cummings (1906) 73 **Kan.** 647, 85 Pac. 755; Cavender v. Waddingham (1878) 5 **Mo.** App. 457; Grimsrud Shoe Co. v. Jackson (1908) 22 **S. D.** 114, 115 N. W. 656; Curtis Land & Loan Co. v. Interior Land Co. (1908) 137 **Wis.** 341, 129 Am. St. Rep. 1068, 118 N. W. 853; Hussey v. Horne-Payne (1878) 47 L. J. Ch. N. S. 751, L. R. 8 Ch. Div. 670, 38 L. T. N. S. 543, 26 Week. Rep. 703, affirmed in (1879) L. R. 4 App. Cas. 311, 48 L. J. Ch. N. S. 846, 41 L. T. N. S. 1, 27 Week. Rep. 585, 6 **Eng.** Rul. Cas. 155; 39 Cyc. 1200, 1201; 1 Page, Contr. 78.

In Morse v. Tillotson & W. Co. (**Fed.**) supra, it was claimed that there was no concluded contract for the sale of notes or bonds, to be secured by a mortgage on steamboats, because at one point in the negotiations plaintiffs offered to advance the consideration, on being advised by their attorneys that the title was good. The court said: "It will no doubt be conceded that an offer to sell implies that the title is marketable. And if an offer to sell is made by A, and accepted by B, subject to the title being found good upon examination, it hardly seems that the words 'subject to the title being found good' import any new term into the acceptance, so as to prevent a meeting of the minds upon the offer as made." After discussing cases relied on by the parties, and stating that if there was any conflict the court preferred to follow Hussey v. Horne-Payne (**Eng.**) supra, the court concluded its remarks on this branch of the case by saying: "An acceptance which, in terms, is conditioned on what the law implies, is a good acceptance, as it introduces nothing new into the contract."

In Ryder v. Johnson (**Ala.**) supra, it appeared that an offer to sell land was accepted, provided the title of the vendor proved to be good. The court said: "The acceptance by the complainant of the offer to sell, both being by letter, would complete the contract of sale, the proviso in the acceptance being merely the proviso which the law would attach to the acceptance at any rate, to wit, that the seller had a good title to the land."

Bennett v. Cummings (**Kan.**) supra, involved an offer to purchase corn, which was accepted on the condition "terms good firms," which was construed by the court to mean that the corn was to be weighed at its destination by responsible business men, and that the seller did not bind himself to accept weights made by unreliable people. The court said: "In the absence of a special agreement, there was no obligation on his part to do so. The words used did not affect the contract between the parties. The situation was the same as though Cummings had said: 'I reserve the right to insist upon honest weights.' The mere declaration of a matter which the law clearly implied was not the addition of a new term."

Cavender v. Waddingham (**Mo.**) supra, was an action by a broker employed by defendant to negotiate with the owners of land for its purchase. Defendant contended that plaintiff did not obtain from the owners an unconditional acceptance of his offer to purchase, because the acceptance provided that the occupants of the premises should be given a reasonable time to vacate. The court said: "We think this was an unconditional acceptance of the offer as made, without any modification of its terms. . . . It was no counter proposition, but an acceptance of the same thing in the same sense. . . . The occupants were entitled to a reasonable time to vacate the premises whether the Scudders [the owners] said so or no."

In Grimsrud Shoe Co. v. Jackson (**S. D.**) supra, it appeared that a debtor sold a stock of goods, and that the defendant agreed with the purchaser to hold him harmless from all indebtedness of the debtor. An attorney wrote defendant about a claim in his hands, and in reply defendant promised to pay such claim, if approved by the debtor. The attorney obtained such approval, and again wrote defendant, offering to accept the amount of the claim without interest, "provided we receive remittance at once." The court first discussed the case on the assumption that defendant's agreement to pay the claim was a guaranty, and disposed of the contention that there was no sufficient acceptance of the guaranty by saying: "The contention of counsel for respondent that the guaranty was not accepted in the terms proposed is clearly untenable, as the law would imply that the claim was to be paid immediately upon the acceptance of the promise."

Curtis Land & Loan Co. v. Interior Land Co. (**Wis.**) supra, involved an acceptance of an offer to sell land. In accepting the offer, the purchaser called the vendor's attention to certain tax sales, and asked him to take care of such taxes. The court said: "If this portion of the letter contained any requirement that was not comprehended in the defendant's offer to sell, then it may well be asseverated that plaintiff did not make an unqualified acceptance, but a conditional one, and that therefore no contract was made. If the legal effect of defendant's offer to sell the land at a stated price was that it should furnish a marketable title, free and clear of outstanding liens and encumbrances, then the paragraph quoted added nothing to the defendant's proposition to sell, and did not constitute a counter proposition. The defendant's offer to sell is silent as to the nature of his title, and as to the character of the conveyance which it purposed giving. But the law seems to be well settled that an agreement in general terms to convey real estate, without specifying the nature of the title held by the vendor or the kind of a deed which is to be given, calls for a conveyance of the entire interest in the land sold, by a good and sufficient deed. In other words, an agreement to sell at a sound price, without reservation or exception, implies that a marketable title, free of encumbrances, will be passed to the

vendee upon compliance with his obligations. . . . The tax certificates referred to in the plaintiff's letter . . . constituted an encumbrance upon the land and a cloud upon the title. It is apparent that the defendant would not be complying with the terms of its offer to sell, in the event of its refusal to take care of these outstanding tax liens, and that, therefore, the plaintiff might insist in its letter of acceptance that the certificates in question, if outstanding, be redeemed, and that, by so doing, it added nothing to the obligations the defendant had assumed, in the event of its offer being accepted."

In Hussey v. Horne-Payne (**Eng.**) supra, an offer to sell real estate was accepted, "subject to the title being approved by our solicitor." The suit was for specific performance, and the vice chancellor, without discussing the quoted phrase, held that the offer was unconditionally accepted. The court of appeal held that the quoted phrase added a term not included in the offer, as the law gave a purchaser no right to have the title approved by his solicitor or anyone else, but only a right to a marketable title. In discussing this question, the court, however, says: "There was no acceptance of that additional term, and the only question which we are called upon to decide is whether that additional term, so expressed, amounts in law to an additional term, or whether it amounts, as was very fairly admitted by the counsel for respondents, to nothing at all; that is, whether it merely expresses what the law would otherwise have implied,"—thus very clearly indicating the court's opinion that, if such term would be implied by law, the acceptance was unconditional. As stated in the reported case, the judgment was affirmed by the House of Lords on another ground; but the Lord Chancellor expresses the opinion that the quoted phrase did not constitute the solicitors the arbiters of whether the title was good, and was nothing more than a guard against its being supposed that the title was to be accepted without investigation, and as meaning that the title must be investigated and approved in the usual way. It is not quite clear whether he meant to hold that the acceptance, as so construed, was unconditional, but the case has apparently been regarded as so holding.

See also Andrews v. Calori (1907) 38 **Can.** S. C. 588, affirming (1906) 12 **B. C.** 236, in which it is apparently held that an acceptance of an offer to sell land was not rendered conditional by stating therein that payment would be made, "so soon as proper title is evidenced to our satisfaction." The case of Corcoran v. White (1886) 117 **Ill.** 118, 57 Am. Rep. 858, 7 N. E. 525, holding that an acceptance of such an offer on condition that title is perfect is not an unconditional acceptance, is doubtless distinguishable upon the ground that the condition annexed exceeded that which the law would have implied.

In Ottumwa Brick & Constr. Co. v. Ainley (1899) 109 **Iowa,** 386, 80 N. W. 510, taxpayers attacked the validity of a contract made with a city for a street improvement. The resolution ordering the improvement provided that the contractors should accept certificates issued against abutting property as full compensation, except with respect to improvements at street intersections, and in front of city property, and property not subject to special assessment. The exception of property not subject to special assessment was not carried into the advertisement for bids, but the successful bidder made it a condition of its bid that the city should guarantee the payment of the certificate to be issued against certain property, which was below the ordinary high-water mark of a river. It was contended that the city had no power to accept such bid, but the court held that as title to such property was in the state the city could not impress it with an assessment, and that, in the absence of any express provision in the contract, it would have been liable, as upon an implied guaranty, for the cost of the improvement in front of such property. The court said: "The guaranty in the contract, if but expressive of a liability that would have existed in its absence, could not affect the legality of the instrument."

In Jordan v. Walker (1908) 154 Mich. 394, 117 N. W. 942, the court held that the acceptance of an offer to sell pickles was not rendered qualified or conditional by a specification therein, "6 bushels to 45-gallon cask," as this was the statement of the trade manner of measuring quantities, understood by both parties whether stated or not, there being testimony that "45 gallons were considered by all packers as 6 bushels."

In Brown v. Norton (1888) 50 Hun, 248, 2 N. Y. Supp. 869, it was held that an answer to an order for brick, to be imported and delivered upon the opening of navigation on the Hudson river, was an acceptance of the offer, and not a counter proposal, though it provided for the delivery of the brick on the dock, the court saying that it was to be inferred, as the parties were engaged in the business and understood the source from which the brick would be obtained, that they would be unloaded upon the dock, even if no reference had been made to that fact by the answer of the seller.

In the reported case (PHŒNIX IRON & STEEL CO. v. WILKOFF CO. ante, 1497) the court, as will be noted, does not deny, but apparently recognizes, that an acceptance on a condition which the law would imply will create a contract. The holding in that case is, that, if the accepter requires the offerer to agree to such condition, then the acceptance does not create a contract. No other case has been found in which the court discusses the effect of an acceptance, containing a provision that the offerer shall agree to a condition which the law would imply; and, while the distinction between such an acceptance and an acceptance merely attaching the condition, without requiring the offerer to agree thereto, appears to be rather fine, the reported case cannot be said to be in conflict with cases dealing with the latter class of acceptances. The value of the case as a precedent upon the question under annotation is, doubtless, to some extent, at least, affected by the fact that the court, in the subsequent part of its opinion, takes the view that the right of inspection stipulated for in plaintiff's acceptance was not the same right of inspection which the law would have implied; as, upon that assumption, the question under annotation does not arise.

This note does not embrace cases such as Turner v. McCormick (1904) 56 W. Va. 161, 67 L.R.A. 853, 107 Am. St. Rep. 904, 49 S. E. 28, and Horgan v. Russell (1913) 24 N. D. 490, 43 L.R.A.(N.S.) 1150, 140 N. W. 99, cited in the reported case, holding that the acceptance of an offer is not conditional because it is accompanied by a request or demand for some modification of the terms of the offer respecting performance of the contract.

A. McT.

JAMES A. MARTIN et al., Appts.,

v.

JAMES CUNNINGHAM SON & COMPANY.

Massachusetts Supreme Judicial Court—November 25, 1918.

(231 Mass. 280, 121 N. E. 21.)

Sale — inability to perform — return of payments.

All the money paid under the contract must be returned upon material failure of the seller of a vehicle to perform, under a contract providing for a down payment with the order, which is to be returned if the order is not accepted, and further payments at specified times, although the order is accepted and payments have been made in addition to the down payment for the return of which the contract provides.

[See note on this question beginning on page 1513.]

APPEAL by plaintiffs from an order of the Appellate Division of the Municipal Court of the City of Boston in their favor for less than the amount asked for, in an action brought to recover the amount paid by them upon a written contract for the purchase of a motor hearse. *Reversed.*

Defendant's request for rulings of law, mentioned in the opinion, were as follows:

(1) On all the evidence, the plaintiffs are not entitled to recover.

(2) If the delay in delivery of the motor hearse was due to a cause unavoidable or beyond the control of the defendant, the plaintiffs are not entitled to recover.

(3) By the terms of the contract, the defendant fully performed, if it was ready to deliver the hearse as soon as practicable after August 1st as the delays unavoidable or beyond its control would permit.

(4) The plaintiffs in any event are not entitled to recover the first payment of $250, which by the terms of the contract was to be returned only if the order was not accepted, the order having been accepted, and the hearse having been built.

Messrs. **A. D. Welch, G. F. James,** and **Bion B. Libby** for appellants.

Mr. **Louis C. Doyle,** for appellee:

Plaintiffs are not entitled to recover the first payment of $250, which accompanied the order in accordance with its terms, since the order was accepted and the work begun under it, and their recovery in this action is limited to the second payment of $250.

International Textbook Co. v. Martin, 221 Mass. 1, 108 N. E. 469; Loveland v. Epstein Drug Co. 227 Mass. 311, 116 N. E. 570; Massachusetts Biographical Soc. v. Russell, 229 Mass. 524, 118 N. E. 662; Hoe v. Rex Mfg. Co. 205 Mass. 219, 91 N. E. 154; Marsch v. Southern New England R. Corp. 230 Mass. 483, 120 N. E. 120.

Braley, J., delivered the opinion of the court:

The evidence is not reported and the questions of fact on which the first, second, and third requests are predicated having been decided adversely to the defendant, nothing remained but the assessment of damages, the measure of which, as presented by the fourth request, is the only question raised on the record. The plaintiffs having advanced $500, which is the amount awarded by the trial judge, contend that the decision of the appellate division, that only $250 could be recovered, should be reversed. The defendant is the vendor, and because of its material failure in performance the plaintiffs, in whom title to the motor hearse never vested, had the right to rescind. Ballou v. Billings, 136 Mass. 307; Earnshaw v. Whittemore, 194 Mass. 187, 192, 80 N. E. 520, and cases cited. And the consideration having entirely failed, they are entitled to recover back the money paid on account of the contract price. Moore v. Curry, 112 Mass. 13; Graham v. Hatch Storage Battery Co. 186 Mass. 226, 230, 71 N. E. 532; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69. The clause relating to the price and mode of payment reads as follows: "A payment of $250 accompanies this order, which is to be returned only if the order is not accepted. Two hundred and fifty dollars in thirty days. $500 dollars to be paid on arrival of said vehicle . . . and the balance in equal monthly notes of $450 each . . . with 6 per cent interest from date of arrival."

It is urged by the defendant that the purpose of the preliminary payment was to guarantee this amount if the order, after acceptance, was subsequently canceled by the plaintiffs. But the contract, the printed form of which in blank was furnished by the defendant, is not so worded, and the plantiffs are not shown to have been in default. The whole clause means, if your order is not accepted the money will be refunded, but if it is accepted you become bound to pay the stipulated price, and the money will be credited, leaving a balance, the amount of which is stated, to be paid in cash and notes. Griggs v. Moors, 168 Mass. 354, 360, 47 N. E. 128. The defendant, having accepted the offer

or proposal, thereupon entered on the performance of a contract under which the amount in dispute was to be applied in part payment of the entire price. Bishop v. Eaton, 161 Mass. 496, 499, 42 Am. St. Rep. 437, 37 N. E. 665; Lennox v. Murphy, 171 Mass. 370, 373, 50 N. E. 644. If the payment is treated as in the nature of liquidated damages for anticipated nonperformance, the answer is that the plaintiffs have fully performed the agreement. If, upon acceptance, it is treated as in the nature of a forfeiture, they must be deemed to have intended to make a gift of the amount to the defendant. The plaintiffs, moreover, who have acted in good faith, instead of being made whole, will lose one half of their money, while the defendant, although cast in damages, obtains an equivalent pecuniary benefit or enrichment, a result not to be reached unless the express wording of the instrument admits of no other contruction.

Sale—inability to perform—return of payments.

The defendant also cites International Textbook Co. v. Martin, 221 Mass. 1, 108 N. E. 469, as decisive that this provision is to be deemed an independant covenant. But in that case the agreement expressly provided that, when accepted, it should not be subject to cancelation, and that in no event would the plaintiff, who had never made default, be required to refund any part of the money paid for the scholarship which he agreed and was ready to furnish. We are of the opinion, for the reasons stated, that the decision of the Appellate Division should be reversed, and the report of the trial judge should be dismissed.

So ordered.

ANNOTATION.

Effect of stipulation for return of deposit or advance payment if the order is not accepted.

As pointed out in the reported case (MARTIN v. JAMES CUNNINGHAM SON & Co. ante, 1511), where a buyer pays money as a deposit or advance payment for goods, and the seller fails to make delivery, there is an entire failure of consideration for the money thus paid by the buyer, and he is entitled to recover the same. The question presented in the reported case is whether or not and to what extent this right of the buyer is affected by a clause which in effect makes the advance payment liquidated damages if the buyer does not perform.

No case other than the reported case has been found which passes upon the specific question. It would seem clear, however, that this provision applies only where the failure of the buyer to perform was due to his own default, and not to that of the seller, and this in substance is the holding in the reported case.

A case of interest in this connection is D'Ambrosio v. Russo (1915) 153 N. Y. Supp. 113, holding that where a deposit is made under an agreement that it is to be retained as liquidated damages in event the buyer fails to complete his purchase, the latter cannot recover the same where he is in default, without reference to the question as to whether or not the payment was in fact intended as liquidated damages. And see also Bell v. Hoffman (1885) 92 N. C. 273, holding that where each of the parties to a contract of sale executed a note as a forfeiture for nonperformance, the same to be sealed and delivered with the contract of sale, and the seller failed to comply with his agreement, the buyer was entitled to recover on the note given by the seller. It is also apparently assumed that the buyer was entitled to a return of his own note. A. G. S.

C. M. WHEELER, Admr., etc., of Catharine Grover, Deceased, Respt.,
v.
HENRY McKEON et al., Appts.

Minnesota Supreme Court—June 1, 1917.

(137 Minn. 92, 162 N. W. 1070.)

Executor and administrator — action to set aside deed.

1. The personal representative of a decedent can maintain an action to set aside the decedent's contract of sale of real property upon the ground of mental incompetency.

[See note on this question beginning on page 1517.]

Evidence — sufficiency.

2. The evidence sustains a finding that the plaintiff was mentally incompetent at the time of the execution of the contract of sale involved.

Same — transactions with deceased.

3. Persons interested in the event of such an action may testify as to conversations and declarations of the deceased, in the nature of verbal acts, tending to show loss of memory, a wandering mind, and delusions, as bearing upon the question of competency, and the court properly admitted such testimony. The statute (Gen. Stat. 1913, § 8378), which forbids the giving in evidence by a person interested in the event of the action of conversations with or admissions of deceased persons, is in the nature of an exception to the general rule that interested persons are competent witnesses, and must be construed strictly.

Same — business acts.

4. The business acts of a party whose competency is in question, and declarations and conversations about the time, when they tend to show his comprehension of affairs, are admissible; and testimony of this character was erroneously excluded.

Appeal — sufficiency of evidence.

5. The plaintiff claimed that the contract of sale was too indefinite for enforcement, and the defendants claimed that the agreement was in fact definite and certain, and that whatever uncertainty existed resulted from mistake in framing the written contract, and that it should be reformed. The court found with the plaintiff and against the defendants. In view of the error in excluding testimony bearing upon the question of competency the finding is not sustained.

Headnotes by DIBELL, C.

APPEAL by defendants from a judgment of the District Court for Pipestone County in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to set aside a contract for the sale of certain land. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Howard & Gurley and C. H. Christopherson,** for appellants.

Plaintiff, as administrator of the estate of the decedent had no right to maintain this action.

Paine v. First Div. St. Paul & P. R. Co. 14 Minn. 65, Gil. 49; State ex rel. Beals v. Probate Ct. 25 Minn. 22; Noon v. Finnegan, 29 Minn. 420, 13 N. W. 197; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; Fleming v. McCutcheon, 85 Minn. 156, 88 N. W. 433; Jenkins v. Jenkins, 92 Minn. 310, 100 N. W. 7; Wellner v. Eckstein, 105 Minn. 470, 117 N. W. 830.

Evidence concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties, is incompetent.

Griswold v. Edson, 32 Minn. 436, 21 N. W. 475; Re Goldthorp, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; Holcomb v. Holcomb, 95 N. Y. 316; Re Eysaman, 113 N. Y. 62, 3 L.R.A. 599,

20 N. E. 613; Griswold v. Hart, 205 N. Y. 384, 42 L.R.A.(N.S.) 320, 98 N. E. 918, Ann. Cas. 1913E, 790; Lowe v. Lowe, 83 Minn. 206, 86 N. W. 11.

Permitting a witness to give an opinion, withholding from the jury the right to pass upon the reasonableness and credibility of such opinion, as deduced from narrated facts, is manifest error.

Woodcock v. Johnson, 36 Minn. 217, 30 N. W. 894; Underhill, Ev. § 197; Scott v. Hay, 90 Minn. 312, 97 N. W. 106.

Every fact and circumstance about the signing of the contract and the knowledge of decedent as to the terms, about the time of the execution of the contract, should have been allowed.

Re Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; Woodcock v. Johnson, 36 Minn. 217, 30 N. W. 894.

Evidence was insufficient to sustain the findings of incompetency.

Trimbo v. Trimbo, 47 Minn. 391, 50 N. W. 350; Albrecht v. Albrecht, 44 Minn. 70, 46 N. W. 145; Merchants' Nat. Bank v. Northwestern Mfg. & Car Co. 48 Minn. 358, 51 N. W. 117; Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911; Scott v. Hay, 90 Minn. 304, 97 N. W. 106; Youn v. Lamont, 56 Minn. 216, 57 N. W. 47; Argo v. Coffin, 142 Ill. 368, 34 Am. St. Rep. 86, 32 N. E. 679; 2 Page, Contr. § 894; 1 Clevenger, Med. Jur. 244; Sands v. Potter, 165 Ill. 397, 56 Am. St. Rep. 253, 46 N. E. 282; Elwood v. O'Brien, 105 Iowa, 239, 74 N. W. 740; Milks v. Milks, 129 Mich. 164, 88 N. W. 402; Wilkinson v. Sherman, 45 N. J. Eq. 413, 18 Atl. 228; Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. 264; Whitaker v. Hamilton, 126 N. C. 465, 35 S. E. 815; Carnagie v. Diven, 31 Or. 366, 49 Pac. 891; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383; Shaughnessy v. Shaughnessy, 135 Minn. 262, 160 N. W. 769.

For a person to prevail in an action of this kind it is necessary to show, not only insanity or incompetency, but it must also appear that the contract is unreasonable and unconscionable.

Youn v. Lamont, 56 Minn. 221, 57 N. W. 478; 2 Pom. Eq. Jur. § 946; Schaps v. Lehner, 54 Minn. 212, 55 N. W. 911.

Messrs. **Morris Evans and Bryson & Bryson**, for respondent:

In case of the death of the plaintiff, his representative is ordinarily substituted as a matter of course.

Landis v. Olds, 9 Minn. 90, Gil. 79; 22 Cyc. 1174, 1175; Billson v. Linderberg, 66 Minn. 66, 68 N. W. 771; Anderson v. Fielding, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357, 16 Am. Neg. Rep. 92; Brown v. Brown, 35 Minn. 191, 28 N. W. 238; Cooper v. St. Paul City R. Co. 55 Minn. 134, 56 N. W. 588; Clay v. Chicago, M. & St. P. R. Co. 104 Minn. 1, 115 N. W. 949.

If an agreement is so uncertain and ambiguous that the court is unable to collect from it what the parties intended, the court cannot enforce it; and since there is no obligation, there is no contract.

9 Cyc. 248 (C); Gould v. Gunn, 161 Iowa, 155, 140 N. W. 380; 1 Greenl. Ev. ¶ 300.

At the time of making the contract, Catharine Grover was not mentally competent to make the same and to understand the same.

Anderson v. St. Cloud, 133 Minn. 467, 158 N. W. 417; Speer v. Speer, 146 Iowa, 6, 27 L.R.A.(N.S.) 294, 140 Am. St. Rep. 268, 123 N. W. 176; Re Winslow, — Iowa, —, 122 N. W. 971; 22 Cyc. 1206 (B); Darby v. Hayford, 56 Me. 246; Mays v. Prewett, 98 Tenn. 474, 40 S. W. 483; Re Brown, 38 Minn. 112, 35 N. W. 726.

The conversations in question were admissible to show the mental condition of deceased.

Cady v. Cady, 91 Minn. 139, 97 N. W. 580; Leasman v. Nicholson, 59 Iowa, 259, 12 N. W. 270, 13 N. W. 289; Dean v. Carpenter, 134 Iowa, 275, 111 N. W. 815.

Dibell, C., filed the following opinion:

Action to set aside a contract for the sale of land upon the ground of the mental incompetency of the vendor. The issue of mental incompetency was submitted to the jury, which found the vendor incompetent. There were findings for the plaintiff in accordance with the finding of the jury. In the complaint it was alleged that the contract was too indefinite for enforcement. The defendants claimed that the agreement for the sale was definite and certain, and that, if there was any indefiniteness in the written contract, it was because it by mistake failed to state the actual agreement, and that it should be reformed. The court found for the plaintiff and against the defend-

ants upon this issue. The defendants appeal from the order denying their motion for a new trial.

1. The action was brought in behalf of Catharine Grover, an incompetent, by her guardian. Mrs. Grover died pending trial, and the plaintiff was appointed administrator and was substituted as plaintiff. The point is made that the plaintiff cannot maintain this action, but that it should be maintained by the heirs who succeeded to Mrs. Grover's property upon her death. No objection was made by plea or otherwise prior to the trial. Conceding, but not holding, that the objection may be first made at the trial, it is not well taken. By statute the administrator is entitled to the possession and to the rents and profits of the real estate of the decedent, and "may himself, or jointly with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same." Gen. Stat. 1913, § 7296. The authorities upon the general question of the right of the personal representative to maintain an action to quiet title are not in harmony, but under similar statutes the usual holding favors the right. Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327; Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029; Munger v. Doolan, 75 Conn. 656, 55 Atl. 169; Ladd v. Mills, 44 Or. 224, 75 Pac. 141; Laverty v. Sexton, 41 Iowa, 435; Re Higgins, 15 Mont. 474, 28 L.R.A. 116, 39 Pac. 506. And see Eyre v. Faribault, 121 Minn. 233, L.R.A. 1917A, 685, 141 N. W. 170; Quinn v. Minneapolis Threshing Mach. Co. 102 Minn. 256, 113 N. W. 689; Pabst Brewing Co. v. Small, 83 Minn. 445, 86 N. W. 450.

Executor and administrator—action to set aside deed.

2. Something more than a year prior to the making of the contract Mrs. Grover sustained an injury to her head through a fall. After that she failed. A number of people, familiar with her in her daily life, testified as to her acts, declarations, and conduct, and gave their opinion, based upon such facts, that she was not of contractual capacity. Her attending physician gave it as his opinion that she was suffering from senile dementia and that she died from it. She was seventy-eight years of age. The contract was made August 18, 1915, and she died on March 8, 1916. The evidence of incompetency was seriously controverted and is not all all conclusive, but it supports the finding of the jury.

Evidence—sufficiency.

3. Mrs. Grover's sons, who were interested in the event of the action, were permitted to testify to her conversations, which indicated a loss of memory, a wandering mind, and delusions. These conversations were not in connection with the execution of the contract. Objection was made to them as in violation of Gen. Stat. 1913, § 8378, which forbids a party to an action or one interested in the event thereof "to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties," etc. In Re Brown, 38 Minn. 112, 35 N. W. 726, it was held that conversations of a party since deceased might be given in evidence by those interested in the action without a violation of the statute when they were in the nature of verbal acts and bore upon the question of mental competency. The authorities throughout the country are not in harmony. The statutes so differ that a decision in one jurisdiction may not be persuasive in another. The case cited is sufficiently supported. Cato v. Hunt, 112 Ga. 139, 37 S. E. 183; Kostelecky v. Scherhart, 99 Iowa, 120, 68 N. W. 591; Smith v. Guerre, — Tex. Civ. App. —, 159 S. W. 417; Grimshaw v. Kent, 67 Kan. 463, 73 Pac. 92; Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171; Williams v. Williams, 90 Ky. 28, 13 S. W. 250; Ducker v. Whitson, 112 N. C. 44, 16 S. E. 854. Nothing said or decided in Cady v.

Same—transactions with deceased.

Cady, 91 Minn. 137, 97 N. W. 580, impairs its force. The statute is in the nature of an exception to the general rule that witnesses are not disqualified by interest, and is strictly construed. Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55; Re Brown, 38 Minn. 112, 35 N. W. 726; Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850; Ikenberry v. New York L. Ins. Co. 127 Minn. 215, 149 N. W. 292; Bowler v. Fahey, 136 Minn. 408, 162 N. W. 515.

4. The defendants sought to show that the deceased talked intelligently about her property and knew the condition of it at the time of the making of the contract,—in short, that she comprehended business affairs at the time. Evidence of this kind was excluded and we think erroneously. The business acts of a party whose competency is in question, and his declarations, made about the time of the transaction, tending to show his comprehension of business affairs, are admissible. Woodcock v. Johnson, 36 Minn. 217, 30 N. W. 894; Re Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; Hammond v. Dike, 42 Minn. 273, 18 Am. St. Rep. 503, 44 N. W. 61; 1 Wigmore, Ev. § 229. Evidence should have been admitted of all acts, declarations, and conversations of the deceased at or about the time of the execution of the contract, tending to show that she comprehended its significance.

Same—business acts.

5. The plaintiff claims that the contract was too indefinite for enforcement. The defendants claim that the agreement was certain, and that if the written contract is indefinite it should be reformed. The plaintiff claims that there was in fact no sufficiently definite agreement. The court found with the plaintiff, and he now claims that such finding determines the case in his favor, regardless of other questions.

Two written contracts were executed. The first one was indefinite. The next day, apparently to make a slight change in a payment, another was executed. It was not much better. However, if it be assumed that Mrs. Grover was of contractual capacity, and appreciated the natural import of the words used, the evidence leaves little doubt as to the actual agreement. A finding that the deceased was mentally competent would bear very directly upon the one under immediate consideration. In view of the error, referred to in the preceding paragraph, in excluding evidence bearing upon competency, the finding that the parties were not at an actual agreement when the written contract was executed should not be sustained. Whether it would be sustained if there were a finding of mental competency we need not consider.

Appeal—sufficiency of evidence.

We have referred to all questions determinative of the result or likely to be important upon a new trial. In view of the new trial it is proper to say that considerable liberality should be allowed in the introduction of evidence upon the issue of incompetency. The issues were submitted to the jury in a very clear charge, and the new trial is limited to the issues mentioned in the fourth and fifth paragraphs of this opinion.

Order reversed.

ANNOTATION.

Right of executor or administrator to avoid contract or conveyance by decedent on ground of mental incapacity.

I. Introductory, 1517.
II. Right to avoid contract, 1518.
III. Right to avoid conveyance, 1520.

I. Introductory.

It is the purpose of this note to review the decisions involving the right

of an executor or administrator to set aside or avoid a contract or conveyance by his testator or intestate on the ground of the mental incapacity of the latter. The question is one which has but rarely been the subject of direct decision, most of the cases herein cited being those wherein an action by some other person to avoid such a contract or conveyance has been dismissed on the ground that the right of avoidance was in the personal representative.

II. Right to avoid contract.

It seems to be the rule that if a party to a contract is lacking in mental capacity, the contract may be set aside or avoided after his death by his executor or administrator on that ground. Beverley's Case (1603) 4 Coke, 123b, 76 Eng. Reprint, 1118, 17 Eng. Rul. Cas. 702, 2 Co. Inst. 14, Fitzherbert Nat. Brev. 532; Reg. Brev. 267; Langley v. Langley (1885) 45 Ark. 392; Bunn v. Postel (1899) 107 Ga. 490, 33 S. E. 707; Mead v. Stegall (1898) 77 Ill. App. 679; Voris v. Harshbarger (1894) 11 Ind. App. 555, 39 N. E. 521; Copenrath v. Kienby (1882) 83 Ind. 18; Nutter v. Des Moines L. Ins. Co. (1912) 156 Iowa, 539, 136 N. W. 891; Judge of Probate v. Stone (1863) 44 N. H. 593; Wagner v. Harriott (1887) 10 N. Y. S. R. 709; New York L. Ins. Co. v. Hagler (1914) — Tex. Civ. App. —, 169 S. W. 1064; Lazell v. Pinnick (1801) 1 Tyler (Vt.) 247, 4 Am. Dec. 722.

Thus, in Langley v. Langley (1885) 45 Ark. 392, a widow sought, after the death of her husband, to set aside an assignment by the husband of a contract for the purchase of lands, on the ground that, at the time of making it, he was mentally incompetent. In holding that the defendant did "not stand in such a relation of privity in blood or representation as to entitle her to enforce a trust against a third person in favor of her deceased husband," the court said: "Now the deed or contract of a lunatic is not absolutely void. It may be avoided by his heirs, or his personal representatives, or a subsequent purchaser from him."

In Voris v. Harshbarger (1894) 11 Ind. App. 555, 39 N. E. 521, while the question discussed in this note was not raised, the court held that the answer of the defendant administrator, setting up the unsoundness of mind of his intestate in defense of a suit on a promissory note executed by the intestate, was sufficient.

The question involved in this note was not discussed in Copenrath v. Kienby (1882) 83 Ind. 18, but in that case an administratrix was permitted without objection to set up the insanity of the intestate as a defense to an action on a promissory note executed by the intestate as a surety. In reply it was alleged by the plaintiff that the deceased had subsequently ratified the transaction on his recovery, and it was held that this reply was, because of its general form, not a valid rejoinder to the plea of insanity.

In Nutter v. Des Moines L. Ins. Co. (1912) 156 Iowa, 539, 136 N. W. 891, the action was on a life insurance policy, instituted by the widow of the insured, who was named therein as the beneficiary. A few weeks before his death, the insured, while mentally incapable of contracting, had surrendered his policy to the defendant and received its cash value. Whether there was a disaffirmance by any person other than the beneficiary does not appear. The court said: "There was a disaffirmance of the act of surrender by a party having capacity to disaffirm the acts of the deceased. An insane person, acting through his guardian or personal representative, can disaffirm and avoid his contract."

In Judge of Probate v. Stone (1863) 44 N. H. 593, an action of debt on the bond of an administrator, instituted by the administrator of the estate of a claimant of a distributive share of the estate of the defendant's intestate, a codefendant claimed the distributive share in controversy by virtue of an assignment from the plaintiff's intestate of the latter's rights therein. In defense of this claim the plaintiff set up the insanity of his intestate. The court held that the plaintiff could rescind the transaction on the discovery of a fraud practised on his intestate, who was mentally incapacitated.

In Wagner v. Harriott (1887) 10 N. Y. S. R. 709, the question involved was the right of the plaintiff to certain money which had been assigned to him by one who had been placed in an insane asylum, the defendant being the official custodian of valuables taken from such persons before their confinement. The court held that only the mentally incapacitated person or his "legal representatives" had the right to avoid his assignment.

In New York L. Ins. Co. v. Hagler (1914) — Tex. Civ. App. —, 169 S. W. 1064, the action was by the administrator of the estate of one on whose life several insurance policies had been issued, to annul a contract of the insured with the defendants whereby the former surrendered his policies and received the surrender value thereof. The plaintiff alleged the insanity of the insured at the time of executing the aforesaid agreement. The court held that the mental incapacity of the insured was such as to avoid the contract, and entered judgment in favor of the plaintiff without discussing his right to sue for such relief.

In Lazell v. Pinnick (1801) 1 Tyler (Vt.) 247, 4 Am. Dec. 722, an action against the administrator of the surety on a bail bond by the principal, against whom a judgment on the bond had been rendered and satisfied, the administrator set up in defense of the suit the mental incapacity of his intestate to contract. The court held that the administrator of the deceased surety was entitled to show the insanity of his intestate in avoidance of the contract of suretyship.

In Bunn v. Postell (1899) 107 Ga. 490, 33 S. E. 707, the action was against the administrator of a party to a contract for the purchase of shares of stock of a certain mining corporation to recover the purchase price thereof. The administrator interposed as a defense to the action the mental incapacity of his intestate. The principal questions argued were whether the intestate had the capacity to make the contract, and whether an administrator could ratify the contract of his intestate, made while the latter was non compos mentis, certain acts of the administrator being relied on by the plaintiff as a ratification of the contract, notwithstanding the insanity of the defendant's intestate. The question of the right of the defendant to avoid his intestate's contract on the ground of the latter's mental incapacity was not raised. The court said, however: "The contract of an insane person or one non compos mentis, who has never been adjudicated to be insane or of unsound mind as prescribed by the Code, is not absolutely void, but only voidable. . . . Such a contract may be ratified by him upon afterward becoming sane, or during a lucid interval, or, after his death, may be avoided or ratified by his heirs or personal representative. In a case like the present the contract is voidable at the option of the personal representative."

In Mead v. Stegall (1898) 77 Ill. App. 679, a suit was instituted by a daughter against the administrator of her deceased father to recover the amount of expenditures made by her for the care and support of her father and mother during a number of years prior to their deaths. The administrator set up in defense of the suit a contract which the father had entered into with the plaintiff, whereby the latter, in consideration of the obligation assumed by her of maintaining her parents, was to have the use of certain property of the decedent. The plaintiff set up in opposition the mental incapacity of her father to contract. The question presented to the appellate court, therefore, was the right of a party to a contract to avoid it on the ground of the mental incapacity of the opposite party thereto, and not the right of an executor or an administrator of the latter to set aside or avoid his decedent's contract on the ground stated. The court nevertheless stated the rule as follows: "We think the question of competency may be raised only by the party himself, or his legal representatives, and cannot be availed of by the same party to the contract, to relieve himself from its performance."

However, where the heirs of the decedent have acted towards a transaction of their ancestor involving the

purchase by the latter of real estate in a manner wholly at variance with any right of avoidance, the administrator may not avoid the transaction on the ground of the decedent's insanity. Campbell v. Kuhn (1881) 45 **Mich.** 513, 40 Am. Rep. 479, 8 N. W. 523. In that case the action was by an administrator to recover the alleged unpaid balance of an indebtedness represented by a note executed by the defendant in favor of the plaintiff's intestate, and in which the latter had accepted a conveyance of certain land from the defendant in satisfaction of the alleged indebtedness. The complaint charged that the deceased was mentally incapacitated at the time of the conveyance. It appeared that the heirs of the decedent had acted towards the transaction of their ancestor in a manner to dispel any thought of their avoiding it. The court said: "No one can at the same time insist that a contract is in force and is not in force, nor recover on a basis which his proceedings contradict; and whilst a voidable transaction remains unavoided it operates as one that is binding; and no action that contemplates it as one which has been avoided can be maintained. The result is that if the arrangement with decedent has been suffered to remain, which is a fact unquestioned, and if this action has no force to avoid it, a complete denial is necessarily implied of all right to recover what is sued for. Is there, then, any efficacy in this case to avoid that arrangement? The answer is obvious. The administrator has no power either directly or indirectly to waive the conveyance. The law casts the right on the heirs, who have the title by descent (1 Co. Litt. 2b, and 5 Bacon, Abr. 'Idiots & Lunatics,' D), two of whom seem to have dealt with the premises in a manner wholly at variance with any right of avoidance. An administrator has no commission from the law to intervene and by his election unsettle the landed possessions held by the heirs through inheritance, on the specific ground that the ancestor, at the time when the property vested in him, was not of sound mind. Neither is it his province to proceed in disregard of the fact whether the heirs have or have not elected to abide by the grant, and sue to reclaim the purchase money."

The reported case (WHEELER v. MCKEON, ante, 1514) was an action to set aside a contract for the sale of lands on the ground of the mental incapacity of the vendor. The action was instituted by the latter's guardian, and on his death his administrator was substituted as the plaintiff. It was contended that the administrator could not properly maintain the action, but that the heirs should have been substituted for the guardian as the plaintiffs. The court refused to sustain this contention, the refusal being based on a statute (Gen. Stat. 1913, § 7296) whereby the administrator was entitled to the possession and to the rents and profits of the real estate of the decedent, and might "himself, or jointly with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same."

III. Right to avoid conveyance.

The authorities seem to be in accord in holding that an executor or administrator has the right to set aside or avoid a conveyance executed by the decedent in his lifetime, on the ground of mental incapacity. Beverley's Case (1603) 4 Coke, 123b, 76 **Eng.** Reprint, 1118, 16 Eng. Rul. Cas. 702, 2 Co. Inst. 14, Fitzherbert, Nat. Brev. 523, Reg. Brev. 267; Doe ex dem. Hickman v. King (1868) 12 **N. B.** 330; Orr v. Equitable Mortg. Co. (1899) 107 **Ga.** 499, 33 S. E. 708; Fecel v. Guinault (1880) 32 **La.** Ann. 91; Hunt v. Rabitoay (1900) 125 **Mich.** 137, 84 Am. St. Rep. 563, 84 N. W. 59; McAnaw v. Tiffin (1897) 143 **Mo.** 667, 45 S. W. 656; Ingraham v. Baldwin (1853) 9 **N. Y.** 45, affirming (1851) 12 Barb. 9; Merritt v. Merritt (1899) 43 App. Div. 68, 59 **N. Y.** Supp. 357; Miskey's Appeal (1883) 107 **Pa.** 611.

Thus, in Doe ex dem. Hickman v. King (1868) 12 **N. B.** 330, an action of ejectment against the widow of a grantor, the defendant pleaded in defense of the suit the insanity of her husband at the time of executing the conveyance. In holding for the plaintiff, the court said: "It cannot be said

that the deed under which the lessor of the plaintiff claimed in this case was void. At most it was voidable; but if so, it could only be avoided by the grantor or his representatives, the contrary of which position this defendant occupied."

In Orr v. Equitable Mortg. Co. (1899) 107 Ga. 499, 33 S. E. 708, the suit was against the administrator of a deceased mortgagor to foreclose the mortgage. The defense of insanity of the defendant's intestate at the time of the execution of the mortgage was interposed. The court, following its ruling in Bunn v. Postell, stated in the preceding subdivision of this note, held that the administrator was a competent person to set up the defense of the insanity of the mortgagor.

In Fecel v. Guinault (1880) 32 La. Ann. 91, the question of the right of an administrator or an executor to avoid a conveyance by a decedent on the ground of mental incapacity was not raised, but the plaintiff, who was the administratrix of the estate of her deceased husband, sued as such and as tutrix of his children, was awarded a decree in a suit to annul a mortgage executed by the husband on certain of his property while he was mentally incapacitated.

In Hunt v. Rabitoay (1900) 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59, a suit for the partition of real estate, the court said: "There is no evidence in this case to show that this partition was an unequal one. If, however, it were unequal, these complainants are not in position to raise that question and to avoid it. They are neither privies in blood nor are they the legal representatives of Marie Louise Viger, and only these two classes can avoid the deed of an insane grantor."

In McAnaw v. Tiffin (1897) 143 Mo. 667, 45 S. W. 656, the plaintiff introduced evidence to show the insanity of the grantor who was the common source of the titles claimed by both parties. The court said: "As to whether or not the deed of an insane person, made before inquest, is void, or only voidable, the authorities are in conflict. It was held in Dexter v. Hall (1872) 15 Wall. (U. S.) 9, 21 L. ed. 73; Re Desilver (1835) 5 Rawle (Pa.) 111, 28 Am. Dec. 645; and Van Deusen v. Sweet (1872) 51 N. Y. 378, that the deed of an insane person is void; but the great weight of modern authority is to the effect that such a deed is voidable only, at the instance of the grantor's guardian thereafter appointed, his heirs or legal representatives."

In Ingraham v. Baldwin (1853) 9 N. Y. 45, affirming (1851) 12 Barb. 9, a defendant in ejectment set up in defense that the maker of the mortgage under a foreclosure of which the plaintiffs claimed title was insane at the time of its execution. The court said: "A second objection to the admission of this testimony was that the lunacy of the mortgagor did not absolutely avoid the mortgage. It was, at most, voidable, at the election of the lunatic, or his personal representatives, or those claiming some interest under him in the premises."

In Merritt v. Merritt (1883) 43 App. Div. 68, 59 N. Y. Supp. 357, a suit to foreclose a mortgage, it was held by the trial court that the administrator of the mortgagor could not show the insanity of the latter in defense of the suit unless he also intended to prove knowledge on the part of the plaintiff, the assignee of the mortgagee, of the insanity. In reversing that decision it was said: "Whatever question there may be as to deeds, it is well settled [in New York] that a mortgage executed by a lunatic is voidable only. Ingraham v. Baldwin (1853) 9 N. Y. 45. Being voidable at the election of the lunatic's personal representatives, the latter may in the first instance rest upon proof of the lunacy, and it thereupon becomes incumbent upon the mortgagee or his assignees 'to show the facts necessary in equity to sustain' the instrument."

In Miskey's Appeal (1885) 107 Pa. 611, a suit by the widow and administratrix of the grantor to set aside a conveyance of the latter's estate to his father, the administratrix recovered a judgment on the ground of the mental incompetency of the grantor.

J. V. B.

EDGAR F. LUCKENBACH et al.

v.

W. J. McCAHAN SUGAR REFINING COMPANY et al.

United States Supreme Court — December 9, 1918.

(248 U. S. 139, 63 L. ed. —, 39 Sup. Ct. Rep. 53.)

Insurance — loan or payment — release of carrier — subrogation.

1. Agreements between shippers and insurers after a loss that the latter shall adjust the loss by making a loan to the former, repayable to the extent only of any subsequent net recovery against the carrier, and that the insurers shall have the conduct of the suit against the carrier which the shippers agree to begin, are valid, where, by the bills of lading, the carrier is given the benefit of any insurance effected by the shippers, and by the insurance policies the insurers are not liable to the shippers if the carrier is liable. Sums paid over under such agreement should be regarded as loans or conditional payments, and not as absolute payments of the insurance, which, under the bills of lading, would relieve the carrier from liability to anyone.

[See note on this question beginning on page 1528.]

Certiorari—review of facts.

2. The concurrent decisions of the two lower courts on issues of fact, like the unseaworthiness of a vessel at the commencement of a voyage, and the failure to exercise due diligence to make her seaworthy, will be accepted by the Federal Supreme Court unless clearly shown to be erroneous.

Shipping — limiting liability — personal contract — seaworthiness.

3. The liability of shipowners under their personal contract for a loss of cargo due to unseaworthiness is not affected, despite their want of privity or knowledge, by the provisions of U. S. Rev. Stat. § 4283, and the Act of June 26, 1884, § 18, for a limitation of liability to the value of the ship and pending freight.

Same — charter parties — warranty of seaworthiness.

4. A warranty of seaworthiness at the commencement of each voyage is imported by the language of a time charter that the vessel being, on her delivery, tight, staunch, and strong, the owners will maintain her in a thoroughly efficient state in hull and machinery for and during the service.

Appeal — rendering proper judgment.

5. The presumed inadvertence in a decree below adjudging one of the owners of a vessel liable for the loss of her cargo will be corrected by modifying such decree so as to render all the owners liable, where the right to recover against all the owners for the full amount in case any of them was so liable was not controverted.

PETITION for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which modified a decree of the District Court for the Southern District of New York in favor of libellant, in a suit to recover damages for loss of a cargo, due to the unseaworthiness of the vessel. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Peter S. Carter, Charles C. Burlingham,** and **Roscoe H. Hupper,** for petitioners:

Petitioners, if liable for the damage, are entitled, under the benefit of insurance clause in the bills of lading, to the benefit, to the extent of their liability, of the insurance moneys received by the libellants.

Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 1176; Wager v. Providence

Ins. Co. 150 U. S. 99, 108, 109, 37 L. ed. 1013, 1017, 1018, 14 Sup. Ct. Rep. 55; Pom. Eq. Jur. 3d ed. §§ 713, 715; Great Lakes & St. L. Transp. Co. v. Scranton Coal Co. 152 C. C. A. 437, 239 Fed. 603; Roos v. Philadelphia, W. & B. R. Co. 199 Pa. 378, 49 Atl. 344; Lancaster Mills v. Merchants' Cotton Press & Storage Co. 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317; Demming v. Merchants' Cotton-press & Storage Co. 90 Tenn. 310, 13 L.R.A. 518, 17 S. W. 89.

The Julia Luckenbach was not unseaworthy at the beginning of her voyage from San Juan, April 25, 1912, or when she sailed from New York for Porto Rico April 13, 1912, and due diligence to make her seaworthy had been exercised.

The Rover, 33 Fed. 515; The Alvena, 74 Fed. 254, affirmed in 25 C. C. A. 261, 51 U. S. App. 100, 79 Fed. 973; The Carib Prince, 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; The Wildcroft, 201 U. S. 378, 50 L. ed. 794, 26 Sup. Ct. Rep. 467; The Aggi, 46 C. C. A. 276, 107 Fed. 300; The Ontario, 106 Fed. 324; Jay Wai Nam v. Anglo-American Oil Co. 121 C. C. A. 130, 202 Fed. 822; The Charlton Hall, 125 C. C. A. 116, 207 Fed. 343.

Petitioners are entitled to limit their liability to the value of the Julia Luckenbach and her pending freight, notwithstanding the maintenance clause of the chapter.

Lord v. Goodall, N. & P. S. S. Co. 4 Sawy. 292, Fed. Cas. No. 8,506, affirmed in 102 U. S. 541, 26 L. ed. 224; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 602, 27 L. ed. 1038, 1047, 3 Sup. Ct. Rep. 379, 617; Quinlan v. Pew, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 116; Craig v. Continental Ins. Co. 141 U. S. 638, 646, 35 L. ed. 886, 888, 12 Sup. Ct. Rep. 97; The Tommy, 81 C. C. A. 50, 151 Fed. 570; Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co. 117 C. C. A. 97, 197 Fed. 709; The Annie Faxon, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 312; The Colima, 82 Fed. 665; Van Eyken v. Erie R. Co. 117 Fed. 712; Smitton v. Orient Steam Nav. Co. 96 L. T. N. S. 848, 23 Times L. R. 359, 12 Com. Cas. 270; The Harry Hudson Smith, 74 C. C. A. 56, 142 Fed. 724; Re Myers Excursion & Nav. Co. 57 Fed. 240, affirmed in 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 109; La Bourgogne, 75 C. C. A. 647, 144 Fed. 781, affirmed in 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664; The Jane Grey, 99 Fed. 585; The Burma, 110 C. C. A. 330, 187 Fed. 94; Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 121, 122, 20 L. ed. 585, 591.

Mr. **Lawrence Kneeland**, for W. J. McCahan Sugar Refining Company:

Neither the owners nor the charterer are entitled to the benefit of the insurance effected on the cargo, or the moneys loaned or advanced by said insurers to the libellant after his suit was instituted.

Inman v. South Carolina R. Co. 129 U. S. 128–140, 32 L. ed. 612–616, 9 Sup. Ct. Rep. 249; Pennsylvania R. Co. v. Manheim Ins. Co. 56 Fed. 301; Bradley v. Lehigh Valley R. Co. 82 C. C. A. 426, 153 Fed. 350; Pennsylvania R. Co. v. Burr, 65 C. C. A. 331, 130 Fed. 850; Fayerweather v. Phenix Ins. Co. 118 N. Y. 324, 6 L.R.A. 805, 23 N. E. 192; Rintoul v. New York C. & H. R. R. Co. 21 Blatchf. 439, 17 Fed. 905; Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co. 185 Fed. 177.

Messrs. **J. Parker Kirlin** and **Mark W. Maclay, Jr.**, for Insular Line:

By the valid terms of the contract of carriage, the carrier was to receive the benefit of insurance.

Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; Rintoul v. New York C. & H. R. R. Co. 21 Blatchf. 439, 17 Fed. 905; Carstairs v. Mechanics' & T. Ins. Co. 18 Fed. 473; The Sidney, 23 Fed. 88; Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173; Platt v. Richmond, Y. River & C. R. Co. 108 N. Y. 358, 15 N. E. 393; Fayerweather v. Phenix Ins. Co. 118 N. Y. 324, 6 L.R.A. 805, 23 N. E. 192.

The transaction between the libellant and its insurer operated as a settlement of insurance, the benefit of which inured to the carrier.

Carstairs v. Mechanics' & T. Ins. Co. 18 Fed. 473; Inman v. South Carolina R. Co. 129 U. S. 128, 32 L. ed. 612, 9 Sup. Ct. Rep. 249; Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176.

The responsibility for unseaworthiness should rest on the shipowners, because they warranted that their vessel was seaworthy and that they would maintain her in that condition.

Atkins v. Fibre Disintegrating Co. 2 Ben. 381, Fed. Cas. No. 601, affirmed in 18 Wall. 272, 299, 21 L. ed. 841, 843; Panama R. Co. v. Napier Shipping Co. 166 U. S. 280–288, 41 L. ed. 1004–1006, 17 Sup. Ct. Rep. 572; Constantine & P.

S. S. Co. v. West India S. S. Co. 199 Fed. 964; The Alert, 9 C. C. A. 390, 26 U. S. App. 63, 61 Fed. 113; The New York, 93 Fed. 495; The Presque Isle, 140 Fed. 202; Church Cooperage Co. v. Pinkney, 95 C. C. A. 462, 170 Fed. 266; Benner Line v. Pendleton, 133 C. C. A. 349, 217 Fed. 497; The Vortigern L. R. [1899] P. 140, 68 L. J. Prob. N. S. 49, 47 Week. Rep. 437, 80 L. T. N. S. 382, 15 Times L. R. 259, 4 Com. Cas. 152, 8 Asp. Mar. L. Cas. 523; The Guadeloupe, 92 Fed. 670; United States v. New York & O. S. S. Co. 132 C. C. A. 305, 216 Fed. 71; Thin v. Richards [1892] 2 Q. B. 141, 62 L. J. Q. B. N. S. 39, 66 L. T. N. S. 584, 40 Week. Rep. 617, 7 Asp. Mar. L. Cas. 165; David McIver Sons & Co. v. Tate Steamers [1903] 1 K. B. 362, 72 L. J. K. B. N. S. 253, 51 Week. Rep. 393, 88 L. T. N. S. 182, 19 Times L. R. 217, 8 Com. Cas. 124, 9 Asp. Mar. L. Cas. 362; Park v. Duncan, 25 Sc. Sess. Cas. 4th series, 528, 35 Scot. L. R. 378, 5 Scot. L. T. 280; Cohn v. Davidson, L. R. 2 Q. B. Div. 455, 46 L. J. Q. B. N. S. 305, 36 L. T. N. S. 244, 25 Week. Rep. 369, 3 Asp. Mar. L. Cas. 374; Sumner v. Caswell, 20 Fed. 249; The Eugene Vesta, 28 Fed. 762; Bowring v. Thebaud, 5 C. C. A. 640, 11 U. S. App. 648, 56 Fed. 520; Putnam v. Wood, 3 Mass. 481, 3 Am. Dec. 179; Whipple v. Mississippi & Y. Packet Co. 34 Fed. 54; The Burma, 110 C. C. A. 330, 187 Fed. 94.

The owners of the steamer cannot limit their liability to the value of the steamer and her pending freight, as against the charterers' claim for indemnity, because their liability is based on a personal contract.

Pendleton v. Benner Line, 246 U. S. 353, 356, 62 L. ed. 770, 772, 38 Sup. Ct. Rep. 330; Richardson v. Harmon, 222 U. S. 96, 106, 56 L. ed. 110, 114, 32 Sup. Ct. Rep. 27.

Mr. Justice **Brandeis** delivered the opinion of the court:

The W. J. McCahan Sugar Refining Company shipped a cargo of sugar from Porto Rico to Philadelphia by the Julia Luckenbach, which was under charter to the Insular Line; and the cargo suffered severe damage. In the district court of the United States for the southern district of New York, a libel seeking damages was filed in the name of the shipper in personam against the Insular Line, and in rem against the steamer. It alleged that the damages resulted from unseaworthiness of the hull, existing at the commencement of the voyage. The petitioners, owners of the ship, were impleaded. The bills of lading sued on contained a clause relieving the carrier from liability for damages arising from "any latent defect in hull, . . . or by unseaworthiness of the ship, even existing at the time of shipment or sailing on the voyage, but not discoverable by the exercise of due diligence by the shipowner or manager; . . ."

The libel alleged that the unseaworthiness would have been discovered had due diligence been exercised. The district court so found, and held that the libellant was entitled to recover. The damages were agreed to be $87,526.65, with interest; and the value of the ship and pending freight was found or agreed to be $66,600. The owners duly moved for limitation of liability. The district court found that the damages sustained were occasioned without the privity or knowledge of the owners; held that they were entitled to limit their liability, both as against the shipper and as against the charterer, who claimed indemnity; and ordered that the owners should pay the shipper's claim to the extent of the value of the ship and pending freight; and that the balance should be paid by the Insular Line (148 C. C. A. 650, 235 Fed. 388). Both the owners and the Insular Line appealed to the circuit court of appeals. That court modified the decree, so as to award that payment of the full amount be made to the shipper primarily by the steamer and the owners; and that the charterer should be called upon to make payment only of the deficiency, if any (ibid.). The case comes here on writ of certiorari, granted on the petition of the owners (242 U. S. 638, 61 L. ed. 540, 37 Sup. Ct. Rep. 111).

It is urged, on three grounds, that the decision of the circuit court of appeals should be reversed, and that the district court should be directed,

either to dismiss the libel or to limit the owners' liability to the value of the ship and pending freight.

First. The owners contend that both lower courts erred in holding that the steamer was unseaworthy at the commencement of her voyage and that due diligence to make her seaworthy had not been exercised. The issue involved is one of fact; and no reason appears why the general rule should not apply, that concurrent decisions of the two lower courts on an issue of fact will be accepted by this court unless shown to be clearly erroneous. The Wildcroft, 201 U. S. 378, 387, 50 L. ed. 794, 796, 26 Sup. Ct. Rep. 467; The Carib Prince, 170 U. S. 655, 658, 42 L. ed. 1181, 1185, 18 Sup. Ct. Rep. 753.

Certiorari—review of facts.

Second. The owners (and also the charterer) contend that the libel should be dismissed, because the shipper had already been compensated for the loss by insurance which it effected; and that the carrier is entitled to the full benefit of this insurance.

The shipper had effected full insurance. The bills of lading sued on contain the following clause:

"In case of any loss, detriment, or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner, or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods."

Such a clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier. Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; Wager v. Providence Ins. Co. 150 U. S. 99, 37 L. ed. 1013, 14 Sup. Ct. Rep. 55. In the case at bar, the shipper has received from the insurance companies an amount equal to the loss; but it is contended that the money was received as a loan or conditional payment merely, and that, therefore, the carrier is not relieved from liability. The essential facts are these:

The policies under which the shipper was insured contained the following, or a similar, provision:

"Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."

The situation was, therefore, this: The carrier (including in this term the charterer, the ship, and the owners) would, in no event, be liable to the shipper for the damages occasioned by unseaworthiness, *unless* guilty of negligence. The insurer would, in no event, be liable to the shipper, *if* the carrier was liable. In case the insurer should refuse to pay until the shipper had established that recovery against the carrier was not possible, prompt settlement for loss (which is essential to actual indemnity and demanded in the interest of commerce) would be defeated. If, on the other hand, the insurers should settle the loss, before the question of the carrier's liability for loss had been determined, the insurer would lose the benefit of all claims against the carrier, to which it would be subrogated in the absence of a provision to the contrary in the bill of lading (The Potomac, 105 U. S. 630, 634, 26 L. ed. 1194, 1195), and the carrier would be freed from liability to anyone. In order that the shipper should not be deprived of the use of money which it was entitled to receive promptly after the loss, either from the carrier or from the insurers, and that the insurer should not lose the right of subrogation, agreements in the fol-

lowing (or similar) form were entered into between the insurers and the shipper:

New York, Aug. 15, 1912.

Received from the Federal Insurance Company, twenty-three hundred four and 1%00 dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee, or others on account of loss to our property (described below) due to damage on S/S Julia Luckenbach from Porto Rico/Philadelphia, on or about ——— ——— 190—, or from any insurance effected by any carrier, bailee, or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company the said recovery and deliver to them, duly indorsed, the bills of lading for said property, and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Federal Insurance Company. The W. J. McCahan Sugar Refining Co.,

R. S. Pomeroy, Treasurer.

$2,304.16.

Description of property:—Sugar.

Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.

Agreements of this nature have been a common practice in business for many years. Pennsylvania R. Co. v. Burr, 65 C. C. A. 331, 130 Fed. 847; Bradley v. Lehigh Valley R. Co. 82 C. C. A. 426, 153 Fed. 350. It is clear that, if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which, by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. Such claims, like tangible salvage, are elements which enter into the calculations of actuaries in fixing insurance rates; and, at least in the mutual companies, the insured gets some benefit from amounts realized therefrom. It is essential to the performance of the insurer's service that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts

Insurance—loan or payment—release of carrier—subrogation.

or notes with bills of lading attached would not be granted. Whether the transfer of money or other thing shall operate as a payment is ordinarily a matter which is determined by the intention of the parties to the transaction. Compare The Kimball, 3 Wall. 37, 44, 18 L. ed. 50, 54. The insurer could not have been obliged to pay until the condition of their liability, i. e., nonliability of the carrier, had been established. The shipper could not have been obliged to surrender to the insurers the conduct of the litigation against the carrier until the insurers had paid. In consideration of securing them the right to conduct the litigation, the insurers made the advances. It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.

Third. The owners contend that, under § 4283 of the Revised Statutes and § 18 of the Act of June 26, 1884, chap. 121, 23 Stat. at L. 53, 57, Comp. Stat. 1916, §§ 7707, 8028, their liability should have been limited to the value of the ship and her pending freight; because the district court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the circuit court of appeals. But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the Limitations Acts do not apply. Pendleton v. Benner Line, 246 U. S. 353, 62 L. ed. 770, 38 Sup. Ct. Rep. 330.

Shipping—limiting liability—personal contract—seaworthiness.

It is also urged that, as between the owners and the Insular Line, the original warranty of seaworthiness was exhausted upon delivery of the ship to the charterers, and that the maintenance clause relied upon does not import a warranty of seaworthiness at the commencement of each voyage under a time charter, but merely an obligation to pay the expense of keeping her hull and machinery in repair throughout the service. Neither the language of the clause nor the character of time charters affords support for this contention. The charter of the vessel states clearly that the vessel "being, on her delivery, tight, staunch, [and] strong," the owners will "maintain her in a thoroughly efficient state in hull and machinery for and during the service,"—*not pay the expense* of maintaining her. This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer becomes liable to shippers, without limitation, for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners; and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage. Compare The Burma, 110 C. C. A. 330, 187 Fed. 94; Whipple v. Mississippi & Y. Packet Co. 34 Fed. 54; David McIver, Sons & Co. v. Tate Steamers [1903] 1 K. B. 362, 72 L. J. K. B. N. S. 253, 51 Week. Rep. 393, 88 L. T. N. S. 182, 19 Times L. R. 217, 8 Com. Cas. 124, 9 Asp. Mar. L. Cas. 362; Park v. Duncan & Sons, 35 Scot. L. R. 378. If Giertsen v. Turnbull & Co. 45 Scot. L. R. 916, strongly relied upon by the owners, is inconsistent with this view, it should be disregarded.

Same—charter parties—warranty of seaworthiness.

Fourth. The vessel was owned $^{54}/_{80}$ths by Edgar F. Luckenbach, as sole trustee of the estate of Lewis Luckenbach; $^{10}/_{80}$ths by Edgar F. Luckenbach individually; and $^{16}/_{80}$ths by John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach. All of these parties were impleaded as owners. The charter party was signed only by "Estate of Lewis

Luckenbach, per Edgar F. Luckenbach, Trustee;" but it was admitted by all the petitioners that Edgar F. Luckenbach, trustee, in so signing the charter party, acted for all the owners and intended to bind all. The decree in the district court declares that libellant was entitled to recovery "from the respondents Edgar F. Luckenbach et al., her owners." The decree in the circuit court of appeals adjudged (presumably through inadvertence) that the payment should be made by "the estate of Luckenbach." The right to recover against all the owners, for the full amount, in case any of them was so liable, was not controverted. The decree of the Circuit Court of Appeals should be modified so as to render all the owners liable. Compare Pendleton v. Benner Line, supra. As so modified, the decree is affirmed.

Appeal—rendering proper judgment.

ANNOTATION.

Insurance: validity and effect of agreement between insured and insurer for a loan repayable to extent of recovery against carrier or other person causing loss.

The endeavor by carriers on the one hand, and insurers on the other, to cast the burden of bearing a loss, caused by the destruction or loss of goods, upon the other, has called forth various contractual provisions. Agreements of the character considered in this note were conceived by insurers, to relieve them of a part, at least, of their liability for a loss of insured property, brought about by the fault of a carrier. It is usual for carriers, in order to escape the burden of bearing a loss, to insert in their bills of lading a provision that the carrier shall, in case of loss or damage to goods, have the benefit of any insurance effected on them. By virtue of this provision, a payment by an insurer to the shipper would discharge, pro tanto, the latter's claim against the carrier, and, such claim of the shipper being discharged, there would obviously be no valuable right of subrogation by the insurer, upon payment of a loss, of the shipper's right against the carrier, which right existed as a general rule at common law.

To escape this consequence the insurer conceived the idea of making a loan to the insured, pending settlement with the carrier, upon condition that it should be repaid to the extent that a recovery was obtained from the carrier.

These loan agreements have been given effect in a number of cases in which they were held not to constitute payments which discharged the liability of the carrier, or by reason of which any rights of the insurer under its policy were waived.

The loss thus having been thrown upon the carrier by this device, the interesting question is suggested, whether the carrier could not escape its liability, in some cases at least, by inserting in its contract with the shipper, in addition to the provision giving it the benefit of any insurance, an agreement that any sum advanced by it on account of a loss should merely constitute a loan, repayable to the extent of recovery of any insurance; and that the insured should, upon receiving such advancement, prosecute his claim against any insurer for the benefit of the carrier.

In some instances, the loan agreements under consideration have been inserted in the policy issued to the shipper, while in others there was no such provision in the policy; but the agreement was made between the insured and the insurer after a loss had occurred, and before a settlement had been made with the carrier.

It will be noted that the latter course was pursued in the reported case (LUCKENBACH v. W. J. MCCAHAN SUGAR REF. CO. ante, 1522), where the bill of lading contained a provision that the carrier should have the full benefit of any insurance effected on

the goods, and the policy obtained by the shipper contained a provision excluding liability by the insurer for goods shipped under a bill of lading giving the carrier the benefit of any insurance, and an agreement between the shipper and the insurer was made, after a loss, that the latter should adjust the loss by making a loan to the former, repayable only to the extent of any subsequent net recovery against the carrier, and that the insurer should have the conduct of the suit against the carrier which the shipper agreed to institute; it being held in that case that the transaction was valid as a loan, and that it did not constitute a payment which inured to the carrier's benefit.

A like conclusion was reached in The Guiding Star (1893) 53 Fed. 936, affirmed on other grounds in (1894) 10 C. C. A. 454, 22 U. S. App. 344, 62 Fed. 407, where, after a loss of the insured property while in the possession of a carrier, the insurer advanced to the insured, the shipper, the value of the property as a loan, without interest, upon the understanding that the shipper should prosecute the claim against the carrier, and, if successful, should repay the loan, but, if unsuccessful, the loan should be converted into a payment of the insurance; the court holding that this transaction did not devest the shipper of his title to the property, and was not a satisfaction of his claim, either against the insurance company or the carrier.

And in Lee v. Barrett (1913) 82 Misc. 475, 144 N. Y. Supp. 941, where, after a loss to a shipper had occurred because of a carrier's default, an insurer which had issued a policy to the shipper advanced money to the latter, and took an instrument acknowledging the recipt of the sum advanced "as a loan, and repayable only to the extent of any net recovery we may make from any carrier bailee, or others, on account of loss of our property," and pledging to the insurer any recovery from the carrier, or from an insurer of the carrier, and agreeing to deliver the bills of lading and to prosecute suit against the carrier on the claim, at the expense, and under the exclusive direction and control of the insurer, it was held that the advancement did not constitute a payment of the loss, and that the insurer was not, therefore, subrogated to insured's rights against the carrier, and an action was, therefore, held properly brought by an assignor of the insured.

In Bradley v. Lehigh Valley R. Co. (1907) 82 C. C. A. 426, 153 Fed. 350, affirming (1906) 145 Fed. 569, a bill of lading, issued to the owner of property, provided that in case of loss the carrier should be given the benefit of any insurance for or on account of the owner of the goods, and should be subrogated to his rights before any demand should be made upon the carrier; a policy obtained by the owner of the property shipped contained a warranty that the insurance should not inure, directly or indirectly, to the benefit of the carrier, by stipulation in the bill of lading, or otherwise, and that the policy should be null and void to the extent of any amount paid or recoverable from any carrier; after a loss the insurer advanced to the insured a sum equal to the amount of the loss, and took a receipt which recited that the amount had been received "as a loan, without interest, and repayable only to the extent of any net recovery we may make from the carrier responsible for the loss." It was contended that this operated as a payment and extinguished the insured's right against the carrier, but this contention was held erroneous, the court stating that, even if it were treated as a payment, a payment by a third person does not discharge liability as between the original parties, unless it is made and received with such intention; and it was held that the insurer did not, by this transaction, waive its right to insist upon the terms of its policy, and that it did not relieve the carrier from liability. The court said: "When the transaction took place, the insurance policy had become void at the election of the insurance company, because of the breach of the warranty. Although the insurance company was entitled to insist upon its right to treat its contract as nugatory, it could, if it chose, waive that right, and treat the policy as a

valid and existing one. By making an unconditional payment of the loss, it would have waived the breach, in the absence of some agreement or understanding to the contrary between the parties to the transaction. But the parties were at liberty to agree that the payment should not be unconditional, or that it should not operate as a waiver, or that it should be regarded as a loan or as a gratuity. The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regarded as a payment of the loss in any sense. Its form was carefully devised for that purpose. It is industriously framed to show that the money advanced was not advanced in payment of the loss; and apparently to deprive the railroad company from obtaining any benefit from the insurance, and enable Nourse & Co., or some assignee or appointee of theirs, to recover the loss from the railroad company for the benefit of the insurance company. It is not important that Nourse & Co. may not have expressly consented to receive the payment as one not made by the insurance company in recognition of its liability. It suffices if the insurance company did not intend to recognize its liability. As is pointed out by Chief Justice Shaw, in Farlow v. Ellis (1860) 15 Gray (Mass.) 231, a waiver is the relinquishment of a right which otherwise the party making it would have enjoyed, and the voluntary choice on his part not to claim the benefit is of the essence of the waiver; and whether there has been a waiver is a question of fact, depending upon the intention of the party against whom the waiver is asserted. That the insurance company did not intend to waive its right to treat the insurance as nugatory can hardly be questioned. The struggle between carriers and insurers to escape ultimate loss, when insured cargo has been damaged or destroyed while in the custody of the carrier, has resulted in efforts by each to cast the burden upon the other by the insertion of astute provisions in their respective contracts with the shippers or owners of cargoes, and by availing themselves of every technical advantage to secure the benefit of their own provisions. To infer that an insurance company has intentionally foregone such an advantage would be to indulge in a violent and preposterous presumption.

Notwithstanding the stipulation in the bill of lading, Nourse & Co. were under no legal obligation to effect any insurance for the benefit of the railroad company. The carrier is undoubtedly entitled by a stipulation in his contract to reserve to himself the benefit of any insurance which the shipper may effect or may have effected on the goods, although he thereby shifts from himself to the insurer the loss for which he is primarily responsible; but any stipulation which requires the shipper to procure insurance for the benefit of the carrier in case of loss is void. . . . The same reasons which forbid the enforcement of a stipulation requiring the shipper to insure for the benefit of the carrier would forbid the enforcement of one requiring him, when he does effect insurance, to procure such as will protect the carrier. The shipper cannot be circumscribed in his liberty to make such a contract with the insurer as he chooses. If he sees fit to make one which may be worthless to the carrier, it is his right to do so. The present stipulation does not purport to circumscribe that right. The contract which Nourse & Co. saw fit to make with the insurance company was framed so as to render the insurance worthless to the railroad company, at the option of the insurer. Unless the insurance company waived that option, and made the advance to Nourse & Co. as a payment for insurance in recognition of its liability, Nourse & Co. never obtained any insurance, and there was none to which any right of subrogation, under the stipulation in the bill of lading, could attach when the present action was brought. We conclude that there was no defense to the action arising from the stipulation."

And upon a similar state of facts the same conclusion was reached in Kalle & Co. v. Morton (1913) 156 App. Div. 522, 141 N. Y. Supp. 374.

Conclusions in accord with the pre-

ceding cases, holding that transactions by which the insurer, after a loss, entered into loan agreements with the insured, did not constitute payments or relieve the carrier, have been reached in cases in which the provision for a loan was contained in the policy.

Thus, in Gulf, C. & S. F. R. Co. v. Zimmerman (1891) 81 Tex. 605, 17 S. W. 239, a suit by shipper against carrier for goods lost, the bill of lading provided that the carrier should have the benefit of insurance effected on the goods; the shipper obtained a policy, providing that "it was not to cover the common-law liability of the carrier," and further providing that, on presentation of proof of loss, "the insurance company shall advance" to the insured "an amount equivalent to the insured value of the cotton so lost, damaged, or destroyed, pending investigation and determination as to whether such loss is one for which the carrier should be liable at common law;" and that, if the carrier should be found liable, the insured should return to the insurer "such amount as is received from the common carrier, immediately upon its receipt, which payment is to be a discharge in full of said advance." It appearing that the insurer had, pending an investigation of a loss, advanced a sum to the insured, and that the investigation had established that the loss was due to the carrier's negligence, it was held that the advancement by the insurer did not constitute a payment of the loss, and that the liability of the carrier was not thereby reduced.

The provision as to loan or advancement involved in Pennsylvania R. Co. v. Burr (1904) 65 C. C. A. 331, 130 Fed. 847, differs somewhat from those in the cases previously considered. In that case the bill of lading provided that the carrier should have the benefit of insurance effected by the shipper, and the policy obtained by the shipper provided that in case of any agreement by the insured with the carrier, by which it was stipulated that the latter should, in case of loss for which it might be liable, have the benefit of any insurance, "the insurers shall be discharged of any liability for such loss hereunder; but this policy, in these and all cases of loss or damage by perils insured against, shall be liable and owe actual payment for (only) what cannot be collected from carrier . . . but also shall be chargeable with the direct pecuniary consequence to the assured, temporarily arising from delay in collection from said carrier . . . and the advancing for this purpose only of funds to the assured for his protection, pending such delay, shall in no case be considered as affecting the question of the final liability of this insurance; and as soon as collection is made from the carrier the title of the insured to hold the funds so advanced . . . shall discontinue, and a portion thereof, equal to the sum collected from the carrier, shall be repaid to the insurer; but in case of final failure to collect from carrier, a portion of the sums advanced by the insurers, equal to the sum short collected from the carrier, may be retained and applied in settlement of the actual liability of this insurance." It appeared that, after a loss, the insurer advanced money to the insured and took a receipt, reciting that, in consideration of the insurer's advancing the sum, the insured agreed to put forward a claim against the carrier in whose hands the insured property received the damage, and, on receiving payment from the carrier, undertook to refund the advancement. It was held that this transaction did not amount to a payment of the loss, and that there was not a waiver of the benefit of the clause of the policy set out. The court referred to Roos v. Philadelphia, W. & B. R. Co. (Pa.) infra, calling attention to the fact that it did not appear in that case what the provisions of the policy were, and, with reference to the case at bar, said that unless they were prepared to hold, as they most assuredly were not, that the clause providing for a loan under the conditions specified was void, they could reach no other conclusion than that the sum paid to the insured was turned over as a loan, and not as an adjustment.

In Roos v. Philadelphia, W. & B. R. Co. (1901) 199 Pa. 378, 49 Atl. 344,

where a shipper sought recovery against a carrier for damage to goods, shipped under a bill of lading providing that the carrier should have the full benefit of any insurance that might be effected upon the goods, and after the goods had been damaged a company which had issued a policy to the shipper advanced a sum of money to the latter, taking an instrument reciting that the insured had borrowed from the insurer the sum advanced, "being a loan pending the investigation and determination whether the loss . . . is a loss for which the carrier should be held liable, and, if the carrier should be held liable, the undersigned agrees to return to the said president and directors the amount thus loaned, when and to the same extent same shall be recovered from the carrier," it was held that the question whether the transaction amounted to a loan or a payment was properly left to the jury, and a finding that it constituted a payment and should be deducted from the amount of the carrier's liability was sustained. The court distinguished the case of the Guiding Star, supra, on the ground that there was no provision in that case that the carrier should have the benefit of insurance effected by the shipper. J. T. W.

STEPHEN A. D. CLARK et al., Appts.,

v.

CITY OF MANHATTAN BEACH et al., Respts.

Supreme Court of California—July 17, 1917.

(175 Cal. 637, 166 Pac. 806.)

Elections — ineligible board — effect.

1. An election authorizing the issuance of municipal bonds is not invalidated by the fact that, contrary to the provision of the statute, persons officiated as election officers who had been in the employ of the city.

[See note on this question beginning on page 1535.]

Same — issuance of bonds — advertisement for officers.

2. The provision of Political Code, § 1142, requiring advertisements for officers to conduct an election, does not apply to municipal elections for the issuance of bonds.

Same — delay in opening polls.

3. A delay of ten minutes in opening the polls does not invalidate an election, where the delay works no injury to any voter.

Same — two objects.

4. An election authorizing the issuance of bonds to construct municipal wharves is not invalidated because the improvement involves the construction of two wharves, which are not separated in the proposition.

APPEAL by plaintiffs from a judgment of the Superior Court for Los Angeles County in favor of defendants in an action brought to enjoin the issuance and sale of municipal improvement bonds. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. **C. Franklin Baxter**, for appellants:

All the acts, resolutions, and ordinances must be governed by the laws governing the right to tax.

Hewes v. Reis, 40 Cal. 255; Fallbrook Irrig. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793; People v. Seale, 52 Cal. 71; People v. Castro, 39 Cal. 69; Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30; People v. Eagan, 116 Cal. 290, 48 Pac. 120; McCarthy v. Wilson, 146 Cal. 327, 82 Pac. 243.

Messrs. **Frank L. Perry** and **Bordwell & Mathews**, for respondents:

The board of election was appointed according to law, and its acts were legal.

Murphy v. San Luis Obispo, 119 Cal. 631, 39 L.R.A. 444, 51 Pac. 1085; Inglewood v. Kew, 21 Cal. App. 617, 132 Pac. 780; Booth v. Mott, 169 Cal. 677, 147 Pac. 953; People ex rel. Pixley v. Lodi High School Dist. 124 Cal. 694, 57 Pac. 660; Sprague v. Norway, 31 Cal. 173; Keller v. Chapman, 34 Cal. 635; McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243; People ex rel. Lee v. Prewett, 124 Cal. 7, 56 Pac. 619; Davis v. Grunig, 143 Cal. 342, 76 Pac. 1102; Laird v. Boothe, 22 Cal. App. 569, 135 Pac. 703.

The delay in opening the polls had no effect upon the result and was inconsequential.

Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841.

The form of ballot was proper.

Clark v. Los Angeles, 160 Cal. 317, 116 Pac. 966; Oakland v. Thompson, 151 Cal. 576, 91 Pac. 387.

Lorigan, J., delivered the opinion of the court:

Plaintiffs, as property owners, sued for an injunction to prevent the issuance and sale by defendants of $90,000 of municipal improvement bonds, and from a judgment in favor of defendants, plaintiffs appeal.

The facts show that Manhattan Beach is a city of the sixth class; that on November 7, 1914, its board of trustees determined that public interest and necessity demanded that the said city incur a bonded debt of $90,000 for the construction and completion of wharves upon or adjacent to the water front of said city, to be owned and operated by said city, one to be located at the foot of Center street, of the estimated cost of $70,000, and one at the foot of Marine avenue, of the estimated cost of $20,000; and that an election to vote upon the proposition of incurring said indebtedness in the amount of said $90,000 be held on January 20, 1916. An election was accordingly held at which 311 votes were cast; that 230 thereof were cast in favor of the issuance of said bonds, and 78 against their issuance. The city was proceeding to issue and sell said bonds when this action was brought.

A number of grounds for a reversal are urged by appellants.

First. They insist that the board of election was illegally constituted because not appointed according to law. Their counsel does not say anything further on this point than to make it; he does not attempt to point out why or how in any particular the appointments were not all according to law, and, hence, for this reason we might well ignore any consideration of it. But as in another part of his brief he makes reference to the fact (which is true) that the board of trustees "did not publish, advertise, or receive any petition of any election officers signifying their willingness or consent to act as such officers of election," in compliance with § 1142 of the Political Code of 1915, it may be assumed that noncompliance with this particular section is what, in the opinion of counsel for appellants, rendered the appointed board an illegal one. While the section referred to provides for advertising or calling for applications to serve as officers on boards for certain elections, it has no application to municipal elections such as were held here. That was definitely decided in Booth v. Mott, 169 Cal. 677, 147 Pac. 953, involving this very point, and nothing further need be said about it.

Elections—issuance of bonds—advertisement for officers.

Second. The next point, taking it up a little out of its order as made by appellants, but properly to be considered here as related to the one we have just been considering, is that the board of election was particularly chargeable with being illegally constituted because two of its members had been employed by the city of Manhattan Beach ninety days prior to this bond election at which they served. The trial court found as a fact that they had been so employed, but held that this did not affect the legal integrity of the election board or the validity of the election. This ruling was proper.

Same—ineligible board—effect.

While it is true that § 1142 of the Political Code provides that persons who have been employed by a city are not eligible as members of an election board at a municipal election held within ninety days of such employment, it has never been held that the simple fact that they were nevertheless appointed and acted as such rendered the election invalid. This very point was raised in McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243, the court saying: "Conceding that the evidence showed that certain members of these boards [election boards] came within the inhibition of § 1142 of the Political Code, and were therefore ineligible, they nevertheless did act, and were at least de facto officers of election, and as such their acts were valid in the absence of fraud, even though they did not possess all the qualifications requisite for the office. Certainly no principle of law would warrant the disfranchisement of the voters of a precinct on any such ground as the one relied on as the basis of this objection." See also, as declaring this same principle, People ex rel. Lee v. Prewett, 124 Cal. 7, 56 Pac. 619; Davis v. Grunig, 143 Cal. 342, 76 Pac. 1102. Here the board of election consisted of six members, including the two disqualified members. It is not alleged or pretended from the evidence that there was any fraudulent conduct on the part of the election board or of any of the officers of election. The claim is simply that an invalid election followed solely because there were two disqualified election appointees appointed on the election board, and notwithstanding it appears that there was not the slightest unfairness for that or any other reason in the conduct of the election. This contention the law will not sanction.

Third. It is claimed that the polls were not opened on time. This point is trivial. The law directs that the polls shall be opened at 6 A. M. They were, in fact, opened at 6.10 A. M. The slight delay was occasioned through the key of the polling place having been mislaid; and such delay worked not the slightest injury to any voter. Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841.

Same—delay in opening polls.

Fourth. It is next contended that the form of the ballot submitted at the election did not allow the voters to express their choice. But here again we are left to conjecture in what respect counsel for appellants thinks the form of the ballot was improper or unfair, because he makes no attempt to point out in what particulars he claims it open to these objections. He contents himself with simply making the point and citing the case of Clark v. Los Angeles, 160 Cal. 317, 116 Pac. 966. We take it, however, on account of his citation of the Clark Case and the discussion in the brief of counsel for respondents, that what counsel for appellants claims is that the proposition to incur an indebtedness for constructing a wharf at the foot of Center street and one at the foot of Marine avenue should have been submitted to the voters as distinct and independent propositions, so that they could express their choice of either without affecting the other, instead of compelling them to vote on the municipal wharf improvement as an entire scheme embracing these two wharves as integral parts thereof, and the bonded indebtedness therefor to be incurred or rejected as an entirety. There is nothing in the Clark Case to support this claim of appellants. It discusses the matter of when subjects should be separately stated on the ballot because distinct, unrelated, and independent of each other, and when not. It lays down valuable rules to be followed in proposing to voters the incurring of municipal indebtedness, but suggests nothing which could support the present claim of appellants. In fact, it sustains the submission of the proposition of municipal im-

provements as an entirety in the manner just as submitted here. The proposition for this Manhattan Beach municipal wharf constituted a single scheme, of which the several wharves mentioned were to constitute a general plan. It was not to consist of either, but of both. How far the municipality should proceed to improve its water front by the construction of wharves was a matter addressed to the discretion of the city, to be indorsed or rejected by the voters. It could adopt one general plan or scheme which might embrace the construction of several wharves as necessary to effect the single purpose of adequate harbor improvement, and have that improvement provided for and constructed under one bonded indebtedness. The proposition submitted here for the action of the voters was no different in principle from that submitted in the case of Oakland v. Thompson, 151 Cal. 576, 91 Pac. 387. In this latter case the proposition submitted was to acquire several distinct and widely separated parcels of land for park purposes. The same point was made there as here, that the voters should have been allowed to vote as to each separate tract of land, and not for or against the acquisition of all as a single unit. In sustaining the right of the city to submit the question of the acquisition of the several parcels to the voters as a single scheme or unit, the court said: "The scheme is a single scheme, the purpose a single purpose. . . . The law does not contemplate, much less compel, that each parcel of land which may be desired for a park shall be voted upon separately. The plan is a single plan for the acquisition of all these lands for park purposes. . . . Certainly the plan adopted was within the discretionary power of the council under the law, and it enabled every voter to express himself as being for or against the whole proposition. More than this was not required." The proposition submitted here was intended to embrace a whole scheme for municipal wharves for the city, and upon the authority of the case just referred to was properly submitted to the voters in the manner that it was, as a single unit, without a violation of any of the rights of the appellants.

Same—two objects.

A couple of other points are made for a reversal, but they are so entirely without merit as not even to warrant mentioning.

The judgment is affirmed.

ANNOTATION.

Result of election as affected by lack of title or by defective title of election officers.

I. Introductory, 1535.
II. Lack of appointment or of regular appointment:
a. General rule, 1536.
b. Cases holding election void, 1539.
III. Ineligibility:
a. In general, 1540.
III.—continued.
b. Candidate acting as election officer, 1541.
IV. Election officers not of opposite parties, 1542.
V. Failure to take proper oath, 1542.
VI. Miscellaneous, 1544.

I. Introductory.

This note does not deal with the cases where lack of appointment, or defects of appointment or in qualification, of those acting as election officers, are shown to have had an actual prejudicial effect upon the result of an election. It deals with the legal effect of these matters per se. The question of the method of procedure in attacking elections, whether by quo warranto or otherwise, is not included.

It is customary for the courts to say that statutes as to the mere mode of conducting elections are directory rather than mandatory, and this expression is often used in cases, where there is a lack of appointment of those

acting as election officers, or where there are defects of appointment or in qualification. Probably the original theory of the courts in sustaining elections conducted by irregular election officers was that those so acting were de facto officers having color of title. And most of the cases sustaining election so conducted are either put on the expressed ground that those acting were de facto officers, or else it appears from the facts that they were de facto officers acting under color of title. There are some cases as will be seen, where elections have been held void because those acting as election officers were declared to be mere usurpers, having no vestige of right or title. There are also, however, a few cases of sustained elections where there seems little more than usurpation on the part of those acting as election officers, and where the courts have brushed aside the defects as mere irregularities. It would seem to be a matter of doubt and difficulty to say whether or not the courts are reaching the conclusion that, if the result is honest, anyone, even a usurper, may hold an election, on the ground that the statutes requiring certain election officers are directory, and not mandatory. But probably at this time no court is definitely so far committed that it would not feel at liberty to throw out a district on the ground that those acting as election officers were mere usurpers.

II. Lack of appointment or of regular appointment.

a. General rule.

An election is not vitiated because an election officer was not properly appointed. Choisser v. York (1904) 211 Ill. 56, 71 N. E. 940; People v. Cook (1853) 8 N. Y. 67, 59 Am. Dec. 451, affirming (1852) 14 Barb. 259; Ward v. Kropf (1910) 120 N. Y. Supp. 476; State ex rel. Byrne v. Wilcox (1902) 11 N. D. 329, 91 N. W. 955; Thompson v. Ewing (1861) 1 Brewst. (Pa.) 113; Casey v. Smith (1894) 26 N. S. 177.

Where there is a doubtful question of law as to whether the inspectors of elections were properly appointed, their acting will not vitiate the election. Ward v. Kropf (1910) 120 N. Y. Supp. 476, supra.

In People v. Cook (1852) 14 Barb. (N. Y.) 259, affirmed in (1853) 8 N. Y. 67, supra, the court said, referring to objections to inspectors of election: "These objections are of a twofold character, extending to the regularity or legality of their appointment, and of their omission to qualify, by taking the proper oath of office. It will not stop to inquire whether these inspectors, in these several cases, were inspectors de jure or not. It is sufficient that they were inspectors de facto. They came into office by color of title, and that is sufficient to constitute them officers de facto."

So, an election will not be vitiated because of an irregularity in the appointment of an election officer. Pickett v. Russell (1900) 42 Fla. 116, 28 So. 764; Motley v. Wilson (1904) 26 Ky. L. Rep. 1011, 82 S. W. 1023.

Where the statute required election officers in a certain city to be appointed in August or September, the fact that the appointments are made after that time, but before the election, will not disfranchise the city. People ex rel. Van Wyck v. Police Comrs. (1879) 57 How. Pr. (N. Y.) 445; People ex rel. McMackin v. Board of Police (1887) 46 Hun. (N. Y.) 296.

An election for separate schools will not be vitiated because the election officials were appointed twenty-six days before the election, although the statute declares that they shall be appointed not more than twenty days before the election. Such a provision is merely directory although the statute also declares that "any failure to comply with any and all the provisions of this act shall render such act of establishing separate schools void." Marion v. Territory (1893) 1 Okla. 210, 32 Pac. 116.

In McCraw v. Harralson (1867) 4 Coldw. (Tenn.) 34, the court said as to the appointment of inspectors and judges of election: "The object of the statute is to secure just and competent inspectors; and when that end is attained, without prejudice to the contestant, it constitutes no grounds for declaring the election void. Were the

law held otherwise, and a strict conformity in all respects to its letter exacted of every officer holding popular elections, it would result in interminable contests about unsubstantial formalities, and end in a practical denial of the right of the people to choose their own officers."

An election will not be vitiated because the officer holding it was not appointed by the proper authority, if he was an officer de facto.

Martin v. Crook (1908) 155 Ala. 198, 46 So. 482; Ryan v. Tuscaloosa (1908) 155 Ala. 479, 46 So. 638; Sprague v. Norway (1866) 31 Cal. 174; Keller v. Chapman (1868) 34 Cal. 635; People ex rel. Pixley v. Lodi High School Dist. (1899) 124 Cal. 694, 57 Pac. 660; Gilleland v. Schuyler (1872) 9 Kan. 569; Fidelity Trust & S. V. Co. v. Morganfield (1895) 96 Ky. 563, 29 S. W. 442 (not necessary to decision); Hankey v. Bowman (1901) 82 Minn. 328, 84 N. W. 1002; Carabajal v. Lucero (1863) 22 N. M. 30, 158 Pac. 1088.

In Gilleland v. Schuyler (1872) 9 Kan. 569, supra, Brewer, J., said, in delivering the opinion of the court: "As to the irregularity in the mode of appointing or electing the clerks and judges, and the fact that there were but two judges qualified or acting. How the clerks secured their positions we are not told. They should have been appointed by the judges. Gen. Stat. 404, § 3. They were not. Yet the judges accepted them as clerks, recognizing them as such. One of the judges was so de jure. Both judges and clerks were officers de facto. They formed an election board. They were recognized as such by all persons having occasion to deal with an election board during the whole term of office of such board. Their acts as such officers can no more be questioned, collaterally, now, than can the acts of one who has served as mayor of a city during a term of two years, with the general recognition of community, be questioned after the expiration of such term. The manner of their election or appointment is merged in their assumption of power and the public recognition of their right. The shortness of their term of office does not affect the rule. They were officers de facto during the whole of the term."

Where the inspector failed to attend, the appointment of an inspector by the judges of election, instead of by the electors, will not invalidate the election when the irregularity did not affect the result, the statute providing: "That no irregularity or improper conduct in the proceedings of the judges, or any of them, shall be construed to amount to such malconduct as to annul or set aside any election, unless the irregularity or improper conduct shall have been such as to procure the person whose right to the office may be contested, to be declared duly elected, when he had not received the highest number of legal votes." Sprague v. Norway (1866) 31 Cal. 174, supra.

So, where one of an election board being sick, his place was filled by the others. People ex rel. Pixley v. Lodi High School Dist. (1899) 124 Cal. 694, 57 Pac. 660, supra.

But where the voters present were wrongly and fraudulently prevented from joining in the choice of election officers, the vote was declared void. State ex rel. Bradford v. Harwood (1887) 36 Kan. 236, 13 Pac. 212.

So the election will not be vitiated because those conducting it were not the proper officers, if they were officers de facto. Mercy v. Ohio (1873; C. C. N. D. Ill.) Fed. Cas. No. 9,457 (affirmed in (1874) 18 Wall. (U. S.) 552, 21 L. ed. 812, on the ground that there were no exceptions raising any question of law that the United States Supreme Court could consider); Lee v. State (1873) 49 Ala. 43; Choisser v. York (1904) 211 Ill. 56, 71 N. E. 940; People ex rel. Woods v. Green (1914) 265 Ill. 39, 106 N. E. 504, Ann. Cas. 1916A, 707; Chambers v. Board of Directors (1915) 172 Iowa, 340, 154 N. W. 581; People ex rel. Guernsey v. Pierson (1901) 35 Misc. 406, 71 N. Y. Supp. 993, affirmed in (1901) 64 App. Div. 624, 72 N. Y. Supp. 1123; Thompson v. Ewing (1861) 1 Brewst. (Pa.) 112; Krickbaum's Contested Election (1908) 221 Pa. 521, 70 Atl. 852; Leboutillier v. Harper (1875) 1 Quebec, L. R. 4.

Thus it was held that the election would not be disturbed—

—because the election board was not entirely composed as directed by the statute, Chambers v. Board of Directors (1915) 172 **Iowa**, 340, 154 N. W. 581, supra;

—because the inspectors chose one of their number to be poll clerk, People ex rel. Guernsey v. Pierson (1901) 35 Misc. 406, 71 **N. Y.** Supp. 993, affirmed in (1901) 64 App. Div. 624, 72 N. Y. Supp. 1123, supra;

—because the clerk irregularly assumed the office of inspector, Thompson v. Ewing (1861) 1 Brewst. (**Pa.**) 67, 112, supra;

—where one chosen in the absence of an inspector retired on the coming of such inspector, who thereafter acted, though it seems that, strictly speaking, he had ceased to be inspector, Lee v. State (1873) 49 **Ala.** 43, supra.

In Chambers v. Board of Directors (**Iowa**) supra, the court said: "While the law seems to provide that the president and secretary and one of the board shall act as judges of election (Code, § 2746), the judges who were selected were at least de facto officers, and the election should not be invalidated because of irregularities in the manner of their selection. The rule universally adopted is that irregularities in the selection of election judges will be disregarded unless prejudice be shown. 15 Cyc. 311, 312; Mechem, Pub. Off. § 184. If this were not the rule, substance would be subordinated to shadow; and mere technicalities would thwart the will of the people."

In Krickbaum's Contested Election (1908) 221 **Pa.** 521, 70 Atl. 852, supra, the court said: "In the present case, Hess was duly and properly appointed as judge of election at the preceding election, and both he and the other officers assumed that the appointment was good for the remainder of the year, and under this assumption he claimed and was awarded by the other election officers the right to act as judge at the election in dispute. It was a mistake, but the claim and its allowance were enough to give him color of right to the office and to prevent him from being considered as a mere usurper. Certainly the rights of the voters should not be prejudiced by any such irregularity as this."

In Tullos v. Lane (1893) 45 **La. Ann.** 333, 12 So. 508, it was held, where the registry was not made by the proper officer, that a voter may accept the registrars de facto as they may accept the inspectors de facto.

The cases sustaining elections, heretofore cited in this note, are either upon the expressed ground that the person acting was an officer de facto, or on facts showing that he was such officer and had color of title. But a few cases do not indicate any distinction between officers de facto and mere usurpers, although not definite on the question.

Thus, in Lehlbach v. Haynes (1891) 54 **N. J. L.** 77, 23 Atl. 422, it was treated simply as an irregularity that a person acted as a member of the election board without being legally appointed and sworn, the court not discussing the question whether he was a judge de facto. So, in Wells v. Taylor (1884) 5 **Mont.** 202, 3 Pac. 255, where it does not appear by what authority certain persons assumed to act as judges and clerks of election, the court does not discuss the de facto question, but says: "The question is, Was there a fair vote and an honest count? If there was, the election is valid though the officers conducting the same were not duly sworn or chosen, or did not possess the qualifications requisite for the office." So, in Smith v. Hackett (1916) 129 **Md.** 73, 98 Atl. 140, the court does not state that the persons in question were de facto officers, but says: "Persons not duly sworn and qualified acted as substitute judges and clerks of election during the absence of some of the officials originally appointed. There is no suggestion that those who served in such capacities were guilty of any misconduct or failed to properly perform the duties of the positions which they assumed. While their service, as unsworn officers, was irregular, it was not fatal to the validity of the votes

cast in the precincts in which they were so engaged."

In Choisser v. York (1904) 211 Ill. 56, 71 N. E. 940, supra, where, in the absence of the regularly appointed judges, three other persons took their places, it appeared that of the three, one stated that he acted at the request of an election judge in another district, a second, that he acted at the request of the supervisor of the township, but how the third came to act did not appear. The majority of the court held that the persons acting were at least judges de facto, but three judges dissented. Two of them in an opinion considered that the men who acted were mere intruders without any right or authority.

b. Cases holding election void.

In some cases elections not held by the proper officers have been declared void.

Thus, in Phillips v. Corbin (1896) 8 Colo. App. 346, 46 Pac. 224, where judges of a special election were appointed by a body having no authority so to do, the election was held void. So where a private person assumed to record the votes at a tax election, which the statute directed to be done by a certain officer. Norman v. Boaz (1887) 85 Ky. 557, 4 S. W. 316. So, where the constable was to hold elections, or, in his default, other specified officers, and the election was held by other persons. Com. ex rel. Leslie v. Philadelphia County (1835) 5 Rawle (Pa.) 75.

These cases do not state that the acting officer was a usurper. And the same court which decided the case of Norman v. Boaz (Ky.) supra, has said: "The directions of the statutes in reference to the particular officers who shall hold an election are but directory." Fidelity Trust & S. V. Co. v. Morganfield (1895) 96 Ky. 563, 29 S. W. 442.

In Perrault v. Brochu (1860) 10 Lower Can. Rep. (Dec. des Tribunaux) 111, where the officer appointed to preside at a parish election left the meeting and another person was called to preside in his place, it was held that the election was void, following English municipal cases to the effect that the election officer must not only be an officer de facto, but also one de jure.

It was decided in Lippincott v. Pana (1879) 92 Ill. 24, that an election upon issuing town bonds, held as an ordinary special town meeting, presided over by a moderator, then and there chosen and sworn as such, is void where the law provided for a board of three judges of election, and designated the supervisor, assessor, and collector as such board. The court said: "An election is not void where it is held by persons who are not officers de jure, but are officers de facto, and act in good faith under colorable authority. Had a majority of the board acted, or had one of the board, together with one or more other persons assuming to act as judges of the election, presided, or had three or even two persons, and they all other than those designated by law, officiated under color of an appointment, however defective, and assumed to act as judges of the election and as the board designated by the law, a different question would have been presented."

In State ex rel. Van Amringe v. Taylor (1891) 108 N. C. 196, 12 L.R.A. 202, 23 Am. St. Rep. 51, 12 S. E. 1005, it was held that a mere intruder, who, without color of authority, simply assumes to act as an officer, is not an officer de facto, where the public knows or ought to know that he is a usurper, and his acts are absolutely void for all purposes. So that an election is void when the registrar's clerk fraudulently obtains the books, refuses to return them, assumes to be registrar, appoints three judges of election, and with them and a judge regularly appointed, holds such election. The court said: "It is difficult to define in precise terms what constitutes an officer de facto in all cases. . . . A variety of facts and circumstances tending to show authority of the person claiming and exercising it go to constitute such officer, and, upon grounds of necessity and public policy, to give his acts validity as to the public and persons taking benefit of his official acts. There must be something, some consideration, evidence,

facts, circumstances, or conditions, that reasonably lead those persons who, in the course of the administration and the discharge of the duties of the office, must in some way have relations or business with it, to recognize and treat the person claiming to be officer as the lawful incumbent. . . . A mere intruder or usurper is not ordinarily, but may become, an officer de facto in some cases. This can happen only by the continued exercise of the office by him, and the acquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when, without color of authority, he simply assumes to act,—to exercise authority as an officer,—and the public know the fact, or reasonably ought to know, that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest, could not impart to them validity and efficiency."

(It was held in McKinney v. O'Connor (1861) 26 Tex. 5, that where it appears that A was the proper election officer, the mere fact that B signed the returns is no evidence that B assumed to act with the acquiescence of the electors.)

It may be noted that it has been held that bystanders opening the poll before the legal hour are not de facto election officers, as there is no office till the proper hour. Lower Terrebonne Ref. & Mfg. Co. v. Police Jury (1906) 115 La. 1019, 112 Am. St. Rep. 291, 40 So. 443.

III. Ineligibility.

a. In general.

It is a general rule that the ineligibility of an election officer will not vitiate the election. Swepston v. Barton (1882) 39 Ark. 549; Keller v. Chapman (1868) 34 Cal. 635; McCarthy v. Wilson (1905) 146 Cal. 323, 85 Pac. 243; the reported case (CLARK v. MANHATTAN BEACH, ante, 1532); Collins v. Huff (1879) 63 Ga. 207; Slate v. Blue Ridge (1901) 113 Ga. 646, 38 S. E. 977 (declining to follow Walker v. Sanford (1886) 78 Ga. 165, 1 S. E. 424); People ex rel. Agnew v. Graham (1915) 267 Ill. 426, 108 N. E. 699, Ann. Cas. 1916C, 391; Quinn v. Markoe (1887) 37 Minn. 439, 35 N. W. 263; Johnson v. Yazoo County (1917) 113 Miss. 435, 74 So. 301; Wilson v. Peterson (1873) 69 N. C. 113; Hendersonville v. Jordan (1908) 150 N. C. 35, 63 S. E. 167 (obiter); Re District Atty. (1874) 11 Phila. (Pa.) 645 (obiter); Marks v. Park (1875) 7 Legal Gaz. (Pa.) 70; Bell v. Faulkner (1892) 84 Tex. 187, 19 S. W. 480.

Thus, the election will not be vitiated because an election official is an alien (Keller v. Chapman (1868) 34 Cal. 635, supra), or is not qualified by residence (Swepston v. Barton (1882) 39 Ark. 549, supra; People ex rel. Agnew v. Graham (1915) 267 Ill. 426, 108 N. E. 699, Ann. Cas. 1916C, 391, supra), or is not a registered voter or qualified to register (Wilson v. Peterson (1873) 69 N. C. 113, supra), or is not a freeholder (Collins v. Huff, (1879) 63 Ga. 207, supra; State v. Blue Ridge (1901) 113 Ga. 646, 38 S. E. 977, supra; Johnso v. Yazoo County (1917) 113 Miss. 435, 74 So. 321, supra; Hendersonville v. Jordan (1908) 150 N. C. 35, 63 S. E. 167, supra), or because he is a postmaster (Swepston v. Barton (1882) 39 Ark. 549, supra; Marks v. Park (1875) 7 Legel Gaz. (Pa.) 70, supra), or because he cannot read English (Quinn v. Markoe (1887) 37 Minn. 439, 35 N. W. 263, supra).

So the election will not be vitiated because the clerk was a minor (Swepston v. Barton (1882) 39 Ark. 549, supra; Bell v. Faulkner (1892) 84 Tex. 187, 19 S. W. 480, supra), nor because one of two judges is ineligible (Savage v. Umphries (1909) — Tex. Civ. App. —, 118 S. W. 893).

In Walker v. Sanford (1886) 78 Ga. 165, 1 S. E. 424 (afterwards disapproved in Slate v. Blue Ridge (1901) 113 Ga. 646, 38 S. E. 977, supra), it was held that an election was void where the statute required three superintendents of election, the persons qualified to hold elections being ordinaries, justices of the peace, and freeholders, and one of the three superintendents was not so qualified.

In Quinn v. Markoe (1887) 37 **Minn.** 439, 35 N. W. 263, supra, where the appellant had assigned as error that the court received the return for a certain town for the reason that two of the judges of election were disqualified because they could not read the English language, the appellate court said: "There is no claim that these judges made any mistake, or that the votes cast for appellant, in that town were not all counted for him. Assuming, without deciding, that these judges were, for the reason stated, not qualified to act, there is nothing better settled than that the acts of election officers de facto, being under color of election or appointment, are valid as to third parties and the public. The doctrine that electors may be disfranchised because one or more of the judges of election did not possess all the qualifications required by law finds no support in the decisions of any judicial tribunal."

b. Candidate acting as election officer.

It has been held that the election of a candidate will not be vitiated by his having acted as an election official. Collins v. Masden (1903) 25 **Ky.** L. Rep. 81, 74 S. W. 720; People ex rel. Hartwick v. Avery (1894) 102 **Mich.** 572, 61 N. W. 4; State ex rel. Roche v. Cosgrove (1892) 34 **Neb.** 386, 51 N. W. 974 (obiter).

In State ex rel. Roche v. Cosgrove (**Neb.**) supra, where the statute provided that supervisors of registration should be "not candidates for any office to be voted for," the court said: "The statute above copied in effect prohibits a person who is a candidate for an office to be voted for at the election, from discharging the duties of supervisor. It does not declare that votes cast for him for an office shall be void, nor that he shall not hold an office to which he is elected, notwithstanding he may not have been a candidate. So far as we can see that was the case here. The voters of the precinct, or a large majority of them, seemed to have considered him a suitable person for assessor, and cast their votes for him for that office. These votes were not void and we have no right to declare them so. In a free government the will of the electors as declared through the ballot box must be respected and carried into effect."

In Collins v. Masden (1903) 25 **Ky.** L. Rep. 81, supra, the court said: "The person appointed as clerk of the election, upon a valid excuse, failed to act. Another was selected by the judge, with the consent of the voters present, to act in his stead and did act. This was a sufficient appointment. Common School Dist. v. Garvey (1882) 80 **Ky.** 163. He was voted for as one of the trustees. But as he was already a trustee of the common school district, and he and the others elected seem to have been elected without opposition, it does not appear to us that he had such interest as disqualified him from acting as clerk. But if the disqualification had existed, it could have affected his own election only. He was assuredly a de facto officer as to the voters in other particulars. The record does not show that he did anything wrong in connection with the election. It was a viva voce election, and there does not appear the slightest ground for the charge of fraud."

That an election officer is a candidate will not vitiate the election as to other candidates. Swepston v. Barton (1882) 39 **Ark.** 549. So, in Wilcox v. Magruder (1849) 1 **Ohio** Dec. Reprint, 350, it was held that the fact that one of the election judges is ineligible, as being a candidate, will not prevent the candidate for another office from showing that he received a majority. Where the statute declared that if an inspector is a candidate his office as inspector becomes vacant, and he nevertheless acted with the two other inspectors, this will not vitiate the election, at least so far as the other candidates are concerned. People ex rel. Crimmins v. McManus (1861) 34 Barb. (**N. Y.**) 620.

In Com. v. McCormick (1906) 18 **Pa.** Dist. R. 641, it was held that an election officer was not an eligible candidate for supervisor, for although the statute provided that "nothing in this act nor in the act to which this is a supplement shall be construed to

prohibit a judge, inspector, or clerk of election from being voted for to fill any township office, or render either or any of them ineligible to hold the same," a subsequent constitutional provision declared: "Nor shall any election officer be eligible to any civil office to be filled at an election at which he shall serve, save only to such subordinate municipal or local offices below the grade of city or county offices as shall be designated by general law," and the legislature had passed no general law in pursuance of such constitutional provision.

But in Com. ex rel. Biles v. West (1909) 19 Pa. Dist. R. 269, it was held that an election officer was an eligible candidate for road supervisor, the court not referring to the Constitution.

IV. Election officers not of opposite parties.

That election officers are not divided between opposing parties when so required by law will not vitiate the election. Hawthorn v. State (1897) 116 Ala. 489, 22 So. 894; Sanders v. Lacks (1897) 142 Mo. 255, 43 S. W. 653; State ex rel. McMillan v. Sadler (1899) 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; Carabajal v. Lucero (1916) 22 N. M. 30, 158 Pac. 1088; Dial v. Hollandsworth (1894) 39 W. Va. 1, 19 S. E. 557.

Statutes of this character are merely directory. Hawthorn v. State (1897) 116 Ala. 489, 22 So. 894, supra; State ex rel. McMillan v. Sadler (1899) 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, supra; Carabajal v. Lucero (1916) 22 N. M. 30, 158 Pac. 1088, supra.

The court declined to interfere with the result where the law required the ballot clerks to be of opposite politics and the commissioners of election appointed two extra ballot clerks, making four in all, allowing two of them, both Democrats, "to take charge of the booths and fill up all ballots when either called upon or they volunteered acceptably to the voter." Dial v. Hollandsworth (1894) 39 W. Va. 1, 19 S. E. 557, supra.

In Carabajal v. Lucero (1916) 22 N. M. 30, 158 Pac. 1088, supra, the court said: "It would indeed present an anomalous situation if it were true, as apparently contended by appellees, that the returns of an election in a given precinct would be invalidated by reason of the fact that three of the judges of the election selected by the county commissioners or selected by the people at the polls, all belonged to one political party. In many precincts in the state all the voters are affiliated with the one party or the other, and it is impossible to select judges and election officers of different political faith. Suppose, for example that in a given precinct no voters of a given political party should be in attendance at the opening of the polls, and the judge appointed to represent such party should not be present, —could it be contended that an election could not legally be held in such precinct because it would be impossible to select an election official to represent such party? The very statement of the proposition refutes it."

In Mann v. Cassidy (1857) 1 Brewst. (Pa.) 11, the court said: "The first fraud charged is alleged to have been committed by a majority of the voters at the election for inspectors, in the spring of the present year, in choosing two inspectors of the same political view. Doubting very much whether such a choice of inspectors constitutes a fraud, it is sufficient to say, that no effort was made in proper time to set aside the election for said inspectors, and we certainly cannot examine its validity in a collateral proceeding. This would be contrary to all legal principle, and be inconsistent with the meaning of the law which regulates this subject, and which requires a direct proceeding to contest an election; always presuming that to have been fair which has not been legally questioned. We can, therefore, receive no evidence upon this point, and it may be stricken from the petition."

V. Failure to take proper oath.

The failure of an election officer to take the oath prescribed by law will not vitiate the result of the election. Whipley v. McKune (1859) 12 Cal. 352; People ex rel. Lee v. Prewett

(1899) 124 **Cal.** 7, 56 Pac. 619; State ex rel. Bisbee v. County Canvassers (1878) 17 **Fla.** 9; State ex rel. McClenny v. Baker County (1886) 22 **Fla.** 29; Jossey v. Speer (1899) 107 **Ga.** 828, 33 S. E. 718; Tanner v. Deen (1899) 108 **Ga.** 95, 33 S. E. 832; People ex rel. Fuller v. Hilliard (1862) 29 **Ill.** 413; Dishon v. Smith (1859) 10 **Iowa,** 212; Lunsford v. Culton (1893) 15 **Ky.** L. Rep. 504, 23 S. W. 946; Montgomery v. Chelf (1904) 118 **Ky.** 766, 82 S. W. 388 (committee calling primary election); Rounds v. Smart (1880) 71 **Me.** 380; Taylor v. Taylor (1865) 10 **Minn.** 107, Gil. 81; Sanders v. Lacks (1897) 142 **Mo.** 255, 43 S. W. 653; Heyfron v. Mahoney (1890) 9 **Mont.** 497, 18 Am. St. Rep. 759, 24 Pac. 93 (votes thrown out on another ground); Stinson v. Sweeney (1883) 17 **Nev.** 309, 30 Pac. 997; Smith v. Howell (1897) 60 **N. J. L.** 384, 38 Atl. 180; People v. Cook (1853) 8 **N. Y.** 67, 59 Am. Dec. 451, affirming (1852) 14 Barb. 259; State ex rel. Manhattan Constr. Co. v. Barnes, (1908) 22 **Okla.** 191, 97 Pac. 997; Boileau's Case (1845) 2 Pars. Sel. Eq. Cas. (**Pa.**) 503; Marks v. Parks (1875) 7 Legal Gaz. (**Pa.**) 70; McCraw v. Harralson (1867) 4 Coldw. (**Tenn.**) 34; Murphy v. Spokane (1911) 64 **Wash.** 681, 117 Pac. 476 (where it does not seem clear whether the question was in the case); Grant v. McLennan (1913) — **Yukon,** —, 12 D. L. R. 464.

In Lehlbach v. Haynes (1891) 54 **N. J. L.** 77, 23 Atl. 422, it was held that the fact that a member of the election board in a certain district was not legally appointed and sworn would not vitiate the election.

That the election officers permitted unsworn persons to count the votes, while irregular, is not fatal when the officers certified to the result and no error is shown. State ex rel. Roberts v. Calvert (1887) 98 **N. C.** 580, 4 S. E. 127.

An election will not be vitiated because election officers failed to take the oath of secrecy. Brandon's Election (1911) 20 **Manitoba** L. R. 705.

In Browning v. Gray (1916) 137 **Tenn.** 70, 191 S. W. 525, it was held that while the statutory requirement that the oath be taken was mandatory, the election would not be invalidated where it affirmatively appeared that no injury had been done.

In Whipley v. McKune (1859) 12 **Cal.** 352, supra, the court said: "It will be seen that no charge of the fraud is made in this allegation, nor of collusion between McKune and these officers, nor of wilful neglect of duty on the part of the officers, nor that the vote for McKune, so returned from these polls, was larger than the vote returned for Botts, nor that McKune received any benefit, nor Botts any injury, by the counting in of the votes so returned. The naked question presented by this specification is whether the failure of the officers conducting an election in a given district, to be sworn, of itself invalidates the entire election, without reference to its influence or the result. This proposition cannot for a moment be maintained. If it could, no state or even county election ever would stand; for probably no election has ever occurred in the state, at which some informality, of equal grade and importance to this, did not occur."

In Jossey v. Speer (1899) 107 **Ga.** 828, 33 S. E. 718, supra, it was held that the word "qualified" in the statute referred not to taking the oath, but to eligibility, where it read: "No election shall be defeated for noncompliance with the requirements of law, if held at the proper time and place by persons qualified to hold them, if it is not shown that, by that noncompliance, the result is different from what it would have been had there been proper compliance."

But where a party rule required that the judges of a primary election be sworn, and that the oath accompany their return to the convention, and the oath was without jurat, it was held that the acts of the convention were void. Re Connell (1903) 27 **Pa.** Co. Ct. 305.

In State ex rel. Rice v. County Judge (1858) 7 **Iowa,** 186, it was held that canvassers should not reject returns because it did not appear that the election officers were sworn, as

this was a question for another tribunal.

VI. Miscellaneous.

Where there were two sets of election officers, both sets chosen by some of those present, and it could not be determined by the court which candidate for office was elected, the election was declared void. Johnson v. Little (1917) 176 Ky. 505, 196 S. W. 156, Ann. Cas. 1918A, 70.

In State ex rel. Murphy v. Bernier (1888) 98 Minn. 1, 38 N. W. 368, the court, without stating its reasons, quashed a quo warranto where it was asserted among the objections to an election that no judges of election were appointed by the proper authoriy, that the judges acting could not read or write English, and that the person who acted as clerk of the election was a candidate.

Davis v. Grunig (1904) 143 Cal. 342, 76 Pac. 1102, cited in the reported case (CLARK v. MANHATTAN BEACH, ante, 1532), related to irregularities in the acts of the election officers; not to any disqualification.

The facts in Demaree v. Johnson (1897) 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376, are not sufficiently reported to make the case of value on the subject. B. B. B.

GEORGE R. STEWART, Plff. in Certiorari,

v.

WILLIAM E. DODSON.

Illinois Supreme Court — December 19, 1917.

(282 Ill. 192, 118 N. E. 405.)

Gaming — option contract — repurchase of stock.

1. A provision in a contract between the purchaser and the seller of corporate stock that the seller will, at the request of the buyer, at the expiration of a year, repurchase the stock at a certain price, and may offer such price any time during the year, the refusal of which will terminate the contract, is not within the operation of the statute avoiding options to sell or buy at a future time stock of a corporation.

[See note on this question beginning on page 1548.]

Appeal — necessity of cross errors.

2. A defendant in error has the right, without assigning cross errors, to sustain the judgment appealed from upon any ground warranted by the record, whether the reasons given in the opinion are sufficient to sustain the judgment or not.

Same — failure to assign cross errors — effect.

3. A defendant in error cannot, upon reversal of a judgment reversing a judgment in his favor because the complaint did not state a cause of action, without remanding the cause, secure a new trial for errors committed against him unless he assigns cross errors.

CERTIORARI to the Appellate Court, First District, to review a judgment reversing a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover money alleged to be due from defendant, under a contract for the purchase of corporate stock. *Reversed.*

The facts are stated in the opinion of the court.

Mr. George W. Wilbur, for plaintiff in certiorari:

The contract between the parties hereto is not a gambling contract, within the prohibition of § 130 of the Criminal Code.

Bawden v. Taylor, 254 Ill. 464, 98 N. E. 941; Osgood v. Skinner, 211 Ill.

229, 71 N. E. 869; Ubben v. Binnian, 182 Ill. 508, 55 N. E. 552; Wolf v. National Bank, 178 Ill. 85, 52 N. E. 896; Loeb v. Stern, 198 Ill. 371, 64 N. E. 1043; Kantzler v. Bensinger, 214 Ill. 589, 73 N. E. 874; Shultz v. Miller-Hamilton, 189 Ill. App. 396.

In order to invalidate a contract of this character, it must appear that neither party intended to make a delivery of the property, but that settlements were to be made on differences only.

Riley v. Lamson, 164 Ill. App. 297; R. E. Pratt & Co. v. Ashmore, 224 Ill. 587, 79 N. E. 952; Johnson v. Milmine, 150 Ill. App. 208; Schmidt v. Marine Milk Condensing Co. 197 Ill. App. 279; Cromwell v. Davies, 163 Ill. App. 152; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762.

Proper objections and exceptions to the rulings of the trial court, together with a motion for new trial, must be shown by bill of exceptions, in order to bring before an appellate court questions for determination.

Alward v. Harper, 253 Ill. 294, 97 N. E. 653; Martin v. Foulke, 114 Ill. 206, 29 N. E. 683; Firemen's Ins. Co. v. Peck, 126 Ill. 493, 18 N. E. 752; East St. Louis Electric Street R. Co. v. Cauley, 148 Ill. 490, 36 N. E. 106; Kankakee v. Phipps, 135 Ill. App. 585; M. Swarttz & Sons v. Goodman, 165 Ill. App. 27; Starnes v. Dering Coal Co. 147 Ill. App. 75.

Messrs. **Buell & Abbey**, for defendant in certiorari:

Under the original § 130, in force on March 8, 1913, option contracts to buy or sell stock were void.

Schneider v. Turner, 27 Ill. App. 229, affirmed in 130 Ill. 37, 6 L.R.A. 164, 22 N. E. 497; Corcoran v. Lehigh & F. Coal Co. 138 Ill. 398, 28 N. E. 759; Bates v. Woods, 225 Ill. 126, 80 N. E. 84; Wolsey v. Neeley, 62 Ill. App. 141; Peterson v. Currier, 62 Ill. App. 163.

If, as alleged in the affidavit of merits, plaintiff failed to tender the stock within the year limited by the option contract, which time was expressly made the essence, defendant was not required to buy. Failure to tender was a good defense.

Stoolfire v. Royce, 71 Ill. 225; McPherson v. Gale, 40 Ill. 368; McPherson v. Hall, 44 Ill. 264; 2 Mechem, Sales, p. 1221, § 1407; 35 Cyc. 164 B 2.

Defendant had the right to a reasonable time to plead or demur. The court erred in denying this right.

McCarthy v. Neu, 91 Ill. 130; Griswold v. Shaw, 79 Ill. 449; Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 221, 59 N. E. 12; Maegerlein v. Chicago, 141 Ill. App. 418; Nelson v. Akeson, 1 Ill. App. 169.

Cooke, J., delivered the opinion of the court:

Plaintiff in error, George R. Stewart, secured a judgment in the circuit court of Cook county against William E. Dodson, defendant in error, for $1,800. On appeal to the appellate court for the first district, the judgment of the circuit court was reversed, without remanding, and the record of the appellate court has been brought here for review by certiorari.

The original declaration consisted of a special count and the common counts. The special count charged that on March 8, 1913, the defendant in error entered into a written contract with the plaintiff in error in the words and figures following:

This agreement, made and entered into this 8th day of March, 1913, by and between George R. Stewart, of the city of Chicago, county of Cook, and state of Illinois, party of the first part, and William E. Dodson, of the city of Chicago, county of Cook, and state of Illinois, party of the second part, witnesseth:

Whereas, that said party of the first part has heretofore purchased from the said party of the second part 200 shares of the capital stock of the National Machine Recorder Company; and whereas, the said party of the first part may be desirous of selling and disposing of the said 200 shares of stock:

Now, therefore, it is mutually agreed between the parties hereto, each with the other, that if the said party of the first part be desirous of selling and disposing of the said 200 shares of stock one year from the date hereof, at $9 per share, and upon notice in writing of such desire thirty days prior to the expiration of this contract to the party of the second part, the said party of the second part will one year from the date hereof purchase the said stock at the said price of $9 per share.

But said party of the second part shall have the right, at any time on or before one year from the date hereof, upon written notice by him and tender of the sum of $1,800, to purchase said 200 shares, and should said party of the first part then be unwilling or refuse to sell the same, this contract shall thereupon terminate and be void without any further liability or obligation against either party hereto. Time being of the essence of this contract.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

George R. Stewart. [Seal.]
William E. Dodson. [Seal.]

That on February 2, 1914, plaintiff in error notified defendant in error, in writing, of his election to sell and dispose of the shares of stock mentioned in the contract to defendant in error for the sum of $1,800, but that defendant in error refused to comply with the terms of the agreement above set forth. In the special count plaintiff in error offers to surrender to defendant in error the certificates of stock upon the payment to him of the sum of $1,800. To this declaration defendant in error interposed the plea of the general issue, and filed an affidavit of merits, denying the service of notice and tender of the stock, and asserting the invalidity of the agreement. The special count was amended. The amendment set up the circumstances under which it is alleged plaintiff in error purchased the shares of stock from defendant in error and the controversy which arose between them, resulting from charges of fraud and misrepresentation, and the fact that the contract sued on was made in a settlement of the controversy. After pleas had been filed to the declaration as amended, and demurrers to the same had been sustained, plaintiff in error secured leave to strike the amendment to the declaration, leaving the declaration as originally filed. Upon motion the court struck the affidavit of merits filed by defendant in error, and rendered judgment against defendant in error as by default for $1,800.

The appellate court was of the opinion that the agreement of March 8, 1913, was a gambling contract and in violation of § 130 of the Criminal Code, and for that reason the judgment of the circuit court was reversed without remanding the cause. In its opinion the appellate court relies upon Schneider v. Turner, 130 Ill. 28, 6 L.R.A. 164, 22 N. E. 497, and in his contention here defendant in error relies almost wholly upon that case to sustain the judgment of the appellate court.

Section 130 of the Criminal Code, as in force at the time of the making of the contract of March 8, 1913, provided that "whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, . . . shall be fined . . . and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

It is the contention of defendant in error that the contract in question is an option contract and comes within the provisions of this section of the statute. Plaintiff in error does not contend that it is not an option contract, but contends only that it does not fall within the provisions of the statute.

We had before us in Schneider v. Turner, supra, a contract very similar to the one here under consideration. We there held that this section of the Criminal Code was not intended to make unlawful merely such option contracts as contemplate a settlement by differences, or, in other words, merely gambling contracts, as such contracts were illegal and void before such section was ever enacted; that the statute goes much further, and makes all contracts of option to buy or sell at a future time any grain or other commodity, stock, etc., gambling contracts and void, whether intended to be settled by differences or

not; and we held the contract there under consideration to be within the provisions of the statute. While the Schneider Case has not been expressly overruled, its holding has not been adhered to, but has been departed from in later cases. In Schlee v. Guckenheimer, 179 Ill. 593, 54 N. E. 302, we held that a contract of sale by which the purchaser of a quantity of barley is given the privilege of purchasing a certain additional quantity at the same price, if taken before a certain day in the future, is not void as an option contract prohibited by this section of the statute. In Wolf v. National Bank, 178 Ill. 85, 52 N. E. 896, it was held that a contract by which a bank, on selling staple bonds, agrees to repurchase them at a specified time in the future at their selling price, with interest from date of selling, is a contract of conditional sale and not an option contract, where both parties acted in good faith; the purchaser having refused to take the bonds unless the bank would agree to take them back, and both parties believing they had the authority to do so. This holding was followed in Ubben v. Binnian, 182 Ill. 508, 55 N. E. 552. In Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, an agreement by the purchaser of property, who turned in certain shares of stock as part of the purchase price, to purchase such stock at par value upon written notice on or before a certain date, was held not to be an option or gambling contract within this section of the statute; and in Kantzler v. Bensinger, 214 Ill. 589, 73 N. E. 874, it was held that a contract whereby one party agreed, at any time within a certain period, to purchase from the other a specified number of shares of stock at a guaranteed book value, was not such an option contract as is illegal under the statute, even though the second party was not obligated to sell. In each of the last two mentioned cases it was stated that it is only contracts for options which are in the nature of gambling transactions, which come within the meaning of § 130 of the Criminal Code. In R. E. Pratt & Co. v. Ashmore, 224 Ill. 587, 79 N. E. 952, and in First Nat. Bank v. Miller, 235 Ill. 135, 85 N. E. 312, we held that, to invalidate a contract under this section of the statute, it must appear that both parties intended to settle by the payment of differences, and not by delivery of the commodity sold or purchased, and that such intention may be established, not merely by the assertion of the parties, but by the facts and circumstances attending the transaction, including the nature and manner of carrying on the business. In Bawden v. Taylor, 254 Ill. 464, 98 N. E. 941, it was held that a stockholder in a publishing corporation, negotiating for the sale of its publications to another company, who would be able to make the sale only by purchasing the shares of stock owned by another stockholder, did not violate this section of the statute by securing an option on such stock for a certain price within a specified period, and that the statute prohibiting gambling in grain or stocks does not make it a crime for one engaged in an ordinary and legitimate business transaction to obtain a price on stocks as a part of such transaction or incident thereto, where there is no attempt to use the contract as a cover for a wager on the price of the stocks.

There is nothing in this contract to indicate that it was not intended that certain specified shares of stock were to be delivered, or that it was the intention of the parties to settle on differences, nor is there anything about the contract that can be said to indicate an attempt to use it as a cover for a wager on the price of the stock. The contract discloses that the stock in question had been purchased by plaintiff in error from defendant in error, and that it was this identical stock that defendant in error agreed to repurchase from the plaintiff in error upon thirty days' written demand, at the price specified. Under the holdings in the cases above referred to, this is clearly

not such an option contract as comes within the provisions of § 130 of the Criminal Code, and the appellate court was in error in reversing the judgment of the circuit court upon that ground.

Gaming—option contract—repurchase of stock.

Defendant in error contends that the judgment of the appellate court should be sustained, for the reason that the declaration fails to allege any tender of the stock to him, and that the circuit court erred in refusing to allow him to file an additional affidavit of merits, and in entering judgment as by default, when the plea of the general issue had been interposed. Defendant in error has the right, without assigning cross errors, to sustain the judgment of the appellate court upon any ground warranted by the record, whether the reasons given by that court in its opinion are sufficient to sustain its judgment or not; but as a matter of practice, where the defendant in error desires alleged errors against him to be corrected upon another trial in case the judgment is reversed, he must assign cross errors. Pelouze v. Slaughter, 241 Ill. 215, 89 N. E. 259. The matters complained of by defendant in error do not go to the right of plaintiff in error to maintain his action, but simply question the correctness of the action of the trial court in refusing to allow him to make his defense. By reversing the judgment of the circuit court, without remanding the cause, the appellate court held that plaintiff in in error had shown no cause of action. The only relief which defendant in error could secure if his contentions, other than that the contract was a gambling contract, were sound, would be a reversal of the judgment of the appellate court, and a remandment of the case to that court with directions to remand it to the circuit court for a new trial. He can only secure such relief by the assignment of cross errors in this court. Having failed to do this, no points raised by him can be considered, except those in support of the judgment of the appellate court.

Appeal—necessity of cross errors.

Same—failure to assign cross errors—effect.

For the reasons given, the judgment of the Appellate Court is reversed, and the judgment of the Circuit Court is affirmed.

Petition for rehearing denied February 6, 1918.

ANNOTATION.

Contracts of present sale of personal property with options as gambling contracts.

Under statute.

The decided weight of authority seems to be to the effect that statutes prohibiting gambling contracts do not invalidate a contract of present sale of personal property, although the contract also gives an option for future dealing with the property; at least unless it appears that the parties intended to settle on differences without delivery, or that the contract was used as a cover for a wager on a possible fluctuation in price.

This was the position taken in the reported case (STEWART v. DODSON, ante, 1544), wherein it was held that § 130 of the Illinois Criminal Code, which provides that an option contract to sell or buy at a future time any grain or other commodity, corporate stock or gold, etc., is a gambling contract and void, and that the person having or giving the option shall be fined, did not render illegal or void a contract whereby the seller of corporate stock agreed, at the option of the purchaser, to repurchase the same within a certain time at a stipulated price. To the same effect are the following Illinois cases, which are sufficiently set out in STEWART v. DODSON: Wolf v. National Bank (1899) 178 Ill. 85, 52 N. E. 896, reversing (1898) 77 Ill. App. 325; Schlee v. Guckenheimer

(1899) 179 Ill. 593, 54 N. E. 302; Osgood v. Skinner (1904) 211 Ill. 229, 71 N. E. 869, affirming (1904) 111 Ill. App. 606. And following Wolf v. National Bank (1899) 178 Ill. 85, 52 N. E. 896, reversing (1898) 77 Ill. App. 325, it was held in Ubben v. Binnian (1899) 182 Ill. 508, 55 N. E. 552, reversing (1898) 78 Ill. App. 330, that an agreement by a seller of stock to buy it back within a specified time at the purchase price, with interest, less dividends declared, was not within the category of those condemned by the statute. And again, following the Wolf Case, it was held in Loeb v. Stern (1902) 198 Ill. 371, 64 N. E. 1043, affirming (1902) 99 Ill. App. 637, that a contract of sale of a note secured by mortgage, whereby the seller agreed to take it back at par, with accrued interest, less a commission upon certain notice, was not an option contract, and not inhibited by § 130 of the Code. So in Schultz v. Miller-Hamilton (1914) 189 Ill. App. 396, a contract for the sale of stock, giving the buyer the right to return the same after two years and receive back the purchase price, was held to be one of conditional sale, and not an option contract within the meaning of the Illinois Code. And in Richter v. Frank (1890) 41 Fed. 859, a contract by which stock was sold at a specified price with an option to resell at a future time at an increase in price sufficient to cover accrued interest on the original sale price was held not to be a gambling contract within the meaning of the terms of § 130 of the Illinois Code, or the mischief it was intended to remedy. So in Kantzler v. Bensinger (1905) 214 Ill. 589, 73 N. E. 874, where defendants purchased a controlling interest in a manufacturing establishment and contracted to purchase the remaining stock at its face value at the expiration of five years, at the option of the plaintiffs, it was held that there was nothing immoral or illegal in the option feature of the contract, or anything which partook of the character of a gambling contract, and that it was not void under § 130 of the Code, which was said to avoid only those contracts for options which are in the nature of gambling transactions. The decision in the case of Schneider v. Turner (1889) 130 Ill. 28, 6 L.R.A. 164, 22 N. E. 497, which, as stated in the reported case (STEWART v. DODSON), while not expressly overruled, has not been followed in the recent Illinois cases, did not involve a present sale, but merely a contract to sell certain stock at a specified price if taken before a given date. However, the ruling therein to the effect that the Illinois statute makes all contracts of option to buy or sell at a future time gambling contracts and void, whether intended to be settled by differences or not, is broad enough to include contracts of the character under consideration in the present annotation, and the case to this extent, at least, must be regarded as no longer controlling. And in fact, the theory laid down in the Schneider Case was adopted in a few early Illinois cases which involved transactions of the character under consideration in the present annotation. Thus, in Locke v. Towler (1891) 41 Ill. App. 66, it was held that a contract for the present sale of corporate stock, giving an option to the purchaser to resell the stock to the original seller at a future date at a specified price, was a gambling contract and within § 130 of the Illinois Criminal Code. And in Corcoran v. Lehigh & F. Coal Co. (1891) 138 Ill. 390, 28 N. E. 759, reversing on other grounds (1890) 37 Ill. App. 577, it was held that an option in a contract for the sale of certain specified amounts of coal at fixed prices, giving the purchaser the right to purchase during the season such additional coal as he might need at a specified advance in price, rendered the whole contract void as a gambling transaction prohibited by the statute. And applying the Illinois statute it was held in Osgood v. Bauder (1888) 75 Iowa, 550, 1 L.R.A. 655, 39 N. W. 887, on subsequent appeal in (1891) 82 Iowa, 171, 47 N. W. 1001, that a contract similar to that construed in the Corcoran Case was void as a wagering contract as to the part of the contract to which the option applied, but valid as to the remainder.

And a construction similar to that reached by the later Illinois cases has been given to § 26 of art. 4 of the California Constitution, which provides that "all contracts for the sale of shares of the capital of any corporation or association on margin, or to be delivered at a future day, shall be void," the California courts maintaining that a contract of present sale, with an option to resell, is not within the inhibition of the statute unless it appears that a wagering contract was intended by the parties. Thus, in Maurer v. King (1899) 127 Cal. 114, 59 Pac. 290, in holding that an agreement whereby certain stock was given in payment for other property purchased, and the purchaser guaranteed that the stock would be worth a certain price within two years, and agreed to take it back at that price at the end of such period, if so requested, was not a contract to deliver stock at a future day under the above quoted provision, the purpose of which was to prohibit wagering contracts in regard to the future market value of stocks, the court said: "This constitutional inhibition cannot be evaded by varying the form of the contract. If it be in reality a wagering contract of the character denounced, it is void. It is not so easy to hold the converse of this proposition, that whenever the transaction was but an ordinary business operation, with no intent to gamble in futures, it will be upheld. That would tend to destroy the constitutional policy, and so far as intent is material it goes only to the intent to do the act prohibited. The acts plainly prohibited are sales of stock on margin and contracts for the future delivery of shares of stock. But the provision is highly penal and greatly obstructs legitimate business transactions. A large amount of property is now owned by corporations and the daily business transactions of the community naturally involve sales or agreements to sell corporate stock. While, therefore, courts must enforce the constitutional policy, contracts which are neither prohibited by the letter of the inhibition nor evasions of it will be upheld. The restriction will not be extended by construction. In the present case there was no contract for the delivery of stock at a future day. The transaction was not a wager as to fluctuations in the market value of stock. . . . Perhaps this form of contract could be used to effect a prohibited transaction. If such were the case, and the intent was made to appear, it would be declared an attempt to evade the prohibition and be unlawful." So, in George J. Birkel Co. v. Howze (1910) 12 Cal. App. 645, 108 Pac. 145, where stock was delivered upon an agreed valuation, and the purchaser reserved the option to redeliver the stock at any time after one year and receive back the purchase price, it was held that such contracts were not within the spirit of the constitutional inhibition against dealing in futures, unless it appeared that the intent of the parties was other than appeared on the face of the contract. And see also Gay v. Dare (1894) 103 Cal. 454, 37 Pac. 466, wherein, in upholding a contract whereby national bank stock was bought under an agreement that, at the option of the purchaser, the seller would, at a specified time, repurchase the stock at the price originally paid, with interest, it was said that the exercise of the option in such contracts is merely a rescission thereof.

In absence of statute.

In the Michigan case of Rehberg v. Tontine Surety Co. (1902) 131 Mich. 135, 91 N. W. 132, which did not involve a statute, it was held that a contract providing for the purchase of a diamond for $80, in weekly instalments of $1.25 each, for forfeiture for any default in such payments, for delivery of the diamond three months after the final payment, and giving the vendee the option at that time either to keep the diamond or sell it back for $120, was not a gambling contract within the usual definition of such contracts.

And in Porter v. Plymouth Gold Min. Co. (1904) 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938, where a corporation sold certain capital stock and gave an option to the purchaser to sell the same back in six months for the original price with interest should

he be dissatisfied, it was held that there was "nothing inherently wrong about such contracts," and that they were enforceable; but the specific question as to whether or not the contract was a gambling one was not expressly passed upon. And see the following cases, in which contracts of the character under consideration were upheld, but in which the question of their validity as being gambling contracts was not passed upon: Raiche v. Morrison (1908) 37 Mont. 244, 95 Pac. 1061 (a contract by a corporation for the sale of a certain amount of its stock for $1,000, which gave the purchaser the option to resell the same to the corporation at the end of three years for $1,720, was upheld as a valid contract); Wooster v. Sage (1876) 67 N. Y. 67 (a contract for the purchase of certain railroad bonds, with the option of reselling them to the original vendor if the purchaser at any time "became sick of them," was enforced); Johnston v. Trask (1889) 116 N. Y. 136, 5 L.R.A. 630, 15 Am. St. Rep. 394, 22 N. E. 377 (an oral contract whereby defendants purchased certain bonds for plaintiff and agreed that, should he become dissatisfied, they would, on demand, take the bonds off his hands at what they cost him, was held valid on the ground that the option to return the bonds was merely a provision for the rescission of the contract); Page v. Shainwald (1901) 169 N. Y. 246, 57 L.R.A. 173, 62 N. E. 356 (a contract for the sale of stock, with an option to resell on a specified date, was seemingly regarded as valid); Maguire v. Halsted (1897) 18 App. Div. 228, 45 N. Y. Supp. 783 (a contract whereby the vendor of stock agreed to repurchase at a stated time at the original price should the vendee "wish to sell the same at that time" was enforced); Weld v. Barker (1893) 153 Pa. 465, 26 Atl. 239 (a contract for the sale of stock, binding the vendor to repurchase at a certain time, at the option of the original vendee, was enforced). G. J. C.

WILLIAM McLEAN, Respt.,

v.

STUDEBAKER BROTHERS COMPANY OF NEW YORK, Appt.

New York Court of Appeals—November 13, 1917.

(221 N. Y. 475, 117 N. E. 951.)

Master and servant — window washer — duty of care.

1. The owner of a building owes an employee of one contracting to wash the windows of the building the use of reasonable care and prudence to secure his safety.

[See note on this question beginning on page 1554.]

Appeal — submission to jury — error.

2. The submission of a case to the jury is error if there is no evidence tending to support a verdict in favor of one party.

Master and servant — visible defect — duty.

3. The owner of a building does not owe to the employee of one contracting to wash the windows of the building the duty of seeing that a swinging transom, against which a ladder is to be placed, is securely fastened, if the need and means of fastening are plainly visible to the employee.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part V, for New York County, in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages

for personal injuries, alleged to have been caused by defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Mr. **S. Michael Cohen,** with Messrs. **Rosenthal & Heermance,** for appellant:

Defendant owed the plaintiff no duty upon the breach of which actionable negligence can be predicated.

Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; Birch v. New York, 190 N. Y. 403, 18 L.R.A.(N.S.) 595, 83 N. E. 51; Hickok v. Auburn Light, Heat & P. Co. 200 N. Y. 469, 93 N. E. 1113; Heskell v. Auburn Light, Heat & P. Co. 209 N. Y. 90, L.R.A.1915B, 1127, 102 N. E. 540; Gunhouse v. Fraenkel, 153 App. Div. 359, 138 N. Y. Supp. 444, affirmed in 211 N. Y. 567, 105 N. E. 678; Callan v. Pugh, 54 App. Div. 545, 66 N. Y. Supp. 1118; Fanjoy v. Searles, 29 Cal. 250; Larkin v. O'Neill, 119 N. Y. 221, 23 N. E. 563; Flanagan v. Atlantic Alcatraz Asphalt Co. 37 App. Div. 476, 56 N. Y. Supp. 18, 5 Am. Neg. Rep. 694; Cowen v. Kirby, 180 Mass. 504, 62 N. E. 968, 11 Am. Neg. Rep. 261; Miller v. Woodhead, 104 N. Y. 471, 11 N. E. 57; McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555; Baulec v. New York & H. R. Co. 59 N. Y. 366, 17 Am. Rep. 325; Dwight v. Germania L. Ins. Co. 103 N. Y. 359, 57 Am. Rep. 729, 8 N. E. 654; Wilds v. Hudson River R. Co. 24 N. Y. 433.

Plaintiff failed, as a matter of law, to establish freedom from contributory negligence.

Riordan v. Ocean S. S. Co. 124 N. Y. 655, 26 N. E. 1027; Reynolds v. New York C. & H. R. R. Co. 58 N. Y. 250.

Messrs. **Macklin, Brown, & Purdy,** for respondent:

If defendant knew that plaintiff was in the habit of cleaning the transom in this way, it was equally his duty to see that the transom should not be closed in such a manner as to constitute a trap to plaintiff, for he was there with the consent and by the invitation of the defendant, who was, therefore, under a duty to see that he sustained no injury from a negligent condition or concealed trap in the premises.

Grill v. Gutfreund, 65 Misc. 506, 120 N. Y. Supp. 86; Cheevers v. Ocean S. S. Co. 26 Misc. 193, 55 N. Y. Supp. 445; Homer v. Everett, 15 Jones & S. 300; Stastney v. Second Ave. R. Co. 29 Jones & S. 104, 18 N. Y. Supp. 800; Shearm. & Redf. Neg. 5th ed. § 183; Thomp. Neg. 2d ed. §§ 953, 985; Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990; Fogarty v. Bogart, 43 App. Div. 430, 60 N. Y. Supp. 81, 6 Am. Neg. Rep. 650; Delaney v. Pennsylvania R. Co. 78 Hun, 393, 29 N. Y. Supp. 226; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Stinson v. Edgewater Saw Mills Co. 139 App. Div. 170, 123 N. Y. Supp. 745; Thomas v. Henjes, 42 N. Y. S. R. 28, 16 N. Y. Supp. 700; John Spry Lumber Co. v. Duggan, 80 Ill. App. 394; Scott v. Hough, 14 N. Y. S. R. 401.

Plaintiff was not guilty of contributory negligence.

Donnelly v. Cowen, 20 Misc. 100, 45 N. Y. Supp. 71, 2 Am. Neg. Rep. 750.

Collin, J., delivered the opinion of the court:

The plaintiff seeks to recover damages for personal injuries received, he alleges, by reason of the negligence of the defendant. The appellate division by a decision, not unanimous, affirmed the judgment consequent upon the verdict of the jury in favor of the plaintiff. At the close of the evidence the defendant excepted to the denial of its motion to dismiss the complaint. If there was no evidence that tended to support the verdict, the submission of the case to the jury was error. Heskell v. Auburn Light, Heat & P. Co. 209 N. Y. 86, L.R.A.1915B, 1127, 102 N. E. 540.

Appeal—submission to jury—error.

The jury might have found as the facts most favorable to the plaintiff: In December, 1912, the time the plaintiff was injured, and through the several years last prior thereto, the plaintiff was the employee of L. Frankel & Company, whose business was window cleaning. The defendant was the proprietor of a garage, the windows of which L. Frankel & Company had contracted to clean. The plaintiff was at the garage engaged in performing the contract. A transom of the garage, against which was the top of the ladder in use by the

plaintiff in washing it, swung in, causing the ladder to so move that plaintiff fell and was injured. The transom was above and contiguous to the entrance doors. The entrance was 16 feet wide and 12 feet in height. The transom was of equal width, and 2 feet in height. It hung at its top upon hinges, so that it could be swung inwardly and up to the ceiling by means of a rope or chain, thus increasing by its height the height of the entrance, and was frequently so used. At its either end was a sliding bolt, by means of which it could be immovably closed. The hinges and bolts were plainly visible. The plaintiff had been a window cleaner, employed, as stated, for about thirteen years. Each Tuesday of the nine months last preceding the accident he had cleaned the windows, including the transom, of the garage. The construction and use of the transom had not been changed through at least the last two months of that period. The plaintiff had never seen the transom open, and had always, when washing it, found it solid or secure. The plaintiff testified that he had noticed, when cleaning it on previous occasions, that it had no hinges or catches, and was not made to open and shut, but the testimony of a disinterested witness in behalf of the plaintiff was that through the two months, as stated, it had hinges upon which it swung. The method adopted by the plaintiff in washing the transom was known to the defendant.

The plaintiff asserts it was the duty of the defendant to have securely fastened the transom before the plaintiff began to wash it, and failure so to do constituted its negligence. The duty did not exist. The duty of the defendant to the plaintiff, under the conditions here existing, was the duty owed by it to its own employee in the same case. Hess v. Bernheimer & S. P. Brewing Co. 219 N. Y. 415, 114 N. E. 808. The measure of it was reasonable care and prudence in securing the safety of the plaintiff.

Master and servant—window washer—duty of care.

The case here does not involve the sufficiency or integrity of any appliance or instrumentality. The transom in and of itself and in the manner of its affixation was suitable and proper. It in all respects was adapted and appropriate to its use. It was lawful for the defendant to so use it and to construct it for the use. When the plaintiff came to the garage, the transom in all its parts was readily discernible. Within, or connected with, or a part of it, there was not any latent defect or hidden danger. It did not create a trap or pitfall. Ordinary and reasonably prudent observation by the plaintiff would have disclosed to him the full and exact situation and condition, the hinges, the bolts, the chain or rope by which the transom was swung to the ceiling, and the unfastened and movable condition of the transom. Through ordinary intelligence, experience, and thoughtfulness, he would have known that the ladder against it, ascended by him, might cause it to swing and the stability of the ladder and his safety affected. By using the sliding bolts, he could, as well as could the defendant, have made it stable and secured his safety. The defendant was not bound to accompany him, through the agency of an officer or employee, to the transom and slide the bolts, or warn him that the ladder against it might cause it to swing, because no duty rests on a master to secure the safety of his servant against a condition, or even defect, risks, or dangers, that may be readily observed by the reasonable use of the senses, having in view the age, intelligence, and experience of the servant. The plaintiff here was experienced and intelligent. His means of knowing the danger were the same as the defendant's. The risks and danger were obvious and comprehensible through ordinary and reasonable care and inspection,

and it was not the duty of the defendant to save him from them. McCafferty v. Lewando's French Dyeing & Cleansing Co. 194 Mass. 412, 120 Am. St. Rep. 562, 80 N. E. 460; Flood v. Western U. Teleg. Co. 131 N. Y. 603, 30 N. E. 196; Stuart v. West End Street R. Co. 163 Mass. 391, 40 N. E. 180; Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195.

Same—visible defect—duty.

The judgment should be reversed and a new trial granted; costs to abide the event.

Hiscock, Ch. J., and **Cuddeback, Hogan, Pound**, and **Andrews**, JJ., concur. **McLaughlin**, J., not sitting.

NOTE.

An extensive search has failed to disclose any other case like the reported case (McLEAN v. STUDEBAKER BROS. CO. ante, 1551), involving the liability of the owner or occupant of a building for an injury to a window washer not in his employment.

In Haskell v. L. H. Kurtz Co. (1917) — Iowa, —, L.R.A.1917F, 881, 162 N. W. 598, denying liability for injury to one who, while washing windows, fell to the ground, owing to the fall of the lower sash of a window, the relation between the parties was that of master and servant. The decision was upon the ground that although the employer was negligent in respect of the condition of the window, in failing to warn the plaintiff of the danger of going outside, and in neglecting to supply him with safety appliances, the latter, knowing, as he did, the conditions, was himself negligent in attempting to do the work in a dangerous manner.

The statement in McLEAN v. STUDEBAKER BROS. CO. to the effect that "the duty of the defendant to the plaintiff, under the conditions here existing, was the duty owed by it to its own employee in the same case," is doubtless correct as a general and abstract statement of the defendant's duty in the premises, but it is obvious that such a generalization must be applied cautiously and with due regard to differences affecting the knowledge of conditions or realization of dangers, naturally to be expected from differences in the relations of the injured persons toward the person responsible for the condition of the premises.

STATE OF WISCONSIN EX REL. SCHOOL DISTRICT NO. 8, Town of Wauwatosa,

v.

C. P. CARY, State Superintendent, Appt.

Wisconsin Supreme Court—June 28, 1917.

(166 Wis. 103, 163 N. W. 645.)

School — removal — power to require — repairs.

1. A schoolhouse found unfit cannot, where the power to build schoolhouses is vested in the inhabitants of the district, be ordered to be removed under a statute providing that the inspector shall, if conditions warrant, make an order directing the board to repair and improve the building; or, if he shall deem the schoolhouse unfit for school purposes and not worth repairing, he shall state the facts and recite the reason therefor.

[See note on this question beginning on page 1559.]

Same — invalid order — refusal to comply — effect.

2. A school district cannot be deprived of its share of the state tax for refusing to obey an order which the state superintendent had no power to

give, under a statute providing that whenever any school district shall refuse to comply with the order such district shall forfeit absolutely its proportion of the state tax.

Constitutional law — due process — denial of oral argument.

3. Denial of the right to present oral testimony and make oral argument upon appeal to a state school superintendent from an order directing the removal of a schoolhouse does not deprive of property rights without due process of law, if all facts and suggestions deemed necessary were presented by affidavits and in writing.

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action brought to review a decision of defendant, as State Superintendent, sustaining a finding of the school inspector and his order condemning a certain schoolhouse as unfit for school purposes and not worth repairing. *Affirmed.*

Statement by **Eschweiler, J.**:

The superintendent of schools for Milwaukee county applied to C. P. Cary, state superintendent of schools to have an inspection made of the Thirty-sixth street and State street schools of district No. 8 in the town of Wauwatosa, Milwaukee county, with a view of having both buildings condemned. An inspector was directed by Mr. Cary to view the buildings and make report. Such inspection was made, and on January 31, 1916, the inspector gave to the clerk of the school district a written notice embodying his conclusions as to the conditions he found. As to the State street school, that it is unsatisfactory in several particulars, and then as follows:

"Thirty-sixth street school: This is a very old building; the floors are warped; it has six school rooms occupied; the three hot-air heating and ventilating systems are inadequate in that the cold-air intakes are not large enough, and that the hot-air intakes and outlets for the rooms are not placed properly and in some instances are not large enough; every room is without satisfactory blackboards; the seating is very poor, one teacher reported that about one half of the pupils' feet could not rest on the floor, due to the height of the seats from the floor; the age and general condition of this building is such that in my judgment no attempt should be made to remodel it. I am of the opinion that there is great danger from fire in this building.

"The need of a modern schoolhouse large enough to accommodate all pupils now enrolled in these two buildings and to provide for the future growth of the district is evident. The records show that your district has an assessed valuation of approximately $5,000,000, with a very low tax levy for school purposes, due to the large amount of state and county money it receives annually.

"I therefore direct that the use of said buildings as schoolhouses be discontinued after December 1, 1916, and that a satisfactory new building be erected, fully equipped and ready for occupancy on or before said date, December 1, 1916, the equipment to consist of an adequate heating and ventilating system with provisions for maintaining the proper humidity of the school-room air, at least 100 square feet of the No. 1 slate board for each room, single steel adjustable desks and chairs for all pupils enrolled, and adjustable shades of a tan color for all east, south, and west windows.

"This action is taken in accordance with chapter 30, Laws of 1913, which decrees that in case of failure on the part of the electors to comply with these directions, the district's share of the $\frac{7}{10}$ of a mill tax provided for in § 1072a of the statutes and amendments thereto, is absolutely forfeited and must be withheld for the school year 1915–16, and every year thereafter until these conditions have been complied with."

An appeal was taken by the school district to the state superintendent, who visited the schools in question and by his order upheld the condemnation of the Thirty-sixth street school building, but extended the time for the erection of the new building in its place for one year longer than that fixed by the inspector's order, that is, until December 1, 1917. By the same order or determination he decided as to the other school as follows: "With respect to the State street school I would say that with the exception of poor ventilation, which I think can easily be adjusted, and greater provisions against fire in the basement, the building is satisfactory, and the order of condemnation is not sustained. The chief ground on which the condemnation of this building was based is its location in the vicinity of a manufacturing plant from which smoke and fumes issue constantly, and which at times are carried over and into this building in a manner to distress the occupants. I do not hold that this department is competent under our laws to condemn a building for such a reason. Whether the fumes in question are injurious to health is a matter for the consideration of the health department, and not for the department of education. The teachers in the building have kept a record for some time past and find that about once a week these odors and fumes are distressing, sometimes extremely so. The physical condition of this building is subject to examination and inspection by the State Industrial Commission. It would seem that with their suggestions the defects in the matter of ventilation, etc., in the State street school may be remedied. If this is properly attended to and provision made against fire, the changes will be satisfactory to this department. These changes should be installed by the opening of school next fall."

While the appeal was pending before the state superintendent the district asked to have a hearing before him at which oral testimony might be taken. Such request was denied. The school district then obtained a writ of certiorari from the circuit court for Milwaukee county directed to the state superintendent. Upon trial, judgment was entered vacating such decision of the state superintendent, from which judgment he has appealed to this court.

Messrs. **W. C. Owen**, Attorney General, and **J. E. Messerschmidt**, Assistant Attorney General, for appellant:

Section 517 empowers the graded school inspector and state superintendent to withhold from the district its share of the $\frac{1}{10}$ mill tax for continuing to use a school building for school purposes after the same has been declared unfit for same, and not worth repairing, by said inspector or superintendent.

The statute in question is constitutional.

Bittenhaus v. Johnston, 92 Wis. 588, 32 L.R.A. 380, 66 N. W. 805; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341; State ex rel. Moreland v. Whitford, 54 Wis. 155, 11 N. W. 424.

Mr. **Gilbert J. Davelaar**, for appellee:

Nowhere in the statute, express, by reference, or otherwise, is the inspector given authority to condemn the building or buildings, require the building of a new building, nor given the right and power to impose penalty and forfeiture for failure to build a new building.

Abbot v. Milwaukee, 148 Wis. 26, 134 N. W. 137; State ex rel. Husting v. State Canvassers, 159 Wis. 216, 150 N. W. 542, Ann. Cas. 1916D, 159; Interior Woodwork Co. v. Jahn, 163 Wis. 195, 157 N. W. 772; Krom v. Antigo Gas Co. 154 Wis. 535, 140 N. W. 41, 143 N. W. 163; Pearson v. School Dist. 144 Wis. 623, 140 Am. St. Rep. 1043, 129 N. W. 940; State ex rel. Wisconsin Trust Co. v. Leuch, 156 Wis. 129, 144 N. W. 290.

Defendant in violation of law refused and denied plaintiff a hearing to which he was entitled.

Ekern v. McGovern, 154 Wis. 157, 46 L.R.A.(N.S.) 796, 142 N. W. 595; State ex rel. Arnold v. Milwaukee, 157 Wis. 505, 147 N. W. 50; State ex rel. Ringer v. Harper, 157 Wis. 421, 147 N. W. 633; Schiltz v. Roenitz, 86 Wis. 31, 21 L.R.A. 483, 39 Am. St. Rep. 873,

56 N. W. 194; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Meade v. Dane County, 155 Wis. 632, 145 N. W. 239; State ex rel. Moreland v. Whitford, 54 Wis. 150, 11 N. W. 424; State ex rel. Schuette v. Cary, 143 Wis. 83, 126 N. W. 562; Borgnis v. Falk Co. 147 Wis. 359, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

Eschweiler, J., delivered the opinion of the court:

The defendant state superintendent of schools on this appeal contends for two propositions, viz.: First, that he has the power under the statutes hereinafter cited to condemn and order discontinuance of the use of a schoolhouse such as he held the Thirty-sixth street school to be; and, second, that he is authorized to withhold the $\frac{7}{10}$ mill tax from this school district so long as it does not comply with his order to build a new schoolhouse in place of the one so condemned.

Section 517, Stat., entitled, "Inspection of School Buildings," provides for inspectors of public school buildings who shall act under the directions of the state superintendent and under regulations established by him; that whenever complaint is made that any public school is in an unsanitary condition, or that the conditions are such as to endanger the life and health of the children attending the schools, or that the schoolhouse is unfit for school purposes, one of such inspectors designated by the said superintendent shall personally investigate and examine the premises and buildings. The following paragraphs are parts of the same statute:

"3. Upon such investigation and examination said inspector shall, if conditions warrant it, make an order directing the school board, the board of education, or other officer or officers having control of the school district or school corporation, to repair and improve such building or buildings as may be necessary, and to place said buildings in a safe and sanitary condition; or if said inspector shall deem the schoolhouse unfit for school purposes and not worth repairing he shall state said fact and recite the reason therefor.

"4. The said inspector shall file said order in the state superintendent's office, and cause true copies thereof to be delivered, by mail or otherwise, to the clerk of the district board, . . .

"5. The said order shall state the time in which it shall be complied with, and shall take effect from its date, and shall continue in force and full effect until reversed. The decision of the inspector may be appealed from to the state superintendent in the time and manner now provided for taking appeals to said superintendent, and the decision appealed from shall be stayed, pending such appeal.

"6. Whenever any school district . . . shall refuse to comply with the order of said inspector within the time herein specified, such school district . . . shall forfeit absolutely its apportionment of the fund derived from the $\frac{7}{10}$ mill tax, provided for in § 1072a of the statutes, and amendments thereto, and shall continue to so forfeit its regular apportionment of such fund until there is full compliance with the requirements of said order, unless the electors of said school district shall vote to instruct the school board to close the district school and provide transportation and tuition for all children of school age in the district desiring to attend school at some neighboring school or schools, as provided for in § 496q of the statutes.

"7. Nothing in this section shall be deemed to interfere with the operation of the provision of subsection (3) of § 461 of the statutes, relating to the duties of county superintendent of schools, or with the provisions of § 1418b of the statutes, relating to the inspection and regulation of the sanitary conditions of schoolhouses by boards of health."

The substantial point at issue between the parties in this case arises

from the construction that should be given to subd. 3, above quoted. An examination of its language, alone and in connection with the surrounding sections, leads us to the conclusion that it provides for two separate and distinct determinations that may be arrived at after such inspection.

In the first division of that paragraph preceding the semicolon there is found a provision for the making of an order, the conditions warranting the same first having been found, which order directs the repairing and improving of existing school buildings. By the last portion of that same subsection following the semicolon there is no provision for the giving of any order, and the power there given goes no further than to provide for the reciting of the fact, when so found, that the building is unfit for school purposes and the reason therefor.

Evidently, it is the order that is specified in the first portion of subd. 3 that is referred to in the subsequent subsections of § 517, providing for its filing and its enforcement, and it is such order, and such order only, that is followed by the penalty of the withholding of the $\frac{7}{10}$ mill tax in cases where compliance with such order is refused by the school board as provided in subd. 6 above.

By § 430, Stat., the power of building schoolhouses is vested in the inhabitants of the respective school districts. Such inhabitants at their regular meetings have the power to designate a site for a school building, and to vote such tax as shall be deemed sufficient to purchase or lease such site, and to build, hire, or purchase a schoolhouse and keep it in repair. The original power, therefore, of purchasing and leasing the site and the building, hiring, or purchasing of schoolhouses is thereby vested in such inhabitants, and we must refuse to construe § 517 in a manner that would be in derogation of the powers of the inhabitants of the school district unless there be found, in clear terms, the intention of the legislature that what has been given to these inhabitants of the school district by § 430 is intended to be in effect taken away from them and vested in the state superintendent.

School—removal—power to require—repairs.

It is further urged on behalf of defendant that, although he may not have the power to compel the building of a new schoolhouse, yet that it still may be a proper exercise of the discretion vested in him by § 1072b, Stat. to withhold the $\frac{7}{10}$ mill tax from a school district that will not heed his recommendation that such new building should replace the old, if it should be held that he can only recommend and not order. This, however, would be permitting to be done by indirection what could not be done directly. The only orders, therefore, noncompliance with which can be visited with the penalty of withholding the $\frac{7}{10}$ mill tax, are such lawful orders as the state superintendent may make under the authority of the statute. If warrant for the making of the order cannot be found in the statute, then he has no discretion or power to punish for any violation of any such attempted proceeding.

Same—invalid order—refusal to comply—effect.

However much we may be impressed with the argument that the legislature, by the enactments found in § 517, must have wanted to clothe the state superintendent not merely with the power to require substantial modifications and changes in existing buildings to meet ever-increasing demands for sanitation and safety, but also with the wider and greater power of determining the need for, and then ordering, with the same ends in view, the building of a new structure to replace the old, yet we cannot expand the language of a statute which clearly gives and grants the lesser into an expression, by judicial construction, of the grant of the greater power.

The trial court was therefore

right in the construction placed upon this statute.

The respondent contends that the order of the state superintendent which denied him an opportunity to present oral testimony and make oral arguments before him upon such an appeal as was taken by the school district in this case was an unwarranted denial of a substantial right; and that it in effect deprives it of property rights without due process of law.

Although now not necessary in the determination of the case, yet we are warranted in saying that the rules here in question are practically the same as those that were before this court and approved of as a legitimate exercise of the power and authority vested in him as an administrative officer in the case of State ex rel. Moreland v. Whitford, 54 Wis. 150, 11 N. W. 424. We think the present situation is within the rule laid down in that case, and that where there was opportunity given to the parties interested in such an appeal as herein to present all the facts and make all the suggestions they deemed necessary by affidavits and in writing, there was no infringement of any property rights.

Constitutional law—due process—denial of oral argument.

Judgment of the Circuit Court is affirmed.

ANNOTATION.

Power to require construction or repair of school buildings.

This note does not cover the question whether a refusal to erect a building or repair the school building constitutes a ground for removal of public officers, nor does it deal with questions concerning the selection of sites for school buildings.

It will be noted that in the reported case (STATE EX REL. SCHOOL DIST. v. CARY, ante, 1554), the statute having vested in the inhabitants of school districts the power to designate sites and erect school buildings the court denied the power of the state superintendent of schools to condemn a schoolhouse, and order the erection of a new building by a school district, and withhold the seven-tenths tax from the district until such order was complied with.

But a few cases have been disclosed dealing with the point under annotation.

In Ex parte Manheim Twp. (1855) 5 Clark (Pa.) 400, it appeared that the board of directors of a school district who were empowered by statute to establish a sufficient number of schools for the individuals in their districts, and to cause suitable lots to be procured and buildings to be erected, had considered the necessity of the erection of a schoolhouse, and had resolved that it was unnecessary. It was held that a writ of mandamus would not lie to compel the erection of such schoolhouse since the board of directors was a deliberate body. The court said that where a ministerial act is to be done, and there is no specific remedy, mandamus will be granted, but where the complaint is against one who acts in a judicial, or deliberative, capacity, although he may be ordered by mandamus to proceed to do his duty by deciding and acting according to the best of his judgment, yet the court will not direct him in what manner to decide.

And in State ex rel. Pierce v. Stout Institute (1914) 158 Wis. 417, 149 N. W. 205, where the legislature had made an appropriation for the erection of a household arts building for a state school, and the trustees of the school, after a conference with the governor at which he requested a postponement of the expenditure of the appropriation in order to reduce the state taxes, passed a resolution not to erect the building until a year after the appropriation was available, it was held that a writ of mandamus to compel the trustees to proceed immediately with the construction of the building would not be granted, since the act of the trustees in postponing the expenditure

of the appropriation was a reasonable exercise of their discretion, with which the court would not interfere.

And in Drew v. School Twp. (1909) 146 Iowa, 721, 125 N. W. 815, where, after a vote of the electors authorizing the levy of a tax of a certain sum to build three schoolhouses, a question of redistricting arose, it was held that there was no abuse of discretion on the part of the lower court in denying a peremptory order of mandamus, directing the board of directors to select sites for three new schoolhouses and cause them to be erected, it appearing from the evidence that the directors were proceeding cautiously in an attempt to carry out the wishes of the electors, and by direction of the latter were deferring the building of the schoolhouses until something definite regarding the subdivision of the district could be agreed upon. The court stated that before a writ of mandamus would be issued it must appear that the defendants were failing or refusing to perform some duty resulting from an office, trust, or station, and that, where any discretion is left, it might compel the parties to act, but could not control such discretion.

In Benjamin v. Malaka (1879) 50 Iowa, 648, where the board of directors of a school district had left the question of building a schoolhouse to the electors, and they had decided to build one, and had made an appropriation, and levied a tax for that purpose, it was held that there was a positive official duty enjoined by law upon the directors to build the schoolhouse, and that mandamus, and not an appeal to the county superintendent, who had no power to enforce his decision, was the proper remedy to compel the erection of the schoolhouse. J. T. W.

JOHN E. RAMER, Secretary of State, et al.,

v.

JAMES R. WRIGHT et al.

Colorado Supreme Court (In Banc) — July 3, 1916.

(62 Colo. 53, 159 Pac. 1145.)

Verification — sufficiency of jurat.

1. An officer's attestation of a verification of a protest against a referendum which, under the statute, must be under oath, reading, "subscribed to before me" on a specified date, is not sufficient, for not showing that the oath was administered, although the verification states that the signers "depose and say."

[See note on this question beginning on page 1568.]

Statute — referendum — authority of officer.

2. The right to file a protest against a referendum petition is purely statutory, and the officials have no authority to proceed unless the statutory provisions are complied with.

(Hill and Teller, JJ., dissent.)

PETITION to review the finding and judgment of the District Court for the City and County of Denver, that the protest to a petition to refer a bill relating to the practice of medicine to a vote of the people was insufficient, and directing the Secretary of State to submit the bill for a referendum vote. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Fred Farrar**, Attorney General, **Francis E. Bouck**, **H. L. Ritter**, **Charles H. Haines**, and **Hugh McLean** for petitioners.

Messrs. **I. B. Melville**, **M. D. Melville**, **Carle Whitehead**, and **Albert L. Vogl**, for respondents:

The referendum was in proper form.

State ex rel. Case v. Superior Ct. 81 Wash. 647, 143 Pac. 469, Ann. Cas. 1916B, 838; Re House Resolution, 50 Colo. 71, 114 Pac. 293.

The protest was not sufficient to give the secretary jurisdiction to hold a hearing.

United States v. McConaughy, 33 Fed. 168; Palmer v. McCarthy, 2 Colo. App. 422, 31 Pac. 241; Halbour v. Cuenin, 45 Colo. 507, 101 Pac. 763; Mitchell v. National Surety Co. 206 Fed. 807; Daugherty v. Carnine, 261 Ill. 366, 103 N. E. 1003; 1 R. C. L. 772; Atchison v. Bartholow, 4 Kan. 124; Winn v. Miller, 136 Ga. 388, 71 S. E. 658; Globe Iron, Roofing & Corrugating Co. v. Thacher, 87 Ala. 458, 6 So. 366; Schwarz v. County Ct. 14 Colo. 44, 23 Pac. 84; Sugar City v. Crowley County, 57 Colo. 432, 140 Pac. 809.

The provisions of chapter 97 of the Session Laws of 1913, relative to the time within which the protest must be filed, are not unconstitutional.

Schwarz v. County Ct. supra; State ex rel. Case v. Superior Ct. 81 Wash. 632, 143 Pac. 461, Ann. Cas. 1916B, 838.

The provision of the Constitution requiring residence addresses was not mandatory.

Nicholls v. Barrick, 27 Colo. 432, 62 Pac. 202; Baldwin v. Wade, 50 Colo. 109, 114 Pac. 399; State ex rel. Hill v. Olcott, 67 Or. 21, 135 Pac. 95, 902; State ex rel. Case v. Superior Ct. 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B, 838; Re Initiative Petition, 35 Okla. 49, 127 Pac. 862.

Scott, J., delivered the opinion of the court:

On the 26th day of June, 1915, the respondents filed with petitioner, John E. Ramer, as secretary of state, a petition to refer to the vote of the people of Colorado house bill No. 178, being an act of the twentieth general assembly, relating to the practice of medicine. Within fifteen days thereafter, and on the 19th day of July, 1915, there was filed with the secretary of state what purported to be a protest against said petition.

A motion to dismiss the protest was filed with and overruled by the secretary of state. Upon the hearing, the secretary of state sustained the protest, and held the referendum petition to be insufficient. August 9th, 1915, the respondents filed in the district court of the city and county of Denver, their petition for a review of the proceedings before the secretary of state.

Return was made by the secretary of state in due time, and upon a hearing by the court, it was held that the protest to the petition to refer the act was not sufficient to meet the requirements of the statute in such case, and an order entered directing the secretary of state to submit the bill for a referendum vote.

This action is to review the findings and judgment of the district court.

Section 1, art. 5, of the Constitution, provides, among other things, that "the text of all measures to be submitted shall be published as constitutional amendments are published, and in submitting the same and in all matters pertaining to the form of all petitions the secretary of state and all other officers shall be guided by the general laws, and the act submitting this amendment, until legislation shall be especially provided therefor. . . . The initiative and referendum powers reserved to the people by this section are hereby fully reserved to the legal voters of every city [etc.]. The manner of exercising said powers shall be prescribed by general laws, except that cities, towns and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation."

It will be seen that this article of the Constitution contemplated legislative action providing a special procedure in such cases. The legislature, chap. 97, Laws of 1913, enacted what appears to be a very complete and comprehensive method

of procedure, supplementing the constitutional provision in this regard.

Section 3 of this act provides: "§ 3. All petitions, so verified, shall be deemed and held sufficient if they appear to be signed by the requisite number of signers, and such signers shall be deemed and held to be qualified electors, unless a protest in writing under oath shall be filed in the office in which such petition has been filed, by some qualified elector, within fifteen days after such petition is filed, setting forth specifically the grounds of such protest and the names protested; whereupon the officer with whom such petition is filed shall forthwith mail a copy of such protest to the persons named in such petition as representing the signers thereof, at the addresses therein given, together with a notice fixing a time for hearing such protest, not less than five or more than twenty days after such notice is mailed. All records and hearings shall be public. Hearings shall be summary and must be concluded within forty days after such petition is filed, and the result thereof shall be forthwith certified to the persons representing the signers of such petition. In case the petition be declared insufficient in form or number of signatures of qualified electors, it may be withdrawn by a majority in number of the persons representing the signers of such petition, and may, within fifteen days thereafter, be amended or additional names signed thereto as in the first instance, and refiled as an original petition. The finding as to the sufficiency of any petition may be reviewed by any state court of general jurisdiction in the county in which such petition is filed, but such review shall be had and determined forthwith, and, upon application, the decision of such court thereupon shall be reviewed by the supreme court summarily."

The principal objections urged against the protest were, (a) that it was not under oath, and (b) that it did not specifically set forth the names protested, or the grounds of protest, as required by the statute.

Inasmuch as we hold the first objection fatal to the protest, it is not necessary to consider the second.

The statute requires the protest to be in writing and under oath. The verification to the protest relied on is as follows:

State of Colorado, City and County of Denver, ss.

Martha A. Morrison, A. J. Cobb, J. W. Amesse, Bertha DeWolf, Margaret W. Henderson, and Mabel I. Noble, each for himself (or herself), and not one for the other, deposes and says: That he (or she) subscribed his (or her) name to the above and foregoing protest after reading the same; that he (or she) knows the contents of said protest and the statements therein contained are true to the best of his (or her) knowledge, information and belief.

Martha A. Morrison, D. O.,
Abner J. Cobb, D. C.,
Bertha De Wolf,
J. W. Amesse, M. D.
Margaret W. Henderson,
Mabel I. Noble.

Subscribed to before me this 10th day of July, 1915.

My notarial commission expires July 27, 1915.

Mary M. McCrum,
Notary Public.

It will be seen that the certificate recites that the statement was subscribed to, but nowhere does it appear from such certificates that the signers were sworn.

It is the certificate of the officer from which it must be determined whether or not an oath was administered. It is true that in the body of the statement the signers say that they "depose and say." But, if it be assumed that "to depose" means, "to swear," the certificate does not show that the signers even "deposed" before the officer. It recites only that they subscribed.

It was held in Palmer v. McCarthy, 2 Colo. App. 422, 31 Pac. 241, that "the assignor is also required

to verify the inventory and list of creditors, under oath. The proceedings were, in this respect, fatally defective. The statute, as in all cases where such language is used, requires an affidavit subscribed by the party, and the certificate of an officer that an oath was administered,—neither appears."

The Constitution and the Act of 1913 provide that to each referendum petition shall be attached the affidavit of some qualified elector that each signature thereon is the signature of the person whose name it purports to be. The petition, therefore, is required to be under oath, and it is but just that such a petition should be met with a protest likewise under oath, as the statute requires. The legislature has treated both the petition and the protest as very serious matters, and has required that both shall be under oath. If the oath in the one case may be omitted then it may also be omitted in the other, and there would remain no protection to the public from fraudulent referendum petitions. The statute provides a severe penalty in both cases.

The constitutional amendment authorized the legislature to adopt a special procedure in such case, and the legislature has enacted a statute in apparent harmony with the constitutional provision. This statute declared that all petitions properly verified shall be deemed and held sufficient if they appear to be signed by the requisite numbers of signers, and that such signers shall be deemed and held to be qualified electors unless otherwise determined under the specific procedure provided.

The procedure requires also that a protest shall be filed with the secretary of state within fifteen days from the date of the filing of the referendum petition.

It is further declared that such protest shall set forth specifically the grounds of such protest and the names protested. The further specific requirement is that such protest must be under oath.

These requirements are clearly jurisdictional, and the secretary of state is without power to act in the absence of a substantial compliance with these requirements of the statute. We have held in this case that the protest under consideration was vitally defective in one respect at least, in that it was not under oath. Therefore the proceedings of the secretary of state upon and under such insufficient protest were without authority of law, and are without force or effect.

Verification—sufficiency of jurat.

It is contended by counsel that § 3, at least, of the Act of 1913, is unconstitutional in that the protest is required to be filed within fifteen days from the date of the filing of the petition; that the time provided is so short as to render it physically impossible to comply with it, and therefore it is so unreasonable as to deny the right conferred by the Constitution.

The only matter we determine here is that the protest is invalid for the reason that such protest was not verified as required by the statute. Certainly it cannot be contended that the requirement that the protest must be under oath is so unreasonable as to invalidate the statute. The requirement that the protest shall be filed within fifteen days from the date of the filing of the petition for the referendum is not properly before us, for if the protest was void for the reason suggested, it cannot matter when it was filed.

Neither can the protestants be in any better position if the entire statute be held to be in violation of the Constitution. For aside from the statute in question, there is no constitutional or other lawful authority for the filing of a protest with the secretary of state, and that officer is without power or authority, except under the statute, to hear or deter-

Statute—referendum—authority of officer.

mine the questions attempted to be raised by the protest.

The judgment is affirmed.

Gabbert, Ch. J., Garrigues, J., White, J., and Bailey, J., concur.

Teller and Hill, JJ., dissent.

Teller, J., dissenting:

The majority opinion denies effect to the protest filed with the secretary of state on the ground that it was not under oath; and holds that, in the absence of a protest in conformity with the statute, the secretary of state could take no steps to determine the validity of the petition to refer the law.

I think the opinion is wrong in both these particulars. The statutory provision for a protest is in the public interest, to prevent the incurring by the state of the expense of submitting a law to a vote of the people on a petition not meeting the requirements of that section of the Constitution which provides for the referendum; and, still more important, the protest is a safeguard against the suspension of duly enacted laws, except upon petition of qualified electors to the number prescribed therefor by the Constitution. That being the case, the statute should be liberally construed so as to promote its purpose.

The record discloses no objection to the verification during the several days of the hearing on the protest before the secretary of state. In the district court, among the grounds of a motion to dismiss is one that the protest was not under oath.

The record shows, folio 117, that when the motion to dismiss was on hearing, counsel for the protestants stated that the notary who prescribed the jurat was in court, and that counsel wished to show by the notary that an oath was in fact administered. On objection by counsel for petitioners, the court denied the application, stating that he found the verification to be under oath.

The general rule is that affidavits may be amended both as to formal defects and as to substance (1 Enc. Pl. & Pr. 336); and an affidavit defective for lack of a jurat may be reformed on a showing that it was made under oath (Cusick's Election, 136 Pa. 459, 10 L.R.A. 228, 20 Atl. 574).

The jurat is no part of the affidavit, simply an officer's entry, and can be amended nunc pro tunc. Veal v. Perkerson, 47 Ga. 92.

There is nothing peculiar about the affidavit required in such a case as this which should exempt it from the general rule. Not having objected on this ground before the secretary of state, and having objected when the offer to amend the affidavit was made in the district court, the petitioners should be held to have waived the objection.

Of course, if a verification in due form must be attached to the protest to give jurisdiction to hear the protest, as the majority opinion holds, the fact that the protestants made oath to the protest would avail nothing, and there could be no waiver. But I find nothing in the statute, nor in the nature of the proceeding, to justify that conclusion. The purpose of the requirement manifestly is to prevent reckless and baseless charges against a petition, and that purpose is subserved by the requirement of an oath, and not by the officer's certificate that the oath was administered.

In Miller v. Caraker, 9 Ga. App. 255, 71 S. E. 9, the court said: "None of the American courts, so far as our investigation goes, has ever given any great weight to mere form in these matters, and it is well recognized in this state that no particular form is required, provided the facts sworn to are committed to writing and signed by the affiant, if, as a matter of fact, the oath was administered. . . . The affidavit is, therefore, good provided (1) that there is a written statement; (2) that the oath is administered to the affiant; and (3) that he signs the statement."

The statement that an oath was taken cannot, then, be jurisdictional,

and so to hold is to indulge in a strict construction of the statute, for which there is no good reason, and so defeat its plain purpose. Moreover, if the law be fairly interpreted, the verification may be held sufficient, and it should be so held.

The verification contains the statement that each of the persons therein named "deposes and says," and counsel for protestants urge that the word "deposes" means to state under oath. The opinion ignores this contention, so far as any discussion of it is concerned, and determines the case on the ground that "the certificate does not show that the signers even deposed before the officer."

If "depose" in common usage means to state under oath, then the statement in the affidavit is equivalent to the usual form, "being sworn says," or "under oath says." That it does so mean will appear from an examination of the authorities; and so meaning, it is sufficient despite the supposed defect in the certificate.

As to the first of these propositions it is sufficient to say that it is supported by the definition of "depose" in all the leading lexicons.

One of the definitions of "depose" given in Webster's New International Dictionary, is: "To say under oath, testify; esp'y to give witness of by an affidavit or other sworn statement in writing." The Century Dictionary defines it as: "To give testimony on oath; especially to give testimony which is embodied in writing in a deposition or an affidavit." The Standard Dictionary, Worcester's Dictionary, Richardson's English Dictionary, Anderson's Law Dictionary, Black's Law Dictionary, Bouvier's Law Dictionary, and Cyclopedia, all define the word "depose" in substantially the same way, as meaning to state under oath,—to give testimony by affidavit or deposition.

From the foregoing definitions it appears that the word "depose," used as it is in this case, is sufficient to justify a conclusion that the statement was made under oath. Indeed the derivation of the word naturally gives it that effect, it being from the Latin verb "depono," to place, and meaning, as originally used, that the person named placed —"deponit"—his hands on the Bible, thus making his statement under oath. It does not, then, require any strained construction of the language of the verification to hold it sufficient; and, in the light of the definitions above quoted, it is difficult to see how it can fairly be denied that from the entire instrument the statements in the verification appear to have been made under oath. If it can be so determined the matter of form is not material. And this is true whether the supposed defect be in the body of the affidavit or in the jurat.

In Mitchell v. National Surety Co. (D. C.) 206 Fed. 807, an affidavit was attacked because in the body of it there was no statement that the affiant was declaring under oath. On a full review of the authorities, the court held the affidavit good.

In 2 C. J. p. 362, it is said: "The jurat must show that the affidavit was sworn to by affiant in the officer's presence. But a literal statement to this effect is usually not required if it appears from the entire instrument that the oath was taken."

This authority supports also my second proposition, which is that the verification is not bad because the certificate of the officer does not definitely state that the signers "deposed" before him.

That such statement in the certificate is necessary is the basis of the majority opinion, yet no authority is cited to the point except the case of Palmer v. McCarthy, 2 Colo. App. 422, 31 Pac. 241; and this court has pointed out that it is not clear whether the affidavit was there held bad because the court concluded no oath had been administered, or because the certificate that the oath was administered by the deputy

clerk was not in compliance with the statute. Halbouer v. Cuenin, 45 Colo. 509, 101 Pac. 763.

Such a holding is in direct conflict with the rulings of other courts: Cross v. People, 10 Mich. 25; Re Teachout, 15 Mich. 346; Black v. Minneapolis & St. L. R. Co. 122 Iowa, 32, 96 N. W. 984; Clement v. Bullens, 159 Mass. 193, 34 N. E. 173; Hosea v. State, 47 Ind. 180.

In Trice v. Jones, 52 Miss. 138, it was held that an affidavit appearing by its language to have been made under oath was good though the jurat contained only the recital, "given under my hand and seal."

In Loeb v. Smith Bros. 78 Ga. 504, 3 S. E. 458, speaking of this question, the court said: It is not necessary that it should be stated in the instrument, prior to the signature of the affiant, that the declaration was made under oath, if in fact the oath was administered.

In Bickerdike v. Allen, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740, it is held that an affidavit containing an averment that it was made under oath is good, though the jurat contained only a statement that it was subscribed before the officer.

Applying these authorities to this case and it follows, since the word "depose" in the body of the verification means stating under oath, that it was not necessary for the notary to state specifically that it was made under oath, and hence the verification is sufficient.

I conclude, then, that, with abundant authority for holding the verification good, and in the face of the fact that the secretary of state, upon a hearing lasting for several days, has found and announced that the petition was "insufficient in the number of signatures of qualified electors, as well as insufficient in form as regards residence addresses and other matters required by the law," this court, interpreting a provision of the statute plainly intended to prevent fraud in referendum petitions, and promote the public interest, has rejected a well-known meaning of a word in the verification, and applied a strict rule of construction for which no authority is presented, and thus defeated the purpose of the law.

The further holding that the secretary of state has no power to act independently of the statute is sustained neither by precedent nor on principle. The grounds for this holding are supposed to be found in the constitutional provision that a petition with the prescribed verification "shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are qualified electors." This is to give to the words "prima facie" a new and startling effect. I had supposed that their meaning was well understood as being "on first appearance," or "first sight," following their literal meaning. In this connection they in no wise limit the power of the secretary of state. On the contrary, this provision is clearly intended to relieve him of the duty of determining the genuineness of the signatures, etc.; and he is now authorized —not compelled—to accept a petition, and submit it, without any investigation as to the signatures. It is prima facie good, but if the signatures are questioned, their genuineness may be determined. Prima facie evidence of a fact is in law sufficient to establish the fact, unless rebutted. Kelly v. Jackson, 6 Pet. 622, 8 L. ed. 523.

Is it to be supposed that the people, in adopting this constitutional amendment, intended to require the secretary of state to submit every law upon which a referendum was sought by a petition with the requisite number of signers, regardless of his knowledge of the insufficiency of the petition? This constitutional amendment was adopted in November, 1910, and the legislation providing a procedure therefor was approved May 8, 1913. In the meantime the right of initiating and the right of referring laws had been several times exercised by the people. No objection could be made to the exercise of those rights at that

time, because the amendment, by providing that general laws shall govern until a procedure should be provided by legislation, clearly recognized the right to file such petitions before any general procedure has been provided therefor. Yet, according to the majority opinion, until a procedure has been provided, the secretary of state, and the people as well, were powerless to prevent the submission of any law, or all the laws enacted by the general assembly, if petitions for submission, good on their face, were filed, though their fraudulent character was well known.

By the Statute of 1913, if any elector has doubts of the validity of any petition so filed he may, by filing a verified protest, have the validity of the petition determined; but, if the court is right in its conclusions, the secretary of state, though he may have positive knowledge that the petition is honeycombed with fraud, can, of his own motion, make no investigation of the matter. Under oath to obey the laws and support the Constitution, he must file a petition which he knows does not meet the requirements of this section, and which is therefore no petition in the eye of the law.

To base such a conclusion on language which merely makes the submission of evidence of the validity of the petition unnecessary in the first instance would seem to require some argument for its support. Yet no reason is given for it.

It can hardly be seriously contended that the people intended, by adopting this amendment to the Constitution, to place the secretary of state in such an anomalous position as is above suggested, pending legislation on the question of procedure. Yet if the secretary of state had any authority in the premises before the procedure was provided, it was derived from the Constitution, and the statute did not take it away.

He did have that right; he exercised it, and no one questioned his authority. On July 5, 1913, before the Act of May 8, 1913, was in force, a petition to refer the act creating the county of Alamosa was filed in the office of the secretary of state. He rejected it, and the petitioners then obtained from the district court of the city and county of Denver an alternative writ of mandamus to compel him to submit it. Judge Perry, on a careful examination of the signatures, and a hearing on evidence, found that there were over sixteen hundred names on the petition which were fraudulent; that it could be seen by inspection that they had been written in groups, each group by the same person; and he sustained the secretary of state in his rejection of the petition.

Again, when a petition for a reference of the act creating the Board of Public Utilities was filed in 1913, —no procedure having at that time been provided,—the people, on the relation of the attorney general, applied to the district court for an injunction, on the ground that the secretary of state was about to submit the act on a petition not sufficient in law. On a hearing before Judge Allen, he found that many of the signatures were forged, and granted the injunction. According to the majority opinion those petitions, thus judicially determined to be fraudulent and invalid, should have been accepted and made the basis for suspending valid laws, and imposing on the state the expense attendant upon their submission to a vote of the people.

It may be confidently asserted that until the present case arose, the right of the secretary of state to reject a petition, if he was satisfied of its invalidity, was unquestioned.

To deny him that right is to make the words "prima facie" equivalent to "conclusive," and to compel an officer of the state to aid in perpetrating a fraud upon the law with full knowledge of the fact.

The majority opinion rejects most obvious and seemingly necessary

conclusions, and decides questions of the most serious import to the people without citing authority or giving reasons therefor.

The length of this opinion is justified, I trust, by the importance of the questions involved, and the depth of my conviction that they have not been rightly determined.

Petition for rehearing denied October 2, 1916.

ANNOTATION.

Necessity and sufficiency of officer's jurat or certificate as to oath.

I. Sufficiency:
- a. In general, 1568.
- b. Stating nature of oath, 1569.
- c. Oath or affirmation, 1569.
- d. "Before me," 1569.
- e. Jurat naming affiant, 1570.
- f. More than one affiant, 1570.

II. Jurats omitted or unsigned:
- a. Affidavits for attachments, 1571.
- b. Affidavits for appeal, 1572.
- c. Affidavits for or of publication, 1573.
- d. Affidavits of liens and mortgages, 1573.
- e. Affidavits in criminal proceedings, 1574.
- f. Various affidavits, 1575.

III. Miscellaneous 1576.

I. Sufficiency.

a. In general.

This note does not include the omission from jurat of date, seal, or title of officer.

There is considerable difference of opinion as to what constitutes an affidavit, as will appear from cases throughout this note. Often the decision turns upon the question whether the instrument under consideration was an affidavit within the law.

It has been said that the very function of the jurat "is to show that the statement has been made under oath before a competent officer." Mitchell v. National Surety Co. (1913) 206 **Fed.** 807.

The statement "sworn to" in the jurat is sufficient to show the oath, though the body of the instrument does not show a swearing. Loeb v. Smith (1887) 78 **Ga.** 504, 3 S. E. 458; Miller v. Caraker (1911) 9 **Ga. App.** 255, 71 S. E. 9; Mitchell v. National Surety Co. (**Fed.**) supra.

It will be observed that in the reported case (RAMER v. WRIGHT, ante, 1560) it is held that a signed instrument reciting that certain persons, each for himself deposes and says, with a "jurat" stating merely, "subscribed before me," with the date, and signed by the notary, is not an affidavit within the referendum law.

In Sebesta v. Supreme Court of Honor (1906) 77 **Neb.** 249, 109 N. W. 166, it was held that a signed instrument reciting that certain persons "being each duly sworn upon their oaths depose and say," etc., with a jurat not stating that they were sworn, was not (for the purposes of a stipulation) an affidavit under the Nebraska statute which requires the officer's certificate to show that the affiant was sworn. The court considered that in Bantley v. Finney (1895) 43 **Neb.** 802, 62 N. W. 213 (infra, II. c), the statute was overlooked.

On the other hand, it has been held that a sufficient swearing was shown where, in the body of the affidavit, it appeared that the affiant was sworn, and at the foot was the signed certificate of the officer, "Given under my hand and seal of office on the day and year aforesaid." Hanson v. Cochran (1890) 9 Houst. (**Del.**) 184, 31 Atl. 880.

And in Trice v. Jones (1876) 52 **Miss.** 138, it was decided that an affidavit for appeal, the jurat of which was, "Given under my hand and seal," was wrongly held insufficient, or if not, the appellate court could not see why it was not permitted to be amended. It is not stated whether anything in the body of the paper showed that the oath was administered.

In Gordon v. State (1891) 29 **Tex. App.** 410, 16 S. W. 337, it was held that

a statement by an officer, used on a motion for a new trial, that certain persons each having been duly sworn upon oath says each for himself, etc., ending, "Witness my hand and seal," etc., and signed by the officer, was not an affidavit. The court said: "It did not have the jurat of the officer attached to it, certifying the necessary oath was administered to said named parties; nor is there anything to indicate that they were sworn to its contents."

A notice of a mining location was held not to be on oath where it had attached a paper, stating, after the venue, "Charles K. Cole, being duly sworn says," etc., "and that the matters set forth in the foregoing notice by him subscribed are true. —— —— Erastus D. Edgerton, Notary Public in and for Montana Territory (notarial seal)." Metcalf v. Prescott (1891) 10 **Mont.** 283, 25 Pac. 1037, 16 Mor. Min. Rep. 137, holding that evidence aliunde of the oath could not be received.

In Palmer v. McCarthy (1892) 2 **Colo.** App. 422, cited in the reported case (RAMER v. WRIGHT, ante, 1560), the certificate of the officer to an inventory required to be under oath was that A. B., "who personally appeared before me," "deposes and says," and it was held that it did not show that an oath was administered. Whether the inventory was signed does not appear.

b. Stating nature of oath.

The nature of the oath need not appear. Thus, an answer with a jurat, stating that the defendants were "duly sworn," will not be judged insufficient on allegations that the defendants were not Christians, and that it did not appear that they were sworn according to their creed. Fryatt v. Lindo (1838) 3 Edw. Ch. (**N. Y.**) 239.

c. Oath or affirmation.

Where the jurat shows an affirmation, the word "affirmed" is sufficient. The statutory words of affirmation are not required any more than the statutory words of swearing. Colvin v. People (1897) 166 **Ill.** 82, 46 N. E. 737.

Nor need the jurat show the prerequisites to affirming rather than to swearing. Wolseley v. Worthington (1863) 14 **Ir.** Ch. Rep. 369; Loney v. Bailey (1875) 43 **Md.** 10.

An affidavit is sufficient which states I, A. B., "do solemnly and sincerely promise and swear (or affirm) that I will," etc., with a jurat, "Affirmed before me," etc., as the word "swear" may be treated as surplusage. State v. Shreve (1816) 4 **N. J. L.** 297.

A jurat on an affidavit of two persons is not objectionable which states, "Affirmed, sworn to, and subscribed." Re Contested Elections (1868) 2 Brewst. (**Pa.**) 1.

So, "sworn and affirmed," in the jurat of the affidavit of two persons to a chattel mortgage, was held sufficient showing that both made oath and affirmation. Moyer v. Davidson (1858) 7 **U. C. C. P.** 521, the court stating that rules of court did not apply here.

But, on the other hand, in State, Kaighn, Prosecutor, v. Browning (1859) 27 **N. J. L.** 527, the court raised the question whether a jurat on an affidavit of several school trustees, stating, "sworn and affirmed," and upon their "oaths and affirmations say," etc., was not too indefinite for an assessment.

That the jurat states that the affiants were sworn where they actually affirmed is no objection when the statute provides that the expressions "swear" and "sworn," respectively, include "affirm solemnly," "affirmed solemnly." Dyck v. Graening (1907) 17 **Manitoba** L. R. 158.

d. "Before me."

The English cases hold that the certificate of the officer should state that the witness was sworn before the officer. Reg. v. Bloxham (1844) 6 Q. B. 528, 115 **Eng.** Reprint, 197, 2 Dowl. & L. 168, 1 New Sess. Cas. 370, 14 L. J. Q. B. N. S. 13, 8 Jur. 1117; Reg. v. Norbury (1846) 6 Q. B. 534, note, 115 **Eng.** Reprint, 200, note; Graham v. Ingleby (1848) 5 Dowl. & L. 737, 1 Exch. 651, 154 **Eng.** Reprint, 277. But this is not necessary when the affidavit is sworn to before a judge and certified by him (Empey v. King (1844) 13 Mees. & W. 519, 153 **Eng.** Reprint, 216, 2 Dowl. & L. 375, 14 L. J. Exch. N. S. 48, 8 Jur. 1034), or sworn to in court

(Austin v. Grange (1836) 4 Dowl. P. C. (Eng.) 576, 1 Hurlst. & W. 670). In Archibald v. Hubley (1890) 18 Can. S. C. 116, it was held that the omission of the words "before me" and the date in the jurat to an affidavit to an assignment of bill of sale was fatal and not amendable. So, a jurat of a commissioner on an affidavit to hold to bail was held insufficient where it read, "sworn before at," etc., omitting "me." Hayden v. Goodstein (1898) — Pr. Edw. Isl. —, 34 Can. L. J. 639.

In American practice the words "before me" are not necessary to the jurat, as they are presumed from the statement "sworn to." Black v. Minneapolis & St. L. R. Co. (1903) 122 Iowa, 32, 96 N. W. 984. The same was held in Martin v. McCharles (1866) 25 U. C. Q. B. 279, as to an affidavit of service.

"Before me" has been held unnecessary when the affidavit is used before the officer who administered the oath. Re Teachout (1867) 15 Mich. 346. Also where the taking of the oath before the officer appears in the body of the affidavit with that officer's name. Cross v. People (1862) 10 Mich. 24. Also when the certificate states that the affiant "then personally appeared" "and made oath." Clement v. Bullens (1893) 159 Mass. 193, 34 N. E. 173.

But in Way v. Lamb (1863) 15 Iowa, 79, it was held that the jurat to an affidavit of verification of a petition for an injunction was insufficient as not certifying that the affidavit was sworn to before the officer where it stated, "Subscribed in my presence and sworn to by [affiant] this [date] at my office at," etc.

e. Jurat naming affiant.

Probably the question raised in a few cases, notably in Iowa, that the jurat should state the name of the affiant, was suggested by an English court rule requiring such a naming in affidavits made by two or more (Cases under this rule are not included.)

Signed affidavits do not require the name of the affiant to be stated in the jurat. Stone v. Miller (1882) 60 Iowa, 243, 14 N. W. 781; Stoddard v. Sloan (1885) 65 Iowa, 680, 22 N. W. 924; Kirby v. Gates (1887) 71 Iowa, 100, 32 N. W. 191; Com. v. Keefe (1856) 7 Gray (Mass.) 332.

Thus, a jurat stating "subscribed and sworn to by —— —— before me," is sufficient. Kirby v. Gates (1887) 71 Iowa, 100, 32 N. W. 191. Followed on principle in Blair v. Hemphill (1900) 111 Iowa, 226, 82 N. W. 501.

A jurat "sworn before me this," etc., is sufficient under a statute requiring the officer to subscribe his name to a certificate "purporting that the person making the affidavit had appeared before him and made oath to the same." Jackson ex dem. Merritt v. Gumaer (1824) 2 Cow. (N. Y.) 552.

A statement for confession of judgment, signed by the confessors, who did not sign the affidavit, the jurat of which was in the usual form, stating "subscribed and sworn to," but not stating by whom, is sufficient under the law requiring the statement to be verified by the defendant, but not requiring an affidavit. Briggs v. Yatzer (1897) 103 Iowa, 342, 72 N. W. 647.

f. More than one affiant.

Where more than one is sworn it is not necessary that the affidavit or certificate should show a "several" swearing. Randall v. Baker (1850) 20 N. H. 335; Moyer v. Davidson (1858) 7 U. C. C. P. 521.

An omission of the jurat on the affidavit of two chattel mortgagees to state that they were severally sworn is not fatal. Dyck v. Graening (1907) 17 Manitoba L. R. 158.

It was held that an affidavit of two persons, for use on motion, was not objectionable because they were not stated to be severally sworn in a jurat which named them. Keefer v. Howley (1876) 1 Ont. Pr. Rep. 1. But the contrary was held in Pardoe v. Territt (1843) 5 Mann. & G. 291, 134 Eng. Reprint, 575, 6 Scott, N. R. 273, 2 Dowl. N. S. 903, 12 L. J. C. P. N. S. 143, 7 Jur. 217.

An affidavit signed by twenty-seven persons, beginning, "We, the undersigned, having been duly sworn, make oath and say," etc., with a jurat stating, "I do hereby certify that the persons whose names are signed above were duly sworn to it before me," etc.,

is sufficient in form. Taylor v. State (1872) 48 **Ala.** 180.

In State v. Smith (1866) 54 **Me.** 33, where a statute required that the complaint in a criminal case of a certain kind should be made by three persons under oath, and the magistrate's certificate omitted two of them, it was held that the defect might be amended after service of the warrant.

In Marcum v. Coleman (1890) 10 **Mont.** 73, 24 Pac. 701, it was held that an affidavit to a chattel mortgage was sufficient in form which stated in the body of it that "Samuel Ward and Marcum & Lennon, the parties to the foregoing chattel mortgage, being severally and duly sworn, each for himself says," and was signed, "Samuel Ward, Marcum & Lennon," the jurat signed by the officer stating, "Subscribed and sworn to before me this," etc. The mortgage referred to the parties as named in the affidavit, not stating whether Marcum and Lennon were a partnership or not, but referring to them in the plural. The court refused to recognize outside evidence that Marcum & Lennon was a partnership.

An affidavit to a chattel mortgage given by H. & D. A. Burgett to Sylvanus Randall was held sufficient in form where it stated, "I, the we said H. & D. A. Burgett, and I, the said Randall do solemnly swear," etc., signed "H. & D. A. Burgett, Sylvanus Randall," the jurat signed by the officer stating after the venue and date, "Then the said H. & D. A. Burgett and Sylvanus Randall took and subscribed the above oath, as prescribed by law, before me." The court stated that the only reasonable construction was that all the persons in the firm took the oath; that a swearing by one was sufficient, but that there was no harm in their all swearing. Randall v. Baker (1850) 20 **N. H.** 335.

II. Jurats omitted or unsigned.

a. Affidavits for attachments.

It is the general rule that in case of the omission of the jurat or signature thereto upon an affidavit for attachment, the fact that the oath was administered at the time may be shown aliunde. McCartney v. Branch Bank (1842) 3 **Ala.** 709 (omission by justice); Kruse v. Wilson (1875) 79 **Ill.** 233; Cook v. Jenkins (1870) 30 **Iowa,** 452; James v. Logan (1910) 82 **Kan.** 285, 136 Am. St. Rep. 105, 108 Pac. 81; Dunlap v. Clay (1888) 65 **Miss.** 454, 4 So. 118 (signature both to affidavit and to jurat omitted); Hart v. Jones (1891) 6 Kulp (**Pa.**) 326 (omission by deputy prothonotary); Wiley v. Bennett (1877) 9 Baxt. (**Tenn.**) 581; Farmers' Bank v. Gettinger (1870) 4 **W. Va.** 305.

In Kyle v. Connelly (1832) 3 Leigh (**Va.**) 719, the court said: "The first objection I shall notice is, that it does not appear on the record that any oath was made by the attaching creditor before the justices who issued the attachment. The answer is, that the law requires the oath to be made, and that thereupon the attachment shall issue; but does not require that the affidavit shall be certified or returned by the magistrate to the county court, or shall in any way appear upon the record of the proceedings. If, on the return of the attachment, it had been objected before the county court that no oath had been made, the court would, no doubt, have required evidence of the fact; but no such objection having been taken then, it comes too late before this court."

Such an omission may be cured by amendment. Hyde v. Adams (1885) 80 **Ala.** 111; Fortenheim v. Claflin (1885) 47 **Ark.** 49, 14 S. W. 462 (deputy clerk); Archibald v. Thompson (1874) 2 **Colo.** 388; Farrow v. Hayes (1879) 51 **Md.** 498; Boisseau v. Kahn (1885) 62 **Miss.** 757 (omission of clerk).

The omission of the justice to sign the jurat to an attachment affidavit was held no cause for a motion to quash. Lowry v. Stowe (1838) 7 Port. (**Ala.**) 483.

In Farrow v. Hayes (1879) 51 **Md.** 498, the court sustained an attachment where the affidavit was actually sworn to before the clerk, and he administered the oath before he issued the writ, and where his omission to sign and certify was corrected by him before the writ was returned.

So, the omission of a judge to sign the jurat of the affidavit for an attachment on the same paper with the order is no ground to dissolve the attachment. English v. Wall (1845) 2 Rob. (La.) 132; State ex rel. Singreen v. Downing (1896) 48 La. Ann. 1420, 20 So. 907.

In Neff v. Alvin (1913) 182 Ill. App. 41, it was held that after an attachment writ, it will be presumed that the affidavit was sworn to though without a jurat, and that an objection to such a defect came too late when first made on appeal.

In Continental Oil Co. v. Jameson (1917) 53 Mont. 466, 164 Pac. 727, it was held on an application to discharge an attachment, made simply on the record, on the ground that the jurat to the affidavit was unsigned, that affiants' evidence showing that the oath was duly administered could not be received, though it would have been proper on a motion to amend.

Some cases, however, take another view.

In Tacoma Grocery Co. v. Draham (1894) 8 Wash. 263, 40 Am. St. Rep. 907, 36 Pac. 31, the court considered as no affidavit at all a paper filed in the form of an affidavit, signed by a person who represented himself as the attorney for the plaintiff, there being nothing upon the face thereof to show that it was ever sworn to.

An affidavit in attachment, not attested by the justice, is not amendable by his adding his attestation. Birdsong v. McLaren (1850) 8 Ga. 521 (not necessary to decision).

A statement for attachment, signed by the officer, not showing that anyone was sworn, is not an affidavit. Cosner v. Smith (1892) 36 W. Va. 788, 15 S. E. 977.

In Doty v. Boyd (1895) 46 S. C. 39, 24 S. E. 59, it was held that a paper for attachment with an unsigned jurat was not an affidavit, and that the clerk who issued the attachment on it had no jurisdiction so to do, and the attachment was vacated, though there was evidence that the clerk swore the affiant to the paper.

Where the officer who administered the oath failed to sign the jurat to an attachment affidavit, and the attachment was issued by another officer, the defect cannot be amended as to other attaching creditors. Garriott v. Tiller (1891) 13 Ky. L. Rep. 96.

Where a paper on which an attachment was granted was not signed by the affiant, nor was the jurat signed, the attachment was quashed as the paper was a nullity and incapable of amendment. First Nat. Bank v. Garton (1890) 40 Mo. App. 113.

b. Affidavits for appeal.

The cases are not in accord as to the effect of the omission of the jurat or signature thereto upon an affidavit for appeal.

It has been held that the omission of the officer to sign the jurat of the affidavit for appeal is not fatal, and that the swearing may be shown aliunde. Pottsville v. Curry (1859) 32 Pa. 443.

So, also, it has been held in some of the cases that the failure of the justice to sign the jurat is amendable. People ex rel. Dickinson v. Simondson (1872) 25 Mich. 113; Green v. Boon (1880) 57 Miss. 617. So, where a notary failed to sign it. Lederer v. Chicago, M. & St. P. R. Co. (1875) 38 Wis. 244.

In Price v. Halsted (1834) 3 Mo. 461, it seems to be held that the justice must first correct his docket if it omits the entry of the affidavit.

In Gay v. Walker (1879) 35 Ark. 212, the court expressed the opinion that a justice could be compelled to sign the jurat to an affidavit of appeal.

In Redman v. Union P. R. Co. (1892) 3 Wyo. 678, 29 Pac. 88, the signatures of affiant and of the justice were allowed to be added by amendment to a notice of appeal on proof that the oath was duly taken at the proper time.

Other cases take a different view.

An affidavit for appeal with an unsigned jurat is a nullity. Calvert v. McNaughton (1870) 2 Mich. N. P. 8; Lumbard v. Zimmerman (1870) 1 Mich. N. P. 313.

Where the affiant in an appeal affidavit "does not appear to have been sworn" and there is no jurat, that is no affidavit. Bank of State v. Hinchcliffe (1842) 4 Ark. 444.

A paper without a jurat is not an affidavit within the appeal statute. Peters v. Edge (1901) 87 **Mo.** App. 283. So of one with an unsigned jurat. Ladlow v. Groom (1845) 1 Denio (**N. Y.**) 429.

Such a paper confers no jurisdiction upon the appellate court and it may dismiss the appeal; but where the statute provides that upon a dismissal of the appeal for any cause the judgment may be affirmed, the appellant may not object to affirmance on the ground that the appeal was a nullity on account of the failure to certify to the affidavit. Holmes v. Igo (1910) 110 **Minn.** 133, 124 N. W. 974.

Where a party's statement of appeal, affidavit, and recognizance, all on the same sheet, were filled up by the prothonotary, who subscribed his name at the foot of the recognizance, but did not subscribe it at the foot of the affidavit, an order dismissing the appeal was affirmed, the court saying: "The oath ought to appear of record; and no part of the evidence of it could be supplied by evidence of a lower degree. Neither can the attestation of the prothonotary's name to the recognizance be referred to the affidavit, to which it does not purport to belong; and the court was therefore bound to quash the appeal." Shortle v. Stockton (1838) 7 Watts (**Pa.**) 526.

"The jurat not being signed, the legal presumption is that the paper in the form of an affidavit of appeal was not sworn to; in other words, it is not an affidavit." And the justice who is alleged to have taken the affidavit being dead, the defect is not amendable. Kidder v. Fay (1884) 60 **Wis.** 219, 18 N. W. 839.

c. Affidavits for or of publication.

It was held in Rumeli v. Tampa (1904) 48 **Fla.** 112, 37 So. 563, that a statement for an order for publication with an unsigned jurat is not an affidavit without other proof of the oath having been taken.

But in Bantley v. Finney (1895) 43 **Neb.** 794, 62 N. W. 213, where there had been a failure to sign the jurat of the affidavit on which had been based an order for publication, it was held that it might be shown aliunde that the oath was administered. This case was criticized as having overlooked the statute, in Sebesta v. Supreme Court of Honor (1906) 77 **Neb.** 249, 109 N. W. 166, supra, I.

Where an order for posting notices in a drainage proceeding was based on an affidavit taken before the clerk with an unsigned jurat, it was held that, on evidence, the court had authority to order the jurat to be affixed as of the date when it should have been done. Williams v. Stevenson (1885) 103 **Ind.** 243, 2 N. E. 728.

In Bickerdike v. Allen (1895) 157 **Ill.** 95, 29 L.R.A. 782, 41 N. E. 740, where the body of the affidavit on which an order for publication was made showed a swearing, but the jurat did not, and the judgment recited that due proof of publication was presented, the court refused to allow an attack upon the judgment in a collateral proceeding.

In Holmes v. Crooks (1898) 56 **Neb.** 466, 76 N. W. 1073, it was held that an affidavit of publication with an unsigned jurat does not, of itself, show publication. So it was held in Tunis v. Withrow (1860) 10 **Iowa,** 305, 77 Am. Dec. 117, that such a paper with an unsigned jurat does not show that the affidavit has been made.

In Deputy v. Dollarhide (1908) 42 **Ind.** App. 554, 86 N. E. 344, it was held that a direct attack on a judgment based on a publisher's affidavit of publication, having an unsigned jurat, was good against a demurrer.

d. Affidavits of liens and mortgages.

The cases in regard to lien affidavits are not agreed. It has been held, on the one hand, that the omission to sign the jurat to an affidavit to a lien is not vital and that it may be shown aliunde that the oath was administered. Turner v. St. John (1898) 8 N. D. 245, 78 N. W. 340. The same was held of an affidavit to a lien, and that the officer in such case might sign after the proof was made. Finley v. West (1892) 51 **Mo.** App. 569. So that a notice of lien, verified but without the signature of the officer to the jurat, is good. Sage v. Stafford (1899) 42 App. Div. 449, 59 **N. Y.** Supp. 545.

On the other hand, it has been held

that a paper with an unsigned jurat is not verified by oath within the lien statute, and is not amendable (Finane v. Las Vegas Hotel & Improv. Co. (1885) 3 N. M. 411, 5 Pac. 725); that such a paper is not a verified affidavit, and is not amendable (Hill v. Alliance Bldg. Co. (1894) 6 S. D. 160, 55 Am. St. Rep. 819, 60 N. W. 752, not necessary to decision); and that a paper without a jurat is not a sworn statement, and is not amendable after the time of filing the claim has expired (McGillivray v. District Twp. (1896) 96 Iowa, 629, 65 N. W. 974).

A paper with a blank, unsigned jurat is not an affidavit, and a chattel mortgage filed with such a paper has not, as to creditors, the requisite statutory affidavit. People use of Esper v. Burns (1910) 161 Mich. 169, 137 Am. St. Rep. 466, 125 N. W. 740; Reynolds v. Fitzpatrick (1899) 23 Mont. 52, 57 Pac. 452.

So, a statement on a chattel mortgage with an unsigned jurat is not a statement under oath required by the statute, and the mortgage will be void as to an execution creditor. Benedict v. Peters (1898) 58 Ohio St. 527, 51 N. E. 37.

So, the omission of the signature to the jurat of the affidavit to such a mortgage makes it invalid against a subsequent execution creditor, although it was proved that the oath was duly administered. Nisbet v. Cock (1879) 4 Ont. App. Rep. 200.

A chattel mortgage was held to be void as against an execution creditor where it was executed in duplicate, the affidavit of execution being filled in and sworn to on both originals, but the commissioner, while signing his name to the jurat on one of the duplicates, omitted to sign it on the other. Both duplicates were sent to the clerk, who indorsed the certificate of filing on both, retained the unsigned one on file in his office, and returned the other to the claimant. Inman v. Rae (1895) 10 Manitoba L. R. 411.

But, on the other hand, in Cox v. Stern (1897) 170 Ill. 442, 62 Am. St. Rep. 385, 48 N. E. 906, it was held that the omission of the notary to sign the jurat to the affidavit for extension of a chattel mortgage might be cured by proof aliunde.

A chattel mortgage is not insufficient because the signature of the officer taking the affidavit was written above the jurat instead if below it. Mowat v. Clement (1886) 3 Manitoba L. R. 585.

e. Affidavits in criminal proceedings.

The courts are not in accord as to the effect of the omission to sign jurats to affidavits in criminal proceedings. In the following cases such an omission was held not vital:

A magistrate may permit an amendment by allowing, after the issuing of the warrant, the notary who administered the oath to append a certificate of it. State v. Freeman (1887) 59 Vt. 661, 10 Atl. 752.

After a plea of not guilty the court may allow the clerk to sign the jurat to the information, "it appearing from his oral statement, not under oath, that the county attorney had in fact subscribed and sworn to the information before the filing thereof." State v. Adams (1878) 20 Kan. 311.

Where it was claimed that a justice had no jurisdiction in a criminal case because there was no sworn complaint, the court said: "It appears that the jurat to the complaint had not been signed by the justice. He testifies that he swore the complaining witness to the complaint. The complaining witness also testifies that he was sworn thereto. It is evident from the complaint and the testimony that the justice examined the complaining witness on oath touching the matters referred to in the complaint. This is sufficient, under the statute." People v. Lane (1900) 124 Mich. 271, 82 N. W. 896.

A complaint followed by the justice's warrant reciting that the informants stated to him on oath the facts recited in his warrant is not bad as without a jurat. Fry v. Tippett (1886) 16 Lea (Tenn.) 516.

A conviction will not be set aside because the defendant's affidavit for a granted change of venue had an unsigned jurat. Bittick v. State (1899) 67 Ark. 131, 53 S. W. 571.

It was held in State, Dunn, Prose-

cutor, v. Perth Amboy (1889) 51 N. J. 406, 17 Atl. 971, that a complaint sworn to before the recorder for violation of an ordinance may be amended on the return day of the summons by the recorder's signing the jurat, the the oath being sufficient for the summons though not in writing; and in McConnell v. Booneville (1916) 123 Ark. 561, 186 S. W. 82, that where an information of violation of an ordinance in the form of an affidavit was delivered to the mayor, upon which he signed an order of arrest, the fact that he did not sign the jurat to the affidavit is immaterial; particularly when the statute provides that no written information is required for violation of ordinances.

On a prosecution for perjury for taking an affidavit the jurat of the affidavit was "sworn in open court, Westminster Hall, the 10th day of June, 1846. By the court." The handwriting of the defendant was proved and it was also shown that the jurat was in the handwriting of a certain master of the court. It was held that this was sufficient. Reg. v. Turner (1849) 2 Car. & K. (Eng.) 732.

On the other hand, other cases hold the omission to sign the jurat to be a fatal defect.

An information based upon a complaint with an unsigned jurat will not support a conviction. Morris v. State (1877) 2 Tex. App. 502; Dishongh v. State (1878) 4 Tex. App. 158; Scott v. State (1880) 9 Tex. App. 434.

Where the jurat of the county attorney was affixed to the complaint upon which the information was based after the trial and conviction, the court said and held, in reversing the judgment and dismissing the case: "There was no complaint unless it was sworn to, and that fact shown by the jurat of the proper officer. This not having been done, there was no legal information, and consequently the trial was a nullity. Nor does the affixing of the jurat after the trial heal these defects." Scott v. State (Tex.) supra.

An affidavit with an unsigned jurat is void as the foundation of a summary criminal proceeding in a justice's court, though the justice assert that the affidavit was sworn to before him. Scroggins v. State (1875) 55 Ga. 380. Followed as to a proceeding in a "city" court on a motion in arrest of judgment, nothing appearing except the document. Dundee Woolen Mills v. Edison (1915) 17 Ga. App. 245, 86 S. E. 414.

It is error not to quash the information where the paper intended as an affidavit, on which the information was founded, did not appear to have been sworn to. "It was no affidavit." Cantwell v. State (1867) 27 Ind. 505. So, where the paper purporting to be an affidavit and on which the prosecution was based did not appear to have been sworn to. Swiney v. State (1889) 119 Ind. 478, 21 N. E. 1102.

On a complaint by a private informer for perjury, reciting that it was under oath, there was no certificate by the justice of his having administered any oath, nor did the capias refer to any oath, but the mittimus did, and the process was quashed and the prisoner discharged. State v. J. H. (1802) 1 Tyler (Vt.) 444.

f. Various affidavits.

In the following cases papers with unsigned jurats were held insufficient; viz., such a paper is not an affidavit within the meaning of an insurance policy (Shaw v. St. Lawrence County Mut. Ins. Co. (1860) 11 U. C. Q. B. 73); does not prove a warrant of attorney (Gambra v. Howe (1846) 8 Blackf. (Ind.) 133); is a nullity as ground for a writ of replevin (Knapp v. Duclo (1870) 1 Mich. N. P. 189, obiter); gives no jurisdiction to the court when annexed to a petition which the statute requires to be verified (Royston's Appeal (1881) 53 Wis. 612, 11 N. W. 36); and when annexed to an answer enables the complainant to treat the paper as no answer (Westerfield v. Bried (1875) 26 N. J. Eq. 357).

A paper for a writ of replevin without any official attestation is no affidavit. Kehoe v. Rounds (1873) 69 Ill. 351.

A paper accompanied by an unsigned jurat is not a statement verified by affidavit within a statute requiring such a statement to be filed by one de-

siring to contest an election. Daugherty v. Carnine (1913) 261 **Ill.** 366, 103 N. E. 1003.

In Bill v. Bament (1841) 8 Mees. & W. 317, 151 **Eng.** Reprint, 1060, 9 Dowl. P. C. 810, 10 L. J. Exch. N. S. 302, 5 Jur. 510, the court set aside an order of arrest in an action, granted by the judge on an affidavit the jurat to which he signed after the order was executed.

Where, in spreading a notice by affidavit, to apply for the passage of a law, on the journal of the senate, the name of the notary was left out, it was held that this was a vital defect, and that it was "essential to the validity of the affidavit that the name of the officer be disclosed, either by the recitals in the body of the affidavit or by his signature to the jurat." Sellers v. State (1909) 162 **Ala.** 35, 50 So. 340.

In other cases unsigned jurats have not been regarded as serious defects.

Thus it has been held that the omission to sign the jurat may be amended nunc pro tunc. Bergesch v. Keevil (1853) 19 **Mo.** 127 (justice omitting to sign jurat of claim affidavit); Veal v. Perkerson (1872) 47 **Ga.** 92 (the same, criticizing Birdsong v. McLaren (1850) 8 **Ga.** 521, supra, II.); Peterson v. Fowler (1889) 76 **Mich.** 258, 43 N. W. 10 (justice omitting to sign jurat of affidavit for replevin); Stone v. Miller (1882) 60 **Iowa,** 243, 14 N. W. 781 (petition for certiorari).

In an election contest the affidavits of voters with unsigned jurats ought to be amended at any time on proof. Re Griffiths (1880) 9 Luzerne Leg. Reg. (**Pa.**) 197. The court expressed a similar opinion in Re Cusick (1890) 136 **Pa.** 459, 10 L.R.A. 228, 20 Atl. 574.

In Buckland v. Goit (1880) 23 **Kan.** 327, where the clerk omitted to sign the jurat on the verification of the statement of the contestant in an election case, it was held sufficient when he added his signature before the motion to dismiss the contest was decided.

But where a party rule required that the judges of a primary election be sworn and that the oath accompany their return to the convention, and the oaths were without jurat, it was held that the acts of the convention were void. Connell's Nomination (1902) 27 **Pa.** Co. Ct. 305.

It may be shown aliunde that the oath was administered. Beach v. Averett (1898) 106 **Ga.** 73, 71 Am. St. Rep. 239, 31 S. E. 806 (affidavit for distress warrant); Capner v. Flemington Min. Co. (1836) 3 **N. J.** Eq. 467, 7 Mor. Min. Rep. 263 (master's omission to sign jurat to affidavit to bill in chancery); May v. Ferrill (1858) 22 **Tex.** 340 (clerk's omission to sign jurat to affidavit to petition for writ of sequestration.

That the prothonotary inadvertently omitted to sign the jurat to the affidavit of defense is not vital, the defendant being present and willing to be sworn again. Maples v. Hicks (1844) Brightly (**Pa.**) 56.

The omission of a judge to sign the jurat to an affidavit for an injunction on the same paper as the injunction order is no ground to dissolve the injunction. Lewis v. Daniels (1871) 23 **La.** Ann. 170.

A judgment of confirmation of a special assessment may not be attacked collaterally because the jurat to the affidavit was unsigned, where it had a seal showing a notary's name, and there was an order reciting that the law as to sending notices, etc., had been complied with. Larson v. People (1897) 170 **Ill.** 93, 48 N. E. 443.

In Cleveland v. Stanley (1859) 13 **Ind.** 549, where the court did not consider the affidavit as necessary, it said: "It is also objected that the affidavit filed was not sworn to; but it purports to be an affidavit, and was so treated in the court below, although it does not appear to have the jurat of the clerk. It may have been sworn to in open court; and if so, it needed no jurat as evidence that it had been duly sworn to by the affiant."

III. Miscellaneous.

In Kleber v. Block (1861) 17 **Ind.** 294, it was held that the following was a sufficient affidavit on confessing judgment, the jurat and affidavit being considered to be combined in the same writing:

"State of Indiana, Allen County, ss.:

"Personally came before the undersigned, a notary public of said county, Christopher Kleber, who upon his oath saith," . . .

"Christopher Kleber."

"Witness my hand and seal, February 19, 1859.

(Seal) "Geo. K. Hentman,
Notary Public."

In Hardy v. Beaty (1892) 84 **Tex.** 562, 31 Am. St. Rep. 80, 19 S. W. 778, the court, while not deciding the question, expressed the opinion that a paper could not be regarded as an affidavit sufficient in law for any purpose which read as follows:

"The State of Texas, County of McLennan.

"This day personally came and appeared before A. J. Evans, clerk of the district court of said county, and says the names of the heirs of Joseph Wilson, deceased, are unknown to affiant.

"A. J. Evans.

"J. R. Harris, D. C. McL. Co., T."

Where the statute required that answers to interrogatories should be verified by the affidavit of the party to the effect that the statements in them, made of his own personal knowledge, are true, and those made from the information of others he believes to be true, it was held that the following verification was insufficient: "Subscribed and sworn to before me this 7th day of January, A. D. 1879. Witness my hand and notarial seal. Mason P. Mills, Notary Public." The court said: "An affidavit is a declaration in writing, made by a party and sworn to before some person authorized to administer an oath. No affidavit whatever is attached to these interrogatories. There is nothing but the signature of the notary that the answers were subscribed and sworn to before him. Whether the party swore that the answers were true, or true as he believed, we have no means of knowing." Averill v. Boyles (1879) 52 **Iowa**, 672, 3 N. W. 731.

In Nave v. Ritter (1872) 41 **Ind.** 301, where it was held that a bill made out by the county clerk, signed by him with a jurat "subscribed and sworn to in open court," signed by the officer, was not sufficient, the court, without much clearness, says: "The affidavit is not such as the statute requires. The statute peremptorily requires the clerk or sheriff to take and subscribe an oath or affirmation to the truth of his charges. Here he has not subscribed any oath or affirmation at all. He subscribed the charges, but not the oath or affirmation. The subscribing of his name to the charges is in no sense whatever the subscribing of the oath or affirmation. Again, it does not appear that he swore to the truth of his charges. It appears, by the appended certificate of the auditor, that the claim was 'subscribed and sworn to in open court,' but this does not convey any very exact idea of what was sworn to in relation to the claim."

McDermaid v. Russell (1866) 41 **Ill.** 489, cited in some authorities, is not sufficiently reported to be of value on the subject. B. B. B.

WESTERN NATIONAL BANK, Appt.,

v.

ROBERT H. JENKINS et al.

Maryland Court of Appeals—June 28, 1917.

(131 Md. 239, 101 Atl. 667.)

Mortgage — future advances — what are.

The turning of money advanced on a mortgage over to a trustee, to use it in payment for work as it progresses on buildings to be constructed by

the mortgagor, does not make the mortgage one for future advances within the meaning of a statute making such mortgage invalid, unless it provides how and when the advances are to be made.

[See note on this question beginning on page 1586.]

APPEAL by the mortgagee bank from a decree of the Circuit Court for Baltimore City awarding a fund in the hands of the receiver to defendant Jenkins as mortgage claimant, in a suit by a realty company for the appointment of a receiver to take charge of certain property and said fund, and for other relief. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Frank B. Ober** and **Joseph C. France**, for appellant:

The so-called Jenkins mortgage is clearly an attempt to "secure future loans or advances" within the meaning of art. 66, § 2, of the Code, and is therefore invalid because of its failure to state "the amounts of the same and the times when they are to be made."

Edelhoff v. Horn-Miller Straw Goods Mfg. Co. 86 Md. 595, 39 Atl. 314; Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

There is no justification in law or in the facts of this case for making an exception to art. 66, § 2, of the Code in order to sustain the Jenkins mortgage.

Cole v. Albers, 1 Gill, 412; Wilson v. Russell, 13 Md. 498, 71 Am. Dec. 645; Brooks v. Lester, 36 Md. 65; Hood v. Perry, 75 Ga. 310; State ex rel. MacKenzie v. Casteel, 110 Ind. 174, 11 N. E. 219; Sager v. Summers, 49 Neb. 459; Laeber v. Langhor, 45 Md. 477; Edelhoff v. Horn-Miller Straw Goods Mfg. Co. and Baltimore High Grade Brick Co. v. Amos, supra; Staniels v. Whitcher, 72 N. H. 451, 57 Atl. 678; International Trust Co. v. Davis & F. Mfg. Co. 70 N. H. 118, 46 Atl. 1054; Story, Eq. Jur. 13th ed. § 792; Collins v. Carman, 5 Md. 503.

Any knowledge which the appellant may have possessed of the existence of the appellee's invalid mortgage is immaterial.

Washington Brewery Co. v. Carry, — Md. —, 24 Atl. 151; Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061; Ugland v. Farmers & M. State Bank, 23 N. D. 536, 137 N. W. 572; Messmore v. Cunningham, 78 Mich. 623, 44 N. W. 145; Collins v. Lackey, 31 Okla. 776, 40 L.R.A.(N.S.) 883, 123 Pac. 1118, Ann. Cas. 1913E, 507; Pickerell v. Morss, 97 Ill. 220; Masterson v. Little, 75 Tex. 682, 13 S. W. 154; Sanborn v. Murphy, 86 Tex. 437, 25 S. W. 610; Shelton v. Thompson, 96 Mo. App. 327, 70 S. W. 256; Hunter v. Bales, 24 Ind. 299, 39 Cyc. 1772, note 41; Christopher v. Ferris, 55 Wash. 534, 104 Pac. 818; Central Land Co. v. Laidley, 32 W. Va. 134, 25 Am. St. Rep. 797, 3 L.R.A. 826, 9 S. E. 61; Osmer v. Sheasley, 219 Pa. 390, 68 Atl. 965; McCracken v. Flanagan, 141 N. Y. 174, 36 N. E. 10; Everett v. Todd, 19 Colo. 322, 35 Pac. 544; Saco v. Hopkinton, 29 Me. 268; Poling v. Williams, 55 W. Va. 69, 46 S. E. 704; Scott v. Keane, 87 Md. 709, 42 L.R.A. 359, 40 Atl. 1070.

Mr. **Vernon Cook**, for appellees:

The mortgage to Mr. Jenkins does not violate the statute against mortgages to secure future advances. It is a valid mortgage.

Diggs v. Fidelity & D. Co. 112 Md. 50, 75 Atl. 517, 20 Ann. Cas. 1274; 1 Jones, Mortg. 7th ed. § 365, p. 505; Venable, Syllabus on Real Property, 184; Cole v. Albers, 1 Gill. 412; Maus v. McKellip, 38 Md. 236; Robinson v. Consolidated Real Estate & F. Ins. Co. 55 Md. 109; Neidig v. Whiteford, 29 Md. 183; Edelhoff v. Horner-Miller Straw Goods Mfg. Co. 86 Md. 595, 39 Atl. 314; Stearns v. Bennett, 48 N. H. 400; Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Abbott v. Thompson, 58 N. H. 255; Staniels v. Whitcher, 72 N. H. 451, 57 Atl. 678.

The Western National Bank, prior to taking its third and fourth mortgages, had actual and full notice of the existence and terms of the Jenkins and Shriver mortgages, and therefore cannot, in a court of equity, attack the same.

Baltimore High Grade Brick Co. v. Amos, 95 Md. 600, 52 Atl. 582, 53 Atl. 148; Russum v. Wanser, 53 Md. 92; Johnston v. Canby, 29 Md. 216; Stanhope v. Dodge, 52 Md. 493; Phillips v. Pearson, 27 Md. 242; Harrison v. Morton, 87 Md. 671, 40 Atl. 897; Downs v. Blount, 31 L.R.A.(N.S.) 1076, 95 C.

C. A. 289, 170 Fed. 15; Owens v. Miller, 29 Md. 144; Harrison v. Morton, 87 Md. 671, 40 Atl. 897; Malins v. Freeman, 4 Bing. N. C. 395, 132 Eng. Reprint, 839; Long v. Long, 62 Md. 33; Hunter v. Hatton, 4 Gill, 115, 45 Am. Dec. 117; Smith v. Warden, 19 Pa. 430; Duff v. Wynkoop, 74 Pa. 300.

Mr. **A. J. Shriver** also for appellee.

Burke, J., delivered the opinion of the court:

The Roland Realty Company, a building corporation, hereinafter called the Realty Company, executed and delivered a mortgage to Alfred Jenkins Shriver on certain property described in the mortgage to secure the payment of three negotiable promissory notes made by the mortgagor to the order of the mortgagee. One of these notes was for the sum of $62,700, and payable one year after its date, and the other two being for the interest to accrue on said principal sum,—each being for the sum of $1,881, and payable in six and twelve months respectively after date. The notes and mortgage were dated the 1st day of August, 1911, and the mortgage was recorded among the land records of Baltimore city. A second mortgage on the property, bearing the same date, was executed by the Realty Company and delivered to Alfred Jenkins Shriver to secure the payment of the sum of $5,000 and interest thereon.

The circumstances, briefly stated, under which these mortgages were made are as follows: On July 11, 1911, an application was made by the Realty Company to Alfred Jenkins Shriver for a mortgage loan on property located on the north side of 37th street, in the city of Baltimore, between Chestnut and Elm avenues. The application stated that it was proposed to erect upon the land a certain number of dwellings therein described, which it was represented in the application would cost between twenty-one and twenty-two hundred dollars each; and, further, that the actual cost of the land to the appellant was $15,333.33. Certain representations as to improved land and sales in the locality were also made. The amount of the loan applied for was $66,000 at 6 per cent, payable semiannually for one year, and the appellant agreed to give a bond of a Baltimore city bonding company for the amount of the mortgage for the completion of the buildings. It also agreed to pay a commission of 5 per cent on the amount of the mortgage loan, and a title fee, the amount of which was not at that time fixed, but which was subsequently agreed to be 1 per cent of the mortgage loan. The appellant further stated that it expected to provide the additional money, over and above the mortgage loan, necessary to complete the buildings, from the sale of other real estate and general credit. This application was made by Charles L. Fulton, on behalf of the Realty Company. Mr. Shriver brought the application to the attention of Robert H. Jenkins, who agreed to make a mortgage loan of $62,700 instead of $66,000 as applied for, it having been found that the dwellings proposed to be built could be erected for a less sum than that stated in the application. This reduced amount was satisfactory to the applicant, and it agreed to accept it. The loan was to be put through either on July 26 or August 1, 1911. There is some conflict in the evidence upon this, but it is not of any importance in this case.

The Realty Company was not able to give the completion bond provided for in the contract, but it gave a bond with individual sureties. It was agreed that Mr. Jenkins should draw his checks to the order of the mortgagor for the amount of the loan, who in turn should pass the money over to Alfred Jenkins Shriver, as trustee, for deposit as a special fund in the Western National Bank, and applied by him to the construction of the buildings in accordance with a schedule of payments agreed upon by the parties. The Realty Company did not have title to the land on July 26, 1911, but it expected to perfect its title by August 11, 1911. As Mr. Shriver

was about to leave the city, the following things took place on July 26, 1911, in connection with the loan. On that day two checks were drawn by Robert H. Jenkins as follows:

Baltimore, July 26th, 1911.
The National Bank of Baltimore:
Pay to the order of the Roland Realty Company forty-two thousand, seven hundred dollars.
$42,700. Robert H. Jenkins.

This check was indorsed as follows:

1. Pay to the order of Alfred J. Shriver, trustee, in the matter of the Roland Realty Company for R. H. Jenkins.
Roland Realty Company,
by Charles L. Fulton, President.
2. For deposit to acct. of Alfred J. Shriver, trustee, in matter of Roland Realty Company, for R. H. Jenkins, per Z. Bond Evans.

No. 6. Baltimore, Maryland,
July 26th, 1911.
Maryland Trust Company:
Pay to the order of Roland Realty Company twenty thousand dollars.
Robert H. Jenkins.

The indorsement on this check was as follows:
1. Pay to the order of Alfred J. Shriver, trustee, in the matter of the Roland Realty Company, for R. H. Jenkins.
Roland Realty Company,
by Charles L. Fulton, President.
2. For deposit to account of Alfred J. Shriver, trustee, in the matter of the Roland Realty Company, for R. H. Jenkins per Z. Bond Evans.

The checks were delivered to the Realty Company, and Z. Bond Evans, whose indorsements appear thereon, was a clerk in Mr. Shriver's office. These checks were deposited in the Western National Bank under the above indorsements, and were paid, and the proceeds carried to the credit of Mr. Shriver, as trustee, in that bank. On the deposit book of the bank the following notation appears: "Western National Bank of Baltimore, July 26. Cash, $62,700. Alfred J. Shriver, trustee, in the matter of Roland Realty Company, for R. H. Jenkins."

The bank agreed to pay 3 per cent on the deposits. The two mortgages were executed on July 26, 1911, and held by direction of Mr. Shriver until August 1, 1911, when it was expected that the mortgagor would then have title, and the transaction would be finally closed.

Upon the return of Mr. Shriver to the city about September 17, 1911, he found that the transaction had not been put through as previously arranged. Mr. Robert H. Jenkins became apprehensive about the loan, and expressed a desire to call it off. After a number of interviews between Alfred Jenkins Shriver and Charles L. Fulton, the Realty Company entered into the following agreement on October 4, 1911, under which the loan was made:

Roland Realty Company, in connection with the construction of thirty-three houses on the north side of Thirty-seventh street and concerning the deposit of $62,700 in the Western National Bank:

Whereas the Roland Realty Company has agreed to execute and deliver for the purpose of having the same recorded certain mortgages, being dated the 1st day of August, 1911, to Alfred Jenkins Shriver, who in turn is about to assign the mortgage for $62,700 to Robert H. Jenkins:

And whereas bonds have been executed of date of August 1st by the said Roland Realty Company, and certain sureties therein named to secure the completion of thirty-three houses on Thirty-seventh street between Chestnut and Elm avenues, and which lots of ground are fully referred to in said mortgage:

And whereas it was agreed for the purpose of insuring the prompt construction of said houses according to the terms of said bond, according to the plans and specifications referred to in said bonds, and especially that they should be completed within the period of time

mentioned in said bonds, that the title to said property, subject to said mortgages, would be transferred to Alfred J. Shriver, trustee, by a deed duly executed and acknowledged, but to be held by said trustee and not recorded until some default should occur in constructing said thirty-three houses according to the provisions indicating the period of time within which the stages of construction should proceed as hereinafter set forth in the schedule attached hereto, or that some default should occur in any of the covenants of said mortgages.

And it is also agreed that should any such default occur that said deed shall, at the option of the trustee, be immediately recorded, and that the said trustee is hereby fully authorized and empowered to take possession of said property, and either, in his discretion, to complete said houses from the funds on deposit in the Western National Bank, and should additional funds be necessary he is further authorized to borrow other funds that may be necessary to complete said houses according to said plans and specifications, and he shall have full power to sell, lease, mortgage, or otherwise dispose of said property, in his discretion, for the purpose of executing all the agreements in connection therewith, and after deducting all expenses which he may incur for the purpose of completing said houses, including the usual commissions to the trustees, commissions to a builder, if it may be necessary to employ a builder, at 10 per cent, the usual commissions to real estate brokers for the purpose of either leasing, selling, or mortgaging said property, and he shall pay the balance, if any, to the said Roland Realty Company.

It is also agreed that the said trustee may, on the demand of the mortgagee, return the remainder of said fund to the mortgagee, should any such default occur, or he may, at the option of the said mortgagee, apply the same to the completion or construction of said houses.

Should any such default occur in the completion or the construction of said houses, the trustee shall have J. S. Downing or some other experienced builder examine said houses and certify to the trustee that the work has not progressed according to the schedules hereinafter set forth and according to the plans and specifications and the bond, and the period of four days shall elapse from the time that the trustee may mail any such notice to said Roland Realty Company at its office in the city of Baltimore, at 1024 Fidelity Building, before the trustee shall declare a default and take possession of the property, the trustee may, in his discretion, for good and reasonable cause shown, waive any default. And it is further agreed that should any default occur that interest paid by the Western National Bank shall be paid over to the mortgagee, but the amount of interest so paid shall be credited to the said the Roland Realty Company on account of the interest due on the mortgage. Should the interest on the mortgage not be paid when due, the trustee is hereby authorized to pay the interest and to deduct the same from the payments due to said Roland Realty Company for work done and due to it for the construction of said houses.

It is agreed that the work of constructing said houses shall begin without any delay on the 5th day of October, and it is agreed that it shall be completed as to the stages of completion and within the periods of time hereinafter set forth in the schedules attached hereto and which is considered a part hereof.

In testimony whereof witness the corporate seal of the said Roland Realty Company and the signature of its president.

Roland Realty Company,
(Seal) By Charles L. Fulton,
President.

Before this paper was executed Mr. Shriver assigned the mortgage to Mr. Jenkins by assignment dated October 1, 1911. Attached to this agreement was a schedule of items

and the periods of time within which the houses should be completed, and the times when the amounts Mr. Shriver as trustee, should pay to the Realty Company out of the special deposit for the construction of the houses.

The work of construction began promptly, and Mr. Shriver, as trustee, paid out of the trust fund during the course of the work the sum of $40,425, and the balance of the special deposit, as will hereafter be seen, was used in the completion of the dwellings.

In the application for the loan the Realty Company stated, as we have said, that it expected to get the additional money needed for the completion of the dwellings from the sale of other real estate and from general credit. This credit was obtained at the Western National Bank, which began on July 28, 1911, to make loans to the Realty Company upon its promissory notes indorsed by Charles L. Fulton and David M. Fulton. It began these loans with no idea of a mortgage security, relying largely upon what it supposed to be the financial responsibility of David M. Fulton, and continued them until September 19, 1912, at which time the indebtedness of the Realty Company to the bank upon demand loans amounted to $35,000. About that date the bank deemed it advisable to get from the Realty Company some further security. This matter was turned over to Mr. W. Burns Trundle, its counsel, who caused an examination of the title to the Realty Company's property to be made. The bank knew of the Jenkins and Shriver mortgage at the time it began advancing money to the Realty Company, and David M. Fulton testified that he told the bank that the money deposited "covered this piece of property, and that amount of money was expected to build the houses, to be drawn out at certain intervals as the houses were built." Mr. Trundle, after examination of the title, reported to the bank "that from the facts stated in connection with the mortgage of the Roland Realty Company to Alfred Jenkins Shriver, and the advances made by him, Alfred Jenkins Shriver, to said company, after the date of the mortgage, that it was evidently intended to be a mortgage to secure future advances." With full knowledge of the two mortgages, and after being advised by its counsel, the bank procured a mortgage from the Realty Company to Edwin T. Dickerson, who was acting in its behalf for $35,000. This mortgage was dated September 21, 1912, and was assigned by Mr. Dickerson to the bank on October 11, 1912. The bank then notified Mr. Shriver that the Jenkins mortgage was void, and that the Dickerson mortgage was the only valid lien on the property, and also informed him that the bank proposed to attack the mortgage. Subsequently it was discovered that the Realty Company owed large sums to materialmen for building materials which had gone into the property, and to workmen, and the bank advanced the money to pay these obligations, and took a fourth mortgage in the name of Mr. Dickerson for $10,400. This mortgage was dated October 25, 1912. Then ensued conferences and lengthy correspondence between Mr. Shriver and the counsel for the bank as to the rights of the respective mortgagees.

The work on the buildings had ceased, and suggestions were made that Mr. Shriver use the unexpended money in bank to complete the buildings. Default had occurred in the mortgage covenants, and the Realty Company had defaulted under the agreement of October 4, 1911. The bank insisted that the Jenkins and Shriver mortgages were invalid, and that it held the only valid lien on the property; Mr. Shriver insisted that the Jenkins and his own mortgages were valid, and stood unmovable upon his rights and obligations under the agreement of October 4, 1911, and refused to advance any more money except in conformity to the provi-

sions of that instrument. In the meanwhile the buildings, in their unprotected and uncompleted condition, were rapidly depreciating. Mr. Jenkins procured a decree for the foreclosure of his mortgage, and Howard Wilcox was appointed trustee to make the sale.

On February 12, 1913, the bill in this case was filed by the Realty Company and Samuel H. Barton, a lessee of certain of the lots, against Robert H. Jenkins, Alfred Jenkins Shriver, Alfred J. Shriver, trustee, Howard C. Wilcox, trustee, the Western National Bank, and Edwin T. Dickerson. The prayers of the bill were:

"1. That a receiver may be appointed by this court to take charge of said houses and of the remainder of said fund on deposit in the Western National Bank to the credit of Alfred J. Shriver, trustee as aforesaid, and to proceed with the completion of said houses, and for said purpose to make use of said fund so far as the same may be necessary.

"2. That the said Robert H. Jenkins and Alfred J. Shriver, individually and as trustee, as aforesaid, and the said Howard C. Wilcox, trustee as aforesaid, may be enjoined, temporarily and permanently, from further proceeding in said foreclosure suit, and particularly from making sale of the said property under the foreclosure decree as advertised or otherwise.

"3. That your orators may have such other or further relief as their case may require."

All the defendants, except Mr. Wilcox, trustee, answered the bill, and on the 15th day of May, 1913, the court passed a decree by which Alfred Jenkins Shriver was appointed trustee to take charge of the property and also of the unexpended balance of the mortgage money remaining in the Western National Bank, and to use that sum in completing the houses. He was also empowered to sell the property. The fourth, fifth, sixth, and seventh paragraphs of the decree are here transcribed:

"4. That in completing the houses hereinbefore mentioned the said receiver shall first use the sum of $22,475 now on deposit with the Western National Bank above mentioned, and the accrued interest thereon, which amounts to 3 per cent from August 1, 1912, and that in the event that said sum and interest is insufficient to complete said houses according to the original plans and specifications thereof, and to make the same salable as above stated, that then the Western National Bank shall furnish all such further sums of money as may be necessary for that purpose.

"5. That said receiver shall pay out of said fund on deposit in the Western National Bank the court costs and expense, amounting to about $80, incurred in connection with the foreclosure proceedings in the case filed in this court by Robert H. Jenkins against the Roland Realty Company; said amount not to be charged against or deducted from the mortgage claim of said Robert H. Jenkins.

"6. The said Robert H. Jenkins and Western National Bank shall be entitled to a first lien on all the property herein mentioned; the said Robert H. Jenkins to have such lien for the above sum of $22,475 with the interest which shall have accrued thereon as above set out, and said Western National Bank to have a lien for all such sums as may be advanced by it under the terms of this decree; said liens to cover said property not only for the principal sums above mentioned, but also for interest on the same at the rate of 6 per cent per annum from the time such sums are paid to the receiver until they are repaid by him; and it is further ordered that out of the proceeds of the sale of the houses as they shall be sold from time to time by said receiver, there shall be paid to the said Robert H. Jenkins the amount of the deposit in the Western National Bank, with interest on the same as above set out, and when said sums shall have been fully paid and returned to said Robert H. Jenkins,

that then from the proceeds of subsequent sales there shall be paid the said Western National Bank the amount of money that shall have been advanced by it under the terms of this decree to the receiver, together with interest on the same, as above set out.

"7. That all questions of rights and priorities not expressly covered herein between the various parties mentioned in the pleadings in this case are hereby reserved for the further decision of this court, and the distribution of all proceeds of sale over and above the amounts required to reimburse the said Robert H. Jenkins and the said Western National Bank for the sums advanced to the receiver under this decree as above set forth, shall be held subject to the further order of the court."

By an auditor's report filed January 24, 1917, it appears that there is a balance in cash in the hands of the receiver of $31,362, and unsold property of the value of $11,017. These two amounts are not sufficient to pay the balance due on the Jenkins mortgage, or the mortgages of the bank, and both mortgagees, Jenkins and the bank are claiming the fund in this case. The lower court awarded the fund to Mr. Jenkins, and the appeal in this case was taken by the Western National Bank from that decree.

The sole ground upon which the Western National Bank assails the Jenkins mortgage is that it is alleged to be a mortgage to secure future advances or loans, and since the amounts of the same and the times when they were to be made are not specifically stated in the mortgage, the mortgage is void under § 2, art. 66, of the Code. Mr. Jenkins acted in absolute good faith in the transaction, and it is not claimed that he had in contemplation an evasion of the provision of the Code referred to.

Prior to the Act of 1825, chap. 50, the validity of mortgages in this state to secure future loans or advances was well recognized, and in the absence of statutory prohibition they were so regarded wherever the common law prevailed. The use and convenience grew out of the necessities of trade and commerce, and were availed of by the merchants and bankers, to provide for continuous dealings and security for debts, balances, and obligations to accrue at any future time. Judge Story, in Leeds v. Cameron, 3 Sumn. 488, Fed. Cas. No. 8,206, said that "nothing can be more clear, both upon principle and authority, than that, at the common law, a mortgage bona fide made may be for future advances and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities." See also Wilson v. Russell, 13 Md. 530, 71 Am. Dec. 645. Mortgages for future advances are still valid in this state. Neither the act of 1825, chap. 50, nor the act of 1872, chap. 213, forbids them. They are statutory regulations, not prohibitions, of such mortgages. The first act was intended to limit the effect and operation of such mortgages by confining the lien of the mortgage to the principal sum or sums specified and recited in the mortgage. The evils which this act was intended to remedy are fully stated in Cole v. Alberts, 1 Gill. 412, which will be presently referred to. Under the act of 1825, it was not required that in a mortgage to secure future loans or advances the amounts of the future advancements and when they should be made should be stated in the mortgage, but this requirement was added by the act of 1872, chap. 213, which provides that "no mortgage to secure such future loans or advances shall be valid unless the amount or the amounts of the same, and the times when they are made shall be specifically stated in said mortgage," etc.

The real questions in this case are: First, what is a mortgage for future loans or advances; and, secondly, is the Jenkins mortgage such a mortgage? These questions upon the facts and circumstances in this

case, considered in connection with the law, common and statutory, upon the subject of mortgages for future loans and advances, appear to us to present no real difficulty. In the case of Maus v. McKellip, 38 Md. 231, Judge Robinson said: "In Cole v. Albers, 1 Gill, 423, the construction and purposes for which the act of 1825 was passed were fully considered by this court. In that case the mortgage was to secure the mortgagees to the extent of $10,000. It appeared in evidence that, at the time of its execution, a much less sum was due from the mortgagor, but that the mortgagees were responsible for other sums on account of the mortgagor, and that it was the intention of the mortgagor, as shown upon the face of the mortgage, to protect them to the amount of $10,000, mentioned as the consideration. The court held the mortgage was a valid security to the amount of $10,000, because, that sum being mentioned in it, no one could be deceived or prejudiced. 'The design of the lawmakers,' says Judge Archer, 'in the passage of the act of 1825, chap. 50, was to prevent liens on property to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of its execution, and of which the deed by its terms gave no notice; as, if a deed were executed to cover a mortgagee against all future liabilities, of any and every description, which the mortgagor might incur or be responsible for to the mortgagee, . . . A practice prevailed anterior to the act of 1825, chap. 50, of taking mortgages for specified sums of money, greatly below the value of the mortgaged premises, with a clause or clauses providing that the mortgaged premises should be held as a security for all future liabilities or advances by the mortgagee to the mortgagor, by which means the creditors of the mortgagor were defrauded, sometimes by fraudulent combinations between the mortgagor and the mortgagee, or by the acts of the mortgagee alone, who, after the known insolvency of the mortgagor, purchased up liabilities of the mortgagor at depreciated rates, and held them as liens on the mortgaged premises for their nominal amounts; . . . such transactions the law was designed to meet.' We have thus quoted at length the opinion of the court, because in it the construction and purposes of the Act of 1825 are fully considered.

"It will thus be seen that although the Act of 1825, codified in art. 64 of the Code [1860, §§ 2, 3], was directed against any other or different principal sum or sums of money than the principal sum or sums that shall appear on the face of the mortgage, *that is, against new loans or debts not contemplated by the parties at the time of the execution of the mortgage, but contracted subsequently and attached to the original debt by a new and springing contract between the parties.*"

The facts show that Mr. Jenkins passed over to the mortgagor at the time of the execution of the mortgage the entire consideration stated in the mortgage, and took the promissory note of the mortgagor for that sum. It was not contemplated or suggested that he should make any further loans. The money was turned over to Mr. Shriver, trustee, to be held and applied by him in the construction of the buildings, under the terms of the agreement of October 4, 1911, and the entire amount of the mortgage loan has been so applied. The trustee was holding the money in trust for the parties. The use and possession and dominion over the money had passed from Mr. Jenkins. Whose money was it that the trustee was holding? Certainly it did not belong to Mr. Jenkins. That it was really the money of the Realty Company which it had borrowed from Mr. Jenkins, and which the trustee was holding for its benefit under the provisions of the trust agreement, is shown by the fact that

it received from the trustee more than $40,000 of the fund prior to the commencement of this litigation, and has since secured the application of the whole balance to the completion of the houses. Mr. Jenkins contemplated and entered into no scheme to evade the law, as was done in Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148, which, upon the controlling facts, was wholly and entirely different from the facts appearing in this record. We, therefore, hold that the Jenkins mortgage is not a mortgage to secure future loans or advances within the meaning of § 2, art. 66, of the Code, and that it constituted a first lien upon the mortgaged property. The decree of the lower court properly awarded the fund in the hands of the receiver to Mr. Jenkins, and the decree will be affirmed.

Mortgage—future advances—what are.

As to the second mortgage to Alfred Jenkins Shriver for $5,000, Mr. Shriver did not appeal from the decree, and as there is no money in the hands of the receiver to be applied to his mortgage, we do not find it necessary to pass upon its validity.

ANNOTATION.

What amounts to a mortgage for future advances.

The question as to what amounts to a mortgage for future advances is one likely to arise not only under statutes regulating such mortgages, as in the reported case (WESTERN NAT. BANK v. JENKINS, ante, 1578, but also in contests between the mortgagee and subsequent purchasers or encumbrancers of the mortgaged premises, who deny that the mortgage lien properly embraces advances made subsequently to its execution.

In discussing the subject of this annotation, no attempt has been made to list the cases in which the character of the mortgage so clearly appeared that no question was raised in respect thereto.

A mortgage need not itself disclose that it was given to secure the payment of future advances. Tully v. Harloe (1868) 35 **Cal.** 302, 95 Am. Dec. 102; Westheimer v. Goodkind (1900) 24 **Mont.** 90, 60 Pac. 813; Schofield Implement Co. v. Minot Farmers Grain Asso. (1915) 31 **N. D.** 605, 154 N. W. 527; Blackmar v. Sharp (1901) 23 **R. I.** 412, 50 Atl. 852.

It is not essential that a mortgage to secure future advances shall contain a stipulation that they shall be made or that the limit either in time or amount shall be fixed. Alvord v. Mallory (1888) 10 **Ky. L. Rep.** 590, (abstract).

The fact that a mortgagee has discretion in making future advances does not require the mortgage to be interpreted as not covering future advances. Langerman v. Puritan Dining Room Co. (1913) 21 **Cal. App.** 637, 132 Pac. 617.

A mortgage which provides that it shall be security for a debt of $100, to mature in the future, "and all other indebtedness which may then be due" to the mortgagee by the mortgagor, will cover future advances. Moore v. Terry (1899) 66 **Ark.** 393, 50 S. W. 998.

A mortgage to secure "all moneys due or hereafter to become due" does not relate merely to existing indebtedness, but secures future loans and advances as well. Langerman v. Puritan Dining Room Co. (**Cal.**) supra.

A mortgage purporting to secure a contemporaneous loan of $5,000 of which amount only $1,000 was then advanced, and the balance, evidenced by duebills, was to be paid over in instalments as successive stages were reached in the erection of buildings on the mortgaged premises, is, as to subsequent encumbrancers, a mortgage for future advances, and invalid as to them as not giving notice to subsequent purchasers, with reasonable certainty, of the nature and amount of the indebtedness which it purported to secure. Matz v. Arick (1903) 76 **Conn.** 388, 56 Atl. 630.

A conditional deed, containing a clause providing that the property shall be reconveyed on the payment to the grantee of a "sum of money equal to all claims and evidences of indebtedness that the grantee shall have against" the grantor may be a mortgage for future advances. Collins v. Gregg (1899) 109 **Iowa**, 506, 80 N. W. 562.

A mortgage purporting to secure the repayment of a certain amount and "also all other debts which the mortgagor may contract with the mortgagee," will cover future advances. Bunker v. Barron (1899) 93 **Me.** 87, 44 Atl. 372.

The fact that a mortgage recites a stated consideration does not prevent it from being a mortgage to cover future advances, where the mortgagor covenants to repay such sum and also "any sum of money which he may now or hereafter owe said mortgagee by reason of any note, check, draft, or other paper upon which his name shall appear, either as maker or otherwise; and this mortgage and its accompanying note, until discharged, is to be a continuing security for payment of any such sum or sums." Citizens' Sav. Bank v. Kock (1898) 117 **Mich.** 225, 75 N. W. 458.

A provision in a mortgage that any future transaction by which the mortgagor shall become indebted to the mortgagee shall be based on the same security, and shall be so held and construed, will cover future advances. Holmes v. Strayhorn-Hutton-Evans Commission Co. (1899) 81 **Mo.** App. 97; Rice Bros. v. Davis (1903) 99 **Mo.** App. 636, 74 S. W. 431.

A deed given as security for a note, and for "any other liability or liabilities which may be hereafter contracted," will secure advances for enterprises other than that in which the mortgagor was then engaged. Huntington v. Kneeland (1905) 102 App. Div. 284, 92 **N. Y.** Supp. 944, affirmed without opinion in (1907) 187 N. Y. 563, 80 N. E. 1111.

In Paschal v. Bohannan (1916) — **Okla.** —, 158 Pac. 365, it was held that a mortgage given to secure a stated indebtedness, and therein stipulating that, should the maker become indebted to the mortgagee in any further sum, the instrument should cover and constitute a lien on the mortgaged property to secure the payment thereof, effectively operated to secure an open account made while said mortgage was still in force and effect.

A chattel mortgage, reciting that the mortgagor is desirous of securing the payment of a certain promissory note, payable to the order of a bank, "and all my other liabilities to said bank now existing and which may hereafter arise," is effective to create a lien for moneys subsequently advanced. Brunson v. Dawson State Bank (1915) — **Tex.** Civ. App. —, 175 S. W. 438.

The language of a mortgage, which stipulates that when a certain note is paid the mortgage shall be null and void "unless the holder of said note shall elect to hold said property to secure any other liability or liabilities of mine in the hands of the holder of said note," is broad enough to include a note of the mortgagor to a third party, which is owned by the mortgagee at the time of the payment of the first note. Coleman Nat. Bank v. Cathey (1916) — **Tex.** Civ. App. —, 185 S. W. 661.

In Lamoille County Sav. Bank & T. Co. v. Belden (1917) 90 **Vt.** 535, 98 Atl. 1002, it was held that a mortgage to a bank, securing the payment of a certain note payable to the order of the bank and "all further sums that we or either of us now owe it, or may become owing it in any way," covered a note thereafter given by one of the mortgagors to a third party, and by him sold to the bank.

A mortgage purporting to secure the payment, inter alia, of "what I may owe him on book," may be construed, where it appeared that there was no account then subsisting between the parties, as securing future accruing accounts. McDaniels v. Colvin (1844) 16 **Vt.** 300, 44 Am. Dec. 512.

A mortgage to secure the payment of a bond in the penal sum of $2,000, conditioned for the payment of all advances which might be made under a certain contract at the time, in the

manner and with the interest agreed upon, is a continuing security for all unpaid advances; and the repayment of advances to the amount of $2,000 will not amount to payment or satisfaction of the mortgage. Shores v. Doherty (1886) 65 Wis. 153, 26 N. W. 577.

In Hendricks v. Webster (1908) 87 C. C. A. 107, 159 Fed. 927, it was held that a mortgage to secure the repayment of a certain sum loaned, "and any other sum advanced or expenses incurred on account of the party of the first part for whatsoever purpose made," was to be construed as not securing the payment of future advances, except those made to protect the security of the mortgage.

A mortgage given to secure monthly instalments of rents, to become due in the future, is not one to secure future optional advances, although the landlord, under the terms of the lease, was entitled to terminate it upon nonpayment of any instalment of rent. Friend v. Johnson (1897) 68 Ill. App. 661.

A bill of sale given to one "as security for his liability upon certain notes" indorsed by him, the amount of which is not given, does not cover future liability by indorsement. First Nat. Bank v. Manser (1908) 104 Me. 70, 71 Atl. 134.

A mortgage which recites that it is given as collateral security for the payment of certain book accounts, "according to the terms of a certain contract bearing even date herewith," which did not provide for future advances to the mortgagor, cannot be treated as one for future advances. Frisbie v. Poole (1884) 32 Minn. 411, 21 N. W. 470.

The fact that a mortgage provides that it shall secure future indebtedness will not constitute it a mortgage as to indebtedness incurred after a full settlement of all indebtedness contemplated by the parties when such mortgage was executed. Cantrell v. Cawyer (1913) — Tex. Civ. App. —, 162 S. W. 919.

In New Hampshire, it is provided by statute that "no estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money or the performance of any other thing, the obligation or liability to the payment or performance of which arises, is made, or contracted, after the execution and delivery of the mortgage."

This statute was intended to cut off all mortgages for the payment or security of any money or other thing which were not contracted for, or the liability for which did not attach at the time of the execution of the mortgage. Under this statute, no mortgage can be valid for any future advances or accounts between the parties which were not a matter of right and positive obligation between them at the time of the mortgage. A mere provision for prospective advances or accounts resting in the discretion of the parties, or either of them, is within the mischief aimed at by the statute. Leeds v. Cameron (1839) 3 Sumn. 488, Fed. Cas. No. 8,206.

Where the amount of the advance, the contingency upon which it was to be made, and the obligation of the mortgagee to make it are definitely agreed upon at the execution and delivery of the mortgage, the mortgage is not within the foregoing statute. Fessenden v. Taft (1888) 65 N. H. 39, 17 Atl. 713.

In order to avoid the effect of this statute, a mortgage will not be construed to apply to demands not then existing, unless the language is such as to admit of no other meaning. Page v. Ordway (1860) 40 N. H. 253.

Where, after the making of the bargain for the loan and for the mortgage to secure it, the mortgage was made and recorded while the parties were in the county where the land was situate, the fact that the loan and note were made pursuant to the bargain a few days afterwards does not make the mortgage one to secure future advances within the meaning of the statute. Weed v. Barker (1857) 35 N. H. 386.

A mortgage executed and delivered on the day preceding the assumption of the liability secured thereby is not given to secure future advances within the meaning of such statute. Stav-

ers v. Philbrick (1895) 68 N. H. 379, 36 Atl. 16.

A mortgage given at the time of making an agreement, giving the mortgagor the right within one year from its date to borrow of the mortgagee an amount of money not to exceed $2,000, in such sums as he should desire, upon ten days' notice and a tender of his demand note therefor, the mortgage to stand as security for the payment of the sums borrowed and the performance of the borrower's other undertakings which were to be collateral to the loan, is not invalid under the statute as a mortgage to secure future advances. Staniels v. Whitcher (1904) 72 N. H. 451, 57 Atl. 678.

The statute has likewise been held not to apply in the case of

—A mortgage of a railroad to secure bonds to be issued to raise money to pay the debts of the company contracted in building the road. Richards v. Merrimack & C. River R. Co. (1862) 44 (N. H.) 127.

—A mortgage, executed in good faith, sufficient to secure a note for a stated sum, part of the consideration of which is the agreement of the mortgagee to pay certain sums to and for the use of the mortgagor, and to perform certain labor. Stearns v. Bennett (1869) 48 N. H. 400.

—A mortgage conditioned to secure the payment of two notes of a stated amount, a part of the consideration of which was a credit of an agreed sum by the mortgagee on his books to the mortgagor. Abbott v. Thompson (1878) 58 N. H. 255.

An assignment by the mortgagee of a mortgage given for an existing debt, as security for future advances made by the assignee to the mortgagee, is not within the statute. Lime Rock Nat. Bank v. Mowry (1891) 66 N. H. 598, 13 L.R.A. 294, 22 Atl. 555.

E. S. O.

ALBERT OLSON
v.
SUPERIOR COURT OF MERCED COUNTY et al.

California Supreme Court (In Banc)—June 1, 1917.

(175 Cal. 250, 165 Pac. 706.)

Divorce — final decree — condonation — expiration of time.

1. Reconciliation of the parties within the period after the entry of an interlocutory decree of divorce, at the termination of which a final decree is directed by statute to be entered, and their living together after the termination of such period, will prevent the securing of such final decree by the party whose fault was condoned by the reconciliation.

[See note on this question beginning on page 1591.]

Mandamus — to compel entry of decree.

2. Mandamus lies to compel entry of a final decree of divorce after the interlocutory decree has been entered, where the court's duty is plain and unmixed with the exercise of discretionary powers.

Statute — construction — may and must.

3. A statutory provision that the court may enter a final decree after the lapse of a specified time from the entry of an interlocutory decree of divorce renders the entry mandatory whenever the facts appear entitling movant to a final decree.

APPLICATION for a writ of mandamus to compel respondents to enter a final decree of divorce. *Writ discharged.*

The facts are stated in the opinion of the court.

Messrs. **Stephen P. Galvin, Croop & Croop** for petitioner.

Mr. **Andrew R. Schottky** for respondents.

Messrs. **Adolf Michel** and **George J. McDonough** for Josie L. Olson.

Henshaw, J., delivered the opinion of the court:

This hearing is under an original alternative writ of mandate issued by this court on the petition of Albert Olson, who seeks to compel the superior court of Merced county to enter a final decree of divorce, more than one year having elapsed since the interlocutory decree was made and given in favor of his wife, who was the plaintiff in the divorce suit. Chronologically, the following facts have a bearing on the consideration:

Josie L. Olson, wife of petitioner herein, sued and obtained an interlocutory decree of divorce against her husband, which decree was entered on May 13, 1910. Thereafter, and in February, 1911, before the expiration of the year after which the final decree could be entered, the wife at the solicitation of the husband became reconciled to him, returned to his house, and resumed marital relations with him. Together they thus lived as husband and wife for five continuous years. Then, on the 21st day of February, 1916, the husband secretly and without knowledge of the wife caused a final decree of divorce to be entered in the action. This becoming known to the wife, upon her application and within six months' period of time limited by § 473, Code of Civil Procedure, the court vacated and annuled this final decree, and declared in its order so doing that the defendant (the husband) "is not entitled to a final decree of divorce in the said action; the status of married persons having been restored between the parties by reason of their reconciliation, and the resumption of their marital relations." No appeal was taken from this last-mentioned order. Thereafter the husband again petitioned for a final decree of divorce and, upon the court's refusal to enter it, sued out this writ of mandate.

That mandate is an appropriate remedy to compel the entry of such a final decree, where the court's duty is plain and unmixed with the exercise of dicretionary powers, does not admit of debate, and has, in fact, been decided. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897. Petitioner's contention is that under the facts above narrated the trial court has no discretionary power, by virtue of the mandatory provision of § 132 of the Civil Code. That section declares that: "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce."

Mandamus—to compel entry of decree.

That the word "may," as thus employed in the statute, means "must," whenever the facts are shown entitling the movant to such final decree, requires no discussion. Petitioner's argument is based upon the proposition that, when one year has in fact elapsed, the right is absolutely final, and the trial court is without the slightest discretion in the matter of withholding the relief sought.

Statute—construction—may and must.

The question is one of first impression in this state, but in our view is one exceedingly easy of solution. Under our divorce laws the interlocutory decree fixes the right of the blameless spouse to a decree of divorce as and of the time when the interlocutory decree itself is given. Barring the familiar equitable considerations of fraud or mistake in the procurement of this decree, all matters therein litigated have passed beyond the possibility of future litigation; but it is never to be forgotten that the interlocutory decree does not sever the marital bonds. It is merely a declaration that one of the spouses has at that time established a right to a final decree which will be entered at and after the expiration of one year. Re Dargie, 162 Cal. 51, 121 Pac. 320.

What ends has the law in view in

in enforcing the delay of one year before an absolute severance of the marriage ties? This question, too, has been answered by our decisions, and it is truly declared to be one of the important purposes of the law, to give the spouses a chance to effect a reconciliation, which the law always favors. Barron v. Barron, 7 Cal. Unrep. 347, 96 Pac. 273.

The facts presented show that one of the great purposes of our law had been fulfilled. Before the time when the final decree could have been entered the wife condoned her husband's offense and they became reconciled. They lived together as husband and wife continuously for five years thereafter, at the end of which time the condonee, not the condoner, demands of the court the entry of the final decree, severing the bonds of matrimony between himself and his wife with whom he had thus been living. From its very nature the interlocutory decree can only operate upon facts existing down to the time it is given. It is within the contemplation of the law that facts subsequently arising should have their influence in determining the right to a final decree. While in every proper case a trial court will, and, if necessary, by mandate will be compelled to, enter such a final decree, it would be a grave reproach to our jurisprudence to hold that our law ever contemplated that such a decree could be forced upon a blameless and nonconsenting wife after such a reconciliation. Our law demands no such thing. It never designed to make itself an instrument of such frauds. The similar law in the state of New York entitles either spouse to a final judgment after three months, "unless for sufficient cause the court in the meantime shall have otherwise ordered," and under that statute the court refused a final decree where a reconciliation was effected such as is here shown. Cary v. Cary, 144 App. Div. 846, 129 N. Y. Supp. 444. But in the absence from our statute of this express language found in that of New York the power of our courts is no different. The New York statute but expressed the power which our courts in equity inherently possess. They have, under our present statute and without express authorization, the power to recognize condonations and reconciliations such as are here shown, and to do justice to the litigants as may be demanded by such events in their lives as have arisen subsequent to the entry of the interlocutory decree and before the expiration of the fixed period of one year.

Divorce—final decree—condonation—expiration of time.

It would in our view be superfluous to elaborate upon a proposition so plainly consonant with the principles of equity and the due administration of justice. Wherefore the writ is discharged.

We concur: **Angellotti**, Ch. J.; **Melvin**, J.; **Lorigan**, J.; **Sloss**, J.; **Shaw** J.

ANNOTATION.

Divorce: right to enter final decree after time fixed by interlocutory decree expires.

I. Dependence of divorces upon statute law, 1591.
II. Legislation in point, 1592.
III. Force and effect of interlocutory judgments of divorce, 1592.
IV. Reasons for deferring final judgment in divorce suits, 1593.
V. The spouse entitled to final judgment of divorce, 1593.
VI. The right to final judgment of divorce as affected by the death of one spouse, 1594.
VII. The right to final judgment of divorce a qualified one, 1594.

I. Dependence of divorces upon statute law.

In discussing the legal right to have entered a final judgment of divorce where an interlocutory decree has been granted and the time fixed by it,

or by law, for a final one to follow it, has run, it must be kept in mind that a divorce is not and never can be obtained save by the authority and in virtue of a pertinent statute and procedure in conformity thereto in the jurisdiction in which it may be sought.

Divorce proceedings are creatures of statute law. Martin v. Martin (1901) 112 Wis. 314, 87 N. W. 232, 88 N. W. 215; Lamberton v. Lamberton (1905) 125 Wis. 616, 104 N. W. 807.

II. Legislation in point.

This being so, in reviewing the cases (they are not numerous) which have passed on the right to have a final judgment of divorce entered after the expiration of the proper length of time following the granting of an interlocutory decree, there must be taken into account the pertinent legislation of the states in which they severally were decided.

In Massachusetts, by a statute enacted in 1887 (chap. 332, § 6), original jurisdiction in divorce cases was vested in the superior court, which was commanded to make the necessary rules regulating the practice in such cases. The rules made pursuant to that statute were held to have the force of law, and to bind the court where they applied. Pratt v. Pratt (1892) 157 Mass. 503, 21 L.R.A. 97, 32 N. E. 747.

One of these rules provided that at any time before six months expired after a decree of divorce nisi had been granted, the libellee or another person might file with the county clerk objections to the granting of an absolute final decree, with a statement of facts upon which they rested, verified by an affidavit. Ibid.

That rule was held not to affect the power of a judge of the court which granted the decree nisi in a case where a cause should arise after the six months' period expired which might or should influence him to refuse to make the decree absolute, to hear evidence of and act upon such cause. Ibid. and Darrow v. Darrow (1893) 159 Mass. 262, 21 L.R.A. 100, 34 N. E. 270.

By the New York statutes relating to interlocutory and final judgments of divorce as they read during the first decade of the twentieth century an interlocutory decree in a divorce suit conforming to a decision of the court or a referee's report was mandatorily required to be entered within fifteen days after the prevailing spouse became entitled to it; a final judgment was prohibited until after the lapse of three months following the entry of the interlocutory decree; and then, the final judgment was mandatorily required to be entered within the next thirty days. The court, however, was empowered, upon proper application and when a good and sufficient excuse for delay was shown, to allow either the interlocutory or final judgment to be entered notwithstanding the respective fifteen and thirty-day periods had elapsed. Under all circumstances the entry of final judgment was conditioned upon the fact that, in the interval, the court had not otherwise ordered.

Strict conformity to these statutory requirements has been held to be essential. Re Crandall (1909) 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874.

III. Force and effect of interlocutory judgments of divorce.

The general rule may be said to be well established that only a final absolute judgment is effectual to dissolve a marriage and to restore spouses to the status of single men and women, competent to marry again.

In California an interlocutory judgment of divorce does not sever the matrimonial bond. Grannis v. Superior Ct. (1905) 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Re Seiler (1912) 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093; OLSON v. SUPERIOR CT. (reported herewith) ante, 1589.

In Massachusetts, by the legislation of the latter half of the nineteenth century (Stat. 1870, chap. 404; Stat. 1873, chap. 371), authorizing decrees nisi in divorce suits, marriage was not dissolved by such a decree; but that result only followed when later a final and absolute judgment was rendered. Bigelow v. Bigelow (1871) 108 Mass. 38; Graves v. Graves (1871) 108 Mass. 314; Edgerly v. Edgerly (1873) 112

Mass. 53; Fox v. Davis (1873) 113 Mass. 255, 18 Am. Rep. 476; Sparhawk v. Sparhawk (1874) 114 Mass. 355; Garnett v. Garnett (1874) 114 Mass. 379, 19 Am. Rep. 369; Moors v. Moors (1876) 121 Mass. 232; Cook v. Cook (1887) 144 Mass. 163, 10 N. E. 749; Pratt v. Pratt (1892) 157 Mass. 503, 21 L.R.A. 97, 32 N. E. 747; Darrow v. Darrow (1893) 159 Mass. 262, 21 L.R.A. 100, 34 N. E. 270; Chase v. Webster (1897) 168 Mass. 228, 46 N. E. 705.

In substance the divorce nisi in Massachusetts under the Acts of 1870 and 1873 was the equivalent of a divorce from bed and board. Garnett v. Garnett (1874) 114 Mass. 379, 19 Am. Rep. 369.

An interlocutory judgment of divorce in New York under the statute there (Code Civ. Proc. § 1774) cannot and does not even purport to dissolve the marriage, but contemplates and provides for a final judgment to accomplish that result. Re Crandall (1909) 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874.

A Wisconsin judgment granting a wife a divorce from her husband's bed and board for two years and the use and income of designated property for five years from its date, which contained an express provision that it should not prejudice her right to apply for a divorce from either the bonds of matrimony or bed and board forever in the event of his specified misconduct, and should not be deemed finally to distribute or divide his property between the pair, has been held to be an interlocutory judgment within the scope and meaning of the statutes of the state, and no bar after the two years and before the five years had run to her petition for an absolute divorce and an everlasting separation from bed and board, with alimony, costs, allowances, and general relief. Lamberton v. Lamberton (1905) 125 Wis. 616, 104 N. W. 807.

IV. Reasons for deferring final judgment in divorce suits.

One of the important purposes of the law postponing an absolute severance of the marriage bond, according to the reported case (OLSON v. SUPERIOR CT. ante, 1589), is to give the spouses an opportunity to become reconciled; reconciliation being always favored by the law.

The court rested this statement on the authority of Barron v. Barron (1908) 7 Cal. Unrep. 345, 96 Pac. 273.

The design of a statute providing for interlocutory decrees of divorce, and forbidding final judgments for a stated length of time afterwards, is to put obstacles in the way of speedy dissolutions of marriage, to check collusion and fraud, and to give estranged spouses opportunities to become reconciled. Grannis v. Superior Ct. (1905) 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

The exercise of the undoubted power of the legislature to regulate divorces in postponing entries of final judgments in divorce suits is justifiable because thereby litigants are afforded chances for reconciliation, and temptations to collusion and fraud to obtain quick divorces and contract new marriages are, to a certain extent, removed. Ibid.

The postponement of the entry of final judgment of divorce for a definite time following an interlocutory decree is not a mere matter of form, but the carrying out of a legislative purpose to give the court time to prevent the scandals of fraudulent and collusive divorces and hasty, prearranged new marriages, by exercising power to deny a final decree. Re Crandall (1909) 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874.

V. The spouse entitled to final judgment of divorce.

This is a matter of statute. If a statute in express terms empowers the court, after the lapse of a stated time from the entry of the interlocutory decree, to enter a final judgment of divorce upon its own motion or the application of either spouse, the right to have a final judgment entered is not restricted to the successful litigant. Reed v. Reed (1909) 9 Cal. App. 748, 100 Pac. 897.

And see the reported case (OLSON v. SUPERIOR CT. ante, 1589).

By the Massachusetts Statute of 1870 (chap. 404) the court was au-

thorized to make a decree nisi of divorce absolute upon the petition of either spouse (Bigelow v. Bigelow (1871) 108 Mass. 38); but, by the later Act of 1873 (chap. 371, § 3), the court's authority in that respect was restricted in its exercise to cases of a petition by the spouse "to whom a divorce nisi, or a divorce from bed and board, had been granted." Sparhawk v. Sparhawk (1874) 114 Mass. 355.

In New York the facts that an interlocutory decree of divorce was granted to one spouse, and that the three months prescribed by statute before final judgment can be entered have expired, have been held to give the other spouse no right to enter or compel the entry of a final and absolute decree. Adams v. Adams (1907) 57 Misc. 150, 106 N. Y. Supp. 1064.

VI. The right to final judgment of divorce as affected by the death of one spouse.

If, before a final judgment of divorce is entered, one of the parties to the suit should die, the action would abate, and a decree dissolving the marriage absolute could not be granted in the absence of express statutory authority, notwithstanding the prior entry of an interlocutory decree in the suit. Re Crandall (1909) 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874.

An action for divorce is pre-eminently one of a personal nature, and, if not saved by statute, necessarily abates on the death of the spouse who brought it. Ibid.

A statute that provides as does one in New York (Code Civ. Proc. § 763), that if either party to an action shall die after an interlocutory, and before a final, judgment has been entered, the court must enter a final judgment in the names of the original parties unless the interlocutory judgment shall be set aside, does not apply to actions for divorce. Its application is restricted to actions which survive the death of a litigant. Ibid.

To the like effect was the decision in Chase v. Webster (1897) 168 Mass. 228, 46 N. E. 705.

The death of a spouse after obtaining an interlocutory judgment of divorce, and before a final judgment had been entered, leaves unaffected and unimpaired the other spouse's right to administer the deceased's estate just as if no interlocutory decree had ever been granted. Re Seiler (1912) 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093; Re Crandall (N. Y.) supra.

VII. The right to final judgment of divorce a qualified one.

It is too much, perhaps, to say that the granting of a final decree of divorce after an interlocutory one has been obtained and the necessary length of time has run is altogether an act of judicial grace, but certainly the litigant's right to it is not absolute.

In New York the statute qualifies the right to a final judgment after an interlocutory judgment of divorce has been granted for three months to cases where, in the meantime, the court, for sufficient cause, has not ordered otherwise.

And in that state the reconciliation of the parties in the interval is a sufficient cause for denying a final judgment. Cary v. Cary (1911) 144 App. Div. 846, 129 N. Y. Supp. 444.

This decision was approved and followed in the reported case (OLSON v. SUPERIOR CT. ante, 1589).

In New York a final judgment of divorce does not follow automatically and of course an interlocutory decree. Re Crandall (1909) 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874.

A spouse who obtained a decree nisi in the state of Massachusetts under the Acts of 1870 and 1873 was obliged, if he or she desired to contract a new and valid marriage with another, to apply for a final decree in a new proceeding, upon notice to the other spouse, and could obtain it only after a hearing by the court. Garnett v. Garnett (1874) 114 Mass. 379, 19 Am. Rep. 369.

The court was not then bound to grant an absolute decree even where there was no legal reason for dismissing the proceeding, for it had still to consider the course it was required by public policy and the best interests of the litigating parties to follow. Ibid.

An absolute decree of divorce in Massachusetts will not be granted to a spouse who obtained a decree nisi and afterwards married again unless the applicant is able to establish his or her freedom from negligence, want of moral fault and some mistake of fact (not merely of law) respecting his or her matrimonial status following the decree nisi. Pratt v. Pratt (1892) 157 Mass. 503, 21 L.R.A. 97, 32 N. E. 747; Darrow v. Darrow (1893) 159 Mass. 262, 21 L.R.A. 100, 34 N. E. 270.

The reported case (OLSON v. SUPERIOR CO. ante, 1589) is in harmony with these decisions. J. B. G.

B. PETRI, Respt.,
v.
CORNELIUS MANNY et al., Appts.

Washington Supreme Court (Dept. No. 1)—January 21, 1918.

(99 Wash. 601, 170 Pac. 127.)

Judgment — against maker of note — subsequent suit against indorser.

1. A judgment against the maker of a promissory note does not, on the theory of merger, prevent an action on the note against an indorser in case it is not paid, although the indorser was joined in the former action, if he was dismissed therefrom without prejudice.

[See note on this question beginning on page 1601.]

Attachment — dissolution — judgment against surety.

2. The judgment cannot be entered against a surety on a bond to dissolve an attachment, under a statute providing that if judgment go against defendant the same shall be entered against him and his sureties, upon a cause of action introduced by amendment, after such dissolution, which was in no way related to those causes upon which the action was originally founded.

APPEAL by defendants from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover amounts alleged to be due and unpaid for goods furnished by plaintiff to defendants Manny, and to others at their request, and also for the recovery of amounts alleged to be due on certain promissory notes. *Reversed* as to the defendant company. *Affirmed* as to the other defendants.

The facts are stated in the opinion of the court.

Mr. S. S. Langland, for appellants:

The notes were converted into judgment in the former action, and such judgment constitutes an absolute bar against bringing another action upon the same notes.

Ries v. Rowland, 4 McCrary, 85, 11 Fed. 657; Connecticut Mut. L. Ins. Co. v. Jones, 1 McCrary, 389, 8 Fed. 303; Schuler v. Israel, 27 Fed. 851; Campbell v. Strong, Hempst, 265, Fed. Cas. No. 2,367a; Hollister v. Abbott, 31 N. H. 442, 42 Am. Dec. 342; Housemire v. Moulton, 15 Ind. 367; Ward v. Haggard, 75 Ind. 381; Street v. Beckman, 43 Iowa, 496; Campbell v. Mayhugh, 15 B. Mon. 142; Owens v. Bowie, 2 Md. 457; Temple v. Scott, 3 Minn. 419, Gil. 306; Standifer v. Bush, 8 Smedes & M. 383; M'Knight v. Taylor, 1 Mo. 282.

Plaintiff is estopped by election of remedy to sue again on the notes.

Achey v. Creech, 21 Wash. 319, 58 Pac. 208; Gaffney v. Megrath, 23 Wash. 476, 63 Pac. 520; Babcock, C. & Co. v. Urquhart, 53 Wash. 168, 101 Pac. 713; Gabrielson v. Hague Box & Lumber Co. 55 Wash. 342, 133 Am. St. Rep. 1032, 104 Pac. 635; Longfellow v. Seattle, 76 Wash. 509, 136 Pac. 855; Pickle v. Anderson, 62 Wash. 552, 114 Pac. 177; Holt Mfg. Co. v. Strachan, 77 Wash. 380, 137 Pac. 1006.

Mr. **Adolf Loewe,** for respondent:

A judgment of dismissal of an action, without prejudice, is not a bar to another action between the same parties for the same cause of action.

Bates v. Drake, 28 Wash. 454, 68 Pac. 961; Von Tobel v. Stetson P. Mill Co. 32 Wash. 689, 73 Pac. 788; Budlong v. Budlong, 48 Wash. 649, 94 Pac. 478; A. H. Averill Mach. Co. v. Allbritton, 51 Wash. 32, 97 Pac. 1082; 6 Enc. Pl. & Pr. 986.

Where paper is payable on a future day, presentment and demand are sufficiently made, as against the maker or the accepter, by bringing action thereon.

Hardin v. Sweeney, 14 Wash. 129, 44 Pac. 138; Hillman v. Stanley, 56 Wash. 320, 105 Pac. 816.

The surety company is liable under the case as made out under the amended complaint.

32 Cyc. 190, 306; Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 N. E. 593; Hare v. Marsh, 61 Wis. 435, 50 Am. Rep. 141, 21 N. W. 267; Warren Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 140 Am. St. Rep. 445, 77 Atl. 847; William W. Bierce v. Waterhouse, 219 U. S. 320, 55 L. ed. 237, 31 Sup. Ct. Rep. 241; Pacific Bridge Co. v. United States Fidelity & G. Co. 33 Wash. 47, 73 Pac. 772; Cowles v. United States Fidelity & G. Co. 32 Wash. 120, 93 Am. St. Rep. 838, 72 Pac. 1032; Remington v. Fidelity & D. Co. 27 Wash. 429, 67 Pac. 989; Northern P. R. Co. v. Fidelity & D. Co. 74 Wash. 543, 134 Pac. 498; Costello v. Bridges, 81 Wash. 192, L.R.A.1915A, 853, 142 Pac. 687; Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623; 1 Brandt, Suretyship & Guaranty, 3d ed. p. 221, § 103; Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004; Costello v. Bridges, 81 Wash. 203, L.R.A.1915A, 853, 142 Pac. 687.

Fullerton, J., delivered the opinion of the court:

The respondent, on October 24, 1916, commenced an action against the appellants Manny on three causes of action, one being for goods sold the Mannys, and the other two for goods furnished other parties at their request. At the same time a writ of attachment was sued out and levied upon a boom of logs belonging to the appellants. On November 10, 1916, the logs were released on the filing of a bond with appellant London & Lancashier Indemnity Company as surety. On November 14, 1916, the respondent served an amendment complaint in which were included three additional causes of action upon three separate promissory notes which had been executed by the Taylor Mill Company to the appellant C. Manny, and by him indorsed to the respondent. There was no renewal of either the affidavit or writ of attachment which had been theretofore issued. On December 11, 1916, the appellants answered the amended complaint, admitting the first cause of action and depositing the money therefor in the registry of the court, and entering denials as to the other causes of action. As an affirmative defense they set up that the respondent had theretofore obtained a judgment against the Taylor Mill Company upon the same three promissory notes, in an action brought against the mill company and the appellants Manny. In that action the Mannys had been dismissed without prejudice, the mill company being the only defendant which had been served. On a trial of the present action to the court, judgment was entered in favor of the respondent upon all the causes of action except the two for goods furnished other parties at the instance and request of C. Manny, upon which causes the judgment was that the respondent take nothing. From such judgment an appeal is prosecuted, the errors assigned being that the third and fourth conclusions of law are contrary to the findings of fact, that the judgment against the appellant London & Lancashire Indemnity Company is contrary to law, and that the judgment against the appellants Manny on the fourth, fifth, and sixth causes of action upon the promissory notes of the Taylor Mill Company is contrary to law. The findings and conclusions of the court necessary to a consideration of the questions presented are as follows:

"V. The court finds that as to the

fourth, fifth, and sixth causes of action the Taylor Mill Company, a corporation, made and delivered to Cornelius Manny, the defendant herein, on the 27th day of August, 1915, its certain promissory note for $75, payable sixty days after date, and that thereafter said Manny indorsed in blank said note to the plaintiff; that at the same time said Taylor Mill Company made and delivered to said Cornelius Manny its certain promissory note for $75, payable ninety days after date, and thereafter said Manny indorsed in blank said note, to said plaintiff; that on the 22d day of September, 1915, said Taylor Mill Company made and delivered to said Cornelius Manny its certain promissory note for $100, and payable ninety days after date, and thereafter said Cornelius Manny indorsed in blank said note to said plaintiff, said three promissory notes being in words and figures as set out in plaintiff's amended complaint.

"VI. That on the 2d day of May, 1916, in this court a judgment was duly given and entered in favor of this plaintiff and against the Taylor Mill Company, a corporation, in an action on file and record in this court in cause No. 113,684, wherein plaintiff herein was plaintiff and the Taylor Mill Company and Cornelius Manny and Hattie Manny were defendants, which action was founded upon the same and identical promissory notes mentioned and alleged in finding No. V; that at said time, upon the motion of plaintiff therein, the court dismissed the action as to the defendants Cornelius Manny and Hattie Manny without prejudice; that then and thereupon said notes were marked and stamped 'Canceled.'

"VII. That on the 14th day of November, 1916, plaintiff filed in this court his amended complaint by adding the fourth, fifth, and sixth causes of action to the original complaint; that said causes of action set out and alleged the execution and delivery of said notes to Cornelius Manny and the indorsing of the same to plaintiff; that said notes are due and unpaid, and are the same notes as sued upon in the former action and reduced to judgment therein.

"VIII. The court finds that plaintiff made presentment and demand for the payment of said promissory notes against the maker Taylor Mill Company, bringing an action in cause No. 113,684, and plaintiff gave notice to the indorser Cornelius Manny by telling him of the dishonor of these notes on the part of the Taylor Mill Company, and asking defendant to pay said notes.

"IX. That there are provided in said notes reasonable attorneys' fees in case of suit thereon, and that a reasonable amount to be allowed is sixteen and two-thirds ($16\frac{2}{3}$) dollars in each note.

"X. That on November 10, 1916, defendants filed herein their redelivery bond in attachment with the London & Lancashire Indemnity Company of America as surety."

"III. That plaintiffs is entitled to judgment against the defendants on the fourth, fifth, and sixth causes of action in the sum of two hundred and fifty ($250) dollars, with interest thereon at the rate of 8 per cent from date of execution of said respective notes until paid, and for the sum of fifty ($50) dollars as attorney's fee, and for his costs and disbursements.

"IV. That plaintiff is entitled to have his judgment declared to be a judgment against the defendants Cornelius Manny and Hattie Manny, his wife, and against the marital community consisting of these defendants, and also against the London & Lancashire Indemnity Company of America."

The first contention of appellants is that the judgment on the notes rendered in a prior action against the maker was such a merger of the notes in the judgment that a subsequent action could not be maintained on them against the indorser. The doctrine of merger by judg-

ment as applied to promissory notes relates only to such parties as are jointly liable thereon, or to cases where a judgment is rendered against both the maker and parties secondarily liable with him. The judgment pleaded as a bar here was one which had been obtained in an action in which the Mannys were parties defendant, but from which they had been dismissed without prejudice, and judgment taken against the maker alone. Their liability upon the indorsement still remained, if the judgment was not satisfied. Both of these questions were passed upon in the case of Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314, where it was held that, while a judgment upon promissory notes merges them therein so that the owner of the judgment may not maintain an action against the judgment debtor upon them, they still remain competent evidence of the existence of the debt which they represent in all other actions. And, further, a judgment dismissing an action without prejudice "determines that the parties are left as free to litigate every issue in the action dismissed as they would have been if it had never been commenced." See also Bates v. Drake, 28 Wash. 447, 68 Pac. 961. In Eaton & Gilbert Commercial Paper, p. 543, it is said: "When a judgment is obtained on a note or bill, the bill or note is thereby extinguished and merged in the judgment. But this doctrine only applies to the relation between the plaintiff and defendant. The judgment alone, without actual satisfaction, is no extinguishment as between the plaintiff and other parties not jointly liable with the original defendant, whether those parties be prior or subsequent to the defendant."

Judgment—against maker of note—subsequent suit against indorser.

The law regards the liability of makers and indorsers of promissory notes as a several one, and that a judgment against either, if unsatisfied, is no bar to a subsequent action against the other. Rice v. Groff, 58 Pa. 116; Morrison v. Fishel, 64 Ind. 177; Russell & E. Mfg. Co. v. Carpenter, 5 Hun, 162. In the case of Still v. Lombardi, 8 Tex. Civ. App. 315, 27 S. W. 845, this doctrine is carried to the extent of holding that where, in an action against the maker and indorser of a note, judgment is obtained against the indorser alone, the note is not merged in the judgment so as to prevent an action on it by the indorser. Our own statute (Rem. Code, § 192) allows either a joint or separate action against parties severally liable upon promissory notes. Accordingly, a joint action against maker and indorser, and a dismissal without prejudice as to the indorser, would not prevent a subsequent action action against the latter.

The final contention of appellants is that the entry of judgment against the London & Lancashire Indemnity Company, the surety upon the bond dissolving the attachment, was erroneous. As we have said, at the time of bringing his action against the appellants Manny upon which the respondent issued a writ of attachment, his complaint was based upon but three causes of action. The appellants Manny secured the release of their attached property by filing a bond therefor, secured by the indemnity company. Thereafter the respondent amended his complaint by adding three additional causes of action, in no wise related to those upon which his suit was originally founded. The three original causes were disposed of by the deposit in the registry of the court of money sufficient to meet the admitted claim in respondent's first cause of action, and by the court's judgment of dismissal as to the other two. Upon the three new causes of action added after the discharge of the attachment, the court found that the surety was liable under the provisions of Rem. Code, §§ 671, 672, declaring that the dis-

solution bond shall be conditioned to perform the judgment, and that "such bond shall be part of the record, and if judgment go against the defendant, the same shall be entered against him and sureties." The case principally relied upon to support the holding is Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004. In that case it is said: "Our statute provides that the bond of the defendant in an attachment proceeding shall contain a promise to perform the judgment of the court. The filing of the bond shall be deemed an appearance in the action, and, if judgment goes against the defendant, it shall also be entered against the surety. . . . It is almost universally held that, under such statutory provisions, the bond becomes an unconditional contract or promise to pay whatever judgment shall be rendered against the defendant upon the merits of the case. . . . It follows that the surety upon the bond given in this case is liable upon the judgment rendered against the defendant, and that the court erred when it struck from the judgment that portion thereof which awarded recovery against the surety."

As addressed to the issues then before the court this case is undoubtedly right. But it must be remembered that no new cause of action had been added by amendment subsequent to the execution of the delivery bond, and that the court did not have in mind the altered condition such an amendment implies.

The intent of the statute clearly is that the bond given to perform the judgment of the court merely contemplates such a judgment as shall follow from the cause of action pleaded at the time of its execution. The defendant and his surety could not be chargeable with having executed a bond to cover any greater liability than that existing at the time release of the attached property was sought. While the authorities hold that an amendment of the complaint to cure defects after the execution of such a bond would not defeat a right of recovery on the bond, they just as emphatically hold that such amendment of the complaint cannot subject the liability on the bond to the burden of any new causes of action brought in by way of amendment. This is the purport of the decisions cited by respondent as upholding the trial court, viz.: Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 N. E. 593; Warren Bros. Co. v. Kendrick & Roberts, 113 Md. 603, 140 Am. St. Rep. 445, 77 Atl. 847; William W. Bierce v. Waterhouse, 219 U. S. 320, 55 L. ed. 237, 31 Sup. Ct. Rep. 241.

Attachment—dissolution—judgment against surety.

In Townsend Nat. Bank v. Jones, the court upheld the power to allow an amendment of the complaint, but in doing so used this language: "The surety cannot take advantage of formal defects made by the plaintiff in stating his case. Unless the effect of the amendment would be to impose on him a greater liability than he had originally assumed by letting in a new cause of action, he is not released because of its allowance."

In Warren Bros. v. Kendrick & Roberts, so far from denying the principle contended for, the court stated the general rule in the following language: "The general rule . . . is that 'sureties upon a bond to dissolve an attachment are not discharged by an amendment of the declaration, unless its effect is to let in a new cause of action, and thus to impose upon them a liability greater than that which they assume by signing the bond.' "

In William W. Bierce v. Waterhouse, it was held that pending litigation was subject to the power of Congress to make a change in procedure, and that a redelivery bond was not discharged by such change so long as it did not affect the contractual rights of the parties.

The first two of these cases clearly imply that an amendment introducing a new cause of action

which increases the liability of the surety discharges the surety. The third implies that such an effect would follow from a statutory change of procedure having a like result.

The principle is also supported by the authorities holding that amendments of original affidavits in attachment are not permissible, if thereby the cause of action on which the affidavit was founded was changed as the result of such amendment. Westover v. Van Dorn Iron Works Co. 70 Neb. 415, 87 N. E. 598; Holway v. American Exch. Nat. Bank, 64 Neb. 67, 89 N. W. 382; Jaffray v. Wolf, 1 Okla. 312, 33 Pac. 945. In Brandt, Suretyship, 3d ed. p. 1006, it is stated that "sureties on a bond given for the dissolution of an attachment are held not bound for an increase of plaintiff's claim made by amendment after the bonding," citing Prince v. Clark, 127 Mass. 599.

For other authorities holding that sureties on such bonds dissolving attachments are discharged by amendments of the complaint materially changing the cause of action, see Hyer v. Smith, 3 Cranch, C. C. 437, Fed. Cas. No. 6,979; Wood v. Denny, 7 Gray, 540; Fish v. Barbour, 43 Mich. 19, 4 N. W. 502; Cassidy v. Saline County Bank, 7 Ind. Terr. 543, 104 S. W. 829; Willis v. Crooker, 1 Pick. 204; Bryan v. Bradley, 1 N. C. pt. 2, p. 54 (Taylor p. 77). In Wood v. Denny, 7 Gray, 540, it is said: "In the first of these actions, the new count on a guaranty of a debt due from a third person to the plaintiffs was not for the same cause of action as the money counts, and could not have been given in evidence on those counts. Whether, as between the parties to the action, the filing of that count was properly allowed, is not now in question. As to the bail, we are of opinion that it discharged him from his undertaking. He became bail in an action for money had and received, money lent and money paid, as set forth in the writ and declaration against the principal, and not in an action on a guaranty by the principal of the plaintiffs' claim on another."

The rule by which the court is to decide whether an amendment discharges bail is stated by Mr. Justice Wilde, in Haven v. Snow, 14 Pick. 28, 33, as follows: "Amendments in form merely will not dissolve an attachment, . . . or discharge bail. To have this effect the amendment must be such as may let in some new demand, or new cause of action."

We are satisfied on both principle and authority that, even under a statute as rigorous in its terms as our own, any amendment of a complaint adding entirely new causes of action, subsequent to the giving of a bond dissolving an attachment sued out in the action, operates as a release of the surety upon such bond against that portion of the judgment based upon the new counts.

The judgment is reversed as to the London & Lancashire Indemnity Company, and affirmed as to the other defendants.

Ellis, Ch. J., and **Parker**, **Main**, and **Webster**, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Judgment against less than all parties to contract as bar to action against others.

I. Judgment on joint contract:
a. At common law:
1. General rule, 1601.
2. Application of rule:
(a) In general, 1603.
(b) Contract by partnership, 1605.
(c) Judgment by confession, 1606.
(d) Judgment by default, 1606.
(e) Relief in equity, 1606.
3. Exceptions to rule:
(a) Joint contractor dead or nonresident, 1607.
(b) Personal note for joint debt, 1608.
b. Under statute:
1. Rule in District of Columbia, 1608.
2. Rule in Georgia, 1609.
3. Rule in Indiana, 1609.
4. Rule in Iowa, 1614.
I. b—continued.
5. Rule in Kentucky, 1614.
6. Rule in Louisiana, 1615.
7. Rule in Maryland, 1615.
8. Rule in Massachusetts, 1616.
9. Rule in Michigan, 1616.
10. Rule in Mississippi, 1617.
11. Rule in Missouri, 1617.
12. Rule in New Mexico, 1618.
13. Rule in New York, 1618.
14. Rule in North Carolina, 1621.
15. Rule in Oklahoma, 1622.
16. Rule in Pennsylvania, 1622.
17. Rule in Tennessee, 1624.
18. Rule in Texas, 1624.
19. Rule in Virginia, 1624.
20. Rule in West Virginia, 1624.
II. Judgment on joint and several contract, 1625.

I. Judgment on joint contract.

a. At common law.

1. General rule.

The general rule, in the absence of a statute, is that, where a separate judgment is obtained against one or more of several persons jointly bound by a contract, it is a bar to an action against the other obligors, since the original contract is merged in the judgment.

England.—Cambefort v. Chapman (1887) L. R. 19 Q. B. Div. 229, 51 J. P. 455, 57 L. T. N. S. 625, 56 L. J. Q. B. N. S. 639, 35 Week. Rep. 838; Hammond v. Schofield [1891] 1 Q. B. 453, 60 L. J. Q. B. N. S. 539; Hoare v. Niblett [1891] 1 Q. B. 781, 64 L. T. N. S. 659, 60 L. J. Q. B. N. S. 565, 39 Week. Rep. 491, 55 J. P. 664; Ex parte Higgins (1858) 3 De G. & J. 33, 44 Eng. Reprint, 1181, 27 L. J. Bankr. N. S. 27, 4 Jur. N. S. 595, 6 Week. Rep. 406; King v. Hoare (1844) 2 Dowl. & L. 382, 13 Mees. & W. 494, 153 Eng. Reprint, 206, 14 L. J. Exch. N. S. 29; McLeod v. Power [1898] 2 Ch. 295, 79 L. T. N. S. 67, 67 L. J. Ch. N. S. 551, 47 Week. Rep. 74.

United States.—Sessions v. Johnson (1877) 95 U. S. 347, 24 L. ed. 596; United States v. Ames (1879) 99 U. S. 35, 25 L. ed. 295, affirming (1878) Fed. Cas. No. 14,440; Woodworth v. Sapfford (1840) 2 McLean, 168, Fed. Cas. No. 18,020; Sedam v. Williams (1845) 4 McLean, 51, Fed. Cas. No. 12,609; Earl v. Raymond (1847) 4 McLean, 233, Fed. Cas. No. 4,243; Willings v. Consequa (1816) Pet. C. C. 301, Fed. Cas. No. 17,767. Compare Sheehy v. Mandeville (1810) 6 Cranch, 253, 3 L. ed. 215.

Alabama.—Brown v. Foster (1842) 4 Ala. 282.

District of Columbia.—See infra, I. b, 1.

Georgia.—See infra, I. b, 2.

Illinois.—Wain v. McNulty (1845) 7 Ill. 355, 43 Am. Dec. 58; Mitchell v. Brewster (1862) 28 Ill. 163; Fleming v. Ross (1906) 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas. 314, affirming (1906) 125 Ill. App. 265; Fleming v. Ross (1906) 125 Ill. App. 265. See also dictum in People v. Harrison (1876) 82 Ill. 84.

Indiana.—See infra, I., b, 3.

Iowa.—See infra, I. b, 4.

Kentucky.—See infra, I. b, 5.

Louisiana.—See infra, I. b, 6.

Maryland.—See infra, I. b, 7.

Massachusetts.—See infra, I. b, 8.

Michigan.—See infra, I. b, 9.

Mississippi.—See infra, I. b, 10.

Missouri.—See infra, I. b, 11.

Nebraska.—Tootle v. Otis (1901) 1 Neb. (Unof.) 360, 95 N. W. 681.

New Hampshire.—See dictum in Townsend v. Riddle (1822) 2 N. H. 448.

New Jersey.—Coles v. McKenna (1910) 80 N. J. L. 48, 76 Atl. 344.

New Mexico.—See infra, I. b, 12.

New York.—See infra, I. b, 13.

North Carolina.—See infra, I. b, 14.

Ohio.—Slov v. Lea (1849) 18 Ohio, 279; Carr v. Beckett (1885) 1 Ohio C. D. 43.

Oklahoma.—See infra, I. b, 15.

Pennsylvania.—See infra, I. b, 16.

South Carolina.—See infra, this subdivision.

Tennessee.—See infra, I. b, 17.

Texas.—See infra, I. b, 18.

Virginia.—See infra, I. b, 19.

West Virginia.—See infra, I. b, 20.

Wisconsin. — Lauer v. Bandow (1880) 48 Wis. 638, 4 N. W. 774.

The holding in Sheehy v. Mandeville (1810) 6 Cranch (U. S.) 253, 3 L. ed. 215, that a judgment against one of two joint contractors does not bar an action against the other contractor, was overruled in Mason v. Eldred (1868) 6 Wall. (U. S.) 231, 18 L. ed. 783, wherein the court, in commenting on the decision in Sheehy v. Mandeville, said: "For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of Sheehy v. Mandeville, decided by this court, and reported in 6 Cranch (U. S.) 253, 3 L. ed. 215. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea. The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded, in numerous instances, by the highest tribunals of different states. It was elaborately reviewed by the supreme court of New York in the case of Robertson v. Smith (1821) 18 Johns. (N. Y.) 459, 9 Am. Dec. 227, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication. In the supreme court of Massachusetts, a ruling similar to that of Robertson v. Smith was made. In Wann v. McNulty (1845) 7 Ill. 355, 43 Am. Dec. 58, the supreme court of Illinois commented upon the case of Sheehy v. Mandeville, and declined to follow it as authority. The court observed that, notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons. In Smith v. Black (1822) 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686, the supreme court of Pennsylvania was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. 'No principle,' said the court, 'is better settled than that a judgment, once rendered, absorbs and merges the whole cause of action; neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which certainly actions against partners are not.' In its opinion, the court referred to Sheehy v. Mandeville, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the Supreme Court of the United States, was not of binding authority, and it was

disregarded. In King v. Hoare (1844) 2 Dowl. & L. 382, 13 Mees. & W. 494, 153 Eng. Reprint, 206, 14 L. J. Exch. N. S. 29, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the court of exchequer, and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that, by the judgment recovered, the original demand had passed in rem judicatam, and could not be made the subject of another action. In the course of the argument the case of Sheehy v. Mandeville was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice Marshall, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice Story, in Trafton v. United States (1845) 3 Story, 651, Fed. Cas. No. 14,135, refers to this case in the exchequer, and to that of Sheehy v. Mandeville, and observes that in the first case the court of exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety. The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause. If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged, notwithstanding Sheehy v. Mandeville, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action."

In South Carolina, the common-law rule is that a judgment against one or more joint contractors, but less than all, is no bar to a subsequent action on the contract against those not previously sued, unless the former judgment has been fully paid. Collins v. Lemasters (1830) 1 Bail. L. (S. C.) 348, 21 Am. Dec. 469; Treasurers v. Bates (1831) 2 Bail. L. (S. C.) 382; Watson v. Owens (1844) 1 Rich. L. (S. C.) 111; Union Bank v. Hodges (1858) 11 Rich. L. (S. C.) 480.

2. Application of rule.

(a) In general.

In Hammond v. Schofield [1891] 1 Q. B. (Eng.) 453, 60 L. J. Q. B. N. S. 539, it appeared that the plaintiffs had performed work for the defendant in printing a newspaper for him. At the time the labor was performed one Thomas was a joint owner with the defendant, of the newspaper, but the plaintiffs were ignorant of this fact. Thereafter the plaintiffs brought an action against the defendant and recovered judgment against him, which judgment was partially satisfied. On discovering that Thomas was a joint owner of the newspaper the plaintiffs, with the defendant's consent, sought to vacate the judgment against the latter and bring a new action against both the defendant and Thomas. It was held, however, that the former judgment precluded the plaintiffs from suing Thomas. The court said: "It is, of course, settled law that where one of two joint contractors has been sued to judgment on the joint contract, the other contractor may, if subsequently to the judgment an action is brought against him, plead the judgment obtained against his co-contractor in bar of such action; and it seems also to be well settled by a series of cases beginning with Rice v. Shute (1770) 5 Burr. 2611, 98 Eng. Reprint, 374, 2 W. Bl. 695, 96 Eng. Reprint, 409,

and ending with Kendall v. Hamilton (1879) L. R. 4 App. Cas. 504, 48 L. J. C. P. N. S. 705, 41 L. T. N. S. 418, 28 Week. Rep. 97, 1 Eng. Rul. Cas. 175, that the basis of this defense is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract."

In Hoare v. Niblett [1891] 1 Q. B. (Eng.) 781, 64 L. T. N. S. 659, 60 L. J. Q. B. N. S. 565, 39 Week. Rep. 491, 55 J. P. 664, a judgment in an action against a husband, for the breach of a contract by husband and wife to let a house and give the plaintiff the option of purchasing the furniture therein, was held to be a bar to another action against the wife, although it appeared that she was the sole owner of the furniture.

In King v. Hoare (1844) 13 Mees. & W. 494, 153 Eng. Reprint, 206, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29, it appeared that the plaintiff had sold goods to the defendant and one Smith. The defendant and Smith jointly promised to pay for the goods. Thereafter the plaintiff brought an action against Smith alone and recovered a judgment, which remained unsatisfied. Later he brought the action against the defendant on the same cause. The judgment against Smith was held to be a bar. The court said: "If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement, or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other? If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt, barred against one, is barred altogether; and the only exception now being where one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement both must be joined and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one of two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly, and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

In Carr v. Beckett (1885) 1 Ohio C. D. 43, it appeared that the plaintiff had previously brought an action in a justice's court against one of two joint makers of a note, and obtained a judgment against him. The defendant appealed to the common pleas court, and the other joint maker was also made a codefendant. After trial a judgment was entered against both defendants, but on motion for a new trial the judgment was reversed as to one of the defendants, and a new trial granted; but as to the other defendant the motion was overruled. Later, the plaintiff obtained another judgment against the defendant, who had been previously granted a new trial. In moving for a new trial after the second judgment, and in arrest thereof, the defendant contended that the previous judgment rendered against his codefendant was a bar to the proceedings against him. The court sustained his contention and reversed the judgment against him.

But in Hix v. Davis (1873) 68 N. C. 231, the action was against one of two joint obligors on a promissory note, to recover an unpaid balance on the joint obligation. It appeared that the

plaintiff had previously sued one of the joint debtors, but under the rule of South Carolina, where the action was brought, he could recover only half of the indebtedness. It was held that the former judgment against one of the joint debtors was no bar to the action for the balance against the other debtor.

In Lauer v. Bandow (1880) 48 **Wis.** 638, 4 N. W. 774, it appeared that the plaintiff had previously brought a suit against the defendant and her husband to enforce a mechanic's lien. The plaintiff obtained a personal judgment against the husband for the amount sued, which judgment was adjudged a lien on the house and lot belonging to the wife. Thereafter the wife appealed from the judgment in so far as it related to her property, and the same was reversed; but, there being no appeal on the part of the husband, the judgment as to him remained on record. Subsequently, the plaintiff instituted a second action on the same cause against the husband and wife, seeking to recover a personal judgment as to both. It was held that the personal judgment against the husband was a bar to the second action. The court said: "It is perfectly well settled that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his codebtor, and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and, being indivisible, it cannot be merged or canceled as to one, and existing and operative as to another joint debtor."

(b) Contract by partnership.

Where a judgment has been obtained against one or more partners, but not against all, on a partnership contract, that judgment, whether satisfied or not, is a bar to a subsequent action on the debt against the other partners. Cambefort v. Chapman (1887) L. R. 19 Q. B. Div. (**Eng.**) 229, 51 J. P. 455, 57 L. T. N. S. 625, 56 L. J. Q. B. N. S. 639, 35 Week. Rep. 838; Hammond v. Schofield [1891] 1 Q. B. (**Eng.**) 453, 60 L. J. Q. B. N. S. 539; Ex parte Higgins (1858) 3 De G. & J. 33, 44 **Eng.** Reprint, 1181, 27 L. J. Bankr. N. S. 27, 4 Jur. N. S. 595, 6 Week. Rep. 74; Re Herrick (1876) 13 Nat. Bankr. Reg. 312, **Fed.** Cas. No. 6,420; Blythe v. Cordingly (1905) 20 **Colo.** App. 508, 80 Pac. 495; Thompson v. Emmert (1854) 15 **Ill.** 415; Rychman v. Manerud (1913) 68 **Or.** 350, 136 Pac. 826, Ann. Cas. 1915C, 522; Anderson v. Stayton State Bank (1916) 82 **Or.** 357, 159 Pac. 1033.

In Thompson v. Emmert (1854) 15 **Ill.** 415, the plaintiff brought an action of debt against three partners. In a previous action by the same plaintiff against the same defendants, in which one alone was served with process, the plaintiff obtained a judgment against him. It was held that the previous judgment was a bar to the subsequent action. The court said: "The rule is that, if a judgment be obtained against one partner or joint contractor, the creditor cannot maintain a second action against the other partner or joint contractor. The judgment operated as an extinguishment of the cause of action, and a discharge of the other partner or joint contractor from all liability to the creditor. The law may be otherwise in reference to a judgment against one upon a joint and several cause of action."

In Ex parte Higgins (1858) 3 De G. & J. 33, 44 **Eng.** Reprint, 1181, 27 L. J. Bankr. N. S. 27, 4 Jur. N. S. 595, 6 Week. Rep. 406, the action was by a farmer against two millers, as partners. It appeared that the plaintiff had sold his products to the partnership, dealing with one of the partners. Thereafter he brought a suit and recovered a judgment against the individual partner with whom he had dealt. Before judgment could be satisfied the judgment debtor was declared a bankrupt. The plaintiff then sought to sue both partners, as such, but the former judgment was held to be a bar.

In Cambefort v. Chapman (1887) L. R. 19 Q. B. Div. (**Eng.**) 229, 51 J. P. 455, 57 L. T. N. S. 625, 56 L. J. Q. B. N. S. 639, 35 Week. Rep. 838, it appeared that the plaintiff had sold goods to Wilson & Co. Chapman was a member

of the partnership, but the plaintiff did not know this at that time. Thereafter, he brought an action against Wilson and recovered a judgment, which remained unpaid. On discovering that Chapman was a partner of Wilson, the plaintiff commenced an action against him for the value of the goods sold. It was held that the judgment against Wilson was a bar to the second suit. The court said: "The principle of the maxim, 'Nemo debet bis vexari,' applies not only to the case of one individual being sued twice for the same cause of action, but also to the case of a person suing twice on the same contract. Here the plaintiff had converted the liability on the joint contract into a liability on a judgment, so that they had a security of a higher nature than the mere right to recover on the contract, and therefore the maxim, 'Transit in rem judicatam,' applies."

(c) Judgment by confession.

Where a plaintiff consents to the confession of a judgment by one joint debtor on a joint contract, the same is, at common law, a bar to a subsequent action against the other debtor, or debtors, on the original obligation. Mitchell v. Brewster (1862) 28 **Ill.** 163; Sloo v. Lea (1849) 18 **Ohio,** 279.

In Sloo v. Lea (**Ohio**) supra, it appeared that a bank held several drafts against a partnership firm composed of one Sloo and one McClintoc. The latter, without the knowledge or consent of Sloo, executed to the bank a power of attorney, authorizing any attorney of any court of record in Illinois to appear for the partnership, at the suit of the officers of the bank, and confess judgment for the amount of the drafts. Soon thereafter the bank filed a suit in an Illinois court against Sloo & McClintoc, and caused a judgment to be confessed and entered against them for the amount of the drafts. Later, Sloo moved to vacate the judgment as to him, and that motion was finally granted. The judgment against McClintoc remained on record, but unpaid. The plaintiff then brought an action on the drafts against Sloo and McClintoc, in Ohio. It was held, as to Sloo, that the former judgment was a complete bar. After citing and discussing many authorities, the court proceeds to say: "This court recognizes the principle as established by the authorities before quoted, and decides also that a judgment against one of two partners, upon a joint promise, is a bar to a subsequent suit against both, upon the same promise."

(d) Judgment by default.

Where a plaintiff brings a joint action against several joint contractors, and enters a default judgment as to one or more of the defendants, he is estopped from proceeding further as to the others. Stearns v. Aguirre (1856) 6 **Cal.** 176; Davison v. Harmon (1896) 65 **Minn.** 402, 67 N. W. 1015; Coles v. McKenna (1910) 80 **N. J. L.** 48, 76 Atl. 344. But see Nesto v. Foss (1884) 21 **Fla.** 143, where it appeared that the plaintiffs brought a suit on three joint promissory notes against two defendants. One of the defendants defaulted, and the other interposed an answer. The plaintiffs proceeded to assess the damages against the defaulting defendant, and to prove their case against the other. After a trial by a jury, the plaintiffs recovered one judgment against both the defendants. The defendant who appeared contended that the entry of the default as to his codefendant was a bar to any further action as to him. But the court held that, while this would have been so had there been a separate judgment against the defaulting defendant, the mere entry of his default did not constitute a judgment.

(e) Relief in equity.

It has been held that where a plaintiff, after obtaining a judgment against less than all the joint obligors to a contract, discovers that others were parties thereto, a court of equity will not grant him relief by setting aside the prior judgment so as to enable him to bring a new action against all the obligors. United States v. Cushman (1836) 2 Sumn. 426, **Fed.** Cas. No. 14,908; Trafton v. United States (1845) 3 Story, 646, **Fed.** Cas. No. 14,135; United States v. Ames (1876) **Fed.** Cas. No. 14,440, affirmed in (1879) 99 U. S.

35, 25 L. ed. 295. Compare Baker v. Kinsley (1884) 41 **Ohio** St. 403.

But in Ferrall v. Bradford (1849) 2 **Fla.** 508, the court, while recognizing the general rule that a judgment against one of several joint contractors is a bar to an action against the other contractors, held that the rule cannot be applied where it appears that the separate judgment was induced or procured by the fraud of those of the joint debtors who were not originally sued. In that case it was said: "It matters little as to the mode or manner in which fraud is effected. A court must look to the effect, and ask if the result is a consequence of the fraud. Here, the defendants seek to avail themselves of a legal defense, arising from a state of facts which they themselves, by their fraud, have produced. They admit virtually by their demurrer that the plaintiffs have been deprived of a legal right by their fraud, and they seek now, by their defense, to take advantage of their own wrong,—a defense admitted to arise from their own fraudulent act. The question now is, Will such a defense be available, tolerated, or allowed? Law, reason, justice, and morality unite in a negative response. . . . In relation to the doctrine of transit in rem adjudicatam, a maxim borrowed from the civil law, we are free to admit that it would have been available, but for the fraud of those setting it up against the plaintiffs, inducing them to single out one of the joint obligors against whom to take judgment; and we are disposed to carry out the civil-law doctrine of the restitutio ad integrum, so far as the defendants are concerned, by restoring the plaintiffs as near as may be to the same state in which they would have been but for the fraud of the defendants."

3. Exceptions to rule.

(a) Joint contractor dead or nonresident.

Where one of several joint debtors has died, a judgment against the other obligors will not bar a subsequent action against the estate of the deceased debtor. Re Hodgson (1885) L. R. 31 Ch. Div. (**Eng.**) 177, 54 L. T. N. S. 222, 34 Week. Rep. 127, 55 L. J. Ch. N. S. 241.

And if it appears that one of the joint contractors is a nonresident of the state in which a judgment is obtained against other of the obligors, the judgment will not bar a subsequent action against the nonresident. Beck & P. Lithographing Co. v. Wacker, B. Brewing & Malting Co. (1896) 22 C. C. A. 11, 46 U. S. App. 486, 76 **Fed.** 10; Larison v. Hager (1890) 44 **Fed.** 49; Wood v. Watkinson (1846) 17 **Conn.** 500, 44 Am. Dec. 562; Rand v. Nutter (1868) 56 **Me.** 339; Olcott v. Little (1838) 9 **N. H.** 259, 32 Am. Dec. 357; Tibbetts v. Shapliegh (1881) 60 **N. H.** 487; Yoho v. McGovern (1884) 42 **Ohio** St. 11; Whittaker v. Stone (1898) 16 **Ohio** C. C. 635, 7 Ohio C. D. 591.

In Rand v. Nutter (1868) 56 **Me.** 339, it appeared that the plaintiffs had previously commenced an action against three defendants, but, having made service of process on one only, they discontinued as to the others and entered judgment against him. This judgment was partially unsatisfied. It further appeared that the other two obligors were not within the state when the judgment was entered. Thereafter the plaintiffs instituted another action, on the same cause, against the same defendants. To this action the defendants pleaded the former judgment in bar. The contention was held to be untenable, the court saying: "If one of two joint promisors has neither domicil nor property in this state, a separate action may be maintained against the other. Dennett v. Chick (1822) 2 **Me.** 191, 11 Am. Dec. 59. Neither is a judgment in another state against one of two joint promisors, without satisfaction, a bar to an action in this state against the other, upon the joint contract. Ibid. When one of two joint contractors is without the state, as appears by the officer's return, so that no service can be made upon him, judgment may be rendered against such of the joint contractors as are found within the jurisdiction, and such judgment, remaining unsatisfied,

is no bar to a subsequent suit and judgment against the remaining signer, or signers."

In Yoho v. McGovern (1884) 42 **Ohio** St. 11, the plaintiff brought an action against the joint makers of a promissory note. One was served with process, but no service was made on the other, as he was out of the state. The plaintiff took a judgment against the defendant who was served, but, the same remaining unsatisfied, he subsequently commenced another suit against both defendants. To this second action the defendant not included in the previous judgment pleaded in bar the judgment against this co-obligor. The court held, however, that, in as much as he was out of the state during the pendency of the first action, his contention had no merit, saying: "A careful examination of the authorities will demonstrate that the principle upon which the rule is grounded is that, if one of several joint contractors is beyond the jurisdiction of the court, out of the reach of its process, this creates a necessity of allowing the action to proceed against those within the jurisdiction, and this without affecting the liability of the former, in order to avert an entire failure of justice. It is but the application of this principle to the case at bar which leads us to the view we have adopted."

(b) Personal note for joint debt.

It has been held that where one of several joint debtors gives his personal promissory note in payment of the joint debt, and the creditor brings a suit against the maker on the note and obtains judgment thereon, that judgment, unless satisfied, is not a bar to an action against the other obligors on the original debt. Wegg-Prosser v. Evans [1895] 1 Q. B. (**Eng.**) 108; Drake v. Mitchell (1803) 3 East, 251, 102 **Eng.** Reprint, 594; Hough Lithographing Co. v. Morely (1910) 20 **Ont.** L. Rep. 484; Fairchild v. Holly (1834) 10 **Conn.** 474; First Nat. Bank v. Finck (1898) 100 **Wis.** 446, 76 N. W. 608.

In Wegg-Prosser v. Evans (**Eng.**) supra, it was held that where one of two joint obligors on a contract of guaranty gives a check in payment of the obligation, and the plaintiff brings suit against the maker of the check because the same is dishonored, the judgment on the check is not a bar to an action against the other joint contractor on the original obligation.

In Drake v. Mitchell (1803) 3 East, 251, 102 **Eng.** Reprint, 594, it was held that a judgment on a bill of exchange given by one of three joint covenantors was not a bar to an action against the covenantors on their original undertaking.

In Fairchild v. Holly (1834) 10 **Conn.** 474, it appeared that the plaintiffs had furnished paper on credit to the defendants, who conducted a newspaper as a joint enterprise. One Holly was the editor. Later, Holly gave to the plaintiffs a note signed by himself individually, but which the payees credited to the account of Holly & Company. Thereafter the plaintiffs brought a suit against Holly on the note, and recovered a judgment against him. Holly having become insolvent, the judgment remained unsatisfied. The plaintiffs then brought an action on the original debt against all the defendants. It was held that the judgment against Holly was not a bar to the second action.

b. Under statute.

1. Rule in District of Columbia.

A statute (U. S. Rev. Stat. Relating to District of Columbia, § 827), provides as follows: "Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all or any of the parties by whom the money is payable, at the option of the plaintiff. But an action against one or some of the parties by whom the money is payable may, while the litigation therein continues, be pleaded in bar of another action against another or others of said parties."

In Harris v. Leonhardt (1894) 2 App. D. C. 318, it was said with respect to the effect of that statute: "The obvious meaning of this statute is to put the right of action on all contracts for the payment of money, whether

joint or several, on one and the same footing, and to give to the plaintiff the right to judgment against all the parties bound by such contract. The statute embraces all contracts for the payment of money, and the contracts mentioned,—of obligations, covenants, etc.,—are only by way of examples of what nature of contracts is embraced. But, while it is the intention of the statute to modify the common-law principle of merger of the cause of action in a judgment recovered against one of two or more joint contractors, it designs to avoid multiplicity of actions to be carried on simultaneously for the recovery of the same debt. In other words the creditor should not be allowed to sue jointly and separately at the same time, nor prosecute more than one suit, if all the parties bound by the contract can be proceeded against together in a single action."

But in Hutchinson v. Brown (1890) 8 Mackey, 136, the statute, though then in force, was apparently ignored, the court saying: "The law may be taken as settled that a suit and judgment obtained against one of two joint promisors is a complete merger of the cause of action, and puts an end to any right of action against the other."

2. Rule in Georgia.

In Georgia, the common-law rule is that a judgment on an original contract against one of several joint contractors merges the contract as to those joint debtors who were not sued and who could have been sued in the first instance. Howell v. Shands (1866) 35 Ga. 72; Fullington v. Killen (1880) 65 Ga. 575; Almand v. Hathcock (1913) 140 Ga. 26, 78 S. E. 345; Scarborough v. Yarborough (1913) 13 Ga. App. 792, 79 S. E. 1131.

But under a statute (Act of 1820, p. 485, Ga. Code, §§ 3350, 3351), where one or more of several joint obligors are nonresidents, and they are not served with process in an action on the original obligation, and a judgment is entered against those of the debtors who were served, such judgment is not a bar to a subsequent action against the nonresident debtors, instituted against them after they return to or are found in the state of Georgia. Ells v. Bone (1883) 71 Ga. 466.

It will be observed, however, that the statute above mentioned is in effect merely declaratory of one exception to the general common-law rule previously stated in this note. In deciding Ells v. Bone (Ga.) supra, the court seems to have lost sight of this exception. In that case it appeared that the plaintiff had brought an action against three joint debtors. Two of them were served, but the third was not served, as he was out of the state. The plaintiff obtained a judgment against the two resident defendants, but, they having become bankrupt, the judgment remained unpaid. Thereafter the third defendant returned to Georgia, and he was served with process in an action on the original debt, brought by the plaintiff against him. The defendant contended that the prior judgment merged his obligation. The court, in commenting on this contention, and citing several cases from other jurisdictions, decided under the common-law rule, stated that the same would have been sustained in those jurisdictions, but that such contention was untenable in Georgia, owing to §§ 3350 and 3351 of the Code.

3. Rule in Indiana.

In general.

The general rule in Indiana is, except in so far as modified by statute, that a judgment against one of several joint obligors merges the contract as to the others. Taylor v. Claypool (1841) 5 Blackf. 557; Henderson v. Reeves (1841) 6 Blackf. 101; Nicklaus v. Roach (1851) 3 Ind. 78; Crosby v. Jeroloman (1871) 37 Ind. 264; Holman v. Langtree (1872) 40 Ind. 349; Lingenfelser v. Simon (1874) 49 Ind. 82; Kennard v. Carter (1878) 64 Ind. 31; Robinson v. Snyder (1880) 74 Ind. 110; Wilson v. Buell (1889) 117 Ind. 315, 20 N. E. 231; Sharpe v. Baker (1912) 51 Ind. App. 547, 96 N. E. 627, 99 N. E. 44. See also Odell v. Carpenter (1880) 71 Ind. 463; Richardson v. Jones (1877) 58 Ind. 240.

And where a judgment by default is entered against less than all the parties to a contract, the judgment merges the entire obligation. Irwin v. Hel-

genberg (1863) 21 Ind. 106; Lawrence v. Beecher (1888) 116 Ind. 312, 19 N. E. 143.

In Crosby v. Jeroloman (1871) 37 Ind. 264, decided under the common-law rule, it was held that a judgment on a mortgage given by one of several partners, against the partner who gave the same in his individual name, but for the partnership benefit, was a bar to a subsequent action on the same mortgage against the other partners. The court, in rendering the decision, said: "The authorities upon this point are now quite numerous, but we deem it unnecessary to refer to them further than to quote the following passage from the opinion of the court in the case of Mason v. Eldred (1868) 6 Wall. (U. S.) 231, 18 L. ed. 783. The court says: 'The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when the action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.'"

In Richardson v. Jones (1877) 58 Ind. 240, it was held that a judgment against one of several joint obligors was a bar to a subsequent action against the same defendant, who was impleaded with some of the other joint debtors, although the latter were not sued in the first action.

In Nicklaus v. Roach (1851) 3 Ind. 78, the following facts appeared: The plaintiffs sold goods to a firm composed of two partners, who later dissolved the partnership. Thereafter one of the prior copartners gave his individual note in payment for and as security for the partnership debt. The plaintiffs brought suit on this note and recovered a judgment, which, however, remained unpaid. Subsequently the plaintiffs told the other ex-partner that they had not procured a note from the first partner, nor had they sued him on such note. The second partner then gave his individual promissory note to the plaintiffs for the partnership debt. The plaintiffs then instituted a suit on the latter note. To this action the defendant set up the judgment obtained by the plaintiffs against his former partner. It was held that the judgment was a bar to this action, on the ground that only one judgment can be obtained on a joint contract. See the decisions, supra, I. a, which hold that a judgment on an individual note given by one joint contractor does not merge the original obligation.

A statute of Indiana (Code Civ. Proc. §§ 41, 641) provides that, if an action is commenced against several joint obligors, and only one, or less than all, are served with process, the plaintiff may proceed against those served, and a judgment against the latter may be enforced against the property of all the defendants. This statute further provides that after the judgment is obtained against one or some of the joint debtors, and they fail to satisfy the same, wholly or partially, the plaintiff may proceed against those defendants who were not served, on a motion for them to show cause why the judgment previously obtained should not be enforced against them. In construing this statute, the court held, in Erwin v. Scotten (1872) 40 Ind. 389, that the common-law rule which allows only one judgment in an action against joint debtors, was not thereby changed.

In the following cases the foregoing statute was discussed, but the decisions were rendered according to the common-law rule. Rose v. Comstock (1861) 17 Ind. 1; Archer v. Heiman (1863) 21 Ind. 29; Root v. Dill (1871) 38 Ind. 169; Kittering v. Norville

(1872) 39 Ind. 183; Erwin v. Scotten (1872) 40 Ind. 389; Capital City Dairy Co. v. Plummer (1898) 20 Ind. App. 408, 49 N. E. 963.

Another statute of Indiana (2 Gavin & H. 593, § 63) provides that, in an action instituted in a justice's court against joint debtors, where one or more of the defendants are not served with process, the plaintiff may proceed as to those served and continue or dismiss as to the former, and thereafter bring a separate suit against them. If a plaintiff proceeds under this statute, the judgment against one or more of the several joint obligors is no bar to the subsequent action. But where the plaintiff fails to take the steps as outlined by the statute, the common-law rule will govern. Root v. Dill (1871) 38 Ind. 169, wherein it appeared that the plaintiff brought an action against one of three joint makers of a promissory note, and obtained a judgment for the entire amount of the note. This judgment remained unsatisfied. Thereafter the plaintiff instituted a second action against all the three makers. The court held that, in as much as the plaintiff had neither summoned nor impleaded two of the defendants in the first proceeding, the judgment then obtained was a bar to the second suit. The court said: "It has recently been held by this court that a judgment against one of several joint contractors merges the cause of action, and that neither the one against whom judgment has been rendered nor those that were jointly liable with him can afterward be sued on the same contract. Crosby v. Jeroloman (1871) 37 Ind. 264. This rule applies, at least, where the joint contractors are residents of the state at the time suit is brought. . . . The Justice's Act provides that, 'when a summons is returned not found as to part of the defendants, the plaintiff at his option may continue for alias process, or suggest the return on the record, dismiss the cause as to the defendants not found, and proceed against those served; and such plaintiff may at any time afterward proceed against those not found.' 2 Gavin & H. 593, § 63. Under this statute, if a plaintiff has a joint cause of action against several persons, he must issue his process against all of them, and if part are not found, he may take either one of two courses; first, he may continue the cause for alias process, in order to get service on those not previously found; or, second, he may suggest the return of not found on the record, dismiss his action against those not found, and proceed against those served. In the latter event, he may at any time afterward proceed against those not found. In the case under consideration the steps were not taken, as provided for in the statute above quoted, to continue the liability of the defendants Griffin and Wickard. No process was issued against them, nor was there any return of not found as to them, nor yet was the action dismissed as to them, as it could not well be, in as much as they were never parties thereto. . . . The case is simply one where one of three joint makers of a promissory note has been sued upon the note, upon process of capias ad respondendum, and judgment rendered against him on the note, without any steps being taken to preserve the cause of action against the others. There is nothing alleged in the replications that prevents the judgment thus rendered from operating as merger of the entire cause of action." Compare Beard v. Adams (1847) 8 Blackf. 469, an action by the assignee of a promissory note against the maker thereof. The latter pleaded that the plaintiff had previously brought an action against two indorsers on the note, and had obtained a judgment against one, the other not having been served with process. The court held that this plea was bad as, under the law merchant, a judgment against an indorser, unless satisfied, was no bar to an action against the maker. The court said: "We think the special plea is bad. The assignee's right to sue the maker of a promissory note like the present, which is governed by the law merchant, is not taken away by a judgment recovered against the indorser,

until that judgment is satisfied. Byles, Bills, 223."

Another statute of Indiana (2 Rev. Stat. 1852, § 369, p. 121) provides that "in suits against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." In construing this statute in Rose v. Comstock (1861) 17 Ind. 1, the court held that the statute had reference to joint and several debtors only, but not joint obligors. In that case it was held that a judgment by default against one of three copartners on an ostensibly joint note was a bar to any further proceedings against the other two copartners.

In Archer v. Heiman (1863) 21 Ind. 29, the action was against three joint makers of a promissory note. But one of the defendants was served with process. The plaintiff obtained a judgment against the defendant who was served, but continued the action as to the other two defendants, and later dismissed altogether the action as to them. Thereafter the plaintiff instituted a second action against all the defendants. The plaintiff contended that, under a statute of Indiana, the former judgment against one of the defendants was no bar to the subsequent action. But the court held that the Indiana statute did not entirely change the common-law rule in that state, and said: "The common-law rule is that a suit and judgment upon a joint note against one promisor is a bar to a subsequent suit against another, the note being merged in the judgment. Woodworth v. Spaffords (1840) 2 McLean, 173, **Fed.** Cas. No. 18,020; McMillan v. Robbins (1831) 5 **Ohio,** 33; Robertson v. Smith (1821) 18 Johns. (**N. Y.**) 481, 9 Am. Dec. 227. But this rule, it is argued, has been changed by the Code, and that the rule now in force entitles the plaintiffs to recover. We are referred to § 362 of the Practice Act, which says: 'When the summons has been served in due time on part only of the defendants, the plaintiff may dismiss, or continue for further proceedings, his action as to those not summoned, or not summoned in time, and proceed to trial as to the others or continue as to all of them, at his option.' 2 Rev. Stat. page 120. This provision, although it allows the plaintiff to dismiss as to defendants 'not summoned, or not summoned in time,' and proceed to trial as to those regularly in court, does not, as we construe it, contemplate another action against the dismissed defendants, upon the same joint contract. . . . Indeed, we know of no provision in our statutes which, in reference to the case made by the record before us, in any degree conflicts with the common-law rule to which we have referred."

Effect of reversal or vacation of judgment.

Where a judgment is entered against one of several joint obligors, and is later reversed, such a judgment will not be a bar to a subsequent action on the original debt against the other obligors. Maghee v. Collins (1866) 27 Ind. 83; Martin v. Baugh (1890) 1 Ind. App. 20, 27 N. E. 110; Odell v. Carpenter (1880) 71 Ind. 463; Clodfelter v. Hulett (1884) 92 Ind. 426; Lawrence v. Sample (1884) 97 Ind. 53. Thus, in Martin v. Baugh (1890) 1 Ind. App. 20, 27 N. E. 110, it appeared that the plaintiff had brought an action against two joint makers of a note. One of the defendants appeared, but the other defaulted, and a judgment was entered as to him. Before the first defendant filed his answer the second defendant moved to have the judgment against him vacated, which motion was sustained. The former then filed his answer and, among other things, pleaded that the judgment against his codefendant was a bar to any further proceeding as to him on the note. But the court held otherwise and, quoting from a previous decision of the Indiana supreme court, said: "As we understand the reasoning of the court in Maghee v. Collins, supra, this point has been expressly decided otherwise. Says the court in that case: 'After a judgment has been reversed, it can have no force for any purpose. It no longer binds either of the parties to it. It will not bar another suit for the same cause of action against the

party who was defendant to it, and surely no principle of justice requires that it should be deemed a bar in favor of a stranger, jointly liable with him originally. If there be a rule of law to that effect, it is, therefore, wholly technical and arbitrary, and without any support in sound reason or good morals. In a well-considered brief, the counsel for the appellee admit that they have not been able to find any authority in point, after a careful examination of the books. We think it will not be possible to find an adjudicated case anywhere sustaining the doctrine, and that no court having adequate opportunity for that full deliberation, which is not always attainable at nisi prius, will be desirous of originating the novelty. . . . The judgment against one, or even against both, does not extinguish the indebtedness, but merely changes its form into a contract of record to pay the very same debt. . . . A valid subsisting judgment against one merges his original contract in the judgment, and as the plaintiff, by taking the judgment, has put it out of his power to prove a subsisting joint contract, he cannot recover against the other. But in the case before us, the judgment, having been reversed, is as if it had never been. There is no judgment. There is now simply the cause pending against him; his original contract is not merged, but still subsists in full force as to him, and the reason for discharging his co-obligor does not exist. While the judgment remained, the right of action against the co-obligor was suspended merely, not extinguished.' We are in full accord with the views expressed in the opinion from which we have quoted. We have been referred to no rule of law, and certainly there can be no principle of justice, equity, or good conscience, which supports the doctrine contended for by the appellee. If a reversed or vacated judgment is a bar to a suit against one not a party to it, why is it not a bar also to any future proceeding against the judgment defendant himself? If, by the mere act of the court in rendering a judgment against one of two or more joint makers of a note given for a joint debt, the note and debt become forever merged in the judgment, and cease to have any further separate existence, why will not such a judgment, though reversed and set aside, be a perpetual bar to the collection of the note, or debt, from either or all of the joint debtors, or contractors? Whether there is or is not a merger always depends upon the question whether there is or is not a valid judgment. If the judgment is ineffective, or coram non judice, or is reversed, or set aside, there can be no merger of the cause of action; or if there has been one, it ceases. Freeman, Judgm. § 218, and authorities cited"

Effect of nonresidence of one debtor.

It has been held that where one joint contractor is a nonresident, or away from the state in which an action is brought against one or more of the other joint contractors, a judgment against the latter will not bar a subsequent action against the former. Nicholson v. Bowen (1874) 47 Ind. 601; Cox v. Maddux (1880) 72 Ind. 206; Merriman v. Barker (1889) 121 Ind. 74, 22 N. E. 992. In Cox v. Maddux (1880) 72 Ind. 206, the action was on a promissory note. The defendant pleaded that the plaintiff had previously recovered a judgment on the note against the defendant's comaker in the United States district court for the district of Kansas. The plaintiff replied that, during the proceedings of the former action, the defendant was a resident of Arkansas. The court held that the former judgment was not a bar to this action. In this case it was said: "That a judgment taken against one of the joint makers of a note or contract merges the cause of action, and bars a separate action against the other maker or makers, is well-settled law. . . . There are, however, exceptions to this rule. Where one of two joint debtors has died, a judgment against the survivor does not bar proceedings against the estate of the other. Devol v. Halstead (1861) 16 Ind. 287. Another exception is where the joint makers of the contract are not residents of the same state, or all within the process of any

court in which the suit could be brought. The plain reason for these exceptions is that the holder of the obligation should not be deemed to have waived his claim or remedy against any maker, by reason of a separate suit and judgment against another maker, when a joint suit was impossible."

4. Rule in Iowa.

The Iowa Code (§ 2550) provides that where two or more persons are bound by contract jointly, or jointly and severally, or severally only, including the parties to negotiable paper and sureties thereon, the action may, at the plaintiff's option, be brought against any or all of them; and an action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others. In construing this statute in Citizens' Sav. Bank v. Oleson (1877) 47 Iowa, 492, it was held that, where a plaintiff obtained a judgment by confession against one of two joint makers of a promissory note, such judgment, unsatisfied, was not a bar to a subsequent action against the other maker.

In North v. Mudge (1862) 13 Iowa, 496, 81 Am. Dec. 441, decided prior to the enactment of the statute, the action was on a promissory note executed by a partnership firm. Previous to the institution of this suit the plaintiffs had obtained a confession of judgment on the note by one of the partners. It was held that this judgment merged the claim on the note, and was, therefore, a bar to any further proceedings thereon. The court said: "The general doctrine is that, if a demand of an inferior degree is changed into one of a higher character, the former is merged in the latter, upon which the party must alone rely. Thus, the merger of a simple contract debt in a judgment, or debt of record, is made a familiar example in the books."

5. Rule in Kentucky.

By a statute in Kentucky (Code, § 399) it is provided as follows: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, if a several judgment be proper."

Another act (Code, § 39) contains the following provision: "An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."

In Burrus v. Anderson (1861) 3 Met. 500, an action on a note signed by three persons, service was had on two and the case continued as to the third. Judgment was rendered against the two defendants served. Later service was had on the third defendant, and he filed an answer relying on the previous judgment as a bar. Holding that a demurrer to the answer was properly sustained, the court, after quoting § 399, supra, said: "For what purpose does the law allow the action to proceed against a defendant not served with process, if a previous judgment against a codefendant, and regular proceedings to enforce it, constitute a bar to the proceeding against the other? The object of the provision of the Code is too plain to admit of doubt or discussion."

Prior to the enactment of the Code sections heretofore set out, the common-law rule obtained that a judgment against some but not all of the joint parties to a contract merged the original debt as to the other contractors. Slaughter v. Ripperdan (1824) 5 Litt. 337; Nichols v. Burton (1869) 5 Bush, 320.

In Scott v. Colmesnil (1832) 7 J. J. Marsh. 416, the action was against the defendant as the surviving partner of one William P. Lee. The suit was founded on a note signed by "Wm. P. Lee," and given for goods sold to the firm of "Wm. P. Lee," of which firm the defendant was a secret partner. This latter fact was not known to the plaintiff's assignor, nor to the plaintiff, until after the plaintiff had obtained a judgment against Lee. The judgment against Lee remained unpaid, and then the plaintiffs instituted the suit against the defendant. The latter pleaded the former judgment in bar. But the court held that, while

that judgment would have been a bar to this second suit had the plaintiffs known, prior to the institution of the first suit, that the defendant was a secret partner to Lee, the same could not be so pleaded in the absence of such a showing.

In Brozee v. Poyntz (1842) 8 B. Mon. 178, it appeared that after the dissolution of a partnership the remaining partner executed a note to the plaintiffs in the partnership name, in payment of a pre-existing partnership debt and also for the subsequent individual purchase of goods by the maker of the note. The plaintiffs brought an action against the maker of the note and his ex-partner, as partners. But service having been made only on the former, the plaintiffs obtained a judgment against him. This judgment remained unsatisfied. Thereafter the plaintiffs instituted a suit against the two ex-partners on the joint obligation. To this action the defendant who had not been served in the prior suit pleaded the former judgment as a bar. But the court held that that judgment, which was on the note given by one of the defendants individually, although the same purported to be in payment of the entire debt, did not merge the original obligation.

6. Rule in Louisiana.

The rule obtaining under the statutes of Louisiana was stated in Williams v. Brent (1828) 7 Mart. N. S. 205, as follows: "Whether a debt at common law is not considered, for certain purposes, as merging in a judgment, it is, of course, immaterial for us in this country to inquire. It is equally immaterial, whether the same consequence does not follow the same proceeding here by our own law. This is an action against one of several debtors bound in solido, or jointly and severally; and, in regard to persons so bound, it is a well-settled principle in our jurisprudence that judgment against one is no bar to recovery against another. That nothing but actual satisfaction from one of the creditors will prevent judgment and execution against the person legally bound with him. Rev. Code, lib. 8, title 41, l, 28; Pothier, Obligations 270, 271, 272; Civ. Code, 278, 103, 104." See, to the same effect, Hite v. Vaught (1847) 2 La. Ann. 970.

7. Rule in Maryland.

The Maryland statute (Code, art. 50, § 10) provides as follows: "A judgment rendered against one or more members of a partnership, or one or more persons jointly liable on any bill, bond, covenant, promissory note, bill of exchange, contract, or agreement whatsoever, less than the whole number of partners or persons so bound, shall not work an extinguishment or merger of the cause of action on which such judgment may have been rendered, as respects the liability of the partners or persons not bound by such judgment; and they shall remain liable to be sued as if their original responsibility had been joint and several; provided, that but one satisfaction of the debt or demand shall be made."

The effect of the statute was to abrogate the common-law rule by which the cause of action against one of two joint debtors was merged in a judgment against the other. Thomas v. Mohler (1866) 25 Md. 36; Loney v. Bailey (1875) 43 Md. 10.

In Westheimer v. Craig (1892) 76 Md. 399, 25 Atl. 419, the foregoing act was held to apply to implied contracts, the court saying: "But then it was argued that the contracts or agreements within the meaning of the statute are joint express contracts, and not such as arise by implication of law. The object of the statute was to prevent a judgment recovered against one or more joint debtors from operating as a merger or extinguishment of the original cause of action; and thereby to enable the plaintiff to recover judgment against the other defendants. And, after specifically enumerating bills, bonds, covenants, promissory notes, and bills of exchange, the statute says, or 'contract or agreement whatsoever.' Now, in this case, the plaintiff could have brought an action of tort against each of these defendants, but he waives the tort, which he had the right unquestionably to do, and sues in assumpsit to recover money belonging to him,

and which the defendants had fraudulently appropriated to their own use. It is an action founded on contract, arising, it is true, by implication of law, but none the less a contract strictly within the letter and spirit of the Code."

Moale v. Hollins (1839) 11 Gill & J. 11, 33 Am. Dec. 684, was decided under the common-law rule, and prior to its change by the Maryland statute.

8. Rule in Massachusetts.

In Massachusetts, a statute (Stat. 1852, chap. 312, § 3) authorizes a separate judgment against one of two joint and several promisors. See Hawkes v. Phillips (1856) 7 Gray, 284.

In Ward v. Johnson (1816) 13 Mass. 148, decided before the statute was enacted, the common-law rule was laid down.

9. Rule in Michigan.

A Michigan statute (Comp. Laws 1857, chap. 133, p. 1219) reads as follows: "1. In actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process issued against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process.

"2. Such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand after the liability of such defendant shall have been established by other evidence."

In construing this statute, the court, in Mason v. Eldred (1868) 6 Wall. (U. S.) 231, 18 L. ed. 783, held that a judgment against one of three partners on a joint contract was not a bar to a subsequent proceeding against the other partners.

In Bonesteel v. Todd (1861) 9 Mich. 371, 80 Am. Dec. 90, it appeared that the plaintiff had brought an action in the state of New York against two joint debtors. It further appeared that only one of the defendants was served with process, and a judgment was entered as to him, according to the New York Joint Debtors' Act. Thereafter the plaintiff instituted a suit in a Michigan court against the defendant who was not served in the previous action. The defendant contended that while, under the Michigan Joint Debtors' Act, the plaintiff could have brought separate suits in Michigan, the first judgment, having been obtained in a foreign jurisdiction, was a bar to the second suit. However, it was held that, while this contention might have been tenable in England, the rule was different in the United States, owing to the so-called comity clause of the Federal Constitution; and, in as much as the New York judgment was based on the Joint Debtors' Act of that state, the same effect would be given to such judgment in Michigan as it would have in New York. The court said: "The common-law rule discharged the debtor who was not bound by the judgment from all further liability in any shape. But under all the New York Joint Debtor Acts, it has been held that the judgment was no bar to a further action. Their revised statutes, from which ours were, in this respect, borrowed, referred very plainly to such actions, and provided how far the judgment should be allowed to prevail as evidence. The only dispute has been whether such new action should be in form on the judgment, or on the original demand. But the original demand was always to be made the real foundation of a recovery against the defendant not served in the former action. . . . In Oakley v. Aspinwall (1851) 4 N. Y. 514, six out of the eight judges of the court of appeals held that no joint liability could be regarded as arising out of such a judgment. Jewett, J., who concurred in this opinion, held that, the legislature having full power to determine in what form a remedy should be sought, the statute might permit an action upon the original demand to be in form upon the judgment, as more convenient, although anomalous. Bronson and Mul-

lett, JJ., thought that the judgment should not be regarded as a ground of joint action. But no one has ever doubted the continuing liabilities of all parties. We cannot, therefore, regard the liability as extinguished. And in as much as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment or on the primary debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued. We do not regard the New York judgment as a bar to the action before us."

In Detroit v. Houghton (1880) 42 Mich. 459, 4 N. W. 171, 287, it appeared that the plaintiff had brought an action on a bond against four defendants. One of the defendants entered a general denial, which was sustained, and a judgment rendered in her favor. The trial court further held that, as the plaintiff had to prove a joint liability, its failure to do so as to one of the defendants discharged all. Thereafter the plaintiff moved for a rehearing, contending that if the judgment in favor of one of the defendants remained on record, the same would be a bar to another action against the other defendant. It was held that there was no merit to the contention.

Another statute, relating to actions on bills and notes, provides as follows: "It shall not be necessary for the plaintiff to include in the same record a judgment against all the parties to such bill or note, but judgment may be entered against any of the parties thereto, whenever the plaintiff would be entitled to the same if the suit had been commenced against such parties only; and if the trial or hearing of such cause be put off by any of the parties to such bill or note, or if a default shall have been obtained against part of the defendants, the plaintiff may proceed to the hearing or trial against the other parties in the same manner as if the suit had been commenced against the other parties only, and the action shall thereby be severed." See Storey v. Bird (1860) 8 Mich. 316; Maynard v. Penniman (1862) 10 Mich. 153.

In Beals v. Smith (1892) 91 Mich. 146, 51 N. W. 885, it was held that a cognovit filed by one of the makers of a note was equivalent to a default, for the purposes of the statute.

In Candee v. Clark (1851) 2 Mich. 255, decided before the enactment of the statute, the common-law rule was laid down.

10. Rule in Mississippi.

In Mississippi, under Code of 1880, § 1134, the liability of partners for partnership debts is joint and several. It was, therefore, held in Hyman v. Stadler (1885) 63 Miss. 362, that a judgment against one partner on a partnership debt was no bar to a subsequent action against the other partner on the original obligation. To the same effect, see Scharff v. Noble (1889) 67 Miss. 143, 6 So. 843.

11. Rule in Missouri.

The Missouri statute (Wagner's Stat. p. 269, §§ 1, 294) provides that all joint obligations shall be construed to be joint and several; that, in the event of the death of one or more of the joint obligors, the debt shall survive against the administrator of the deceased obligor, as well as against the survivors; and that, in all cases of joint assumptions of copartners, suits may be prosecuted against any one or more of those who are liable.

Construing that statute, the court has held that an unsatisfied judgment against one of several joint obligors is no bar to a subsequent action against the others. Armstrong v. Prewitt (1838) 5 Mo. 476, 32 Am. Dec. 338; Phillips v. Fitzpatrick (1863) 34 Mo. 276; Knox County Sav. Bank v. Cottey (1879) 70 Mo. 150; Phœnix Mut. L. Ins. Co. v. Landis (1892) 50 Mo. App. 116; Cowan v. Leming (1905) 111 Mo. App. 253, 85 S. W. 953; Taylor v. Sartorious (1908) 130 Mo. App. 23, 108 S. W. 1089; Bagnell Timber Co. v.

Missouri, K. & T. R. Co. (1912) 242 Mo. 11, 145 S. W. 469.

In Knox County Sav. Bank v. Cottey (1879) 70 Mo. 150, it was held that a judgment against the administrator of an original joint maker of a note as a partner was no bar to another action against the administrator of the other members of the partnership, not previously sued.

In Armstrong v. Prewitt (1838) 5 Mo. 476, 32 Am. Dec. 338, it appeared that the plaintiff, as assignee of a bond executed by the defendant and another, brought an action thereon. It further appeared that the plaintiff's assignor had previously obtained a judgment against the administrator of the estate of the deceased joint maker of the bond. This judgment remained unpaid. It was held that the second action was not barred.

12. Rule in New Mexico.

A New Mexico statute (Comp. Laws 1897, § 2942) provides as follows: "Where two or more persons are bound by contract or by judgment, decree or statute, whether jointly only, or jointly or severally, or severally only, and including the parties to negotiable paper, common orders and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the option of the plaintiff, be brought against any or all of them; when any of these so bound are dead, the action may be brought against any or all of the survivors with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment against any one or more of several parties jointly bound, shall not be a bar to proceedings against the others."

Of that statute, the court said, in Territory v. Mills (1911) 16 N. M. 555, 120 Pac. 325: "By the last sentence it will be noted that a judgment against one of several parties jointly bound shall be no bar to proceedings against the others, and it has been the uniform practice in this territory, since this statute was adopted in 1880, to take judgment against one or more of such parties, and to have further proceedings in the same action to obtain judgment against the others. No injustice can result from this practice, as the plaintiff cannot obtain satisfaction upon more than one of such judgments. Appellant attempts to get away from the effect of this statute by insisting that in the statute the word 'contracts' does not mean such a thing as a bond. A bond is a contract by speciality, and is so recognized by every writer on contracts."

13. Rule in New York.

A New York statute (Code Civ. Proc. § 1278) provides that where one or more joint debtors, but not all, confesses or confess a judgment on the joint debt, the same, unless satisfied, is no bar to an action on the contract against the other obligors. Heckemann v. Young (1889) 52 Hun, 610, reversed on rehearing in (1890) 55 Hun, 406, 8 N. Y. Supp. 111, which was reversed in (1892) 134 N. Y. 170, 30 Am. St. Rep. 655, 31 N. E. 513; Harbeck v. Pupin (1890) 123 N. Y. 115, 25 N. E. 311, affirming (1890) 55 Hun, 335, 8 N. Y. Supp. 695; Kantrowitz v. Kulla (1887) 20 Abb. N. C. 321, 13 N. Y. Civ. Proc. Rep. 74, reversing (1887) 9 N. Y. S. R. 540.

New York Code Proc. § 136 (reenacted in substance as Code Civ. Proc. § 1932), provides: "When the action is against two or more defendants and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: 'If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest against the persons of the defendants served.'" Construing this statute, in Lane v. Salter (1872) 51 N. Y. 1, the court held that an unsatisfied judgment against one of two joint makers of a note was no bar to a subsequent action on the note against both makers.

Except in cases coming within the foregoing statutes, the common-law

rule obtains that a judgment against one or more, but less than all, of the joint obligors on a contract, is a bar to a subsequent action on the contract against those not previously sued. National Broadway Bank v. Hitch (1892) 66 Hun, 401, 29 Abb. N. C. 400, 23 N. Y. Civ. Proc. Rep. 10, 21 N. Y. Supp. 395; Robertson v. Smith (1821) 18 Johns. 459, 9 Am. Dec. 227; Benson v. Paine (1859) 2 Hilt. 552, 17 How. Pr. 407, 9 App. Pr. 28; Olmstead v. Webster (1853) 8 N. Y. 413; Candee v. Smith (1883) 93 N. Y. 349; Utica City Nat. Bank v. Penwarden (1917) 180 App. Div. 448, 167 N. Y. Supp. 680. See also dictum in Weston v. Citizens' Nat. Bank (1903) 88 App. Div. 335, 84 N. Y. Supp. 743. See also dictum, in Coonley v. Wood (1885) 36 Hun, 559; Rider Life Raft Co. v. Roach (1884) 97 N. Y. 382. Compare Suydam v. Barber (1858) 18 N. Y. 468, 75 Am. Dec. 254.

In Heckemann v. Young (1892) 134 N. Y. 170, 30 Am. St. Rep. 655, 31 N. E. 513, the action was against two partners to recover a certain sum of money for goods sold and delivered to the defendants by the plaintiff. It appeared that both of the defendants were served with summons and complaint, and both answered thereto by separate attorneys. Later, an amended complaint was served on the respective attorneys. To this amended complaint one of the defendants served an amended answer, which, however, he subsequently withdrew. The other defendant failed to make any answer thereto, and in consequence thereof a judgment by default was entered against both defendants. Thereafter that defendant who had made no answer to the amended complaint moved to vacate the judgment as to himself, which motion was granted, over the plaintiff's objection. This defendant then interposed an answer and, among other things, alleged that the plaintiff had obtained a judgment against his codefendant, which judgment was in full force and effect. The defendant contended that said judgment had merged the plaintiff's original claim. The trial court sustained this contention, and dismissed the action. On appeal, this ruling was reversed. This decision, it seems, was based on the fact that the plaintiff had objected to the vacating of the former judgment as to the defendant, and the granting of a new (separate) trial to the latter. The court cited and discussed § 1278 of the Code of Civil Procedure, but expressly stated that that statute was not applicable, and said: "It is the rule of the common law, recognized and enforced by the courts of this state, except as modified by § 1278 of the Code of Civil Procedure, that a judgment rendered against one of several joint debtors in an action against him alone is a bar to an action against the others. Candee v. Smith (1883) 93 N. Y. 349; Suydam v. Barber, supra. Section 1278 of the Code of Civil Procedure provides that, in case of a confession of judgment by one or more joint debtors, judgment may be entered and enforced against them, 'and it is not a bar to an action against all the joint debtors upon the same demand.' That section is not, in terms, applicable to the situation before us, but it is instructive as indicating a legislative intent to limit in some measure the common-law rule. This court had before it in Harbeck v. Pupin (1890) 123 N. Y. 115, 25 N. E. 311, a case which was held to be governed by that section. It was objected that the action was not within its provisions, because not brought against 'all the joint debtors,' but against the personal representatives of one of the joint debtors; also, that it was not 'upon the same demand, but upon a demand reduced by payments made in pursuance of a compromise with two of the joint debtors, after confession of judgment.' It was said that 'to adopt a construction so narrow and literal as this would be to practically nullify a remedial statute, intended by the legislature to abrogate a harsh and technical rule of the common law that frequently operated to defeat a just claim.' Except as modified by the statutory provisions to which we have referred, the common-law rule, obtaining at the time of its enactment, continues in force. But such enactment should be regarded as a caution

against any extension of the rule beyond the lines already firmly established by authority."

In Suydam v. Barber, supra, it appeared that the plaintiff had brought an action, in Missouri, against one of three joint obligors, and obtained a judgment against him. Thereafter the plaintiff instituted a suit in New York against all the three debtors, on the original obligation. It further appeared that a statute of Missouri provided that joint contracts shall be considered joint and several, and that a judgment against less than all the obligors shall not bar a future action against the others. The court held that while under the New York law the first judgment, if obtained in New York, would have been a bar to the second suit, the same, having been entered under the Missouri Statute previously mentioned, could not have the same effect, and that therefore the plaintiff could proceed against the other two co-obligors.

In Russell & E. Mfg. Co. v. Carpenter (1875) 5 Hun, 162, it appeared that the defendant had made a promissory note payable to Taylor & Graff, and delivered the same to them. They indorsed and transferred the note to the plaintiff, with whom they had an account. When the note became due Taylor & Graff failed to pay the same. The plaintiff then brought suit against them on the note, and also on their previous business account, and recovered a judgment for the full amount. This judgment remained unpaid, and the plaintiff instituted an action on the note against the maker. To this suit the defendant pleaded the former judgment in bar. The court, however, held this contention untenable.

In Coonley v. Woods, supra, it appeared that the defendant and another had given, for value received, a promissory note in the sum of $80 to the plaintiff. The note not being paid, the plaintiff brought an action against the makers, but obtained service of summons on one only, against whom he recovered a judgment. Thereafter the plaintiff received from the judgment debtor a mare, for which he gave the following receipt: "Received of Smith Wood one bay mare, in satisfaction of judgment against him only." The plaintiff then sold the mare for $55, and later brought the action against the defendant to recover the difference between what he received for the mare and the amount of the note; but the court held that the acceptance of the mare was a complete satisfaction of the prior judgment.

And prior to the enactment of § 1278 of the Code of Civil Procedure, the rule in New York was that the confession of a judgment on a joint contract by one of the obligors, with the consent of the obligee, merged the contract as to all the parties. Kramer v. Schatzkin (1899) 27 Misc. 206, 29 N. Y. Civ. Proc. Rep. 86, 57 N. Y. Supp. 803; Robinson v. Marks (1879) 19 Hun, 325; Candee v. Smith (1883) 93 N. Y. 349.

The following cases were decided under the common-law rule, and hold that where a judgment is obtained against one or more of several partners, on a partnership debt, the judgment is a bar to a subsequent action against the other partners. Peters v. Sanford (1845) 1 Denio, 224; Robertson v. Smith (1821) 18 Johns. 459, 9 Am. Dec. 227; McMaster v. Vernon (1854) 3 Duer, 249; Gray v. Palmer (1864) 2 Robt. 500, affirmed in (1870) 41 N. Y. 620.

In Peters v. Sanford (1845) 1 Denio, 224, the action was on a promissory note signed by one of two partners. The plaintiff obtained a judgment against the maker; but, this judgment being unsatisfied, he later brought another action against the other partner. It was held that the judgment barred the plaintiff's right to sue the other partner. The court said: "It is well settled that if a judgment be obtained against one of several joint contractors, in a separate action against him on such contract, the plaintiff cannot afterwards proceed against the parties omitted, and consequently loses their security. It is not necessary that satisfaction should follow the judgment, to work an extinguishment or merger of the liability of the joint contractors; the judgment performs that office."

In Gray v. Palmer (1864) 2 Robt. 500, the action was to recover damages for the alleged conversion by the defendant of the amount called for by a draft belonging to the plaintiff. It appeared that the plaintiff had intrusted the defendant with the draft for collection. The latter gave the document to one Cook, his partner, to collect. Cook received the money and placed the same to the credit of the partnership. Thereafter the plaintiff brought an action against Cook to recover the sum collected on the draft, and obtained judgment against him. This judgment remained unsatisfied, and the plaintiff instituted the present action against the defendant. It was held that the judgment against Cook was a bar to the suit.

In Benson v. Paine (1859) 17 How. Pr. 407, it appeared that the plaintiff loaned to Paine and Barrett the sum of $5,000. Thereafter the plaintiff took from Barrett his five promissory notes for $4,050, as security for the loan. When the notes became due Barrett failed to meet them, and the plaintiff brought an action on them against Barrett and recovered a judgment. Later the plaintiff instituted a suit against Paine and Barrett on their joint obligation. The judgment against Barrett was held to be a bar to the second action. In this case it was said: "It is well settled that the recovery of a judgment against one of several joint debtors, though nothing is obtained upon it, is a bar to any future action thereafter, either against all the debtors or against any of them. . . . It cannot be maintained against any number less than the whole, for, as the obligation is joint, an answer setting up the nonjoinder of any of the parties to the contract will abate the action. . . . And it cannot be maintained against all, for, a judgment having been previously recovered against one, he cannot, as long as it stands, be again charged in judgment for the same debt. . . . If the action is brought against any number less than the whole, and no objection is taken by the plea in abatement, the plaintiff will be deemed to have treated it, and the court will give judgment upon it as the obligation only of the party or parties sued. . . . But if the contract or obligation be several, as well as joint, as in a bond where the obligors bind themselves jointly and severally, the plaintiff has his election to sue all the parties jointly or each of them separately. He may, in such a case, bring distinct actions against each of them, and a judgment without satisfaction against one will be no bar to an action against the other; but though he may maintain distinct actions against each, he cannot unite two in one action, or any number short of the whole. He must either sue them all together, or each of them separately."

In Penny v. Martin (1820) 4 Johns. Ch. 566, it appeared that the plaintiff had obtained a judgment against three partners on a partnership debt. After he issued execution, which was returned unsatisfied, the plaintiff discovered that three other persons were dormant partners in the judgment debtor's firm. It was held that a court of equity could not enable the plaintiff to recover in a new action on the contract against the dormant partners. The court, speaking through Chancellor Kent, said: "I do not know of any principle that will authorize this court to take jurisdiction of a case where the remedy was, in the first instance, full and adequate at law, because the party may have lost that remedy by ignorance, founded on negligence, not on accident, or mistake, or on any misrepresentation or fraud. Generally speaking, a jurisdiction does not arise here from the mere circumstance that a party has omitted to make a proper case at law. There is no such head of equity jurisdiction. The general rule is that, if the party becomes remediless at law by negligence, he shall not be relieved in equity. He must show that he has been deprived of his legal remedy by accident, casualty, misfortune, etc."

14. Rule in North Carolina.

A North Carolina statute (Code, § 187) provides that contracts joint in form are several in law. In construing this statute in Rufty v. Claywell (1885) 93 N. C. 306, the court held

that a judgment against two members of a partnership on a firm debt was not a bar to a subsequent action on the contract against a third member of the firm not previously sued.

15. Rule in Oklahoma.

The statutes of Oklahoma (Stat. 1893, §§ 3957, 3958) contain the following provisions: "Section 3957: 'Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: First. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct, and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served. Second. If the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.'

"Section 3958: Nothing in this Code shall be so construed as to make a judgment against one or more defendants jointly or severally liable, a bar to another action against those not served."

The supreme court of Oklahoma, held, in McMaster v. City Nat. Bank (1909) 23 Okla. 550, 138 Am. St. Rep. 831, 101 Pac. 1103, that this statute abrogated the common-law rule, and that, therefore, a judgment against one of several joint obligors was no bar to a subsequent action against the other obligors. But in Outcalt v. Collier (1899) 8 Okla. 473, 58 Pac. 642, it was held that, while a judgment against one of several joint debtors is a bar to a subsequent action against the others, the rule does not apply where one of several joint obligors, without the consent of the others, confesses judgment as to all on a joint debt; and, when, in such a case, the judgment as to the nonconsenting debtors is set aside, it must be set aside as to the consenting debtor also.

16. Rule in Pennsylvania.

A Pennsylvania statute (Act of April 6, 1830) provides that, where a plaintiff has a claim against joint and several contractors, he may bring separate suits against each, or sue them jointly; and, if he brings a separate suit against one and obtains a judgment, such judgment, unless fully satisfied, is no bar to a subsequent action against the others on the contract.

But if a plaintiff brings a joint action against all, and obtains a judgment against some only, the judgment will be a bar to any further action against the others. Miller v. Reed (1857) 3 Grant, Cas. 51, affirmed on the point discussed in (1856) 27 Pa. 244, 67 Am. Dec. 459; M'Divitt v. M'Divitt (1835) 4 Watts, 384. The statute applies to suits in justice's court, as well as to those in courts of record. Vanemen v. Herdman (1834) 3 Watts, 202.

The following cases were decided prior to the enactment of the statute, and declared the common-law rule. Downey v. Farmers & M. Bank (1825) 13 Serg. & R. 288; Hayes v. Gudykunst (1849) 11 Pa. 221; Taylor v. Henderson (1828) 17 Serg. & R. 453.

In Welsh v. Hirst (1850) 1 Phila. 50, the action was on a contract against a partnership. It appeared that one of the partners, with the plaintiff's consent, had confessed a judgment for a certain sum, which judgment was entered against the partner making the confession. It was held that the Act of April 6, 1830, had no reference to such a judgment, and that, therefore, the taking by the plaintiff of said judgment precluded him from suing the other partners on the contract.

The following cases were decided under the common law, and hold that the confession of a judgment by one of several joint obligors, with the consent of the plaintiff, merges the original contract, and is, therefore, a bar to a subsequent suit against the other debtors. Williams v. McFall (1816) 2 Serg. & R. 280; Beltzhoover v. Com. (1832) 1 Watts, 126.

In Wallace v. Fairman (1835) 4 Watts, 378, it appeared that the plaintiffs had obtained from one Fairman,

a member of the partnership firm of Fairman v. McIllhenny, a note with a warrant to confess judgment thereon. The plaintiffs gave to Fairman the following receipt. "We have received T. G. Fairman's note this day for $362.81, which, when paid, is in full of the above." This note was given for a partnership debt, and the plaintiffs had entered judgment thereon. It was held that the judgment was no bar to a further action against the partnership, since the note was executed in the individual name of one partner, and also because the agreement was that the note should be paid in full before it should be a discharge of the debt.

In Victor v. Abrams (1893) 13 Pa. Co. Ct. 298, it appeared that the plaintiff had previously brought an action in a New York court against two joint debtors, but obtained service on one only. However, judgment was rendered against both. It was held that plaintiff was not barred from bringing an action on the contract, in a Pennsylvania court, against the defendant who was not served in the former suit.

In McFarlane v. Kipp (1903) 206 Pa. 317, 55 Atl. 986, it was held that a judgment in favor of the plaintiff in a former action, and against one of the defendants, was a bar to a second action on the same claim against the defendants and two of his partners who were not previously sued. The court held that the Act of 1830 did not apply, and decided the case under the common law.

In Smith v. Black (1822) 9 Serg. & R. 142, 11 Am. Dec. 686, it appeared that the plaintiff had sold goods to one Nathan Smith. The latter failed to pay for the goods, and the former brought suit and recovered a judgment, which, however, remained unpaid. Thereafter the plaintiff discovered that one Newbery Smith was a dormant partner of Nathan Smith. The plaintiff then instituted an action against Newbery Smith to recover the value of the goods he had sold to the partnership. In denying the right to maintain the second action, the court said: "No principle is better settled than that a judgment, once rendered, absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless, indeed, where the cause of action is joint and several, which certainly actions against partners are not; transit in rem judicatam. There might be a recovery at the end of sixty years; the right of action would never be closed by any delay, or any number of judgments. The rem judicatam would never close, but be a wound never healed, opening on every new discovery of a party; it would indeed be the everlasting suit. As, suppose there were ten partners, nine of them dormant, from A to L; A, the ostensible partner, is first sued, judgment obtained, but no satisfaction; at the end of six years, B is discovered, sued, and judgment against him, with A, and so on, every sixth year, until there are ten actions and ten judgments on the one original action. For, if the argument is worth anything, it goes to the full extent that as soon as a new partner is discovered, a new cause of action arises, and so on ad infinitum. It is by putting an extreme case, the solidity of any position, the soundness of any argument, is tested; for if it will not answer in every case, no dependence can be placed on it. . . . Besides, on whom are the costs of the different actions to be levied? Are they to be recovered from the parties to each action, or to be accumulated and fall on the heads of the ten defendants in the tenth action? I am of opinion that the law will not suffer this splitting up either of actions of severing of persons, and that, where the cause of action is a joint one, a judgment once rendered extinguishes the original cause of action, and is a bar, not only to a subsequent action brought against the same persons, but against all others; that the judgment puts an end to all litigation on the subject-matter of the action, and that a discovery of a new party, or the happening of new damages, does not give a new cause of action."

In Downey v. Farmers & M. Bank (1825) 13 Serg. & R. 288, it was held that where the plaintiff had brought

an action against two joint and several obligors on a bond, and sued them as joint makers thereof, but having served but one of the defendants with process, obtained judgment against him, another suit could not thereafter be maintained against the other obligor.

17. Rule in Tennessee.

A Tennessee statute (Code, § 4484) provides as follows: "Parties jointly or severally or jointly and severally bound on the same instrument or by judgment, decree or statute including the makers and indorsers of negotiable paper and sureties may all or any part of them be sued in the same action."

In Lowry v. Hardwick (1843) 4 Humph. 188, it was said with respect to this statute: "The judgment of Rhea, Ross, & Co., against B. H. Lowry and M. Wasson was not a merger of their claim against Lowry, Wasson, & Co., to prevent them afterwards from suing the other partner, William Lowry, had they failed to make their debt by their suit against the other two partners. The act of assembly by which a party is permitted to sue any one or more of the joint obligors, or partners, does not make such suit a bar to a suit which may be subsequently brought against the remaining partner, or joint obligor."

In Sully v. Campbell (1897) 99 Tenn. 434, 43 L.R.A. 161, 42 S. W. 15, it appeared that the plaintiff had brought an action on a promissory note against one of two joint makers. He recovered a judgment for part of the debt evidenced by the note. Thereafter he instituted another suit against the defendant, as joint maker, to recover the balance. It was held that the former judgment did not merge the entire debt.

18. Rule in Texas.

A statute of Texas provides as follows: "When there are several defendants in a suit, and some of them are served with process, in due time, and others not so served, the plaintiff may either discontinue, as to those not so served, and proceed against those that are; or he may continue the suit until the next term of the court and take new process against those not served; and no defendant against whom any suit may be discontinued, according to the provision of this section, shall be thereby exonerated from any liability, under which he was, but may at any time be proceeded against as if no such suit had been brought, and no such discontinuance entered as to such defendant; provided, that this section shall not be so construed as to allow a plaintiff to discontinue, as to the principal, and take judgment against the indorser, or surety (who is) jointly sued." This act prevents the liability of the joint contractor not proceeded against from merging in the judgment. Wooters v. Smith (1881) 56 Tex. 198; Bute v. Brainerd (1899) 93 Tex. 137, 53 S. W. 1017; Middleton v. Nibling (1912) — Tex. Civ. App. —, 142 S. W. 968.

19. Rule in Virginia.

In Virginia a statute (Code, § 3212) provides as follows: "A person entitled to obtain judgment for money on motion, may, as to any, or the personal representatives of any person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice; provided, that judgment against such personal representatives shall, in all cases, be several. Such motions may be made from time to time until there is judgment against every person liable, or his personal representative."

In Cahoon v. McCulloch (1895) 92 Va. 177, 23 S. E. 225, it was held that a confession of judgment by the principal on a bond did not preclude a subsequent action against the sureties. Beazley v. Sim (1886) 81 Va. 644, was decided prior to the enactment of the statute, and declared the common-law rule.

20. Rule in West Virginia.

A statute of West Virginia reads as follows: "Where, in an action or suit against two or more defendants, the

process is served upon part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against them all." Code, chap. 125, § 52.

The supreme court of West Virginia has construed this statute to mean that a plaintiff may, where he originally brings suit against all the joint obligors on a joint contract but obtains service on some only, proceed against those not served, after he obtains judgment against the former. But the statute does not apply where the plaintiff brings suit against some, and then tries to bring a subsequent action against those not previously sued. Snyder v. Snyder (1876) 9 W. Va. 415. Armentrout v. Smith (1904) 56 W. Va. 356, 49 S. E. 377, former appeal, (1902) 52 W. Va. 96, 43 S. E. 98.

Thus, in Armentrout v. Smith, supra, it appeared that the plaintiff received two promissory notes, as the payee, from a firm composed of three partners. When the notes became due the plaintiff brought suit on them against two of the partners, who failed to appear, and the former entered judgment against them by default. It was held that this judgment was a bar to the institution of another action against the third partner. Referring to the act heretofore quoted, the court said: "This statute applies only to joint defendants against whom process has been issued, but not served as to one or more of them. It permits the plaintiff to obtain judgment in the pending action against those served; and to have execution and judgment lien as to them, although the others also sued and jointly liable may not be before the court. . . . In the former opinion in this case, 52 W. Va. 98, the court says: 'The statute, being in derogation of the common law, must be construed strictly, and its meaning cannot be so extended as to authorize separate actions on a joint contract against each of the obligors. To hold this would be to entirely destroy the distinction between joint and several contracts, and to make all contracts several. . . . ' Section 52, chapter 125, Code, so far changes the common law as to permit a plaintiff to take several judgments against several joint obligors, as they are served with process in the same suit. It does not authorize more than one suit against all or any of the obligors, whether served with process in the first suit or not. As to the bringing of more than one suit on the same joint cause of action, the common-law rule remains unchanged.'"

II. Judgment on joint and several contract.

Where a judgment is obtained against one of several joint and several obligors, the rule is that, unless there is an entire satisfaction of the judgment, it is no bar to an action against the other parties to the contract. Melander v. Western Nat. Bank (1913) 21 **Cal.** App. 462, 132 Pac. 265; Booth v. Huff (1902) 116 **Ga.** 8, 94 Am. St. Rep. 98, 42 S. E. 381; Johnson v. Georgia Fertilizer & Oil Co. (1918) 21 **Ga.** App. 530, 94 S. E. 850; Orr v. Thompson (1847) 9 **Ill.** 451; People v. Harrison (1876) 82 **Ill.** 84; McLean v. Hansen (1890) 37 **Ill.** App. 48; Joyce v. Spafford (1902) 101 **Ill.** App. 422; Morrison v. Fishel (1878) 64 **Ind.** 177; Greathouse v. Kline (1884) 93 **Ind.** 598; Lawrence v. Sample (1884) 97 **Ind.** 53; Corneille v. Pfeiffer (1900) 26 **Ind.** App. 62, 59 N. E. 188; Harlan v. Berry (1853) 4 G. Greene (**Iowa**) 212; Smith v. Coopers (1859) 9 **Iowa,** 376; Sherman v. Christy (1864) 17 **Iowa,** 322; Gilman v. Foote (1867) 22 **Iowa,** 560; Jenks v. School Dist. (1877) 18 **Kan.** 356; see also Hays v. Closon, (1878) 20 **Kan.** 120; Sayre v. Coleman (1839) 9 Dana (**Ky.**) 173; State Bank v. Sloo (1840) 16 **La.** 544; Campbell v. Phelps (1822) 1 Pick. (**Mass.**) 62, 11 Am. Dec. 139; Gilmore v. Carr (1806) 2 **Mass.** 171; Simonds v. Center (1809) 6 **Mass.** 18; Porter v. Ingraham (1813) 10 **Mass.** 88; Byers v. Franklin Coal Co. (1870) 106 **Mass.** 131, 12 Mor. Min. Rep. 27; Hitchcock v. Frackelton (1898) 116 **Mich.** 487, 74 N. W. 720; Armstrong v. Prewitt (1838) 5 **Mo.** 476, 32 Am. Dec. 338; Townsend v. Riddle (1821) 2 **N. H.** 448; Strauss v.

Trotter (1893) 6 Misc. 77, 26 N. Y. Supp. 20; Carter, R. & Co. v. Howard (1896) 17 Misc. 381, 39 N. Y. Supp. 1060; Clinton Bank v. Hart (1855) 5 Ohio St. 33; Avery v. Vansickle (1878) 35 Ohio St. 270; Noble v. Beeman-Spaulding-Woodard Co. (1913) 65 Or. 93, 46 L.R.A.(N.S.) 162, 131 Pac. 1006; Day v. Hill (1844) 2 Speers, L. (S. C.) 628, 42 Am. Dec. 390; Still v. Lombardi (1894) 8 Tex. Civ. App. 315, 27 S. W. 845; Sawyer v. White (1845) 19 Vt. 40; (Compare Hyde v. Long (1832) 4 Vt. 531); Davis v. Schmidt (1905) 126 Wis. 461, 110 Am. St. Rep. 938, 106 N. W. 119. See also United States v. Cushman (1836) 2 Sumn. 426, Fed. Cas. No. 14,908. And see the reported case (PETRI v. MANNY, ante, 1595.) Compare Downey v. Farmers' & M. Bank (1825) 13 Serg. & R. (Pa.) 288.

In Avery v. Vansickle (1878) 35 Ohio St. 270, the action was against a husband and wife on a promissory note, given by the latter as maker and the former as surety. It appeared that the wife had purchased a parcel of land from the plaintiff for which the note was given, and to secure the payment of the same the wife gave a mortgage on the land purchased. Thereafter the plaintiff brought an action to foreclose the mortgage, in which action a personal judgment was also rendered against the husband for the amount of the note. The proceeds realized from the sale of the land were entirely consumed in paying prior liens, and, the husband being insolvent, the personal judgment against him remained wholly unpaid. In a second action the plaintiff sought to obtain a personal judgment against the separate estate of the wife. To this suit the wife interposed the prior judgment against her husband. However, the court, construing the obligation incurred by the defendants to be joint and several, held that the judgment against one obligor was no bar to an action against the other.

In People v. Harrison (1876) 82 Ill. 84, it appeared that one Miller had been appointed guardian of certain minors, and he gave a joint and several bond with Joseph Maxwell and Solomon Miller as his sureties. Maxwell died after the guardian made default in his duties. An action on the bond was brought against the guardian, Solomon Miller, and the administrator of Maxwell's estate. It further appeared that Miller and the administrator were served with process, but the action was dismissed against the latter, and a judgment entered against Miller only. This judgment remained unsatisfied, and the plaintiff sought to recover the amount by a claim against the estate of Maxwell. The administrator of the latter estate contended that the judgment against Miller was a bar to any further proceeding on the same claim. The court held that, as the bond was a joint and several undertaking, the principal and sureties could be sued either jointly or separately, saying: "Contracts which are joint and several may be regarded as furnishing two distinct remedies: one, by a joint action against all the obligors; the other, by a several action against each. Freem. Judgm. § 335. If this be correct, an action against all the obligors on the joint liability would not be a bar to an action against each one on the several liability. As was held in Moore v. Rogers, supra, where the contract is joint and several, its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly; and distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained."

In Smith v. Coopers (1859) 9 Iowa, 376, the action was against all the makers of a joint and several promissory note. A judgment by default was taken against one of the defendants. This, it was held, did not bar further action as to the other defendants. The court said: "The law is that persons jointly and severally liable on the same instrument may all, or any part of them, be sued at once; the judgment may be rendered for or against one or more of several plaintiffs or defendants; and that this may be done against one or more before the case is ripe for decision as to all, when such a course will not unjustly preju-

dice the interests of other parties. Code, §§ 1682, 1815, 1816. We are clearly of the opinion that, under these provisions of the Code, judgment may be rendered against one of the makers of a joint and several promissory notes; that the cause may be continued as to the others, and that such judgment will not bar the plaintiff's right to recover against the other parties when the cause is ripe for disposition as to them. The doctrine of merger and of the release of one of the makers of a note by taking judgment against the other, contended for by appellants, has no application in causes of this character under our statutes."

In Hays v. Closon (1878) 20 **Kan.** 120, the action was against the principal and sureties on a written undertaking. One of the sureties was the only party served with process. The plaintiff obtained a judgment against that surety. He contended that the judgment was erroneously rendered, since the principal was not served, but the court held that the undertaking was joint and several, and that the plaintiff could either proceed jointly against all the defendants or sue them separately. To the same effect, see Swerdsfeger v. State (1879) 21 **Kan.** 476; Kirkpatrick v. Gray (1890) 43 **Kan.** 434, 23 Pac. 633.

In Byers v. Franklin Coal Co. (1870) 106 **Mass.** 131, 12 Mor. Min. Rep. 27, the action was against certain individuals, as officers of a corporation, and was based on a draft which the plaintiff had paid as an accommodator of the corporation. The individual defendants pleaded, among other things, that the plaintiff had previously obtained a judgment against the corporation, and that this judgment merged the original indebtedness and was a bar to any further action on the debt. The court held that, as the defendants were liable severally on the draft, the former judgment against the corporation was no bar as to them.

In Downey v. Farmers' & M. Bank (1825) 13 Serg. & R. (**Pa.**) 288, the action was on a bond executed by the defendant as a joint and several maker. The plaintiff had previously sued the defendant and one Hartman as joint makers of the bond, but, having obtained service on Hartman only, recovered a joint judgment against him. It was held that the judgment against Hartman barred a recovery against the defendant, although it was said that the ruling would have been different had the plaintiff's first action been, in form, several as well as joint.

In Hyde v. Long (1832) 4 **Vt.** 531, it appeared that the defendant, together with one Virgil Long, executed a joint and several promissory note payable to one Green. Green indorsed the note and transferred it to the plaintiff; but before he did so he brought suit thereon against Virgil Long and obtained a judgment. Virgil Long was arrested in execution of the judgment, and while in jail he negotiated his release with Green. He paid a part of the indebtedness to the latter who, through his agent, indorsed the jail liberties bond as follows: "I hereby discharge this bond;" Long then was released from jail and escaped. The plaintiff then brought suit against the defendant as comaker of the note. It was held that the discharge of the jail liberties bond by Green was a complete discharge of the entire debt.

In Hitchcock v. Frackelton (1898) 116 **Mich.** 487, 74 N. W. 720, the action was on a promissory note executed in Minnesota, the defendant being an indorser. It appeared that prior to the institution of the suit the plaintiff had obtained a judgment on the note against the maker, in a Minnesota court. Under the Minnesota law, an indorser of a note was considered a joint and several obligor. It was held, therefore, that the prior adjudication did not merge the original claim against the defendant.

In United States v. Cushman (1836) 2 Sumn. 426, **Fed.** Cas. No. 14,908, it was held that a joint judgment against several joint and several obligors on a bond was no bar to a subsequent action against the estate of one of the deceased judgment debtors. Judge Story said: "When a party enters into a joint and several obligation, he in effect agrees that he will be

liable to a joint action and to a several action for the debt; and if so, then a joint judgment can be no bar to a several suit, if that judgment remains unsatisfied. The defect of the opposing argument is that it supposes that the obligee has an election only of the one remedy or of the other; and that, by electing a joint suit, he waives his right to maintain a several suit. That I take not to be a sound legal interpretation of the contract. The remedies are concurrent. And I know of no principle of law which would have prevented the plaintiffs from bringing a joint suit and a several suit on the bond at the same time, and proceeding therein pari passu. It is true that they could have but one satisfaction. But we all know that, on the same contract, the plaintiff may often maintain different suits at the same time, though he can have but one satisfaction. A joint judgment is not per se a satisfaction of a joint and several contract."

In Greathouse v. Kline (1884) 93 **Ind.** 598, it was held that a judgment against the estate of one of several makers of a promissory note, since deceased, was not a bar to an action on the note against the other comakers or their representatives. The decision was based on a statute (Rev. Stat. 1881, § 2312), which provides, in substance, that where one of several joint contractors dies the joint contract becomes a joint and several obligation. It seems that the statute is but an embodiment of a common-law-rule exception, viz., that, where one joint debtor dies, a judgment against the surviving debtors does not bar an action on the original contract against the estate of the deceased. Weyer v. Thornburgh (1860) 15 **Ind.** 124; Devol v. Halstead (1861) 16 **Ind.** 287; Cox v. Maddux (1880) 72 **Ind.** 206.

A judgment against one of two signers of a note which read as follows: "I promise to pay to the order of Christian Canary $300," has been held not to be a bar to a subsequent suit against the second signer, as the makers were both jointly and severally liable thereon. Giles v. Canary (1884) 99 **Ind.** 116, wherein the court said: "The rule that a judgment upon a joint obligation merges the cause of action, and works a release of a joint obligor against whom no judgment is taken, does not apply to a joint and several note."

In Lawrence v. Sample (1884) 97 **Ind.** 53, the following facts appear: An executrix brought an action against two defendants as the makers of a joint promissory note given to the testator during his lifetime. One of the defendants, who was served with process, made default and a judgment was entered against him; the other defendant appeared and pleaded that he was merely surety on the note, and that the plaintiff, well knowing this fact, entered into a contract, for a valuable consideration, with the principle, extending the time of payment of the note for five years after its maturity, and without his (the surety's) knowledge or consent. The defendant obtained a judgment in his favor, which, however, was subsequently reversed and remanded for a new trial. When the case came up for trial again, the defendant set up the former judgment against his prior codefendant as a bar. But the court held that, in as much as the defendant had previously set up personal defenses to the original action, the judgment against his codefendant on the note was of no avail to him.

In Stingley v. Kirkpatrick (1845) 7 Blackf. (**Ind.**) 359, it was said that, where a plaintiff has a cause of action against several joint and several obligors, he can proceed to sue them jointly in one action, or bring separate suits against each. See also subsequent decision in this case, in Kirkpatrick v. Stingley (1850) 2 **Ind.** 269, wherein it appeared that the plaintiff brought an action against three defendants on a note which read as follows: "May 29, 1839. Sixty days after date we, or either of us, promise to pay to Leonard Stingley or order the sum of $500, for value received. Samuel Bush. David Patton and George Kirkpatrick, surety." It further appeared that the return as to Bush was "Not found." The plaintiff proceeded against the sureties, and a judgment

was rendered in their favor on the ground that the date for the payment of the note was accelerated by thirty days, without the consent of one of the sureties. Thereafter the plaintiff instituted another action against the surety who had consented to the acceleration, and to this action the defendant pleaded in bar the former judgment. It was held, however, that the former adjudication was no bar to this second suit, as the questions involved were different in each suit. And the court further stated that a judgment against one of several joint and several contractors was not a bar to an action against the others. It will be noticed, however, that in this case the former judgment was in favor of and not against one of the defendants.

The cases arising under statutes providing in effect that a contract joint in form shall be deemed joint and several are discussed supra, I. b.

C. M.

RE ANDREW MADALINA.

California Supreme Court (In Banc) — March 23, 1917.

(174 Cal. 693, 164 Pac. 348.)

Parent and child — failure to support illegitimate — prosecution — disputing presumption of legitimacy.

1. A man cannot be prosecuted for failure to support his illegitimate child by another man's wife, where the statute declares that all children born in wedlock are presumed to be legitimate and that this presumption can be disputed only by the husband or wife, or the descendants of one or both of them, since the state is not in a position to raise the question of legitimacy.

[See note on this question beginning on page 1632.]

Statute — construction of Code — place of provision.

2. A mere place in the Codes is not decisive of the effect or the application of Code provisions.

Parent and child — effect of statute.

3. The right of the state to question the legitimacy of a child born in wedlock is not implied from a statute providing for the punishment of a parent of either a legitimate or illegitimate child who fails to provide necessaries for such child.

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody, to which he had been committed for failure to provide for his alleged illegitimate child. *Writ granted.*

The facts are stated in the opinion of the court.

Mr. E. J. Dole for petitioner.

Messrs. **Clarence F. Lea** and **C. W. Hoyle** for respondent.

Lorigan, J., delivered the opinion of the court:

Petitioner seeks his release in this habeas corpus proceeding from the custody of the sheriff of Sonoma county, who holds him under a commitment by a magistrate to answer before the superior court of that county for failure to provide for his alleged illegitimate child. The facts presented on the hearing before the magistrate and upon which the commitment was based, but which are claimed to be legally insufficient to warrant his detention, are stipulated by the attorney for petitioner and the district attorney of Sonoma county.

The petitioner was prosecuted under § 270 of the Penal Code as amended in 1915 (Stat. 1915, p. 572), which reads as follows: "A

parent of either a legitimate or illegitimate minor child who wilfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attendance for his child, is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or by both."

The facts as stipulated are that the minor child referred to in the complaint is about eight months old; that it was born in lawful wedlock to a woman whose husband was alive when said child was born to her, and between whom there had been no judgment of divorce. At the preliminary examination, so it is stipulated, the mother testified to the nonaccess of her husband, or of any person other than said petitioner, for a period of two years next prior to the birth of the child. It was further stipulated that no action had ever been begun by the said mother or by any other person, under § 196a of the Civil Code, to determine the parentage of said child, or to obtain a judgment against the petitioner or any other person for the support of said child, and that there is no such judgment.

In disposing of this petition several sections of the Codes are to be taken into consideration.

Section 196a of the Civil Code, a moment ago referred to, provides: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under §§ 138, 139, and 140 of the Civil Code, in a suit for divorce by a wife."

By § 193 of the Civil Code it is provided that "all children born in wedlock are presumed to be legitimate."

Section 195 of the same Code declares: "Who may dispute the legitimacy of a child. The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact."

The sections quoted are all the sections of the Code, criminal or civil, which bear directly upon the principal and in our opinion the sole question involved here, namely, whether the state of California, in a criminal prosecution of this character brought in its name, is authorized to question the legitimacy of a child born in wedlock.

The first legislation in this state of the nature involved here was enacted in 1913 when § 196a, heretofore quoted, was passed, providing for a *civil* suit at the instance of the mother of an illegitimate child, or its guardian, against its father for its support and education. In 1914, one Gambetta was prosecuted under § 270 of the Penal Code as it then stood, it being claimed that the said § 270, aided by § 196a, provided for the *criminal* prosecution of the father of an illegitimate child for its nonsupport. This court on habeas corpus (Re Gambetta, 169 Cal. 100, 145 Pac. 1005) held that § 270 of the Penal Code as it then stood had no application to the father of an illegitimate child, and that § 196a of the Civil Code, adopted in 1913, imposing an obligation on a father to support his illegitimate child, had not changed the application of said § 270 of the Penal Code in any way. Subsequent to this decision, and in 1915, the legislature amended § 270 of the Penal Code to provide, as it does now, that the parent of either a legitimate or illegitimate minor child shall be liable to criminal prosecution, as each still remains, under § 196a of the Civil Code, liable to a civil action for its nonsupport. While it thus appears that under the amendment to § 270 of the Penal Code the father of an illegitimate child may be prosecuted criminally for its nonsupport, it is contended by counsel for petitioner that a criminal proceed-

ing will lie, under said section, against the father, only in a case where the child is the illegitimate off-spring of his intercourse with an unmarried woman, and that it will not lie, and was not intended to lie, against him in the case of a child which had been born in wedlock. The last portion of the contention of petitioner is the only point in the case which we deem it necessary to consider. As amplified by him in his argument, his position respecting it is this: That it being conceded that this child, of which the petitioner is alleged to be the father, was born in wedlock, the presumption is that it is legitimate; that the declared policy of this state as expressed in its legislation is that the presumption of such legitimacy can be disputed only by the husband or wife, or the descendants of one of them; that no one else may do so; that the state, having thus by express legislation inhibited any question as to the legitimacy of a child born in wedlock being raised except as above indicated, cannot itself raise it in a criminal prosecution or other proceeding. It is, of course, to be understood that, when it is said that the state cannot itself raise the question of the legitimacy of a child born in wedlock, it is not meant that it has no power to enact legislation authorizing such inquiry in a proceeding in its name, but only that it has not so far done so; that on the contrary it has denied itself this right by expressly declaring who of others alone may do so.

We are satisfied that the position of counsel for petitioner is correct, and that any claim to the contrary is answered by a consideration simply of § 195 of the Civil Code, which declares that the presumption of the legitimacy of a child born in wedlock can only be raised by the husband or wife or the descendants of one of them. This is the declared policy of this state, and is simply the adoption of a rule prevailing generally in all civilized communities. If the state has decided to depart from that policy, it certainly has not declared that intent by any express language found in, or any reasonable inference to be deduced from, the terms of § 270 itself, or considered in connection with § 196a. Counsel for respondent strenuously contends that § 195 of the Civil Code is inapplicable, because the criminal proceeding under § 270 is found in the Penal Code, which as to all criminal procedure governs. But this contention is not sound. A mere place in the Codes is not decisive of the effect or the application of Code provisions. The Civil Code by § 195 was laying down a rule of public policy in a matter which the state deemed vital to society; it was following the civilized rule, and made it applicable under all circumstances where the question of legitimacy of childiren born in wedlock was sought to be raised, prescribing a limitation as to the persons who might raise the question, by expressly enumerating those who might do so; it eliminated itself from doing it under an application of the familiar rule that an enumeration of persons to be affected by a Code provision is an implied exclusion of all others. By the Civil Code section the inquiry was expressly limited on behalf of certain persons. When it came to providing for proceedings under § 270, the legislature did not in any language found therein, or anywhere else, abrogate what it had laid down in § 195 as to questioning the legitimacy of a child born in wedlock. This § 195 is to be considered with § 270 as in pari materia with the latter, and must be construed as a part of it. Pol. Code, §§ 4480 et seq.

Statute—construction of Code—place of provision.

But it is said by counsel for respondent that authority to raise the question of legitimacy, where the child is born in wedlock, must be implied from the enactment of § 270, authorizing the criminal proceeding; that such a proceeding can only

Parent and child—effect of statute.

be brought in the name of the state. True, the criminal proceeding must be in the name of the state—the people—and is authorized to punish the parent of an illegitimate or legitimate child for an omission, without excuse, to support it. Parents of legitimate children may be prosecuted at the suit of the state; parents of illegitimates born out of wedlock may also be prosecuted. So that the Code provision is not without cases for its application where the question of the legitimacy of the child will not arise, or where it will be a proper subject of inquiry at the suit of the state. But when it is attempted to bring within its terms, in a criminal prosecution, a question of the legitimacy of children born in wedlock, there is nothing directly or inferentially in the language of § 270 which authorizes the state to raise that question. To the contrary, the expressly declared policy of the state as found in § 195 precludes it from doing so; and in the interest of public policy, decency, morality, and the protection of innocent children this commends itself. Public policy and common decency are opposed to the bastardizing of children born in wedlock, against the wishes and perhaps against the protest of their putative parents. If neither the husband nor the wife to an existing marriage desires to raise any question of the legitimacy of a child born during its existence, the best interests and welfare of society will be promoted if the state likewise declines to intervene in raising that question. It will appear, too, that the welfare, comfort, and happiness of innocent children are, under this policy of the state, best conserved, as they are protected against the stigma of illegitimacy, or aspersions cast upon their birth being raised by third persons, either through excessive zeal or actuated by sinister motives, in criminal proceedings brought in the name of the state.

Same—failure to support illegitimate—prosecution—disputing presumption of legitimacy.

The writ is granted, and the petitioner ordered discharged from custody.

Melvin, J., Shaw, J., Henshaw, J., Sloss, J., Lawlor, J., and Angellotti, Ch. J., concur.

ANNOTATION.

Who may dispute presumption of legitimacy of child born in wedlock.

Any references in this note to the effect of the presumption of legitimacy, the character of evidence by which it may be overcome, or the competency of witnesses to testify upon the subject, are purely incidental.

It is broadly stated in Wright v. Hicks (1852) 12 Ga. 155, 56 Am. Dec. 451, that the legitimacy of a child born in wedlock three months after the marriage of his parents may be disputed by anyone whose interest and right it is to contest the legitimacy of the pretender, by adducing proof that the presumptive father was the innocent victim of a fraud and artifice. One of the main questions in this case was whether the legitimacy of such a child could be disputed for the purpose of excluding him from the inheritance. "Inexpressibly hard," states Judge Lumpkin, "would it be if such privilege was not allowed. It is repugnant to the feelings of every man that his property, upon his demise, should descend through channels where his blood did not flow; channels, too, tainted and corrupted by the grossest impurity."

A child born in wedlock is presumed to be legitimate by the express provisions of the California Civil Code, which further declare that such legitimacy may be disputed "only by the husband and wife or the descendants of both." Re Campbell (1910) 12 Cal. App. 707, 108 Pac. 669; RE MADALINA (reported herewith), ante, 1629.

In view of this provision of the Civil Code of California it was held in the

reported case (RE MADALINA), that the state, in a criminal prosecution brought in its name, for failure to provide for an alleged illegitimate child, may not question the legitimacy of the child, which was born in wedlock.

The principle of estoppel by recitals of fact in a deed was applied in Orthwein v. Thomas (1889) 127 Ill. 554, 4 L.R.A. 434, 21 N. E. 430, holding that recitals in a deed, that the daughter of the grantors, from whom they acquired by descent, the property conveyed, was the wife of a specified person, and that one of the grantees was her daughter, are binding upon the other grantee and his remote grantees, who are estopped from denying the facts recited for the purpose of disputing the legitimacy of the female grantee.

The majority of cases which have considered the question annotated arose in the state of Louisiana and are largely dependent on the provisions of the Civil Code of that state. By it the right to disavow and repudiate a child born under the protection of the legal presumption, "pater est quem nuptiæ demonstrant," is peculiar to the father, and can be exercised only by him, or his heirs, within the time specified by the Civil Code and in certain cases. If the father renounces the right expressly or tacitly, it is extinguished, and can never more be exercised by anyone. Eloi v. Mader (1842) 1 Rob. (La.) 581, 38 Am. Dec. 192; Re Saloy (1892) 44 La. Ann. 433, 10 So. 872; Dejol v. Johnson (1857) 12 La. Ann. 853 (holding, where the father failed to contest the legitimacy of children, in the manner provided by law, that his heirs are debarred by the express provisions of the Code, from raising the question, and will not be allowed, in opposing the right of some of the heirs to share in the distribution of their father's estate, to show that their mother abandoned her husband, their father, and lived so remote from him when she conceived the children whose claims they oppose that cohabitation with him was physically impossible; or to show that such children were adulterous bastards, alleged to be such by their father, and openly acknowledged to be such by their mother); Ducasse v. Ducasse (1908) 120 La. 731, 45 So. 565 (holding that the legitimacy of the children of a wife, which were born during the marriage, cannot be questioned in a suit to set aside a will, where neither the husband nor his heirs brought a direct suit for that purpose within the time limited by statute therefor); McNeely v. McNeely (1895) 47 La. Ann. 1321, 17 So. 928 (holding, under the Civil Code, which declares that, without proof of cohabitation between the spouses since a separation from bed and board, the legitimacy of a child born of the wife three hundred days after the separation may be contested, the legitimacy of a child born three hundred and fifteen days after a judgment of separation cannot be contested by the universal legatee in an action by the mother to obtain recognition of the child as sole heir of the deceased husband, where the latter died without bringing suit to disavow the child's legitimacy); Ezidore v. Cureau (1904) 113 La. 839, 37 So. 773 (holding that plaintiff, in a proceeding to sell real property to satisfy a mortgage, is not entitled to dispute the legitimacy of a daughter of the deceased mortgagor, claiming a minor child's homestead in the property, where such child was born in wedlock, and was never disavowed by her putative father in the mode prescribed by law).

The state, being made by statute an heir in certain contingencies, may institute proceedings to exclude pretended heirs from a succession on the ground that, although born during the existence of a marriage, the deceased was an adulterous bastard who left no legal heirs, and that those claiming to be such are adulterous relations incapable of inheriting; but the only proof which the state can be permitted to offer in this regard is a judgment recovered by the husband or his heirs in a proceeding to disavow his presumptive child, and conducted in conformity with the requirements of the Code. Re Saloy (1892) 44 La. Ann. 443, 10 So. 872.

In Vernon v. Vernon (1851) 6 La. Ann. 242, it is said that defendants in an action to set aside a will would

not be permitted, under the laws of Louisiana, to question the legitimacy of the plaintiff, who was the son of the testator's wife, but born at a time when she and the testator were living apart, but under conditions where it did not appear that cohabitation was physically impossible. The case, however, turned upon the status of the plaintiff under the laws of another state in which the testator's marriage took place.

A reputed father, who introduced into society as his wife the woman with whom he was living, and acknowledged the child born to her as his son, will not be permitted thereafter to bastardize the latter in a suit brought by the son to recover property which belonged to the mother, and which the father retained after her death. Green v. Green (1859) 14 La. Ann. 39.

In an action by a mother against her daughter to recover possession of property to which the latter claims title by donation, the mother will not be permitted to assert that, although born during the lifetime of her husband, the daughter was an adulterous bastard, incapable of taking from her by donation. Tate v. Penne (1829) 7 Mart. N. S. (La.) 548.

The mother has no right to disavow a child, because maternity is never uncertain; she can only contest the identity of the child. Eloi v. Mader (1841) 1 Rob. (La.) 581, 38 Am. Dec. 192.

It is a corollary of the rule prohibiting a married woman from asserting that her offspring is spurious that she will not be permitted to allege the illegitimacy of her son, born in lawful wedlock, in an action to compel a paramour to perform his agreement to pay her a specified sum each month during her lifetime in consideration of her supporting, furnishing a home for and educating the son, who is alleged to have been begotten by the paramour. Flint v. Pierce (1912) 136 N. Y. Supp. 1056.

Similarly, a married woman is not entitled to deny the legitimacy of her child, born in wedlock, in an action brought by her upon an agreement made by a third person, who is alleged to be the father of the child, to pay her what it was reasonably worth to feed, clothe, and care for it. Vetten v. Wallace (1891) 39 Ill. App. 390.

A person born in marriage cannot be permitted by declarations or admissions to repudiate his own legitimacy. Eloi v. Mader (La.) supra. A. W. R.

BUTTE LAND & INVESTMENT COMPANY, Appt.,
v.
ICIE WILLIAMS, Respt.

Montana Supreme Court — May 25, 1918.

(— Mont. —, 173 Pac. 550.)

Broker — right to commissions — advice against title.

1. A broker employed to find a purchaser for real estate cannot recover his commission when the purchaser refuses to accept the property upon the broker's advice that the title is not good, based upon a defect in the abstract which might easily have been corrected.

[See note on this question beginning on page 1636.]

Vendor and purchaser — demand to correct abstract.

2. A demand upon the vendor of real estate who has agreed to furnish an abstract of title, to make good the title as to conveyances which appear to be to a person by one name and from him by another name, is a mere demand to correct the abstract, and not a demand to perfect a title which the vendor is not bound to comply with.

APPEAL by plaintiff for a judgment of the District Court for Silver Bow County in favor of defendant in an action brought to recover a broker's commission. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Nolan & Donovan** for appellant.

Mr. **W. E. Carroll** for respondent.

Sanner, J., delivered the opinion of the court:

The respondent listed a town lot in Butte with the appellant to be sold for $1,400, the appellant to receive a commission of 5 per cent, and she agreed that she would "furnish an abstract of title to date of sale, . . . and to convey said property by good and sufficient deed, clear of encumbrances," to the appellant or its nominee. The respondent furnished an abstract which the appellant brought down to date; but, as completed, the abstract showed two apparent defects in the title, viz., a deed of the property on June 24, 1891, to John W. Fowler, followed by a deed of the same date from James W. Fowler, and a mortgage in 1907 to Augusta Y. Scott, followed by an assignment of said mortgage by Minnie Rowe and Freda Harkins "as devisees and legatees under the last will" of Augusta Young Scott, and a satisfaction of such mortgage by the assignee named. Both of these were sins of the abstractor—the one of commission, the other of omission—easily correctable by reference to the original records; in fact, the appellant satisfied itself, with reference to the mortgage transaction, that the assignors were the devisees of the original mortgagees, entitled as such to make the assignment.

Appellant found a buyer for the property, notified respondent accordingly, and demanded that she correct the abstract as to the mortgage transaction and make good the title as to the Fowler conveyances. This she refused to do, claiming that the contract she made absolved her from any and every expense save the commission. The purchase was not completed and the appellant, claiming this was due to the defendant's failure to furnish the abstract, sued for its commission. Upon the trial a verdict was directed for the respondent, and, judgment being entered accordingly, this appeal is the result.

As reasons for the order directing a verdict the trial judge assigned: (1) That, in its demand to make good the title, the appellant had exacted from the respondent an impossible thing, not required by the contract; and (2) that the sale fell through on the advice of the appellant itself. Only from an ultra technical point of view, which we are loath to adopt, could the first of these propositions be sustained. The respondent had agreed to furnish an abstract and to convey title, and obviously the purpose of the abstract was to show that title could be conveyed by her. Upon examination of it the appellant thought the title, as shown by the abstract, defective; it could, therefore, properly indicate the corrections which the abstract seemed to require; this was done, and the language used with reference to the Fowler transfers must be taken as a demand, not to make good a title which was in that particular faultless, but to correct whatever needed correction, viz., either the title or the abstract.

Vendor and purchaser—demand to correct abstract.

The second proposition of the trial court is a different matter. The evidence makes it clear that the purchaser never saw the abstract, found no fault with the title, had no knowledge of the objections; she may, so far as the evidence shows, have taken the property notwithstanding the objections, chancing the reality or the importance of the apparent defects; what she did take was the appellant's word whether the title was good or not, and, being so governed, did not buy the prop-

erty. We think that this is ample to sustain the court's position. The appellant's agent to effect—not to defeat—a sale of the property, and though it was not bound to impose upon the purchaser a title thought to be defective, it could not on the one hand advise against the purchase, because the title was bad when in fact it was good, and on the other hand claim its commission for finding a buyer able and willing to buy. Its duty was to pass the abstract to the purchaser and permit her to say whether, in view of the actual facts as she might ascertain them, or of the lapse of time since the Fowler conveyances, or of the likelihood that the mortgage assignment and satisfaction were regular, she would care to take the property. Nor is the appellant's situation altered for the better by the fact that it was advancing part of the money for the purchase; the buyer might procure the money elsewhere. That in the attempt to serve three masters, to wit, the respondent, the purchaser, and itself, the appellant lost the sale, is clear; and it is equally clear that the appellant cannot impose the cost and responsibility for that loss upon the respondent alone.

Broker—right to commissions—advice against title.

The judgment is affirmed.

Brantly, Ch. J., and Holloway, J., concur.

ANNOTATION.

Broker's right to commission as affected by his advising purchaser against the title.

The rule seems to be as laid down in the reported case (BUTTE LAND & INVEST. CO. v. WILLIAMS, ante, 1634), that a broker forfeits any right to commissions by making erroneous statements to the intended purchaser in disparagement of his principal's title, which defeat the sale, and this even though such statements were innocently made. At least the decision therein is directly supported by Mercantile Trust Co. v. Niggeman (1906) 119 **Mo.** App. 56, 96 S. W. 293, wherein it was held that where the attorney for a real estate agent, by giving erroneous advice to the purchaser and the seller regarding a lien on the property, prevented the completion of the sale as negotiated by the agent, the latter could not recover a commission, although the advice was honestly given. In this connection the court, among other things, said: "There is no pretense that this advice was not honestly given, but its effect was to defeat the sale, and it was plaintiff's fault, for it is bound by what its agents, including its legal counselor, did in the premises. That the deed was not delivered and the purchase price paid over to the defendant resulted from plaintiff's erroneous advice to the purchaser. It innocently defeated the consummation of the sale it had made as defendant's agent, and we cannot see upon what principle of law or justice it is entitled to recover commissions for undoing the very work which entitled it to compensation."

However, it seems that the broker would not forfeit his right to recover his commission by advising the purchaser against the title were such title actually defective. No case involving such a state of facts has been found, but the principle was involved in the analogous Maryland case of Schwartze v. Yearly (1869) 31 **Md.** 270, wherein the court said that while the law exacts of an agent an honest and faithful performance of his duty, it does not oblige him to misrepresent or conceal the truth. In this case it was held that even though a statement by the agent which made an unfavorable comparison between the property in suit and certain other property operated to defeat the sale, it could not be said that the agent had acted in bad faith toward his principal, provided the statement was fairly made.

And see Christensen v. Wooley (1890) 41 Mo. App. 53, wherein it was held that the fact that a real estate broker, in effecting a sale of land, made disparaging representations to the vendee as to the title, which representations, however, were known to be mere expressions of opinion, and not based on personal knowledge, did not defeat the broker's right to commissions on a resale of the land effected by him for the original vendee, although the second vendee subsequently refused to complete the purchase because of an alleged defect in the title. G. J. C.

YATES & McCLAIN REALTY COMPANY et al., Plffs. in Err.,
v.
EL PASO NATIONAL BANK.

Colorado Supreme Court—December 2, 1918.

(— Colo. —, 176 Pac. 495.)

Vendor and purchaser — waiver of lien — release of personal obligation.

1. Loss of the right to proceed against the indorser of a promissory note of a stranger, transferred by the indorser for the purchase price of real estate, by dealings with the maker, does not release the vendor's lien on the property.

[See note on this question beginning on page 1638.]

Same — retention of title — effect.

2. The lien of a vendor who retains title to secure payment of the purchase price of real estate is not lost by the same circumstances which would create a waiver or cause the loss of liens, where the title has been transferred to the vendee.

ERROR to the District Court for El Paso County to review a judgment in favor of plaintiff in a suit to foreclose a vendor's lien upon certain real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **C. B. Horn** and **Martin M. Burns** for plaintiffs in error.

Messrs. **Chinn & Strickler** for defendant in error.

Allen, J., delivered the opinion of the court:

This is a suit brought by the El Paso National Bank against the plaintiffs in error to foreclose an equitable vendor's lien upon certain real estate. Upon trial the court found that the bank now has and holds a lien upon the real estate in question, and decreed a foreclosure of the lien.

Prior to the trial the court sustained the plaintiff bank's demurrer to the several defenses set up in the answer of the defendant, the Yates & McClain Realty Company. This is assigned as error, and is the only matter argued by plaintiffs in error in their brief, on application for a supersedeas.

It is admitted by the pleadings that the bank sold to the realty company the real estate in controversy. The consideration received consisted of promissory notes executed by one George H. Paul, which were indorsed by the realty company and by it transferred to the bank. At the time of the sale a contract was entered into between the vendor and the vendee, whereby the deed to the property was not to be delivered until the notes were duly paid off and discharged. It is conceded that in this transaction the bank retained a vendor's lien upon the premises.

It is asserted in effect by the

plaintiffs in error that the defenses to which the demurrer was sustained alleged facts showing that the plaintiff bank, "by its conduct and manipulation of these notes, . . . had waived the liability of the indorser," the defendant realty company. Assuming, without deciding or conceding, that the foregoing statement of the plaintiffs in error is correct, the facts therein contained are not sufficient to show that the bank waived or lost its vendor's lien.

The theory of the law apparently adopted by the plaintiffs in error, and the only proposition relied on, is, "that by waiving the liability of the indorser on the notes" the bank "thereby waived the lien." No authorities are cited and no reasoning is offered to sustain this proposition. The case of Hodges v. Roberts, 74 Tex. 517, 12 S. W. 222, is an authority to the contrary. In that case it was held that, although the plaintiff vendor's right to a personal judgment against the vendee, as indorser on the note given for the land, was lost by negligence, the lien reserved by the vendor could still be enforced. The reason on which the decision was based is that the lien was a security for the payment of the debt evidenced by the note. The court also said: "The existence of a debt is necessary to support a lien, but it does not follow from this that the debt must be that of the person creating the lien on which a personal judgment may be rendered against him."

Vendor and purchaser—waiver of lien—release of personal obligation.

Our attention is not called to any facts alleged in the answer, from which it might be inferred that the plaintiff waived or lost its vendor's lien. It is not claimed that the lien was expressly released or that other security was substituted in its stead. Furthermore, it should be noted that the record shows that the legal title was never transferred by the vendor to the vendee, but was retained as security for the payment of the notes. Circumstances which would create a waiver, or cause the loss of a vendor's lien in cases where the vendor has transferred the title, do not have the same effect in cases where, as here, the vendor retains title. 2 Warvelle, Vendors, § 715.

Same—retention of title—effect.

In view of the foregoing circumstances, we are of the opinion that the demurrer was properly sustained, and that the answer presented no facts precluding the plaintiff from foreclosing its lien. The case is controlled by the rule announced in 2 Warvelle on Vendors, § 715, as follows: "By retaining the title the vendor has manifested in the most unmistakable terms his purpose of looking to the land as security for his debt; that security can only be devested by performance of the act for which the land is held, and equity will never compel him to part with the title until he has actually received the consideration."

See also 2 Jones, Liens, § 1116.

The answer alleges no facts coming within any exception to the principle above stated. No reversible error being pointed out in the brief on application for a supersedeas, the application is denied, and the judgment affirmed.

Hill, Ch. J., and Bailey, J., concur.

ANNOTATION.

Release of vendee as indorser of note as waiver of vendor's lien.

The courts are not in entire harmony as to the effect of releasing the vendee as indorser of a note of a third person, transferred to the vendor to be applied on the purchase price of land, assuming, of course, that an acceptance by the vendor of the note did not, in and of itself, constitute a waiver of its lien.

It has been held that the vendor's lien is not released by the fact that the vendee was released as indorser of

a note indorsed to the vendor, the proceeds to be applied on the purchase price of land, the release of the vendee being due to the failure of the vendor to give him notice of the nonpayment of the note. Sehorn v. McWhirter (1874) 8 Baxt. (Tenn.) 201. In this case the vendor retained title to the land, and merely gave bond for title. This is also the doctrine of the reported case (YATES & McC. REALTY CO. v. EL PASO NAT. BANK, ante, 1637) in which also the legal title had been retained by the vendor. And to the same effect see also Hodges v. Roberts (1889) 74 Tex. 517, 12 S. W. 222, as to a lien reserved in the deed. In the latter case, in holding that the release of the vendee as indorser, by a failure to take the necessary statutory steps to fix his liability as indorser, did not waive the vendor's lien, the court said that "it is immaterial whether the right to a personal judgment against the maker of a lien ever existed under the contract, or has been lost by failure to use diligence, for, so long as the debt which the lien was created to secure may be enforced against the person whose obligation is secured by it, the lien exists and may be enforced unless there be that in the contract which evidences a contrary intention." It is, however, pointed out that the contract in this case provided that the lien should continue until the note secured by it and all interest was paid.

But it has been held that where the vendor retains a lien on land in part payment therefor, and he accepts the note of a third person, assigned by the grantee, the lien is to secure the liability of the grantee as assignor of the note, and cannot be enforced if anything occurs to extinguish this liability. Rawlins v. Gaines (1882) 4 Ky. L. Rep. 535 (abstract); Ditto v. Ford (1883) 4 Ky. L. Rep. 726; Motch v. Hill (1885) 7 Ky. L. Rep. 380 (abstract). A. G. S.

RE ESTATE OF RACHEL E. WILLIAMS, Deceased.

ANDREW J. DAVIS, Special Admr., etc., of Rachel E. Williams, Deceased, Appt.

v.

SIBYL SCOTT et al., Appts.

Montana Supreme Court—June 10, 1918.

(— Mont. —, 173 Pac. 790.)

Executor and administrator — deposit in administrator's bank — effect.

1. The continuance by a special administrator of a deposit account opened by decedent in a national bank in which the administrator is a stockholder does not charge the administrator with interest on the fund, because the earnings upon it contributed toward dividends received by him.

[See note on this question beginning on page 1646.]

Same — special administrator — liability for interest.

2. A special administrator, appointed to preserve the estate for the executor or administrator to be regularly appointed, is not liable for interest for failure to lend money collected.

Bank — ownership of majority of stock — effect.

3. That the majority of the stock of a national bank is owned by one person does not make the bank a mere device under cover of which he conducts his private business.

Executor and administrator — allowance of costs.

4. A special administrator cannot be credited with the cost of litigation prosecuted on behalf of the estate and himself individually, where it is im-

possible to separate the personal costs from those incurred on behalf of the estate.

Same — attorney's fees.

5. A special administrator is entitled to an allowance out of the estate of an attorney's fee, made necessary by an attempt by the public administrator to take the estate out of his hands.

Same — proceeds of ancillary administration.

6. The account of a special administrator is properly charged with a fund coming into his hands from ancillary administration in another country.

Same — taxes.

7. A special administrator cannot be credited with taxes paid on a fund erroneously withheld by him from the general administrator, without showing that no prejudice resulted to the estate because of his act.

Same — depreciation in furniture.

8. A special administrator is not chargeable with the depreciation of furniture of the estate because of its use by a caretaker, who is permitted such use as compensation for his services, if the depreciation is no more than the reasonable value of the services of the caretaker would be.

Same — costs.

9. A special administrator cannot, in a proceeding to settle his account, be charged with costs made necessary by a defense against an item which he was not required to pay.

CONSOLIDATED APPEALS by the objectors and the special administrator from an order of the District Court for Silver Bow County sustaining some objections and overruling others, in a proceeding to settle the account of the special administrator in the estate of Rachel E. Williams, deceased. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. **H. L. Maury** and **J. A. Poore**, for appellant administrator:

The duties of a special administrator are prescribed by statute. He must collect and preserve the estate for the executor or administrator, and as an incident thereto he may maintain and defend suits and other legal proceedings as an administrator.

Re Ford, 29 Mont. 283, 74 Pac. 735.

Where the right to a controverted administration is successfully established, the administrator is entitled to credit for the expenses of the controversy.

Ex parte Young, 8 Gill, 285; Re Whetton, 98 Cal. 203, 32 Pac. 970; Re Davis, 35 Mont. 273, 88 Pac. 957.

The district court's power, when sitting in probate matters, is derived from the statute, and it cannot go beyond the provisions of the statute.

State ex rel. Kelly v. District Ct. 25 Mont. 33, 63 Pac. 717; Re Davis, 27 Mont. 495, 71 Pac. 757; Re Dahlman, 28 Mont. 379, 72 Pac. 750.

The court can tax the costs to either party, depending on whether or not the record shows he is acting in good faith, or order them to be paid out of the assets of the estate.

Henry v. Superior Ct. 93 Cal. 569, 29 Pac. 230; Re Williams, 52 Mont. 367, 157 Pac. 963.

Mr. **J. E. Healy** for appellant objectors.

Holloway, J., delivered the opinion of the court:

On May 26, 1916, Andrew J. Davis, special administrator of the estate of Rachel E. Williams, deceased, presented in court his final account. The general administrator and the guardian of Dorothy Alice Williams interposed certain objections, and, after hearing, the court entered its order of May 29, 1917, as amended by an order of June 16, 1917, sustaining some of the objections and overruling others. The objectors have appealed from the order as amended in so far as it fails to charge the special administrator with interest on funds of the estate in his possession, and the special administrator has likewise appealed from it in so far as he deems himself aggrieved. The appeals are consolidated and will be considered in their order.

We enter upon our consideration of these appeals, indulging the presumption that the district court was fully justified in appointing the special administrator, and that his

possession of the property of the estate until the general administrator qualified was lawful. The will was valid upon its face and required extrinsic evidence to demonstrate its invalidity. Davis was an executor named in the will and, assuming the existence of the necessity for a special administrator, he was entitled to be appointed. Rev. Codes, § 7472.

1. The objectors' appeal: Apparently the objectors seek to charge the special administrator with interest upon either of two theories: (1) Because he could have loaned the funds of the estate, and did not, and was therefore guilty of negligence in its management, and should be held to pay interest at the legal rate; (2) because he did employ the money of the estate in such manner that it realized a profit to him personally, and he should be held to account for the profit, or be required to pay interest in lieu thereof.

(1) It is idle to cite sections of the Code or decided cases which have to do with the duties and liabilities of a guardian, an executor, or a general administrator, for they have no application to a special administrator, whose duties, powers, and responsibilities are defined by §§ 7470–7476, Revised Codes. His office is one specially created by statute, with limited tenure and limited powers. To determine whether a particular duty is imposed upon him, he has but to consult these seven sections of the Code, and, if the duty is imposed, it is there disclosed.

If the statute is silent, it is so because the legislature has withheld the duty. These sections have been construed to limit the functions of a special administrator to the exercise of such powers only as are "necessary to collect and preserve the estate for the executor or administrator to be regularly appointed." State ex rel. Bartlett v. Second Judicial District Ct. 18 Mont. 481, 46 Pac. 261; Re Ford, 29 Mont. 283, 74 Pac. 736. The reason for the rule must be apparent to anyone. The special administrator holds temporarily, and may be called upon to relinquish his control any day. His authority ceases automatically upon the appointment and qualification of the executor or general administrator. Rev. Codes, § 7475. To such an extent are the provisions of §§ 7470–7476 exclusive that the court, whose officer the special administrator is, cannot require him to go beyond the fair import of their terms, and any acts done by him beyond the scope of the authority conferred are void. State ex rel. Bartlett v. Second Judicial District Ct. above.

It is worthy of note, in passing, that the duty to loan the funds of an estate is not imposed upon an executor or general administrator as such. Brenham v. Story, 39 Cal. 179. The duty might be required by statute, but in this state it has not been done. Re Davis, 35 Mont. 273, 88 Pac. 957. Such an officer may, however, be directed by order of court, made after notice, to loan the funds for a limited period and upon certain specified securities only. Rev. Codes, § 7652. But the authority to loan the funds of an estate is not conferred upon a special administrator, evidently because of the fact that his tenure is uncertain, and he may be called upon to turn over the property at any time. It was impossible for the special administrator to anticipate that he would have the control of the funds of this estate for any considerable period; but, even if he could have done so, the statute which measures his duties and responsibilities does not permit him to loan the funds, and this of itself is sufficient reason why he cannot be held to pay interest for his failure to do that which he had no authority to do. People ex rel. Bulkley v. Salomon, 184 Ill. 490, 56 N. E. 815.

Executor and administrator—special administrator—liability for interest.

(2) The statute which enumerates the powers of a special administrator does not authorize him

to traffic in the funds, but by implication prohibits him from doing so. Furthermore, the title to this property passed to the heirs immediately upon the death of Rachel E. Williams, subject only to the control of the court for the purposes of administration (Rev. Codes, § 4819), and from these premises it follows as of course that, if the special administrator received any profits from funds in his hands by virtue of his office, they likewise belong to the heirs as constituting a part of the estate, and must be included in his final account.

The only question then is: Did the special administrator receive any profits from funds which constituted a part of this estate? The presumption is that his official duties were regularly performed, and that he did not abuse his power, and the burden of showing that profits accrued to him is upon the objectors who make the charge of wrongful conduct. Re Dolenty, 53 Mont. 33, 161 Pac. 524.

The facts disclosed are that, when Rachel E. Williams died in 1907, she had on deposit with the First National Bank of Butte a considerable amount of money in an open checking account, upon which the bank did not pay any interest. When Mr. Davis qualified as special administrator and took charge of the property, no change whatever was made in the character of this account, except to have the books of the bank show that it was carried in the name "Rachel E. Williams's Estate," and subject to check by Mr. Davis as special administrator. Subsequently, deposits were made to the credit of the account and certain expenses paid from it. Because of the will contest and appeals incident thereto (Re Williams, 50 Mont. 142, 145 Pac. 957; id., 52 Mont. 192, 156 Pac. 1087, Ann. Cas. 1917E, 126; id., 52 Mont. 366, 157 Pac. 963), the special administration was permitted to drag out over a period of nine years, during all of which time the money in the estate continued on deposit in the bank, under the same arrangement, as a checking account upon which no interest was paid. During all this time Mr. Davis was president and guiding genius of the bank and the owner of 86 per cent of its capital stock. The bank is one of the largest institutions of its kind in the state, and one of the most successful, paying handsome dividends upon the stock, earned principally from interest upon loans.

It is not contended that a solvent bank is not a proper depositary for the safe-keeping of estate funds, or that Davis received directly anything for the use of these funds by the bank; but it is insisted that, as these funds were mingled with other funds of the bank, the aggregate of which produced the profits made by the bank, Davis did profit by their use by reason of his ownership of bank stock. In other words, a certain proportion of the dividends paid to Davis represents earnings of the funds of this estate. As already observed, the duty imposed by statute was to exercise ordinary care to keep these funds safely, and in condition to be turned over to the general administrator at any time. So long as the funds were so kept, the place of their keeping is of no consequence. They might have been locked in a private safe, in a safe deposit vault, or deposited in a solvent bank subject to payment on demand without interest, and in either event payment over to the general administrator of the funds so received, less legitimate expenses incurred, would have operated to exonerate the special administrator. Does the fact that Davis owned stock in the bank which was the depositary alter the situation? If he is liable because he owns stock in the bank, then it is immaterial whether he owns 86 per cent of the stock or 1 per cent. If he is liable because he controls the institution, then it is immaterial whether he owns 86 per cent or a bare majority of the stock.

The only theory upon which a special administrator can be held

for profits accruing upon estate funds in his hands by virtue of his office, is, that he has made an unlawful use of the funds; for, as we have already pointed out, he cannot lawfully invest them, loan them, or use them. In what respect did Davis violate the law in keeping these funds in the First National Bank? The funds were kept safely and subject to payment on demand at any time. They were kept in the depositary selected by the deceased in her lifetime for her own funds, and in an institution over which the special administrator had supervision, and of the solvency of which he had personal knowledge. The fact that Davis owned stock in the bank does not convert into an unlawful act that which otherwise would have been lawful. When these funds were deposited, the money became the property of the bank, and the bank became debtor to the estate, or, more strictly speaking, to the special administrator. Stadler v. First Nat. Bank, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; Murphy v. Nett, 51 Mont. 82, L.R.A.1915E, 797, 149 Pac. 713. When the bank used these funds to make profit, it was using its own funds, not the funds of the estate, and dividends paid to Davis were profits earned upon the bank's own money, not upon money owned by this estate.

Same—deposit in administrator's bank—effect.

If it can be said that the corporate entity, "First National Bank of Butte," is a mere phantom, or that the name is but an alias under which Andrew J. Davis conducts his private business, then, upon the authority of Barnes v. Smith, 48 Mont. 309, 137 Pac. 541, and Hanson Sheep Co. v. Farmers' & T. State Bank, 53 Mont. 324, 163 Pac. 1151, we could say that a deposit with the bank was a deposit with himself, and use of this money by the bank was use of it by Davis and he must account for any profits accruing from such unauthorized use. This institution was organized under and conducts its business by virtue of the National Banking Laws of the United States. It must have at least five directors (U. S. Rev. Stat. § 5145, Comp. Stat. 1916, § 9683), each of whom must be a bona fide owner of at least ten shares of stock (§ 5146, Comp. Stat. 1916, § 9684) of the par value of $100 each (§ 5139, Comp. Stat. 1916, § 9676). It is subject to visitation by the proper officers of the government, is a unit of the Federal reserve system, and 14 per cent of its capital stock is owned by persons other than Mr. Davis. Since the government apparently does not place any restriction upon the amount of capital stock which one individual may own, except the restriction implied in the sections cited above, we do not think it can be contended that the charter of this bank is subject to forfeiture because one man owns sufficient stock to control the election of the directors and the policy of the bank, or that the bank is a mere device under cover of which Davis conducts his own private business.

Bank—ownership of majority of stock—effect.

The order of the trial court, refusing to charge the special administrator with interest, is clearly correct and must be affirmed.

2. The special administrator's appeal: Complaint is made that the court erroneously refused to allow to the special administrator as credits: (a) Certain costs and expenses incurred in the Henry Williams estate; (b) an attorney's fee; (c) certain taxes paid; and likewise erroneously charged him with (d) an item of $3,950.23; (e) an item of $500; and (f) the entire costs of this hearing.

(a) It appears from the record that the court costs were incurred by Davis, acting as special administrator and in his private capacity as residuary legatee under the spurious will, and though benefit may have accrued to the estate by reason of the litigation in which these expenses were incurred, so long as it

Executor and administrator—allowance of costs.

was impossible to separate the costs personal to Davis from those incurred on behalf of the estate, the court was justified in refusing any credit on account of these items.

(b) Rachel E. Williams died about March 3, 1907. On March 15th a paper purporting to be her last will was offered for probate in the district court of Silver Bow county. Certain objections were interposed and, pending the hearing, Davis was appointed special administrator of the estate, qualified, and took possession of the assets. In the meantime, on March 9th, A. Short, public administrator of Deer Lodge county, secured from the district court of that county his appointment as administrator of this estate, and thereafter, in December, 1909, petitioned the court of Silver Bow county to remove Davis as special administrator, and secured a citation to Davis to show cause why he should not be required to deliver possession of the property of the estate to the Deer Lodge administrator. Davis employed George F. Shelton, an attorney, who prepared written opposition to the motion and a return to the citation, and conducted the proceedings in court to a determination successful to the special administrator. For the services so performed, Davis paid Shelton $750, which is admitted to be reasonable compensation for the services rendered, and in his final account the special administrator, after setting forth the facts, asked that he be given credit for the amount as a legal charge against the funds of the estate. Upon objection, the district court refused to allow the credit. Upon what theory this claim was disallowed we are unable to understand. As special administrator it was the duty of Davis to retain possession of the property belonging to this estate, until an executor or general administrator was legally appointed and duly qualified. The district court of Deer Lodge county had no jurisdiction over the estate—the deceased being a resident of Silver Bow county at the time of her death—and the order appointing Short was coram non judice. Rev. Codes, § 7383. Davis could not lawfully surrender possession of the property to Short, but he was required by virtue of his office to resist the proceedings, and was authorized by § 7474 to do so.

Same—attorney's fees.

The mental attitude of Davis towards the property in the estate is of no consequence. He discharged a duty imposed upon him by law, and is entitled to credit for the reasonable expense incident thereto. In the brief of counsel for objectors it is urged that Davis's contest of the Short proceedings was waged by him as a residuary legatee under the spurious will, but the record does not sustain this contention, and could not. The return to the citation discloses that Davis appeared as special administrator, and not otherwise. Indeed, he could not have defended upon any other ground. As residuary legatee he had no right to the possession of the property, and no preference right to appointment as special administrator. It was only in his capacity as special administrator that he could be heard to insist upon his right of possession and his duty to retain such possession.

(c, d) Three thousand, nine hundred and fifty dollars and twenty-three cents came into the possession of the special administrator by virtue of ancillary administration had in England. No third party disputed the title of the estate to this money, and it was not a part of Mr. Davis's duty to raise any question, so long as he does not claim it himself. Prima facie the money belonged to the estate, and the court properly charged it to the special administrator.

Same—proceeds of ancillary administration.

In June, 1916, the special administrator delivered to the general administrator the property of the estate which he admitted

belonged to it, but withheld this $3,950.23, pending a decision upon this hearing. While thus retained, this sum was subjected to taxation for the year 1917, and $169.84 paid out of it for such taxes. The special administrator now insists that he should be credited with the amount of the taxes, and required to account for only $3,780.39, the residue. The contention is based upon the assumption that the property was subject to taxation, and that the estate is not prejudiced by the fact that the taxes were paid, even though irregularly, by someone other than the general administrator. As an abstract proposition, this conclusion might follow if the premises were sound; but if this fund had been delivered in June, 1916, as it should have been, the general administrator might have secured authority under § 7652 above, to invest it in government bonds exempt from taxation, or in other interest-bearing securities which would have produced an income sufficient to pay the taxes, at least. It was withheld wrongfully, and the burden of showing that no prejudice resulted to the estate by reason thereof was upon the special administrator, and in this he failed.

Same—taxes.

(e) Among the effects of Rachel E. Williams at the time of her death were certain articles of household furniture of the value of $1,500. The special administrator took possession of this property and put a caretaker in charge of it, permitting him to use the furniture as consideration for his services in looking after it. The court found that by reason of such use the value of the furniture had depreciated to the extent of $500, and charged the special administrator with that amount. As heretofore pointed out, it was the duty of the special administrator to preserve this furniture for the general administrator. The manner in which it should be preserved is left to his discretion, and if the means employed were effective, and the expense to the estate not excessive, he is entitled to credit for its care. It was of no consequence to the estate whether $500 in cash was paid for the care of this property, or an equal amount expended upon it through its use by the caretaker. The result would be the same. The special administrator offered evidence to show that by the means which he employed the estate was depleted $400 less than it would have been had he crated the furniture and stored it, as he might have done. We cannot understand the theory upon which an expenditure of approximately $900 would be approved, and an expenditure of $500 to accomplish the same end rejected. In charging the special administrator with this item, the court erred.

Same—depreciation in furniture.

(f) The court taxed all the costs of this hearing against the special administrator personally. Speaking generally, costs in probate proceedings are governed by § 7718, Revised Codes, which provides that the costs may be taxed against any party to the proceeding, or ordered paid from the funds of the estate as justice may require. New York and California each has a similar statute, and it has been held—and we think rightly—that the controlling consideration in every instance is: Did the party against whom it is sought to have the costs taxed act in good faith with respect to the particular matter which gave rise to the costs? Noyes v. Children's Aid Soc. 70 N. Y. 484; Henry v. Superior Ct. 93 Cal. 569, 29 Pac. 230.

It is conceded by counsel for objectors that an item of $30 is erroneously included in the cost bill. It appears that the sum of $93.20 was paid to witnesses called by the objectors to testify with reference to their claim that the special administrator should be made to pay interest. This contention was determined in his favor, and certainly it cannot be said that he acted in bad faith in refusing to account for interest which he was not required to pay. Justice does

not require him to pay the costs of defending against an unjust claim.

The cause is remanded to the district court, with directions to modify the order as amended, by crediting the special administrator with $750 paid to George F. Shelton as an attorney's fee in the Short proceedings, by eliminating the item of $500 for the depreciation of the furniture, and by deducting $123.20 from the cost bill, and, when thus modified, the order will stand affirmed; but the special administrator will be entitled to deduct from the funds of the estate now in his possession one half of his costs of these appeals. Except as herein otherwise directed, each party will pay his own costs of these appeals.

Same—costs.

Brantly, Ch. J., and Sanner, J., concur.

ANNOTATION.

Liability of executor, administrator, or trustee for interest or profits on funds deposited in a bank in which he is interested.

Corporate bank.

There does not seem to be any fixed rule of law as to the payment of interest by an executor, administrator, or other trustee, on moneys of the trust funds deposited in a banking corporation in which he is a stockholder, that is to say, depending upon the fact that he is a stockholder.

It will be seen that the reported case (RE WILLIAMS, ante, 1639) holds that a special administrator is not liable for such interest by reason of his ownership of stock in the depositary.

The court took a similar view in Howe v. Winn (1912) 150 Ky. 667, 150 S. W. 842; Re Johnson (1901) 57 App. Div. 494, 67 N. Y. Supp. 1004, modified in another particular in (1902) 170 N. Y. 139, 63 N. E. 63; and in Re Sexton (1908) 61 Misc. 569, 115 N. Y. Supp. 973.

Probably the court, in the reported case (RE WILLIAMS), is speaking with reference to the particular facts when it says: "The only theory upon which a special administrator can be held for profits accruing upon estate funds in his hands by virtue of his office, is, that he has made an unlawful use of the funds; for, as we have already pointed out, he cannot lawfully invest them, loan them, or use them." Of course, if the trustee has made a profit, he must account for it, even though he has acted lawfully.

In Howe v. Winn (1912) 150 Ky. 667, 150 S. W. 842, it was insisted that, as the executor deposited the money in a bank of which he was president and a stockholder, he should be charged with interest on it; but he showed that the bank maintained its reserve over and above this fund, and that he had the bank do this because he could not tell when he would be required to pay the money out; and no interest was charged him.

Similarly, in Re Sexton (1908) 61 Misc. 569, 115 N. Y. Supp. 973, where the executor deposited funds of the estate in a bank of which he was the principal owner, and which paid 6 per cent dividends, he testified that the funds brought no revenue to the bank, and were always on hand for payment, and the court declined to hold him chargeable with any interest, saying: "Neither do I think that, simply because an executor is the owner of stock in a bank, he should be forbidden from the keeping of his trust funds therein, and that if he does he must pay interest thereon."

In Re Johnson (1901) 57 App. Div. 494, 67 N. Y. Supp. 1004, modified in another particular in (1902) 170 N. Y. 139, 63 N. E. 63, in refusing to charge the executors interest where the bank of which one of them was president and chief owner had treated the estate as other customers on open account, allowing it no interest on deposits, the court said: "It does not

follow because an executor is the owner of stock in a bank that he is forbidden from keeping any of his trust funds therein. The rule prohibiting a trustee from making profit out of the funds committed to him is to be given a reasonable construction. In the modern method of doing business, one who is the custodian of the funds of another is expected to keep them in a solvent bank or trust company. If some measure of profit incidentally accrues to him because of his ownership of stock in the bank he ought not to be mulcted on that account. If the executors kept no more money on hand than the proper execution of their trust required, then the beneficiaries should not complain. If the account was kept substantially as it would have been in any other solvent bank in Palmyra or Wayne county, under a proper management of the fund, then the executors have performed their duty. The bare fact that Mr. Sexton was both executor and chief owner of the bank cannot fairly be made the pretext for punishing him where no wrong has been done. . . . As a counter consideration it is to be noted that the bank furnished, without charge, the office, stenographer, and whatever auxiliaries were necessary for the executors to transact their business."

In Re Sudds (1900) 32 Misc. 182, 66 N. Y. Supp. 231, appeal dismissed in (1902) 75 App. Div. 612, 77 N. Y. Supp. 413, where an executor deposited the estate's money in a bank of which he was cashier and stockholder, taking for a part of the money certificates of deposit at 2 per cent, the court declined to charge him any more interest.

Where the cashier and manager of a bank in bad condition transferred to it funds of an estate of which he was an administrator, from a depositary paying 2 per cent interest, and part of the fund was lost by failure of the bank, the court declined to charge his bondsmen more than 2 per cent interest, saying: "There is no proof that George Barnard enjoyed any profits therefrom. The Fort Stanwix National Bank may have been benefited thereby, and may have employed the same in the usual channels of business, and possibly realized the usual rate of discount; and George Barnard may have indirectly participated therein in the reception of stock dividends; but he should not be considered, according to the weight of the adjudicated cases, as personally employing said fund in his own business." Re Scudder (1897) 21 Misc. 179, 47 N. Y. Supp. 101.

An executor who was the president and principal stockholder of a bank, and who kept a considerable sum of the estate's money on deposit there for eighteen months before settlement, was charged interest upon the bulk of it at 3 per cent, that being the rate allowed by the bank on time deposits. Re Babcock (1889) 2 Connoly, 82, 9 N. Y. Supp. 554.

In Re McKay (1893) 5 Misc. 123, 25 N. Y. Supp. 725, where the executors kept funds of the estate for a considerable period in a bank of which they were directors and stockholders, one of them being president, the parties interested only sought to charge them such amount of interest as could have been obtained by the exercise of reasonable prudence; and the court fixed the charge at the rate of 4 per cent upon the sum of money which could have been reasonably set aside, from the time when that should have been done.

Where executors were respectively president and cashier of a bank, and large stockholders therein, and unnecessarily kept large sums of money of the estate in the bank for many years, allowing at first 2 per cent and later 4 per cent interest, they were charged, from one year after they took letters to the time of final settlement, interest on the average amount of such sums, compounded at the legal rate of 6 per cent per annum, less the interest credited by the bank. The bank, during the period, made loans to some of the distributees at 10 per cent. Owens v. Owens (1904) 84 Miss. 673, 37 So. 149.

Private banking houses, etc.

An administrator who is a private banker, and deposits money of the es-

tate in his own bank, should be charged legal interest on the funds, under the rule of a private individual who mingles the property of an estate with his own. Re Thorp (1900) 31 Misc. 581, 65 N. Y. Supp. 575.

Where an assignee had mixed the trust funds with his own, depositing them with a banking house of which he was a member, receiving interest on the deposits, but declining to disclose the rate, he was charged interest at the rate of 6 per cent. Hess's Estate (1871) 68 Pa. 454.

An executor depositing funds of the estate with a trading house in which he was three-fourths owner was charged interest at the legal rate, it not appearing that he made a greater profit on the money. Cannon v. Apperson (1885) 14 Lea (Tenn.) 553.

In Dick's Estate (1898) 183 Pa. 647, 39 Atl. 2, it was held that an administrator who withdraws the account of the estate from a bank paying interest, and deposits the money and other moneys of the estate with his own private bank, should pay such interest as is customary.

An administrator of a small estate who was a private banker kept the fund in his bank, supposing that he was not chargeable with any interest, as he allowed none on deposits; and he was charged such interest as he had received. Walker v. Dow (1888) 6 Dem. 265, 3 N. Y. Supp. 132.

In Johnson v. Pulver (1901) 1 Neb. (Unof.) 290, 95 N. W. 697, where the facts are not fully reported, an administrator was charged a certain amount of interest "for money held and retained by him in his own bank, unreasonably," it being indicated that he owned the bank.

In Re Adams (1900) 51 App. Div. 619, 64 N. Y. Supp. 591, affirmed in (1901) 166 N. Y. 623, 59 N. E. 1118, it was held that an administrator who turned estate funds into his private bank and appropriated them to his own use must pay interest thereon, but the time from which interest was charged is not reported.

In Dolan's Estate (1900) 15 Pa. Super. Ct. 20, an executor depositing funds in his private bank was charged interest on a part of them.

But in Hess's Estate (1871) 68 Pa. 454, where an assignee deposited funds of the estate in his name, as assignee, with a banking house of which he was a member, and was allowed no interest thereon, the court declined to charge him interest.

B. B. B.

SYMPHONY PLAYER COMPANY, Appt.,
v.
G. H. HACKSTADT.

Kentucky Court of Appeals — December 17, 1918.

(182 Ky. 546, 206 S. W. 803.)

Negligence — injury to organ taken for repairs — damages.

1. One who, taking an organ to repair, renders it worthless by changing and losing its parts, is liable for its value as for conversion.

[See note on this question beginning on page 1654.]

Appeal — value of organ — conclusiveness of finding.

2. A finding by the jury of the value of an organ, destroyed by one to whom it was delivered for repairs, cannot be disturbed on appeal, where the witnesses on one side place its value at $700 or $800, and on the other at $50 to $200.

Bailment — failure to repair — remedy.

3. If one taking an organ for repair fails to begin his work by the time stipulated for completion, the owner

may abandon the contract and seek damages for the breach.

Bailment — delay in repairs — curing wrong.

4. One who, having taken an organ to repair, delays for years to complete the work, after taking the instrument to pieces, cannot relieve himself from the consequences by attempting to make the repairs after the owner has taken steps to assert his rights in court.

APPEAL by defendant from a judgment of the Circuit Court for Kenton County in favor of plaintiff in an action brought to recover damages for alleged breach of a contract to alter and repair an organ. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Richard G. Williams** and **O. M. Rogers**, for appellant:

It was error to give an instruction to the jury to find for plaintiff, as the evidence failed to show conversion of the organ.

Edge v. Ott, 151 Ky. 672, 152 S. W. 766; Louisville & N. R. Co. v. Moore, 150 Ky. 692, 150 S. W. 849; Joseph Goldberger Iron Co. v. Cincinnati Iron & Steel Co. 153 Ky. 20, 154 S. W. 376; Bowers, Conversion, §§ 1–10; Hale v. Ames, 2 T. B. Mon. 144, 15 Am. Dec. 150.

Messrs. **R. C. Simmons** and **S. I. Rouse**, for appellee:

The offer of a party to perform a contract, after the lapse of a reasonable time for the performance, imposes no obligation on the other party to accept the tender.

Page, Contr. § 1154; 2 Parsons, Contr. p. 137.

The injured party had his election either to demand the property or sue on his contract for damages.

Lewis v. Hoover, 1 J. J. Marsh. 500, 19 Am. Dec. 120.

Thomas, J., delivered the opinion of the court:

On or about March 1, 1911, the plaintiff and appellee here, G. H. Hackstadt, was the owner of a pin-cylinder organ used in connection with a merry-go-round or flying Dutchman, in the operation of which plaintiff was engaged at that time. He entered into a contract with the predecessors in business of the appellant and defendant below, the Symphony Player Company, to convert the organ into a player organ, to play perforated 65-note music; the work to be completed, according to plaintiff's testimony (which is undisputed), by April 15, 1911. It was further agreed that certain work should be done to the bellows of the organ, and that it should be painted, for all of which plaintiff was to pay $135.

Shortly after the contract, the partnership with whom it was made became incorporated in the name of the Piano Player Manufacturing Company, which assumed all the obligations of the partnership, and the name of that company was afterwards changed to that of appellant, the Symphony Player Company. The place of business of the defendant at the date of the contract was in Cincinnati, Ohio, but a short while after the execution of the contract it moved its place of business to another part of the city, from which latter place it later removed its business to the city of Covington, Kentucky. Nothing appears to have been done under the contract for almost a year, except to tear the organ to pieces and perhaps saw off some of the pipes; but in the meantime plaintiff was making frequent demands that the contract be carried out and the work completed.

Eventually plaintiff was notified that his organ had been remodeled so as to play 44-note paper music instead of that called for by the contract, but even this much was not done for more than two years after the contract was entered into. When plaintiff learned what had been done to the organ in an alleged effort to carry out the contract, he at once repudiated it and declined to accept the organ thus remodeled, because it failed to produce the volume of music which he desired for his business, and further because it was an entire failure even as a play-

er of 44-note music, in that the sound was low and there was a great discord and a lack of harmony in its notes. About that time, or shortly afterward, defendant began preparations to move its business from the city of Cincinnati, Ohio, to the city of Covington, Kentucky, and under the contention that it had complied with its contract it wrote a letter to plaintiff to the effect that his organ had been completed according to contract, and offering to deliver it to him upon demand. That letter was written on July 16, 1912, and on the 31st of the same month they again wrote him stating their intention to move, and that unless he called for the organ they would be compelled to leave it in the building defendant then occupied, subject to his orders. On August 5th following, the defendant wrote him, saying: "We received your favor of the 31st inst. We have the organ now in as good a condition as can be made. We are moving our factory, and would therefore like to get it out of the road."

The letters of plaintiff in response to those of defendant are not filed, but he testified that he was protesting in them all the while that the organ had not been completed according to the contract. When the move was made from Cincinnati to Covington, the organ was taken along and stored in the basement of the building which defendant occupied in the latter city, where it remained for more than a year without anything whatever being done to it; and when plaintiff went there to see about the organ in response to a letter written him by the defendant on May 17, 1913, the manager for defendant could not at first find the organ, but eventually located it in the basement, as above stated.

On June 10, 1913, another letter was written by plaintiff to defendant, saying: "Replying to your letter of June 3, will state that we have found that it is going to be utterly impossible for us to repair the organ. We wish you would kindly call upon us as early as possible without any inconvenience to yourself, and we will endeavor to get together and straighten this matter out. Regretting our inability to make the repairs as you require them, we remain," etc.

Plaintiff replied to that letter on June 13th, and next day defendant wrote him saying: "Replying to your letter of June 13, in reference to the organ, will state that we are compelled to advise you, much to our regret, that your organ cannot be finished at any time."

The letter then continues by stating that some of the pipes were gone, and that defendant did not know whether they had ever been received or whether they had been lost.

Notwithstanding all these rebuffs, the plaintiff continued to make heroic efforts to have his organ completed according to contract. But utterly failing, he finally, some time in June, 1915, placed the matter in the hands of his attorney, which resulted in the filing of this suit to recover the value of the organ, upon the ground that defendant had so mutilated and abused it as to render it worthless. In the meantime, defendant's representatives suggested to plaintiff that he buy a new organ, since it appeared impossible for defendant to make the repairs according to contract. Plaintiff did buy a new one, but not with the intention of abandoning his contract with defendant, since he continued thereafter to insist upon its performance until it became evident that defendant had not only abandoned its contract, but had also rendered the organ worthless, as stated. The petition fixed the value of the organ at $700, and sought judgment for that amount.

The answer was a denial with the affirmative allegation that there was no agreement to repair the organ for the price indicated, but only one to *undertake* such repairs, with no guaranty that the work could be done. A denial of that plea consti-

tuted the issues, and at the close of the evidence the court peremptorily instructed the jury to find for plaintiff what it might reasonably believe from the evidence was the value of the organ at the time it was delivered to defendant under the contract. This was followed by a verdict in favor of plaintiff for $700, upon which judgment was rendered, and to reverse it the defendant prosecutes this appeal.

The principal argument made in behalf of defendant in this court is that the evidence failed to show a conversion of the organ by the defendant, and that the court was in error in giving the above instruction to the jury. It is also insisted that the court erred in refusing to give instructions offered by the defendant, and that the verdict finding the value of the organ to be $700 is flagrantly against the evidence.

If the first error complained of be without merit, then the second one complained of would necessarily be so. But, postponing for the present the consideration of these questions, we will first dispose of the last error relied upon. A number of witnesses besides plaintiff, who, according to the testimony, were versed in such matters, said that plaintiff's organ, in the condition it was at the time it was delivered to defendant, was reasonably worth $700 or $800, the plaintiff fixing its value at a still higher sum. Witnesses for defendant, perhaps equal in number to those who testified for plaintiff on this point, gave it as their opinion that the organ at the time it was delivered to defendant was worth from $50 to $200. This condition of the testimony produced a contradiction of proof upon this point and created an issue essentially for the determination of the jury, and under the long-established rules governing jury trials we cannot, under the state of this record, disturb the verdict for this reason.

Appeal—value of organ—conclusiveness of finding.

The defendant was a bailee of the organ under its contract to remodel it, by which contract it agreed, according to the undisputed proof, to repair it so as to convert it into one playing perforated 65-note music. There is absolutely no testimony that defendant agreed to undertake to make the repairs only, without assurances of success, as it alleged in its answer. It did not perform or commence to perform its contract within the time specified, nor within a reasonable time after it was made, which duty the law would impose upon it in the absence of a specified time. Plaintiff then at any time thereafter had the right to abandon his contract, and to seek against defendant whatever relief the law would afford him. Under such conditions, the law seems to be well settled that the bailor, if a chattel has been rendered worthless by the bailee, may treat it as a conversion and sue the bailee for its value. 2 Parsons' Contr. p. 137; 6 C. J. 1165. In the last work referred to, the text says: "Where an article is intrusted to a bailee for alterations or repairs, and by reason of deviation from the bailor's instructions, of negligence, or of unskilfulness, the work is not properly performed, the bailor may sue for the breach of contract to repair, in which case the measure of his damages is the difference in the value of the article in its present condition and what it would have been worth if the work had been properly performed; or, if the article has been converted by the bailee or has been so seriously injured by him as to have practically lost its value to the bailor, and has accordingly been abandoned to the bailee, an action may be brought in trover and plaintiff may recover the value of the property."

Bailment—failure to repair—remedy.

Negligence—injury to organ taken for repairs—damages.

This is not only supported by most respectable authority, but it is the essence of sound legal reasoning, and we do not hesitate to adopt it as the correct legal principle. Here the proof shows that at the expira-

tion of more than four years nothing remained of plaintiff's organ but a lot of disconnected parts, of no value except perhaps as junk, and plaintiff had the right to treat defendant's conduct as a conversion of his organ, and to sue for its value. A different state of case might have been presented if the organ had not been rendered worthless through defendant's conduct, but we have no such conditions here. We therefore conclude that, since there was no material contradiction in the testimony relating to the nonperformance of the contract, the court did right in submitting to the jury only the value of the organ.

Clearly, the effort to repair or restore the organ after the long delay, and after plaintiff had taken steps to assert his rights in court, could not cure the wrong nor relieve defendant of the consequences. According to the testimony of its president, after the matter was placed in the hands of an attorney the defendant "got busy" to repair the organ; but this awakening to its obligation was too late for it to be benefited thereby, since the law in a case like this ascribes no saving grace to such tardy repentance.

Bailment—delay in repairs—curing wrong.

A thorough consideration of the entire record fails to reveal any prejudicial error committed at the trial, and the judgment is therefore affirmed.

ARKANSAS MACHINE & BOILER WORKS, Appt.,
v.
W. H. MOORHEAD.

Arkansas Supreme Court — October 21, 1918.

(— Ark. —, 205 S. W. 980.)

Negligence — making repairs — liability of machinist.

1. One holding himself out as a machinist and accepting employment to repair a steam engine is liable for the loss proximately resulting from a negligent and unskilful performance of his work.

[See note on this question beginning on page 1654.]

Damages — negligent repairs on engine.

2. The damages to be awarded against a machinist who accepts employment to repair a steam engine, which wrecks itself because of the negligent character of the repairs made, are not limited to the difference in their value as made and what their value would have been if properly done, but may include the loss proximately resulting from the negligence.

APPEAL by defendant from a judgment of the Circuit Court for Arkansas County in favor of plaintiff in an action brought to recover damages for the destruction of an engine alleged to have been negligently repaired by an employee of defendant, and for damages to a rice crop occasioned by delay in securing a new engine. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Young & Wilson**, for appellant:

To render one liable for damages for breach of a contract, which arise from special circumstances, and are so large as to be out of proportion to the consideration agreed upon, it must appear, not only that he knew of such special circumstances, but also that he at least tacitly consented to assume the particular risks arising therefrom.

Hooks Smelting Co. v. Planters' Compress Co. 72 Ark. 275, 79 S. W. 1052; Wells, F. & Co. Exp. v. W. B.

Baker Lumber Co. 115 Ark. 142, 171 S. W. 132; 13 Cyc. 158; Fagan v. Whitcomb, 4 Tex. App. Civ. Cas. (Willson) 47, 14 S. W. 1018; Sunman v. Clark, 120 Ind. 142, 22 N. E. 113; Wiley v. Athol, 150 Mass. 426, 6 L.R.A. 342, 23 N. E. 311.

Messrs. **E. W. Moorhead** and **J. E. Ray**, for appellee:

Plaintiff was entitled to damages for the destruction of the engine.

Clark v. Bales, 15 Ark. 452; 2 Elliott, Contr. § 1364; 3 Elliott, Contr. § 2147; Sunman v. Clark, 120 Ind. 142, 22 N. E. 113.

Smith, J., delivered the opinion of the court:

This action was instituted to recover the damage suffered by appellee through the negligence of an employee of appellant in making certain repairs on an engine, as a result of which negligence the engine blew up and wrecked itself. The negligence complained of "consisted in defendant failing to drill a sufficient number of holes of a sufficient depth, and in not putting in a sufficient number of cap screws, and in not putting in properly the cap screws that were put in to hold the broken piece in place, in that the hole was not drilled into the broken piece as it should have been, but was only made like a shallow dent, against which the cap screw was placed, but which allowed the broken piece to slip upward, thereby causing the flywheel shaft to jump out of the bearing boxing and destroying the engine almost completely."

The engine was in use by appellee in pumping water for the cultivation of a rice crop, and there was a prayer for the damage to the engine, and damage to the rice crop occasioned by the delay in securing a new engine. The court below eliminated any question of damage to the crop, and submitted only the question of damage to the engine. There was a verdict for $150, and a judgment accordingly, and we have before us on this appeal only the correctness of this judgment.

As grounds for reversal, it is insisted that there was no proof of negligence, and that an erroneous measure of damages was given in an instruction on that subject. An instruction given at the request of appellant told the jury "that the plaintiff must show by a preponderance of the evidence that the damage was caused by the negligent work of defendant or its employees, and that said breach or damage was the direct result of the negligence on the part of said defendant or its employees."

Abner Underwood, the engineer who operated the engine, testified that he was present when the agreement between appellee and appellant's representative was made for the repair of the engine, and that the repairs were not made as agreed upon. The testimony is not undisputed, either as to the omission or as to the result of this omission; but these conflicts have been resolved against the contention of appellant, and the testimony of Underwood as to the cause of the injury is sufficient to support the verdict.

On the question of the measure of damages, the court told the jury that if appellant undertook to repair the engine, and "if there was no agreement to fix it any certain way," that there was an implied agreement that the work should be done in a skilful and workmanlike manner, and that if the repairs were made in an unskilful, careless, and faulty way, and that said negligence was the cause of the explosion, the plaintiff would be entitled to recover the damage to the engine. It was shown in the testimony that appellant made a charge of $1 per hour for the labor of its machinist, and that a total charge of $11 was made.

It is insisted that as the measure of damage the jury should have been told that when work is improperly done the measure of damage is the difference in its value as done and what its value would have been if it had been properly done, and it is also insisted that, to render one liable for damages for the breach of a contract which arises

from special circumstances and are so large as to be out of proportion to the consideration agreed upon, it must appear, not only that he knew of such special circumstances, but also that he at least tacitly consented to assume the risk arising therefrom. In support of this contention appellant cites the opinion of this court in the case of Wells, F. & Co. Exp. v. W. B. Baker Lumber Co. 115 Ark. 142, 171 S. W. 132. In that case special damages were asked against a common carrier for delay in the delivery of a part of the machinery of a sawmill to timber, due to the inability of the plaintiff to saw the same, and this court held that such damages could not be recovered without an allegation and proof that the carrier had special notice of such damage at the time of the shipment. And it is argued here that the testimony should have shown that appellant was advised that it would be charged with responsibility for the explosion of the engine, so that a charge could have been made proportionate to that responsibility. But we think the doctrine of the case cited is not applicable here. One holding himself out as a machinist and accepting employment to repair a steam engine is presumed to know the nature and the character of the work he is about to do, and the results likely to follow a negligent performance of his work, and is, therefore, liable for the damage proximately resulting from a negligent and unskilful performance of his work. Gibson v. Carlin, 13 Lea, 440; Livermore Foundry & Mach. Co. v. Union Compress & Storage Co. 105 Tenn. 187, 53 L.R.A. 482, 58 S. W. 270; Sutherland, Damages, § 702.

Negligence—making repairs—liability of machinists.

Damages—negligent repairs on engine.

The instructions as a whole correctly submitted the case to the jury, and we think the testimony was legally sufficient to warrant the jury in finding that the damage to the engine was such a proximate result of its negligent repair as to be within the contemplation of the machinist as a probable result of his negligence, and the judgment of the court below is therefore affirmed.

ANNOTATION.

Liability of one contracting to make repairs for damages from improper performance of the work.

The rule supported by the decided weight of authority is to the effect that one who contracts to make repairs, and performs the work in an unskilful or negligent manner, is liable for the damage proximately resulting from the improper performance, and which can be regarded as having been within the contemplation of the parties.

Thus, in ARKANSAS MACH. & BOILER WORKS V. MOORHEAD (reported herewith) ante, 1652, the court laid down the rule that, where one holds himself out as an expert and accepts employment to make repairs requiring skill, he is presumed to know the nature and the character of the work he is about to do and the results likely to follow a negligent performance thereof, and is, therefore, liable for the damage proximately resulting from such a negligent and unskilful performance; and, applying the rule, held that a machinist who contracted to repair a steam engine used in pumping water for the cultivation of a rice crop, but who so negligently and unskilfully performed the work that the engine blew up, was liable for the whole damage to the engine, but that he was not liable for damage to the rice crop occasioned by the delay in securing a new engine, the damages to the engine being regarded as within the contemplation of the machinist as a probable and proximate result of his negligence, and the damages to the crop only the remote result, and not within the con-

templation of the parties at the time the contract was entered into.

And in Livermore Foundry & Mach. Co. v. Union Compress & Storage Co. (1900) 105 **Tenn.** 187, 53 L.R.A. 482, 58 S. W. 270, one who contracted to repair the machinery of a cotton compress plant was held liable for the damages resulting from an explosion of the plant, caused by defective work and materials, the court maintaining that the loss must fall on that one whose wrong brought it about, and that since the defendant knew of the purpose for which the repairs were made, which was to have the plant in readiness for the beginning of the cotton-pressing season, the measure of damages included the actual damages to the plant from the explosion as well as the rental value of the plant during the season of enforced idleness.

So, in Bell v. Mutual Mach. Co. (1909) 150 **N. C.** 111, 63 S. E. 680, applying the rule that recovery for the improper making of repairs must be confined to the direct consequences of the breach of duty which were in the contemplation of the parties at the time the contract was entered into, it was held that the damages for defectively calking and repairing a vessel were the cost of having the defects repaired, plus the interest on the value of the vessel and the hire of employees and the like during the additional delay; but that a recovery for destruction of the vessel by fire, resulting from water leaking in and reaching barrels of lime stored in it, could not be had because too remote; at least, in the absence of notice to the repairer that it was to be used for carrying lime. And in Webster v. Beebe (1910) 2 Boyce (**Del.**) 161, 77 Atl. 769, where a boat was left to be repaired and the work was done unskilfully and the materials used were defective, it was held that the bailor should be allowed any loss or damage incurred by reason of the failure to perform the work in a proper manner, and according to contract, and that the damages were not necessarily what had to be paid for subsequent repairs; at least, if they were different from those contracted for.

And in Gibson v. Carlin (1884) 13 Lea (**Tenn.**) 440, applying the general rule that the measure of damages for negligence or improper performance of a contract for work and labor is the difference between the contract price and the value of the work done, or the cost of properly completing the work, plus the actual damage from any injury which proximately resulted from the breach, and occurred within a reasonable time after the breach, it was held that where a mechanic contracted to repair a building by putting on a new tin roof, but did defective work, the owner could recoup the contract price by proper reductions for the inferior and defective work, and by the damages to the building occasioned by the defective work, and which occurred within a reasonable period, after the completion of the work, for the owner to have had the defects remedied. The court said that injury to the building from rain would be within the contemplation of the parties, and the proximate result of defective work under a contract, the very object of which was to prevent that very injury, but that the owner could charge the delinquent party only for such damages as by reasonable effort and expense he could not prevent, it being his duty to rectify the defects within a reasonable time. And again in Malony v. Brady (1892) 45 **N. Y.** S. R. 864, 18 N. Y. Supp. 757, it was held that a contractor who repaired a roof in a defective manner was liable for the resulting damages, the measure of which was the cost of repairing effects of the negligence, "unless it were excessive." And that, where a water tank on a house is relined in an unskilful and negligent manner, the owner is entitled to damages directly resulting from the unworkmanlike work, see Schery v. Welstead (1905) 93 **N. Y.** Supp. 466.

In Fleming v. Beck (1864) 48 **Pa.** 309, a suit to recover damages for the alleged unskilful and defective dressing of millstones, it was held that the measure of damages was the imme-

diate loss, not the remote consequences, such as loss of profits or custom; at least, in the absence of an express stipulation that such losses should be regarded as consequential. In reaching this conclusion, the court, among other things, said: "A very small part of the machinery of a mill or factory may be so essential to its running that the want of it will stop operations until this part be mended or replaced, causing a large loss by suspension. But who has ever supposed that the blacksmith, millwright, or mechanic who undertakes to repair or replace it, and whose compensation may be a few dollars or even a few cents, is, by his implied contract to do his work in a workmanlike manner, to be held liable for the large losses of being idle? But few men could be found to work at a risk so great for a compensation so inadequate. But where, by the terms of a special contract or the facts brought into view at the time of his employment, the attention of the party is called to the fact that the risk is to be his, and he enters upon the duty with this consequence in his mind, he may be held to another measure of compensation."

In May v. Gunther (1897) 20 Misc. 659, 46 N. Y. Supp. 379, where a fur garment was taken to a furrier's to be remodeled and refitted, and the work was done in such an unskilful manner as to produce an absolute misfit, it was held that the bailor could refuse to accept the remodeled garment, and recover the full value thereof, and this, although in its existing condition it was actually as valuable a garment as when it was brought to the bailee; but on appeal (May v. Georger (1897) 21 Misc. 622, 47 N. Y. Supp. 1057) the judgment was reversed, and the true measure of damages said to be not the full value of the cloak, but the cost of making it fit and suitable for the plaintiff to wear, or the difference in value to the plaintiff in its misfit condition and what it would have been worth to her had the defendant made the proper alterations.

So, in Woltag v. Reichgott (1915) 156 N. Y. Supp. 133, it was held that the measure of damages for negligent work on a watch turned over for repairs was the difference between the market value of the watch in its alleged damaged condition and the value if the work had been performed skilfully, and not the cost of a new watch, at least, where the watch remained in the owner's possession; and this, though the latter offered to turn the watch over to the bailee.

And in Adams v. Kline (1909) 119 N. Y. Supp. 280, where a dress was sent to a cleaning establishment and in the process of cleaning the lace yoke was seriously damaged, it was held that the cleaner was liable in damages for the injury to the dress, and that the measure thereof was the cost of repairing or replacing the yoke.

And in Miller v. Levy (1907) 104 N. Y. Supp. 368, an action on contract to recover for damages to cloth which had been bailed to defendant to be examined and sponged, it was held that the proper measure of damages was the difference between the value of the goods in the condition in which they were delivered and their value in the condition in which they were returned.

And in Heyman v. Barretts, P. & H. Dyeing Establishment (1915) 156 N. Y. Supp. 418, where silks were delivered to be redyed and were negligently damaged in the process, it was held that in as much as the goods were returned, and were not all rendered valueless, the measure of damages was not the value of the goods as a total loss, but the difference in the value of the goods properly dyed and in their value as the work was done. So, in Cohn v. Reliable Fur Dressing & Dyeing Co. (1912) 133 N. Y. Supp. 446, the court, applying the rule that one improperly performing work upon a thing is liable only for the loss resulting from his negligence, held that the measure of damages for improperly dyeing certain skins was the depreciation in value caused by the unskilful work. And again in Gutschneider v. Pirosnick (1910) 123 N. Y. Supp. 190, it was held that the measure of damages for improperly

dyeing certain skins, where they were not rendered worthless was the difference between the value of the skins uninjured and their value in the condition when returned in a damaged condition. And in Emmerich v. Chegnay (1905) 46 Misc. 456, 92 N. Y. Supp. 336, where the defendant improperly dyed certain ribbons, and an action was brought for breach of contract, it was held that the measure of damages was not the full value of the ribbons, but the difference between their value in the damaged condition and what they would have been worth if properly dyed, and this, although as dyed they were of no use to the plaintiff. And in Barrett Dyeing Establishment v. Wharton (1883) 16 N. Y. Week. Dig. 500, reversed on other grounds in (1886) 101 N. Y. 631, 4 N. E. 344, the liability of a dyeing establishment for unskilful work in dyeing certain fabrics was recognized by the court, but the measure of damages was not stated.

However, in SYMPHONY PLAYER CO. v. HACKSTADT (reported herewith) ante, 1648, where defendant contracted to remodel and repair an organ, but so treated it as to render it worthless, except perhaps as junk, it was held that the proper measure of damages was the value of the organ, the bailor having abandoned it to the bailee. And in this connection see also May v. Georger (1897) 21 Misc. 622, 47 N. Y. Supp. 1057.

In Pusey v. Webb (1900) 2 Penn. (Del.) 490, 47 Atl. 701, where plaintiff left a horse at a blacksmith shop to be shod, and a cut on the hoof resulted in blood poisoning and the death of the horse, it was held that, if the cut was occasioned by the failure of the bailee to exercise that degree of knowledge and skill which is ordinarily possessed by others engaged in the same trade, the plaintiff could recover, and that the proper measure of damages was the value of the horse at the time of the injury, plus such additional sum as the plaintiff reasonably and necessarily expended in endeavoring to save the horse. And see Miller v. Ben H. Fletcher Co. (1914) 142 Ga. 668, 83 S. E. 521, wherein it was held that where a mule is bailed for the purpose of being reshod, and the bailee so negligently performs the work that the animal is killed, he is liable for the resulting damages.

G. J. C.

JESSE CAPPON, Respt.,
v.
BAT O'DAY, Appt.

Wisconsin Supreme Court—May 15, 1917.

(165 Wis. 486, 162 N. W. 655.)

Chattel mortgage — where filed — mortgagor's residence — removal.

1. A chattel mortgage given to secure the purchase price of personal property on a farm purchased by the mortgagors must be filed at the place of the mortgagors' residence at the time the mortgage was executed, and not where the farm is situated, although they intend to move onto the farm and one of them in fact does so before the mortgage is filed.

[See note on this question beginning on page 1662.]

Appeal — question raised for first time.

2. The appellate court may consider the question of the validity of a chattel mortgage, to recover property covered by which the action was brought which is raised for the first time on appeal, if all the facts are before it.

APPEAL by defendant from a judgment of the Circuit Court for Wood County in favor of plaintiff in an action brought to recover possession of certain property covered by a chattel mortgage. *Reversed.*

Statement by **Rosenberry, J.**:

On December 10, 1913, Anna Kern sold to Silber and Scheer, all of the parties at the time being residents of the city of Milwaukee, a farm in Wood county, together with certain personal property thereon, and to secure the payment of $2,000, which was part of the purchase price of the farm and personal property, she took back a chattel mortgage from the purchasers dated December 10, 1913, upon the personal property. The chattel mortgage recites that the mortgagors, Silber and Scheer, reside in the city of Milwaukee, and that part of the description of the personal property material here is as follows: "Three (3) horses . . . Said property is now on the north half of the northeast quarter (N. ½ of the N. E. ¼), section thirty-one (31), township twenty-three (23) north, of range five (5) east, Wood county, Wisconsin. All of the said property being now in the possession of said first party in the county and state as aforesaid, and free from all encumbrance."

It appears that at the time of the execution of the chattel mortgage Silber intended to remove to the farm in Wood county, and that he did so remove within two or three days after the mortgage was executed. Scheer and his family continued to reside in the city of Milwaukee until April 22, 1914, when they also moved upon the farm. On January 24, 1914, the chattel mortgage was filed with the town clerk of the town of Sigel, Wood county, the town in which the farm was situated. At the time the chattel mortgage was recorded Silber was residing upon the farm and Scheer in the city of Milwaukee. On March 2, 1914, Anna Kern assigned the mortgage to the plaintiff Jesse Cappon. August 20, 1914, Silber and Scheer sold for value to defendant two of the horses which they purchased from Anna Kern and which were attempted to be described in the chattel mortgage. After making the bargain for the horses but before paying for them, except a down payment of $10, defendant went to the office of the town clerk of the town of Sigel to inquire as to liens upon the property. The clerk was not at home, and his wife looked at the files but failed to find anything. On his way home the defendant met the clerk and renewed his inquiries, and was advised by the clerk that he could not remember, and the clerk promised that he would examine the records and write him; and he did write defendant, advising him of the existence of the mortgage. But without waiting to hear from the clerk the defendant paid the balance of the purchase price and took the horses. After receiving the town clerk's letter the defendant went to the mortgagors and secured a guaranty to the effect that the horses were free and clear of liens and that the mortgagors would protect him. September 29, 1914, Silber and Scheer were arrested for selling property covered by chattel mortgage, contrary to the statute. The case was continued, and on October 14, 1914, it was settled in accordance with the statute and dismissed. It appears that by the settlement Silber and Scheer deeded to plaintiff their equity in the real estate, on which they had paid $1,000, turned back all of the personal property remaining on the farm, and in addition paid $100 in cash. Silber and Scheer claim that this was to be a settlement of all claims. Plaintiff claims that it was a settlement of special damages accruing by reason of the sale of the chattel-mortgaged property. In the property turned back was some personal property which Silber and Scheer

had acquired after the purchase of the farm, and not covered by the chattel mortgage. Shortly after the settlement plaintiff commenced this and two other actions to recover property described in the chattel mortgage.

The court submitted the case to the jury, and the jury found (1) that the description of the horses in the chattel mortgage from Silber and Scheer to Anna Kern was insufficient, so as to render the chattel mortgage void as to the defendant; (2) that there was an agreement between Silber and Scheer and Anna Kern that Silber and Scheer could sell or exchange the horses and stock described in the chattel mortgage (Exhibit A) and replace the same with other horses and stock; and (3) that the value of the horses involved in this action was $325. The parties then made the usual motions. Upon motion of the plaintiff the court changed the answers to questions 1 and 2 from Yes to No, and upon the verdict as so changed directed judgment for the plaintiff in the sum of $325, and further found that plaintiff was entitled to judgment in any event, notwithstanding the verdict, for such sum. Judgment was entered accordingly, and defendant appeals.

Messrs. **W. E. Wheelan**, and **Claire B. Bird**, for appellant:

The description "three horses" located at a certain place, as against this defendant, was void for uncertainty.

Knapp, Stout & Co. Co. v. Deitz, 64 Wis. 31, 24 N. W. 471.

If not void as a matter of law, it was a jury question whether extrinsic evidence could make the description valid.

6 Cyc. 1037d; Harris v. Kennedy, 48 Wis. 500, 4 N. W. 651; Weber v. Illing, 66 Wis. 79, 27 N. W. 834; Knapp, Stout & Co. Co. v. Deitz, supra.

If properly filed no subsequent changes avoid the mortgage.

Bailey v. Costello, 94 Wis. 87, 68 N. W. 663.

Where the statute does not state what time is intended, it means in fact the time of execution.

Jones, Chat. Mort. §§ 251, 251a; Pingrey, Chat. Mortg. § 362; 2 Cobbey, Chat. Mortg. §§ 573, 574; First Nat. Bank v. Weed, 89 Mich. 373, 50 N. W. 869; Fassett v. Wise, 115 Cal. 316, 36 L.R.A. 505, 47 Pac. 47, 1095; Burbank v. Bobbitt, 157 Ky. 524, 163 S. W. 457; Brittenham v. Robinson, 18 Ind. App. 502, 48 N. E. 616; Horton v. Wright, 113 Me. 439, 94 Atl. 883; Stirk v. Hamilton, 83 Me. 524, 22 Atl. 391; Witham v. Butterfield, 6 Cush. 217; Re Nuckols, 201 Fed. 437; Burlington State Bank v. Marlin Nat. Bank, — Tex. Civ. App. —, 166 S. W. 500; Hales v. Zander, 24 Okla. 246, 138 Am. St. Rep. 879, 103 Pac. 669; Lasswell v. Henderson, 144 Mo. App. 396, 128 S. W. 789; Fife v. Ohio Invest. Co. 52 Ind. App. 108, 100 N. E. 393; Harris v. Jones, 83 N. C. 317.

If date of recording is meant, the statute was not then complied with.

First Nat. Bank v. Biederman, 149 Wis. 8, 134 N. W. 1132, Ann. Cas. 1913C, 837; Stewart v. Platt, 101 U. S. 731, 733, 25 L. ed. 816; 6 Cyc. 1085 (3); Clough v. Kyne, 40 Ill. App. 234; Ashland Lodge v. Williams, 100 Wis. 223, 69 Am. St. Rep. 912, 75 N. W. 954.

Messrs. **Goggins, Brazeau, & Goggins**, for respondent:

The question of the sufficiency and validity of a chattel mortgage is one for the court exclusively.

Weber v. Illing, 66 Wis. 79, 27 N. W. 834; Newman v. Tymeson, 13 Wis. 172, 80 Am. Dec. 735; Harris v. Kennedy, 48 Wis. 500, 4 N. W. 651; Adler v. Godfrey, 153 Wis. 186, 140 N. W. 1115.

The filing of the chattel mortgage given by Silber and Scheer, mortgagors, dated December 10, 1913, in the town of Sigel, Wood county, Wisconsin, was a sufficient filing to make the same valid as against third parties under §§ 2313, 2314 of the statutes.

Nickerson v. Wells-Stone Mercantile Co. 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; Dahlman v. Milwaukee, 131 Wis. 438, 110 N. W. 479; Harris v. Snyder, 113 Wis. 460, 89 N. W. 660; Gordon v. Sullivan, 116 Wis. 548, 93 N. W. 457; Bell v. Anderson, 74 Wis. 641, 43 N. W. 666; Hasbrouck v. Armour & Co. 139 Wis. 357, 23 L.R.A. (N.S.) 876, 121 N. W. 157, 21 Am. Neg. Rep. 430; Rudd v. Bell, 55 Wis. 563, 13 N. W. 446; Toepfer v. Sterr, 156 Wis. 226, 145 N. W. 970; 3 C. J. arts. 593, 618.

Mortgagors' residence, as used in the statute, is the town of Sigel, Wood county, Wisconsin, even though the papers were in fact delivered in Mil-

waukee, if they were so delivered, of which there is in fact no evidence.

Avery v. Wilson, 47 S. C. 78, 25 S. E. 286; Harris v. Jones, 83 N. C. 317; Simpson v. Morris, 48 N. C. (3 Jones, L.) 411.

Rosenberry, J., delivered the opinion of the court:

It is claimed (1) that the description of the property in the chattel mortgage is insufficient to make the mortgage a valid instrument; (2) that the court erred in holding incompetent the evidence of the agreement between the mortgagors and the mortgagee as to the right of the mortgagors to sell and replace the property described in the mortgage; and (3) in refusing to submit to the jury the question whether, before this action was commenced, plaintiff's claim was discharged and satisfied.

The question as to whether or not the chattel mortgage was filed as required by §§ 2313 and 2314, Stat., so as to be valid as against third parties, was not raised in the court below. It appearing from the undisputed evidence, however, that the mortgagors resided in the city of Milwaukee at the time of the execution of the mortgage, and that only one of the parties resided in the town where the mortgage was recorded at the time it was recorded, this court upon its own motion required briefs to be filed on the following question: "Was the filing of the chattel mortgage given by Silber and Scheer, mortgagors, dated December 10, 1913, in the town of Sigel, Wood county, Wisconsin, a sufficient filing to make the same valid as against third parties, under §§ 2313 and 2314, Stat.?"

Such supplementary briefs have been filed. No claim is made that the facts are other than as stated, nor is there any claim that the mortgage was ever filed in the city of Milwaukee.

Respondent claims in his supplementary brief that, the question of the validity of the mortgage not having been raised, the record is conclusive upon this court, and for this court to now consider the question would amount to a perpetration of a gross wrong and hardship upon the plaintiff, and imposition upon the trial court. We cannot agree with this contention. This court sits here to do justice between litigants. For the purpose of orderly administration and the attainment of justice certain rules are established. Any rule the enforcement of which results in a failure of justice should be carefully scrutinized and not blindly adhered to, unless the abandonment of it will work more injustice than will follow if it be adhered to. One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. 3 C. J. 689. The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court. But to this rule there are many exceptions. Questions as to the jurisdiction of the court may be raised. Telford v. Ashland, 100 Wis. 238, 75 N. W. 1006. Questions as to the legal effect of a deed or other instrument may be raised for the first time in this court. Hartung v. Witte, 59 Wis. 285, 18 N. W. 175; Nightingale v. Barens, 47 Wis. 389, 2 N. W. 767. There are numerous other exceptions. 3 C. J. 740. No question of the power of this court is involved. Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is

one of administration, not of power. The statements in Brandon's Will, 164 Wis. 387, 160 N. W. 177, and Ritter v. Ritter, 100 Wis. 468, 76 N. W. 347, to the effect that questions not brought up in the court below cannot be considered here, must be considered as statements of the general rule, to which there are exceptions as here indicated.

In this case the question as to the validity of the mortgage has been fully argued. It is not claimed that the facts do not fully appear. The record is complete. If it were not, we should feel it our duty to remand the record and order a new trial in accordance with the provisions of § 2405m, Stat.

Appeal—question raised for first time.

"Section 2313. No mortgage of personal property shall be valid against any other person than the parties thereto unless the possession of the mortgaged property be delivered to and retained by the mortgagee or unless the mortgage or a copy thereof be filed as provided in § 2314, except when otherwise directed in these statutes. . . .

"Section 2314. Every mortgage of personal property or a copy thereof may be filed in the office of the clerk of the town, city or village where the mortgagor resides, or in case he is a nonresident of the state then in the office of the clerk of the town, city or village where the property mortgaged may be at the time of the execution of such mortgage; . . . "

It is undisputed in this case that the mortgagors at the time of the execution of the mortgage resided in the city of Milwaukee, and that the chattel mortgage was never recorded in the city of Milwaukee. In order to meet the requirements of §§ 2313 and 2314, Stat., so as to make the mortgage valid as against third parties, it must be recorded in the office of the clerk of the town, city, or village where the mortgagors reside at the time of the execution, and if the mortgage is executed by two or more persons residing in different towns, cities, or villages it must be recorded in the office of the clerk of the town, city, or village in which each of the mortgagors resided at the time of the execution of the mortgage. A mortgage recorded in a town to which one of the mortgagors subsequently removes is not properly recorded, and neither does the removal of the mortgagor to the town where the mortgage is in fact recorded, but improperly so, make the mortgage valid as to third persons. That such was the intention of the legislature seems clear from the history of the statute, and the construction that has heretofore been placed upon it by this court points the same way. First Nat. Bank v. Biederman, 149 Wis. 8, 134 N. W. 1132, Ann. Cas. 1913C, 837; Bailey v. Costello, 94 Wis. 87, 68 N. W. 663. Such construction is in accordance with the great weight of authority elsewhere. Jones, Chat. Mortg. 5th ed. §§ 250, 251a; Pingrey, Chat. Mortg. § 363; 2 Cobbey, Chat. Mortg. § 573; Re Nuckols, 201 Fed. 437; Burbank v. Bobbitt, 157 Ky. 524, 163 S. W. 457; Burlington State Bank v. Marlin Nat. Bank, — Tex. Civ. App. —, 166 S. W. 499; Hales v. Zander, 24 Okla. 246, 138 Am. St. Rep. 879, 103 Pac. 669; Lasswell v. Henderson, 144 Mo. App. 396, 128 S. W. 789; Fife v. Ohio Invest. Co. 52 Ind. App. 108, 100 N. E. 392.

Chattel mortgage—where filed—mortgagor's residence—removal.

Not having been filed in accordance with the terms of the statute, we are clear that the chattel mortgage in question was void as to third parties, and the consideration of other questions becomes immaterial.

Judgment reversed, and cause remanded with directions to dismiss the complaint.

ANNOTATION.

Effect of recording chattel mortgage in town or county to which the mortgagor subsequently removed.

This note is concerned with the question of the effect of filing a chattel mortgage in the town to which the mortgagor subsequently removes, to give constructive notice to third persons of the mortgage, where, because of the failure to file the same or because the original filing was defective, constructive notive was not otherwise imparted.

In this connection it is to be noted that the purpose of filing a chattel mortgage is to give notice to all interested persons of the existence of the mortgage. In order to effect this purpose, the statute usually requires that the mortgage be filed in the town or county where the mortgagor resides. In a few instances, the statute specifically requires that the mortgage be filed in the township where the mortgagor resides at the time of its execution, and in some states the requirement is that the mortgage shall be filed in the township where the mortgaged property is located. Of course where the statute is explicit on the subject, and specifically requires that the mortgage be filed in the township where the mortgagor resides at the time of its execution, much stronger grounds are presented for holding to be of no avail the subsequent filing of the mortgage in a township to which the mortgagor removed after the execution of the mortgage. See Witham v. Butterfield (1850) 6 Cush. (Mass.) 217.

The cases are not in accord in their construction of a statute which, like that involved in the reported case (CAPPON v. O'DAY), ante, 1657, merely requires that the mortgage shall be recorded in the township where the mortgagor resides. The holding in the O'DAY CASE, that under such a statute a mortgage must be filed in the township where the mortgagor resided at the time of its execution in order to charge third persons with constructive notice of its existence, is apparently in conflict with the holding in Harris v. Jones (1880) 83 N. C. 317, to the effect that where, at the time of the execution of a mortgage upon crops to be grown in a county in which the mortgagor did not then live, but in which he had purchased property, and to which he was about to remove, the recording of the mortgage in this latter county was sufficient to charge third persons with notice thereof. This case follows on this point Simpson v. Morris (1856) 48 N. C. (3 Jones, L.) 411, holding that third persons have constructive notice of a bill of sale, although it was not filed in the county where the seller resided at the time of its execution, it having been filed in a county to which he shortly removed.

In Cass v. Gunnison (1888) 68 Mich. 147, 36 N. W. 45, the mortgagor moved into the county in which the mortgage was recorded subsequently to its record, and it was held that the mortgage was not properly recorded, and that hence filing the mortgage in the county to which the mortgagor thereafter removed was not constructive notice thereof to subsequent good-faith purchasers of the mortgaged property. The effect of the removal of the mortgagor to the county where the mortgage was recorded was not discussed.

While not strictly within the scope of the note, attention is called to the holding that, under a statute in effect making a mortgage effective as against third persons from the time it is recorded, if it is recorded some time after its execution in a county to which the mortgagor removed, it is constructive notice to third persons dealing in the mortgaged property after it is recorded, although it never was recorded in the county in which the mortgagor resided at the time of its execution. Avery v. Wilson (1896) 47 S. C. 78, 25 S. E. 286.

The foregoing case suggests a distinction between the effect of such a mortgage to give constructive notice

subsequently to its being recorded and where the rights of third persons have intervened prior to the time it was recorded. This distinction is made in Powers v. Freeman (1869) 2 Lans. (N. Y.) 127, holding that where a mortgage was not filed in the town in which the mortgagor resided at the time of its execution, it was invalid as against good-faith purchasers of the mortgaged property, and the subsequent filing of the mortgage in the township to which the mortgagor removed did not restore validity to the mortgage as against such purchasers. The statute construed in this case required that chattel mortgages be filed in the county where the mortgagor resided at the time of the execution thereof. A. G. S.

W. R. HYATT, State Insurance Commissioner, Appt.,
v.
BLACKWELL LUMBER COMPANY.

Idaho Supreme Court—June 25, 1918.

(— Idaho, —, 173 Pac. 1083.)

Constitutional law — insurance — foreign policies — regulation.

1. Laws 1913, chap. 185, § 15, when applied to contracts of insurance made and to be performed outside of the state, covering property within the state, is unconstitutional as depriving persons of liberty without due process of law.

[See note on this question beginning on page 1665.]

Courts — Federal decisions — state courts.

2. In considering the application of the Federal Constitution on the question of due process of law, the Idaho supreme court is concluded by the decisions of the Federal Supreme Court.

Definition — liberty.

3. "Liberty," as used in U. S. Const. Amend. 14, means not only the citizen's right to be free from mere physical restraint, but the right to be free in the enjoyment of all his faculties; to live and work where he will; to earn his livelihood by any lawful calling; and to enter into all contracts proper, necessary, and essential to such rights.

Headnotes by RICE, J.

APPEAL by plaintiff from a judgment of the District Court for Kootenai County in favor of defendant in an action brought to recover taxes and recording fees on fire insurance policies, which it refused to pay, and penalties equal to the amount of taxes so unpaid. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **T. A. Walters**, Attorney General, **J. P. Pope, A. C. Hindman,** and **J. Ward Arney,** Assistant Attorneys General, and **Black & Wernette** for appellant.

Messrs. **John P. Gray** and **W. F. McNaughton** for respondent.

Rice, J., delivered the opinion of the court:

Session Laws 1913, chap. 185, § 15, p. 600, reads as follows:

"All persons, firms, companies or corporations, obtaining fire insurance upon property situated in this state, in companies not authorized to transact business in this state, shall file with the insurance commissioner a statement or declaration under oath setting forth the name of the company and its location, the number of the policy, the amount of insurance, rate, premium and description of property insured in such unauthorized company, and

shall be required to pay a tax thereon of 10 per cent of the premiums paid on such policies to the said insurance commissioner; and shall pay a further fee to the commissioner of $1 on each policy in such unauthorized company for making record of said statement or declaration which record shall be kept for the information of the insurance department of this state.

"If any person, firm, company or corporation obtaining fire insurance in such unauthorized company shall fail or neglect for twenty days after taking such insurance to file the report and to pay the taxes and fees herein provided to be paid to the insurance commissioner, the insurance commissioner is hereby authorized to begin suit against such person, firm, company or corporation, in any court of competent jurisdiction, in his name as insurance commissioner, for said taxes and fees, and in addition thereto shall recover from such person, firm, company or corporation in any such suit a penalty equal to the amount of said taxes so unpaid, plus the sum of $100. The attorney general of the state shall file and prosecute all such suits when requested so to do by the insurance commissioner, and the moneys so recovered shall be paid to the state treasurer as other fees received by the insurance commissioner."

The respondent obtained insurance in such unauthorized companies, and paid to them $5,943.16 as premiums upon 110 insurance policies.

A statement or declaration under oath was filed with the insurance commissioner, setting forth the names of the companies and their location, the number of each policy, the amount of insurance, rate, premium, and description of the property insured; but respondent refused to pay the 10 per cent tax and $1 per policy for making record of such insurance. This action was instituted to recover the tax and the $1 recording fee for each such policy, and in addition a penalty equal to the amount of the taxes so unpaid and $100 provided for by the statute, amounting in all to $1,508.64. The court found that all the contracts of insurance referred to in the complaint, and involved in this case, were made and were to be performed outside of the state of Idaho, and that any losses covered by the same were payable outside of the state; that the contracts were valid at the place where made and where they were to be performed. The court further found that none of the companies had an agent within the state soliciting insurance, and did no act relating thereto within the state, and that none of the companies were engaged in doing business in the state at the time the insurance was procured or written. Judgment was entered in favor of the defendants, from which this appeal is prosecuted.

It is urged that the law quoted above is repugnant to the 14th Amendment of the Federal Constitution, in that it deprives persons of liberty and property without due process of law, and denies to persons within its jurisdiction the equal protection of the laws.

Courts—Federal decisions—state courts.

In considering the application of the Federal Constitution to this question, we are concluded by the decisions of the Federal Supreme Court. The case falls within the rule laid down in Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. In that case it is said that the "liberty" mentioned in the 14th Amendment means "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may

Definition—liberty.

be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

In the case of New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, Ann. Cas. 1918E, 592, 38 Sup. Ct. Rep. 337, it is said: "In Allgeyer v. Louisana, supra, we held a Louisiana statute invalid which undertook to restrict the right of a citizen while within that state to place insurance upon property located there by contract made and to be performed beyond its borders. We said: 'The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it,' and ruled that under the 14th Amendment the right to contract outside for insurance on property within a state is one which cannot be taken away by state legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed, and must be accepted as established."

As applied to such transactions as were had in this case, the statute is unconstitutional. It is an abridgement upon the freedom to contract which the 14th Amendment guarantees. If any such restriction should be upheld as an exercise of the taxing power of the state, the burden may be increased until it becomes prohibitive. Allgeyer v. Louisiana, supra; Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238; Dalamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 Sup. Ct. Rep. 879; Provident Sav. Life Assur. Soc. v. Kentucky, 239 U. S. 103, 60 L. ed. 167, L.R.A.1916C, 572, 36 Sup. Ct. Rep. 34; New York L. Ins. Co. v. Dodge, supra. See also the case of Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

Constitutional law—insurance—foreign policie—regulation.

The action in the court below was instituted by George F. Steele, who at that time was insurance commissioner of the state. Since the trial of the case was had, W. R. Hyatt has succeeded Steele in the office of insurance commissioner. An order will therefore be made substituting Hyatt as appellant in this court.

The judgment is affirmed. No costs awarded.

Budge, Ch. J., and **Morgan**, J., concur.

ANNOTATION.

Constitutionality of statutes relating to insurance contract, made and to be performed out of state, upon property or life within the state.

This note is confined to the consideration of the validity of legislation expressly relating to, and attempting to regulate, insurance contracts made out of the state, on property or a life within the state. It does not cover the question, what amounts to a doing of business within the state.

Cases merely involving the question of comity as to whether a court of one state will entertain an action based on a contract of insurance made out of the state, by a foreign insurance company which had not complied with the conditions of doing business within the state, are not within the scope of the note. See, for example, Buell v. Breese Mill & Grain Co. (1896) 65 **Ill.** App. 271; Swing v. Thomas, 120 **Ill.** App. 235; Seamans v. Zimmerman (1894) 91 **Iowa**, 363, 59 N. W. 290; Swing v. Cameron (1906) 145 **Mich.** 175, 9 L.R.A.(N.S.) 47, 108 N. W. 506, 9 Ann. Cas. 332; Seamans v. Temple Co. (1895) 105 **Mich.** 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408; Seamans v. Christian Bros. Mill Co. (1896) 66 **Minn.** 205, 68 N. W. 1065; Commonwealth Mut. F. Ins. Co. v. Hayden Bros. (1900) 60 **Neb.**

636, 83 Am. St. Rep. 545, 83 N. W. 922, reversed on other grounds in (1910) 61 Neb. 454, 85 N. W. 443; Swing v. Munson (1899) 191 Pa. 582, 58 L.R.A. 223, 71 Am. St. Rep. 772, 43 Atl. 342; Commonwealth Mut. F. Ins. Co. v. Sharpless (1900) 12 Pa. Super. Ct. 333. So, of course, the general subject of conflict of laws in relation to insurance contracts is beyond the scope of the note.

Notwithstanding the broad powers which the states enjoy in respect of the conditions which may be imposed upon foreign insurance companies seeking to do business within their borders, statutes which attempt directly or in effect to forbid or penalize the making of contracts of insurance outside the state, to be performed outside the state, upon property within the state or upon the lives of residents of the state, or to make such contracts a subject or source of taxation, have been quite consistently condemned as in violation of the 14th Amendment. Lamb v. Bowser (1876) 7 Biss. 315, Fed. Cas. No. 8,008; Allgeyer v. Louisiana (1896) 165 U. S. 580, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; French v. People (1895) 6 Colo. App. 311, 40 Pac. 463; Swing v. Hill (1905) 165 Ind. 411, 75 N. E. 658; Stone v. Old Colony Street R. Co. (1912) 212 Mass. 459, 99 N. E. 218; Swing v. Brister (1905) 87 Miss. 516, 40 So. 146, 6 Ann. Cas. 740; Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co. (1899) 149 Mo. 165, 50 S. W. 281; Western Massachusetts Mut. F. Ins. Co. v. Hilton (1899) 42 App. Div. 52, 58 N. Y. Supp. 996; Hammond v. International R. Co. (1909) 63 Misc. 437, 116 N. Y. Supp. 854; Stone v. Penn Yan, K. P. & B. R. Co. (1910) 197 N. Y. 279, 134 Am. St. Rep. 879, 90 N. E. 843; Western Massachusetts Mut. F. Ins. Co. v. Girard Point Storage Co. (1898) 6 Pa. Super. Ct. 288.

It will be noted that in the reported case (HYATT v. BLACKWELL LUMBER Co. ante, 1663) a statute providing for a tax and recording fee from those taking insurance in companies not authorized to transact business within the state was held, as applied to contracts made and to be performed outside of the state, covering property within the state, to violate the 14th Amendment of the Federal Constitution which forbids depriving persons of liberty and property without due process of law.

In the leading case of Allgeyer v. Louisiana (1896) 165 U. S. 580, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, a statute subjecting to a fine any person or firm who should fill out, sign, or issue in the state any certificate of insurance under an open marine policy, or who in any manner whatever should do any act in the state to effect for himself or for another insurance on property then in the state, in any marine insurance company which had not complied with the laws of the state, was held to violate the 14th Amendment of the Federal Constitution, when construed to prevent an owner of property in the state from sending by mail to an insurance company in another state, not authorized to do business in the state where the person lived, an order for insurance on his property, in pursuance of a valid contract for such insurance previously made, and to be performed in the other state, the court said: "The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least, with reference to the Federal Constitution. To deprive the citizen of such a right as herein described, without due process of law, is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which, under the Federal Constitution, the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation, in the legitimate exercise of its police or other powers, as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution. In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property,

must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the state, may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may, at the time when such insurance attaches, be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. . . . The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was properly temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification, in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state. The Atlantic Mutual Insurance Company of New York has done no business of insurance within the state of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the state of Louisiana, and correlatively the citizens of Louisiana had the right without the state of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the state of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract, validly entered into, outside and beyond the jurisdiction of the state. In such a case as the facts here present, the policy of the state in forbidding insurance companies which had not complied with the laws of the state from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the state of Louisiana, when it is written pursuant to a valid contract made outside the state, and with reference to a company which is not doing business within its limits. For these reasons we think the statute in question (La. Laws 1894, No. 66) was a violation of the Federal Constitution, and afforded no justification for the judgment awarded by that court against the plaintiffs in error."

And following Allgeyer v. Louisiana (U. S.) supra, it was held in Swing v. Hill (1905) 165 **Ind.** 411, 75 N. E. 658, that a state legislature was not empowered to enact a statute which prohibited citizens of the state from entering into contracts outside of the state, insuring property within its boundaries.

And in Hammond v. International R. Co. (1909) 63 Misc. 437, 116 N. Y. Supp. 854, a Massachusetts insurance company was held to have a constitutional right to enter into a contract in Massachusetts with citizens of New

York for the purpose of insuring property in New York, and the provisions of the insurance law of New York, providing that policies issued to residents of that state on property located therein, by companies which had not complied with the general insurance law, should be void, were held invalid so far as they interfered with this right.

And in Stone v. Penn Yan, K. P. & B. R. Co. (1910) 197 **N. Y.** 279, 134 Am. St. Rep. 879, 90 N. E. 843, the court stated that there was no statute in New York which forbade its citizens from entering into contracts with foreign insurance corporations, and that any law to such effect would be of doubtful validity, within the provisions of the 14th Amendment of the Federal Constitution, citing Allgeyer v. Louisiana (1896) 165 **U. S.** 580, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, supra.

And in the following cases the courts refused to construe the statutes indicated as applying to contracts of insurance made out of the state, although upon property or life within its limits, stating that to construe the acts as applicable to such contracts would require them to hold the statutes void, as an infringement of the 14th Amendment of the Federal Constitution:

—Western Massachusetts Mut. F. Ins. Co. v. Hilton (1899) 42 App. Div. 52, 58 **N. Y.** Supp. 996, involving a statute prohibiting insurance brokers from acting as agents to procure policies from corporations, or others, not authorized to do business in New York, except when a license was issued to them, and prohibiting such agents from obtaining insurance except upon certain conditions, and providing that all insurance policies issued to residents of New York, on property there located, by companies which had not complied with the requirements of the general insurance law of New York, should be void;

—Stone v. Old Colony Street R. Co. (1912) 212 **Mass.** 459, 99 N. E. 218, involving a statute providing that "all contracts of insurance on property, lives, or interests in this commonwealth shall be deemed to be made herein;"

—French v. People (1895) 6 **Colo. App.** 311, 40 Pac. 463, involving a statute rendering it unlawful for any person to aid in the transaction of the business of insurance with any company which had not complied with the provisions of the statute, regulating insurance companies doing business within the state;

—Lamb v. Bowser (1876) 7 Biss. 315, **Fed.** Cas. No. 8,008; Swing v. Brister (1905) 87 **Miss.** 516, 40 So. 146, 6 Ann. Cas. 740; Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co. (1899) 149 **Mo.** 165, 50 S. W. 281, involving statutes governing the rights of foreign insurance companies to do business within the state;

—Boston Mfrs. Mut. F. Ins. Co. v. Hendricks (1903) 41 Misc. 479, 85 **N. Y.** Supp. 44, involving a statute providing that foreign insurance companies not authorized to do business in New York, which should insure any property in that state against loss, should pay a tax annually on all premiums collected and received upon property situated within the state;

—Atlas Mut. Ins. Co. v. Fisheries Co. (1907) 6 Penn. (**Del.**) 256, 68 Atl. 4, involving statute governing the licensing and taxing of bonds of insurance companies.

And the courts in Provident Sav. Life Assur. Soc. v. Kentucky (1915) 239 **U. S.** 103, 60 L. ed. 167, L.R.A. 1916C, 572, 36 Sup. Ct. Rep. 34, and State v. Connecticut Mut. L. Ins. Co. (1901) 106 **Tenn.** 282, 61 S. W. 75, recognized that a tax on a foreign insurance company, on account of contracts of insurance made by it outside of the state with a citizen of the state, would be unconstitutional and void.

And in Western Massachusetts Mut. Ins. Co. v. Girard Point Storage Co. (1898) 6 **Pa.** Super. Ct. 288, a recovery in Pennsylvania for assessments growing out of a contract of insurance made in Massachusetts, on property situated in Pennsylvania, was held not precluded because the insurer had not complied with the law of Pennsylvania governing foreign

insurance corporations, the court holding that to give such laws extraterritorial effect would deprive citizens of their constitutional right to make such contracts as they desired beyond the boundaries of Pennsylvania.

The court in the preceding case was governed by Com. v. Biddle (1891) 139 Pa. 605, 11 L.R.A. 561, 21 Atl. 134, in which the court, in construing a penal statute as applying only to insurance agents and brokers, and not extending to an owner of property who insured his property in a foreign company, stated that it might be readily conceded that any act which should attempt to prevent a nonresident owner of property in the state, or a resident owner not at the time within its territory, from insuring his property in any manner lawful in the place of contract, would be void as extraterritorial; and that it might also be conceded that, if a citizen of the state had, by a contract validly made outside of Pennsylvania, incurred a liability, no law of the latter state could, under the Federal Constitution, prevent his fulfilling the obligation even by any act done within the state. See however, Swing v. Munson (1899) 191 Pa. 582, 58 L.R.A. 223, 71 Am. St. Rep. 772, 43 Atl. 342, and Commonwealth Mut. F. Ins. Co. v. Sharpless (1900) 12 Pa. Super. Ct. 333, referred to supra.

In Columbia F. Ins. Co. v. Kinyon (1874) 37 N. J. L. 33, and Northampton Mut. Live Stock Ins. Co. v. Tuttle (1878) 40 N. J. L. 476, it was held that a statute, providing that it should not be lawful for any company chartered by another state to transact any business connected with insuring property situated in New Jersey without conforming to certain requirements, was to be construed, in view of all its provisions, as simply limiting any foreign company from transacting insurance business through agencies established within the state; the court here stated that, although it would be competent by legislation to invalidate an insurance contract made in good faith in another state, on property located within the state of the forum, it would be so contrary to the comity which has been observed between the states that such an intention would not be imputed to the lawmakers unless the language used so clearly expressed this purpose as to bear no other reasonable interpretation; and that therefore comity required the enforcement of assessments made upon a deposit note, the contract of insurance being valid in the state where it was made.

There are but few cases which have passed upon the constitutionality of statutes, attempting to prescribe the terms or control the construction and effect of contracts made and to be performed beyond the borders of the state.

However, it has been held that the right of a citizen of a state to conclude with a foreign life insurance company at its home office a policy and loan agreement, whereby the policy on his life was pledged as collateral security for a cash loan, to become due and payable upon default in payment of the premium, in which case the entire policy reserve might be applied to discharge the indebtedness, is within the protection of the 14th Amendment of the Federal Constitution, guaranteeing freedom as to contract, and cannot, consistently with the guaranty of this amendment, be brought, through a license authorizing the insurance company to do business in the state, into subjection to, and thus rendered ineffective by, a statute of the state, providing that in case of nonpayment of life insurance premiums, three fourths of the policy reserve, after paying advances for premiums, shall be appropriated to purchasing term insurance, notwithstanding any contrary agreement. New York L. Ins. Co. v. Dodge (1918) 246 U. S. 357, 62 L. ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918E, 593.

And in New York L. Ins. Co. v. Head (1914) 234 U. S. 149, 58 L. ed. 1259, 34 Sup. Ct. Rep. 879, it was held that the Nonforfeiture Statute of Missouri, requiring insurance companies to retain from the accumulated surplus a certain percentage, and, in case it was necessary to save a policy from forfeiture, apply the sum of such retained percentage to the payment of

premiums, could not, without denying the rights of freedom to contract guaranteed by the 14th Amendment, be applied to invalidate a policy loan agreement made in the state of New York between a life insurance corporation of that state and the beneficiary, who was a resident of New Mexico, on the settlement effected in New York in accordance with this agreement, and conforming to the New York laws, notwithstanding the fact that the original policy of insurance was made within the state of Missouri, and the fact that that state had exacted, as a condition of the license granted to the company to do business in that state, that it should be subject to the laws of that state as if it were a domestic corporation.

Although it is not within the power of a state to forbid the making of contracts of insurance between a citizen and insurer outside its limits, yet it may prohibit agents or brokers entering into contracts within the state with a citizen thereof, to procure insurance outside of the state, on property located therein, in companies not authorized to do business within the state.

Thus, it has been held that a statute providing "that every person who in this state procures, or agrees to procure, for a resident of this state, any insurance from an insurance company not incorporated under its laws, and which has not filed the bond required by the laws of the state, should be guilty of a misdemeanor," does not violate any constitutional right, and is not repugnant to any of the provisions of the Federal Constitution, and that a marine insurance contract procured for a resident, from a foreign company, by a broker who is also a resident, is a procuring within the state, and a violation by the broker of such statute. Hooper v. California (1895) 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. It will be noticed that the question involved in this case was as to the state's right to regulate contracts made within its borders. It was argued in this case that the right of a citizen to contract for insurance for himself was guaranteed by the 14th Amendment, and that therefore he could not be deprived by the state of the capacity to so contract through an agent. With reference to this the court said: "The 14th Amendment, however, does not guarantee the citizen a right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state within her own limits, involves a clear non sequitur, and ignores the vital distinction between acts done within, and acts done beyond, the state's jurisdiction." To the same effect is Adler-Weinberger S. S. Co. v. Rothschild (1903) 123 Fed. 145.

And relying upon the decision in Hooper v. California (U. S.) supra, in Nutting v. Massachusetts (1902) 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238, affirming (1900) 175 Mass. 154, 78 Am. St. Rep. 483, 55 N. E. 895, the 14th Amendment of the Federal Constitution was held not violated by a statute providing that it should be unlawful for any person, as insurance agent or broker, to make, negotiate, solicit, or in any manner aid in the transaction of insurance on, or concerning, any property, interest, or lives in Massachusetts, except as authorized by statute, and providing that any person who should act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company, not admitted to do business in the state, should be punished by a fine, and it was held that a licensed insurance broker in the state, who, as local agent of insurance brokers in another state, secured authority from a property owner in the state to place insurance upon property located therein, might be convicted of a violation of such statute, where he delivered to the property owner a policy of insurance on the property, issued by an insurance company not admitted to do business in the state, which he had received by mail from the brokers located in the foreign state. J. T. W.

F. M. STRATTON, Appt.,
v.
BANKERS' LIFE COMPANY OF DES MOINES, IOWA, And MARY M. ALLEN, Intervener.

Nebraska Supreme Court — November 30, 1918.

(— Neb. —, 169 N. W. 722.)

Insurance — assignment as collateral — who pays premiums.

1. Where insured assigns his life insurance as collateral security, the duty to keep the collateral in force by payment of the premiums rests on him, in absence of an agreement to the contrary.

[See note on this question beginning on page 1673.]

Appeal — second — law of case.

2. A question once determined in the appellate court will not ordinarily be re-examined there on a second appeal in the same case; but there may be an exception, where such a determination was outside of the pleadings and proofs, and was contrary to law and to the rules of equity.

Headnotes by the COURT.

APPEAL by plaintiff from a judgment of the District Court for Saunders County in favor of intervener in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Charles H. Slama, for appellant:

The assignment of a life insurance policy as security for a note does not relieve the insured of the obligation to pay the premiums.

Bush v. Block, 193 Mo. App. 704, 187 S. W. 153; Brown v. Equitable Life Assur. Soc. 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968, 1126; Kendall v. Equitable Life Assur. Soc. 171 Mass. 568, 51 N. E. 464; 25 Cyc. 774, 775; Joyce, Ins. § 1148; Killoran v. Sweet, 72 Hun, 194, 25 N. Y. Supp. 295, affirmed in 144 N. Y. 703, 39 N. E. 857; 19 Am. & Eng. Enc. Law, 2d ed. 88; Du Brutz v. Bank of Visalia, 4 Cal. App. 201, 87 Pac. 467, 469.

Messrs. B. F. Good and **R. R. Rose,** for appellee:

Questions once determined in the appellate court will not ordinarily be re-examined there in a second appeal in the same case.

Younkin v. Younkin, 44 Neb. 729, 63 N. W. 31; The Santa Maria, 10 Wheat. 431, 6 L. ed. 359; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167; State ex rel. McDonald v. Farrington, 86 Neb. 653, 126 N. W. 91; Kerr v. McCreary, 86 Neb. 786, 126 N. W. 299; Sucha v. Sprecher, 84 Neb. 241, 121 N. W. 106; Frederick v. Buckminster, 83 Neb. 135, 119 N. W. 228; Western Travelers Acci. Asso. v. Thompson, 72 Neb. 674, 101 N. W. 341, 103 N. W. 695, 105 N. W. 293; Parkins v. Missouri P. R. Co. 76 Neb. 242, 107 N. W. 260; Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; Boyd v. Lincoln & N. W. R. Co. 89 Neb. 840, 132 N. W. 529.

The alleged assignment does not constitute a legally binding contract for the reason that there was no agreement between the plaintiff and the intervener, for obviously, there could be no "common intention to affect the legal relations" of the parties, where one of them had no knowledge of the contents of the instrument signed until thirty years or so after she had signed it.

Melle v. Candelora, 88 N. Y. Supp. 385; Harrison v. Wilson Lumber Co. 119 Ga. 6, 45 S. E. 730; Gwin v. Waggoner, 98 Mo. 315, 11 S. W. 227; Paris Mfg. & Importing Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748; Foster v. McKinnon, L. R. 4 C. P. 704, 38 L. J.

C. P. N. S. 310, 20 L. T. N. S. 887, 17 Week. Rep. 1105; Anson, Contr. pp. 123 et seq.; Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042; 1 Page, Contr. § 75; Trambly v. Ricard, 130 Mass. 259; Fowler v. Butterly, 78 N. Y. 68, 34 Am. Rep. 507; Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116, 35 N. W. 853.

Per Curiam:

This is an action to recover $2,000 and interest on a policy of life insurance issued by the Bankers' Life Company of Des Moines, March 27, 1885. John B. Allen was the insured, and his wife Mary M. Allen, intervener, was named in the policy as the beneficiary. They owed a debt of $3,500. F. M. Stratton became their surety therefor. September 5, 1892, they assigned the insurance policy to him as collateral for his suretyship. As surety, Stratton subsequently paid creditors of insured and wife over $4,000, and they have never reimbursed him. He is plaintiff herein, and the insurer is defendant. Insured died December 15, 1912. Mary M. Allen, intervener, pleaded that the assignment of the insurance policy to plaintiff was void on the ground that it had been procured by the duress of her husband. She prayed for a judgment in her favor on the policy of insurance. The trial court found there had been no duress, sustained the assignment, and rendered judgment in favor of plaintiff for the amount due on the policy, $2,139.33. Intervener appealed to this court. Upon review the trial court's finding on the issue of duress was sustained; but the judgment in favor of plaintiff was reversed and the cause was remanded, with instructions to the district court to ascertain the amount of premiums paid by insured and intervener after they made their assignment of the policy, and to enter judgment therefor in favor of the intervener. Upon further proceedings in the district court, there was a literal compliance with the mandate of the supreme court, resulting in a judgment in favor of intervener for $948.28. Plaintiff has appealed.

On the present and second appeal, plaintiff takes the position that the judgment of this court on the former appeal was contrary to law, and that there was no pleading or proof to support it. A re-examination of the record shows that his position is well taken. The judgment originally entered by the district court in favor of plaintiff for the full amount of insurance due under the policy was the only one which could have been properly rendered under the pleadings, the proofs, and the law, and should have been affirmed. The reversal by this court for the purpose of allowing intervener to recover the amount of premiums paid after the assignment had been made was an obvious mistake, in no wise attributable to plaintiff.

Insurance—assignment as collateral—who pays premiums.

The law is that, where insured assigns his life insurance as collateral security, the duty to keep the collateral in force by payment of the premiums rests on him, in absence of a contract to the contrary. Grant v. Alabama Gold L. Ins. Co. 76 Ga. 575; Bush v. Block, 193 Mo. App. 704, 187 S. W. 153; Killoran v. Sweet, 72 Hun, 194, 25 N. Y. Supp. 295. In the present case there is no such contract. The assignment by its terms did not relieve the insured from the performance of his duty to pay premiums, nor require the assignee to refund premiums subsequently paid by the insured or the intervener. There is no pleading or proof that plaintiff relieved insured from his duty to pay premiums, or that plaintiff participated in any form of duress to procure the assignment, or that he obligated himself in any way to pay the premiums, or that he agreed to refund premiums if subsequently paid by insured or intervener. There is no rule of equity requiring plaintiff to refund such premiums as a condition of enforcing his rights under the insurance policy assigned to him. It is therefore manifest that the former order of this court, in reversing the original judgment of the district court and in permitting the inter-

vener to recover premiums paid by her and her husband after they assigned the insurance to plaintiff, was outside of the pleadings and proofs, and was contrary to law and to the rules of equity.

To sustain the judgment from which the present appeal is taken, however, intervener invokes the doctrine that questions once determined in the appellate court will not ordinarily be reexamined there on a second appeal in the same case. Coburn v. Watson, 48 Neb. 257, 67 N. W. 171. There are exceptions to this rule. Hastings v. Foxworthy, 45 Neb. 676, 34 L.R.A. 321, 63 N. W. 955. State ex rel. McDonald v. Farrington, 86 Neb. 653, 126 N. W. 91, recognizes an exception and follows the general rule; but the decision was within the issues raised by the pleadings, and in that respect the case is different from the case at bar. The former decision in the present case, being manifestly outside of the pleadings and proofs, and being contrary to law and to the rules of equity, falls within the exceptions.

Appeal—second —law of case.

The judgment of reversal entered by this court on the former appeal, and the judgment presented for review on the present appeal, are therefore reversed, and the original judgment of the District Court in favor of plaintiff for the amount due on the policy is affirmed, at the costs of intervener.

Judgment accordingly.

Aldrich, J., not participating.

Petition for rehearing denied.

ANNOTATION.

Upon whom rests duty to pay premiums on policy of life insurance assigned as collateral.

This note is confined to the question whether it is the duty of the assignor or assignee of a life insurance policy, assigned as collateral, to pay the premiums.

The decision in the reported case (STRATTON v. BANKERS LIFE CO. ante, 1671) that where the insured assigns his life insurance as collateral security the duty to keep the collateral in force by payment of the premiums rests on him, in the absence of a contract to the contrary, is supported by other decisions which have considered the question.

Thus, in Van Duersen v. Scanlan (1882) 8 **Ohio** Dec. Reprint 362, 7 Ohio L. J. 188, it was held that an assignee of a life policy, assigned by the insured as collateral, owed no duty, in the absence of an agreement to do so, to pay the premiums, and was not liable for a forfeiture of the policy because of his failure to pay the premiums. The court said: "The first question that arises, looking at the facts as they appear in the record, the relations of the parties, and the assignment of the policy by Van Duersen to Bussing, is whether there was any obligation on the part of Bussing, or Bussing & Company, whereby he or they became obligated to go forward annually without consultation with Van Duersen and pay the annual premium to keep the policy alive. If such an agreement had been entered into, the most likely place to find it would be in the assignment itself. It is in writing and is presumed to have contained everything the parties agreed upon. It imposes no such obligation. In the opinion of the court, in the absence of any obligation on the part of the assignee of the policy to pay the annual premiums, it was a duty and obligation that devolved on Van Duersen. It is not the case of a policy taken out by a creditor on his application on the life of a debtor. But this is the case of a debtor on his own volition, without the understanding of his creditor, taking out a policy on his own life for his own benefit. Bussing did not become the assignee of the policy for over a year after it was issued. It is claimed on the part of the estate of Van Duersen that because the rec-

ord shows that on one occasion Bussing advanced $151 to make the cash payment due October 16, 1869, he or the firm of Bussing & Company, became obligated to pay the future premiums as they became due, and having failed to do so, and the policy having lapsed, it was Bussing's fault. This is not the case of an agent undertaking to carry a policy for another. Nor of an assignee having received the money to pay premiums from the insured, who has neglected to do so. There was no agreement that Bussing would keep the policy on foot for Van Duersen. The money advanced by the bank is charged against Van Duersen, and the relation of agency did not exist between the parties. In the majority of cases cited by the plaintiff, the assignee had been instrumental in taking out the policy. In this case Bussing had nothing to do in taking out the policy on the life of Van Duersen. It was a transaction of his own, and when he assigned the policy it was simply as collateral security. There was no more obligation on Bussing to pay the annual premiums than upon the mortgagee of real estate to pay the taxes."

And in Killoran v. Sweet (1893) 72 Hun, 194, 25 N. Y. Supp. 295, affirmed in (1895) 144 N. Y. 703, 39 N. E. 857, where, for the purpose of indemnifying a purchaser of property charged with the payment of a legacy in instalments, the vendor procured a policy of insurance on the life of the legatee, payable to his representatives or assigns, and the legatee, on the same day, assigned the policy to the purchaser, who testified that he never promised to keep the policy alive, and that it was issued and assigned to him solely for his security, and there was nothing to discredit this testimony,—it was held that no recovery of damages could be had against him by the administrator of the assignor because of his failure to pay the premiums and keep the policy alive, notwithstanding the vendor delivered to him (the assignee) a sum of money with which to pay the premiums for the period covered by the instalment of the legacy, it appearing that he had paid some of them, but had stopped because the assignor was violating conditions of the policy against using alcoholic liquors, and residing outside of certain limits prescribed by its terms.

And in Dusenberry v. Mutual L. Ins. Co. (1898) 188 Pa. 454, 41 Atl. 736, in which the assignee of the policy sought to surrender it, it was recognized that the assignee of a policy taken as collateral is not, in the absence of an agreement to do so, bound to pay the premiums, the court holding that an affidavit of defense by the assignor that she was informed and believed and expected to be able to prove that the assignee promised and agreed to pay the premiums did not state a valid defense, and stating that such an averment, to be of any efficacy, would have to be positive and direct, and accompanied by a further averment that the agreement to pay the premiums was omitted from the assignment by mistake, fraud, or accident; observing further that the language of the assignment, which contained no agreement by the assignee to pay the premiums, was perfectly plain and easily understood.

And in Bush v. Block (1916) 193 Mo. App. 704, 187 S. W. 153, the court, in holding that the assignee of a life insurance policy had the right, upon the assignor's refusal to pay premiums, to convert the policy into a paid-up policy, stated that the assignor, in the policy, contracted to pay the premiums; that the value and life of the policy depended upon their regular payment; that if the payment of premiums stopped the only right of value upon the policy was to have it converted into a paid-up policy; and that the assignment of the policy as collateral security did not relieve the assignor of the obligation to pay premiums, but that it was still his duty to pay them.

And in Grant v. Alabama Gold L. Ins. Co. (1886) 76 Ga. 575, where recovery was sought on a policy, in an action in which the insurer had filed a plea setting up an assignment of the policy to it as collateral for a loan, and a judgment had been entered for the defendant, the court refused to

disturb the judgment or to enter judgment non obstante veredicto for the amount of premiums, because of the plaintiff's contention that if he could not recover on the policy, he was entitled to judgment for the premiums which he had paid, and said: "If his policy had been transferred to a third person, the premiums must be continuously paid, to prevent lapse and forfeiture. If transferred for collateral security to a third person, the same thing must be done; why not, if transferred as collateral to the defendant company itself? If the company discharged its full duty in respect to the policy,—notice pursuant to usage, and everything else necessary to bind the plaintiff,—why should not the plaintiff keep alive this collateral with the company to secure them as well as others? It would be manifestly unjust to give a security, kill it by failure to keep it alive by feeding it, and then claim a judgment overriding the verdict of the jury for the result of his own wrong. It would be to recover all the premiums already paid by violating the contract to pay more, unless, by three months' notice for a paid-up policy under the contract, he had entitled himself to insure no longer."

In the following cases, where the assignors undertook to pay the premiums, and agreed that if they failed to do so the assignees might pay them and add the payments to the debt, the assignees were held entitled to recover premiums paid after the assignors had failed to keep them up: Fitzwilliam v. Price (1858) 4 Jur. N. S. (**Eng.**) 889; Barber v. Butcher (1846) 8 Q. B. 863, 115 **Eng.** Reprint, 1099, 15 L. J. Q. B. N. S. 289, 10 Jur. 814; Ontario Mut. Life Assur. Co. v. Fox (1899) 30 **Ont.** Rep. 666.

And in the following cases, where there was apparently no agreement as to whose duty it was to pay the premiums, the assignees, who had paid them, were held entitled to reimbursement for the amounts paid: Harley v. Heist (1882) 86 **Ind.** 196, 44 Am. Rep. 285; Des Moines Sav. Bank v. Kennedy (1909) 142 **Iowa,** 272, 120 N. W. 742; Kendall v. Equitable Life Assur. Soc. (1898) 171 **Mass.** 568, 51 N. E. 464; Brown v. Equitable Life Assur. Soc. (1899) 75 **Minn.** 412, 78 N. W. 103, 671, 79 N. W. 968, 1126; Shaw v. Cornell (1901) 59 App. Div. 573, 69 **N. Y.** Supp. 660; Wheeland v. Atwood (1898) 42 W. N. C. (**Pa.**) 178; Stevens v. Germania L. Ins. Co. (1901) 26 **Tex.** Civ. App. 156, 62 S. W. 824; Harde v. Germania L. Ins. Co. (1913) — **Tex.** Civ. App. —, 153 S. W. 666; Gill v. Downing (1872) L. R. 17 Eq. (**Eng.**) 316, 30 L. T. N. S. 157, 22 Week. Rep. 360.

In Ainsworth v. Backus (1875) 5 Hun (**N. Y.**) 414, where the plaintiff obtained a policy on the life of her husband and assigned a certain per cent of it to the defendant, who, in consideration of such transfer, agreed to keep the policy alive for the benefit of the plaintiff, but failed to perform the agreement, and ceased paying premiums without notifying the plaintiff after he had paid some of them, it was held that although there was no consideration for the assignment, yet, having undertaken to keep the policy alive, and having failed to notify the plaintiff of his intention to discontinue paying the premiums, he was liable for his negligence. J. T. W.

P. P. PIERCE, Impleaded, etc., Plff. in Err.,

v.

G. T. GIBSON et al.

Texas Supreme Court—April 5, 1916.

(108 Tex. 62, 184 S. W. 502.)

Husband and wife — sale of community property — insanity of wife.

1. A man may, in case his wife becomes insane, sell the community property to pay community debts, although the statute provides for quali-

fication by the husband as administrator in case of the insanity of the wife.

[See note on this question beginning on page 1680.]

Homestead — abandonment — insanity of wife.

2. The insanity of the wife does not prevent the husband from abandoning the homestead and acquiring a new one.

ERROR to the Court of Civil Appeals to review a judgment reversing a judgment of the District Court for Stephens County in favor of defendant Pierce in an action brought to recover possession of certain land. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **J. R. Stubblefield,** for plaintiff in error:

If Jane P. Pettit was insane at the time of the conveyance of the land in controversy to the defendants, then her husband, C. I. Pettit, if sane, would have the legal right to convey even the homestead.

Shields v. Aultman, 20 Tex. Civ. App. 345, 50 S. W. 219; Mann v. Wilson, 39 Tex. Civ. App. 111, 86 S. W. 1061.

In the absence of any bad faith on the part of C. I. Pettit, he, as the husband and head of the family, had a right to designate the homestead, and having designated a homestead in Guadalupe county, he had the legal right to sell the land in controversy.

McGaughey v. American Nat. Bank, 41 Tex. Civ. App. 191, 92 S. W. 1003; Evans v. Daniel, 25 Tex. Civ. App. 362, 60 S. W. 1012; McDannell v. Ragsdale, 71 Tex. 26, 10 Am. St. Rep. 729, 8 S. W. 625; Holliman v. Smith, 39 Tex. 362; Slavin v. Wheeler, 61 Tex. 654; 21 Cyc. 606.

Messrs. **D. G. Hunt** and **W. P. Sebastian** for defendants in error.

Yantis, J., delivered the opinion of the court:

This suit was instituted in the district court of Stephens county, Texas, by the defendants in error, who were plaintiffs below, against P. P. Pierce and R. Glasscock, to recover 730 acres of land situated partially in Palo Pinto county and partially in Stephens county, Texas. In the district court Glasscock filed a disclaimer, and the trial proceeded against Pierce. The case was submitted to the jury on special issues. The trial resulted in a judgment in the district court in favor of Pierce, who is plaintiff in error here, and against the plaintiffs in said suit in the district court. By them the case was appealed to the honorable court of civil appeals for the second district. The appeal was transferred to the honorable court of civil appeals for the eighth district, in which court the case was reversed and remanded as to Jane P. Pettit, wife of C. I. Pettit, the court holding that she was entitled to recover one half of the land sued for. As to the other plaintiffs in the district court, and as to the remaining one-half interest in the land, the judgment of the district court was affirmed. A writ of error was granted by this court on the petition of P. P. Pierce, the plaintiff in error, on the ground of a conflict between the opinion by the court of civil appeals for the eighth district in this case and the opinion of the court of civil appeals for the fifth district in the case of Shields v. Aultman, 20 Tex. Civ. App. 345, 50 S. W. 219, in which case a writ of error was denied by this court.

By the findings of the jury in answer to special issues the following facts were established: That C. I. Pettit was of sound mind when he executed the deed to Pierce and Glasscock in May, 1907, and at the time he executed the mortgage in February, 1907; that no part of the property in controversy constituted the homestead of C. I. Pettit at said time, or at the time he executed the mortgage thereon in February, 1907, to secure a loan of $1,200; that C. I. Pettit acted in good faith at the time he executed the deed to

Pierce and Glasscock in May, 1907, and at the time he executed the mortgage in February, 1907, and was not guilty of any fraudulent attempt to deprive his wife of the benefit of a homestead exemption in the property involved; that when C. I. Pettit abandoned his home, in Stephens county, and acquired a new home in another county, prior to May, 1907, he acted in good faith in so doing; that at the time Pierce and Glasscock purchased the property from C. I. Pettit in May, 1907, there was a valid and subsisting mortgage against such property in the amount of $1,200; that at the time Pierce and Glasscock purchased the property from Pettit in May, 1907, there were no other liens against the property; that the consideration paid by Pierce and Glasscock to C. I. Pettit for the land in controversy was the reasonable cash market value of such land at the time and place it was sold; that Pierce and Glasscock acted in good faith towards C. I. Pettit when they bought the land in controversy, and did not practise any fraud upon him.

The evidence shows that when C. I. Pettit sold the property in controversy in May, 1907, he paid out of its proceeds the $1,200 which he owed thereon, and which was a community debt.

The findings of fact by the court of civil appeals are to the effect that the evidence was sufficient to sustain all the foregoing findings of fact by the jury, in answer to special issues.

It is contended by the defendants in error that the husband of an insane wife cannot convey by his deed alone the homestead, unless the proof should show that the insanity of the wife was incurable. The findings of the jury in this case were to the effect that none of the property in question was the homestead of Pettit at the time he conveyed the property to Pierce and Glasscock. This finding of fact removes from the case the proposition of law contended for, and renders it unnecessary for us to consider the question of law as to the effect of a husband's deed of conveyance of the homestead while the wife is insane, since in this case there was no homestead at the time of sale. The property in question was the homestead of C. I. Pettit and his wife, Jane, for many years. In January, 1901, the wife was adjudged insane, and was sent to a lunatic asylum, where she remained until during the trial of this case, when she appears to have been released and to have attended the trial, though she did not testify as a witness, and there is no evidence showing that she had or had not been restored to a sane condition. C. I. Pettit and his children continued to occupy the land as a homestead for about four years subsequent to the insanity of his wife. Having contracted tuberculosis he moved to San Antonio, where he acquired another home, which he occupied for about one year. Later, in 1906, he acquired another home, and occupied it as such, in Guadalupe county, for about one year. He mortgaged the property in controversy in February, 1907, for $1,200. On May 16, 1907, he conveyed it to P. P. Pierce and R. Glasscock for a cash consideration of $4,357.50. Later Glasscock conveyed his interest in the land to Pierce. The homestead in Stephens county ceased to be such when it was abandoned by C. I. Pettit with the intention of making his home in south Texas, in the interest of his health. His abandonment of the homestead being in good faith, as found by the jury, it was his right and privilege in law to so abandon it and establish another home. The husband has a legal right, while acting in good faith, to abandon the homestead and acquire a new one without the consent of his wife. The fact that she was insane and unable to give her consent would not defeat this right on his part, since her consent to the abandonment of a homestead, and the acquiring of

Homestead—abandonment—insanity of wife.

a new one, is not necessary. The fact that she became insane, and could not give her consent, would in no way alter the situation, or destroy his rights in this respect. Shields v. Aultman, supra.

The honorable court of civil appeals rested its holding in reversing the case as to one half the property on the proposition that C. I. Pettit's deed to Pierce and Glasscock, in so far as it attempted to convey the wife's one-half interest in said community property, was void, for the reason that he could not convey her one-half interest in the community property without qualifying, which he had not done, as survivor, and making a survivorship bond, under article 3594, chap. 28, title 52, Vernon's Sayles's Civil Statutes (Tex.) which is as follows: "Where the wife dies or becomes insane, leaving a surviving husband and child, or children, the husband shall have the exclusive management, control and disposition of the community property in the same manner as during her lifetime, or sanity; and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment be taken to such conveyances, subject, however, to the provisions of this chapter."

We do not think this article of the statutes in any way abridged the right of the husband to sell the property for the purpose of liquidating community debts, though the other provisions in said chapter make provision for community administration and survivorship bond. It was all community property, and was charged with payment of the community debts. It has been held by this court, in a long and unbroken line of decisions, that the husband, upon the death of his wife may, without administration upon her estate, sell the community property to pay community debts. Ashe v. Yungst, 65 Tex. 631; Sanger Bros. v. Moody, 60 Tex. 96; Fagan v. McWhirter, 71 Tex. 567, 9 S. W. 677; Martin v. McAllister, 94 Tex. 567, 56 L.R.A. 585, 63 S. W. 624.

Husband and wife—sale of community property—insanity of wife.

We hold that the rule should be the same where the wife is not dead but insane. It has never been doubted that, during the life of the wife, the husband could sell any community property except the homestead, for the purpose of liquidating community debts. They are a charge upon the partnership property of a husband and wife as much as are the debts of any other partnership a charge upon the partnership property. The survivor of the partnership is charged with the duty of paying the partnership debts, and it is his right to dispose of partnership property for such purpose. So it has been held unnecessary, when the wife dies leaving community property and community debts, for the surviving husband to cause administration to be had, or to qualify as survivor by giving the bond provided for in article 3598, chap. 29, title 52, Vernon's Sayles's Civil Statutes, in order to dispose of the community property for the purpose of settling the community debts. We think that C. I. Pettit was not deprived of this right because of the insanity of his wife. It is true, as held by the court of civil appeals in its opinion of this case, that when the case of Shields v. Aultman, 20 Tex. Civ. App. 345, 50 S. W. 219, was decided, article 3594, Vernon's Sayles's Civil Statutes, did not contain any provision for a surviving husband, when the wife became insane, to qualify as a survivor under said chapter. At the time the chapter in question authorized community administration as it does now, but it only provided for instances where the wife had died, leaving a surviving husband and child. The change in the chapter was made by amendment in 1893, so as to allow the husband, when the wife became insane, to qualify by giving bond as a survivor on the same basis that said chapter had previously permitted survivorship administration in favor of the hus-

band where the wife had died. But we think the rule is the same.

Prior to this amendment it had been held by this court in many cases that the statute authorizing survivorship administration in case of the death of the wife was not an abridgment of the right of the surviving husband to sell community property for the purpose of paying community debts without making the bond and complying with the survivorship statute. This statute, authorizing survivorship administration in case of death of the wife, with the omission of the insanity clause, had existed since 1856, but notwithstanding its existence in full force, this court repeatedly construed it as not being restrictive of the rights of the survivor, but merely to be an enlargement of his privileges existing at the time of its passage; and it was held that it was not mandatory upon the survivor to qualify under chapter 28, title 52, Vernon's Sayles's Civil Statutes, as survivor, in order to authorize the survivor to sell community property with which to pay the community debts. In passing upon this question this court, speaking through Mr. Justice Ireland, in the case of Dawson v. Holt, 44 Tex. 178, said: "It is contended that the latter clause of the law as quoted is to be construed literally and strictly, and that the authority of the husband to sell did not attach until after the probate court had 'recorded' the inventory and appraisement. It must be borne in mind that the surviving husband had the right to sell the community property to pay debts against the community, after the death of the wife, without the aid of this statute. Jones v. Jones, 15 Tex. 147. It was clearly not the intention of the legislature to throw restrictions around the survivor in such cases, but to enlarge their powers."

Again this court, speaking through Mr. Justice Stayton, in the case of Sanger Bros. v. Moody, 60 Tex. 98, says: "It is claimed that, as community indebtedness was shown to exist at the time the land was sold by Louis Moody to Birge, the sale should be held valid. Under the repeated decisions of this court, it must be held as conclusively settled that the survivor of the marital relation, without administration upon the estate of the deceased member in any of the modes expressly provided by statute, has power as survivor to sell the community property for the purpose of paying debts which are a charge upon it, and by law such property is charged with the payment of debts contracted during the marriage. Paschal's Dig. 4646. It has been properly held that the Act of 1856 did not withdraw such power from the survivor, but that the act was intended to enlarge the powers of the survivor. Wenar v. Stenzel, 48 Tex. 489; Dawson v. Holt, supra; Lumpkin v. Murrell, 46 Tex. 58."

There are many other decisions to the same effect, and holding that the survivorship statute did not deprive the surviving husband of the power to sell community property, and with the proceeds to discharge community debts. Jones v. Jones, 15 Tex. 147; Dawson v. Holt, 44 Tex. 174; Lumpkin v. Murrell, 46 Tex. 51.

We think the rule is the same since the amendment of the statute authorizing the husband, in case of his wife's insanity, to qualify as survivor. The statute as so amended must be held to be an enlargement of the rights of the survivor of an insane spouse, and not an abridgment thereof. Prior to this amendment it was the undoubted right of the husband of an insane wife to sell community property for the purpose of paying community debts, and we think he still has such right, and that he need not qualify under the survivorship statute in order to exercise it. The rule as to selling community property, with the proceeds of which to pay community debts, should be the same now, where the wife becomes insane, as it was prior to this amendment, in cases where the wife

had died. We think the court of civil appeals was in error in holding that Pettit's deed was void because he had not qualified as survivor under chapter 28, title 52, Vernon's Sayles's Civil Statutes. We think the deed was valid, and conveyed all the land in controversy to Pierce and Glasscock.

We have examined the other questions presented by the defendants in error and do not think any of them presents error.

It follows that the judgment of the Court of Civil Appeals should be reversed and the judgment of the District Court should, in all things, be affirmed; and it is so ordered.

Petition for rehearing denied.

ANNOTATION.

Insanity of one spouse as affecting other's right to convey community property.

In Texas and in most of the other states in which the community system prevails, the husband may, as a general rule, sell or otherwise dispose of the community property other than the homestead without the wife's consent. 5 R. C. L. p. 853. It follows, therefore, that the question in the reported case (PIERCE v. GIBSON, ante, 1676) was not whether the insanity of the wife enlarged the power of disposition of the sane spouse, as has sometimes been contended with respect to the insanity of the husband, but whether it restricted or destroyed the power which the husband would otherwise have had. The only other case directly passing on this question is the decision of the civil court of appeals in the same case. Gibson v. Pierce (1912) — Tex. Civ. App. —, 146 S. W. 983. That court held that the husband could not, during the insanity of the wife, convey the community property without qualifying as survivor or administrator of the community under a statute providing that where the wife died or became insane, leaving a surviving husband and a child or children, the husband should have the exclusive management, control, and disposition of the community property in the same manner as during her lifetime or sanity, subject, however, to the provisions of that chapter, which relate to the administration of community property, and contemplate a formal application for authority to act. As the statute had never been regarded as depriving the husband, after the wife's death, of the power of selling the community property for the payment of community debts without qualifying under the statute, it would seem to follow that the same rule should apply in the case of the wife's insanity, and the supreme court so held. The holding is, however, limited to the case of a sale for the purpose of paying community debts, and presumably the husband must qualify under the statute in order to convey the community property for any other purpose.

It should be noted that the statute just mentioned applies only when the insane wife leaves children. Another statute provides that where either husband or wife dies intestate or becomes insane leaving no children and no separate property, the community property passes to the survivor charged with the debts of the community, and that no administration thereon or guardianship of the estate of the insane wife or husband shall be necessary. Unlike the statute referred to in the preceding paragraph, this statute apparently authorizes the sane spouse, whether husband or wife, to convey the community property for any purpose, and not merely for the purpose of paying debts. It does not, however, work any change of title to the community property, or authorize the sane spouse to dispose of the interest of the insane spouse by will. Schwartz v. West (1904) 37 Tex. Civ. App. 136, 84 S. W. 282.

In Washington, contrary to the rule in most jurisdictions, the husband cannot dispose of the community realty

without the wife's consent. 5 R. C. L. p. 853. The wife's insanity apparently gives him no such right. See Curry v. Wilson (1906) 45 **Wash.** 19, 87 Pac. 1065; Colpe v. Lindblom (1910) 57 **Wash.** 106, 106 Pac. 634, where however, the question is not directly passed on.

It is apparently the practice to appoint a guardian for the insane wife to join with the husband in the conveyance. See the cases just cited and Merriman v. Patrick (1918) — **Wash.** —, 174 Pac. 641.

The wife has ordinarily no power to sell or convey the community property during the existence of the community, but in Texas it was held at one time that "during the insanity of the husband, the wife is the head of the family, and, as such head, has the legal right to dispose of so much of the common property of husband and wife, or, in case there be none, of the separate property of the husband, as may be necessary to supply the wants of herself and his and her children." Forbes v. Moore (1869) 32 **Tex.** 195.

That holding was, however, disapproved in Heidenheimer v. Thomas (1885) 63 **Tex.** 287. That case involved a conveyance of the homestead by the husband and wife in payment of a debt; the husband was insane at the time, and it was therefore contended that the wife's deed alone was sufficient. The court, however, pointed out that the property had a rental value of $40 or $50 a month, and that neither husband nor wife owned any other property from which any revenue could be derived, and said that if the rule stated in Forbes v. Moore existed at all, it could only spring from the necessity of the family to have a support, and could not apply to the conveyance in question, which, instead of contributing to the family's support, deprived the family of the only piece of property which could have contributed to such support. The court further held that no such power as that asserted in the Forbes Case rested in the wife of an insane person in respect to community property or the separate property of the husband, saying that the law provided for such a case and rendered unnecessary the exercise of any such power by providing for the appointment of a guardian of the estate of an insane person. The court also said that, so far as could be told from the report of the case, the remarks in the Forbes Case were not necessary to the decision of the cause, as it did not appear in that case that the wife had disposed of any property.

The decision in Heidenheimer v. Thomas (**Tex.**) supra, is apparently approved, though this question is not directly passed upon in Pearson v. Cox (1888) 71 **Tex.** 246, 10 Am. St. Rep. 740, 9 S. W. 124; Texas & P. R. Co. v. Bailey (1892) 83 **Tex.** 19, 18 S. W. 481.

It was also held in Cason v. Laney (1894) — **Tex.** Civ. App. —, 27 S. W. 420, that the wife of an insane person could not sell cotton which was community property, where it was not sold for the maintenance and support of the family, but in consideration of an antecedent debt. If the court means to intimate that the sale would have been valid if made for the maintenance and support of the family, it would seem to have gone further than the decision in Heidenheimer v. Thomas (**Tex.**) supra (from which it quotes) warrants, as, in that case, the court, though in one part of its opinion discussing the case on the assumption that the sale was valid if made for the support of the family, and holding that the sale was not so made, finally denies that such power on the part of the wife exists for any purpose.

In the Cason Case, the court further held that in a suit against the wife alone she could not consent to a judgment foreclosing an attachment lien on the cotton, so as to confer any right of property on the attachment creditor, but that, to give such judgment any force, the guardian of the husband was a necessary party.

As to the power of the wife to dispose of community property during the insanity of the husband, see also Rider v. Regan (1896) 114 **Cal.** 667, 46 Pac. 820, involving the validity of a statute providing that if either husband or wife should become hopelessly insane, the probate court might permit the sane husband or wife to sell,

convey, or mortgage the homestead. The statute apparently made no distinction between community property and separate property. The commissioner's opinion upholding the sale, which was adopted by three of the seven judges, apparently attached no importance to the fact that the homestead was community property; but Chief Justice Beatty concurred specially on the ground that the property was community property, and not the husband's separate property, saying: "If the legislature has the power (as unquestionably it has) to provide generally for the alienation of community property by the husband alone, and his control of the proceeds of the sale, I can see no reason why it has not the power to provide in case of the hopeless insanity of the husband, for the alienation by the wife alone of so much of the community property acquired subsequently to the passage of the act as may have been lawfully dedicated as a homestead." In a strong dissenting opinion attacking the statute because it did not make the sale in any way dependent upon the necessities of the parties, or make any provision for the distribution or disposition of the funds arising from the sale, so as to protect the interests of the insane person, Justice Henshaw said: "We are not in this concerned with a definition of the particular character of the wife's interest in a homestead declared upon the community property. Whether that interest amounts to an estate or whether it be a mere expectancy, it is unquestionably true that the husband, in whom is vested the sole right of control and disposition of the community property, has a legal interest therein. This legal estate has a money value. When a sale of the homestead is made, it involves a sale of an estate in realty belonging to him. By the act under consideration he is neither secured in that property, nor is it devoted, of necessity, to any legitimate purposes. . . . We are not here called upon to say whether or not the legislature has the power to accomplish what seems to have been the principal purpose of this act, namely, to subject the community property or the separate property of an insane spouse to the support of those legally dependent upon him. It is enough to say that the attempt which finds expression in an act such as this is inadequate, improper, and unconstitutional, and amounts to but the confiscation of the property of a person without provision for the distribution of that property, and for no other reason assigned than that he has met with the most lamentable misfortune of becoming hopelessly insane."

As to the power of the wife to convey her separate real estate without the husband joining in the deed where he has become incurably insane, see Clark v. Wicker (1895) — Tex. Civ. App. —, 30 S. W. 1114.

There are some other cases involving the power of husband or wife to convey or mortgage the homestead during the insanity of the other in which it incidentally appears that the homestead was, or may have been, community property. The decision in these cases was, however, based on principles peculiar to the homestead, and not on principles in any way peculiar to community property. For cases of this character see Security Loan & T. Co. v. Kauffman (1895) 108 Cal. 214, 41 Pac. 467; McFalls v. Brown (1896) — Tex. Civ. App. —, 36 S. W. 1110; Shields v. Aultman (1899) 20 Tex. Civ. App. 345, 50 S. W. 219; Ley v. Hahn (1904) 36 Tex. Civ. App. 208, 81 S. W. 354; Priddy v. Tabor (1916) — Tex. Civ. App. —, 189 S. W. 111.

In one or two of the cases just referred to it may have been assumed that the husband had power to dispose of the community property except for the restrictions arising from the fact that the property was the homestead.

A. McT.

STATE OF OREGON, Appt.,
v.
GEORGE L. HOFFMAN, Respt.

Oregon Supreme Court (Dept. No. 1) — July 24, 1917.

(85 Or. 276, 166 Pac. 765.)

Jury — prejudice against witness — interrogation.

1. Jurors cannot be asked on their voir dire in a prosecution for unlawful sale of intoxicating liquors if they are prejudiced against the testimony of informers.

[See note on this question beginning on page 1688.]

Intoxicating liquors — inducing violation of law — effect.

2. That the state employed a witness to purchase liquors, for the purpose of securing evidence against the seller upon which to base a prosecution, is no ground for directing a verdict for accused.

Same — acquittal — effect on liquors.

3. The acquittal of one charged with illegally selling intoxicating liquors does not require the return of the liquors seized upon the institution of the prosecution against him, where the statute provides for a separate proceeding against the liquors, to determine whether they shall be destroyed or returned.

APPEAL by the state from a judgment of the Circuit Court for Multnomah County acquitting defendant of the charge of selling intoxicating liquors in violation of law, and directing the return to him of liquors seized at the time of his arrest. *Reversed.*

Statement by **Benson, J.:**

The district attorney for Multnomah county filed a complaint in the district court for said county, charging the defendant with "unlawfully keeping and maintaining a place as a common nuisance," by keeping for sale, barter, and delivery, in violation of law, certain intoxicating liquors at No. 890 East Yamhill street, Portland. The title of the court and cause as found in the complaint, reads thus:

In the District Court of the State of Oregon for the County of Multnomah.

State of Oregon
vs.
Geo. L. Hoffman, Defendant.

Misdemeanor.

Chapter 141, General Laws of Oregon, 1915.

Thereafter, on the same day, a warrant of arrest, search, and seizure was issued under the following caption:

In the District Court of the State of Oregon for the County of Multnomah.

State of Oregon
vs.
John Doe, Whose True Name is Unknown, Defendant.

Warrant for Search and Seizure and Arrest.

The return of the sheriff discloses that by virtue of this warrant he searched the premises described therein, seized a considerable quantity of liquors, and, "pursuant to the within order, arrested John Doe (George Hoffman) in the county of Multnomah, the keeper thereof, and I have him now in custody before the court." The defendant entered a plea of not guilty, a trial was had resulting in a conviction, from which the defendant appealed to the cir-

cuit court, where, upon a trial to the jury, there was a verdict of acquittal, and judgment discharging the defendant and directing the sheriff to return to him the liquors which had been seized at the time of the arrest. From this judgment the state appeals.

Messrs. **Walter H. Evans, Thomas G. Ryan,** and **George Mowry,** for appellant:

It was error for the court to refuse to permit counsel for the state, in examination of the jurors, to question the jurors as to their views, prejudices, or feelings regarding persons who buy intoxicating liquor for the purpose of getting evidence against the sellers, or regarding such testimony of such persons, or regarding cases in which such testimony is used.

24 Cyc. 280, 281, 338; State v. Steeves, 29 Or. 97, 43 Pac. 947; 12 Enc. Pl. & Pr. 446; Brickwood's Sackett, Instructions to Juries, p. 18, § 31; Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337; 2 Enc. Ev. 399.

The court erred in directing the jury to return a verdict of acquittal at the conclusion of the evidence produced by the state.

Grant v. Baker, 12 Or. 331, 7 Pac. 318; Ferrera v. Parke, 19 Or. 141, 23 Pac. 883; Perkins v. McCullough, 36 Or. 146, 59 Pac. 182; Wasiljeff v. Hawley Pulp & Paper Co. 68 Or. 487, 137 Pac. 755; Beaver v. Mason, E. & Co. 73 Or. 36, 143 Pac. 1000; Morgan's Estate, 46 Or. 233, 77 Pac. 608, 78 Pac. 1029; State v. Pomeroy, 30 Or. 16, 46 Pac. 797; State v. Couper, 32 Or. 212, 49 Pac. 959; State v. Warren, 41 Or. 348, 69 Pac. 679; State v. Meldrum, 41 Or. 380, 70 Pac. 526; State v. Jones, 18 Or. 256, 22 Pac. 840; State v. Emmons, 63 Or. 539, 127 Pac. 791; State v. Billups, 63 Or. 277, 48 L.R.A.(N.S.) 308, 127 Pac. 686; State v. Carmody, 50 Or. 1, 12 L.R.A. (N.S.) 828, 91 Pac. 446, 1081; State v. Isley, 62 Or. 241, 124 Pac. 636.

Messrs. **Manning, Slater, & Leonard** for respondent.

Benson, J., delivered the opinion of the court:

This appeal is taken under the authority of § 34 of chapter 141, Laws of Oregon 1915, which reads as follows: "An appeal to the supreme court may be taken by the state from the judgment or order of the circuit court in all cases arising under this act, upon a judgment for the defendant quashing the indictment, or upon a judgment of acquittal entered on a verdict, whether ordered by the court or otherwise, for the purpose of determining questions of law, but not for the purpose of obtaining a new trial; but nothing in this section contained shall be construed to abridge any right of appeal which the state may have otherwise under the criminal laws of this state."

1. The first assignment of error challenges the ruling of the court in refusing to allow the prospective jurors, upon their voir dire, to answer this question: "If, in a prosecution for unlawfully selling intoxicating liquors or for keeping intoxicating liquor for unlawful sale, a portion of the evidence produced by the state should consist of the testimony of what is commonly known as an informer, namely, a person whose testimony is to the effect that he bought intoxicating liquor for the sole purpose of securing evidence against the seller, have you any such prejudice against testimony of that class, or against witnesses of that class, or against cases in which such testimony is used, as would prevent you from giving a fair, just, and impartial verdict in such a case?"

It will be noted that the question goes to the juror's opinion of the credibility of "informers" as witnesses. In the case of Jenkins v. State, 31 Fla. 196, 198, 12 So. 677, a juror was asked this question: "Is your mind in such a state that you would or could give the evidence of an Ethiopian or descendant of the African race the same weight that you would that of a Caucasian or descendant of the white race, in rendering a verdict upon this case?"

Mr. Justice Taylor, speaking for the court, says: "This question was not at all a proper one to be put to a juror on the voir dire, as it did not seek or tend to demonstrate the juror's bias for or prejudice against the prisoner, but was an effort to make the juror, in advance of the

production of evidence in the cause, disclose what class of witnesses he would or would not give credence to. A field of inquiry that is not proper to be gone into, in testing the qualification of jurors on the voir dire. To illustrate its impropriety: Suppose the prisoner's counsel has put this question to the jury: 'John Doe, who is a white man, and Richard Roe, who is a colored man, will be witnesses in this case; Richard Roe, the colored man, will be the defendant's witness; Doe will be the witness against him. Will you, or can you, give as much credence or weight to Roe's evidence as to that of Doe in rendering your verdict?' Should the juror answer that Doe's would weigh the strongest with him, it would not demonstrate any element of incompetency, bias, or prejudice in the juror, *as such*, to sit in judgment on the prisoner's case, but such an answer from the juror would only demonstrate the ill fortune of the prisoner in having Roe for a witness, or, rather, in not having someone else as a witness, more credible than Roe."

In State v. Holedger, 15 Wash. 443, 46 Pac. 652, objections were sustained to the following questions: "'Would you attach more importance or credibility to the word of a preacher outside of court than any other gentleman?' and . . . 'Would you attach more credence to the testimony of Dr. McInturff, a minister of the gospel, than that of anyone else?'"

The court, speaking through Mr. Justice Dunbar, dismisses the assignment of error with these words: "These questions are so apparently improper and irrelevant that we do not feel called upon to enter into discussion of them."

The question in the case at bar, while more skilfully framed than those quoted, is in the same class, so far as the purpose and result are concerned, and we think the trial court did not err.

Jury—prejudice against witness—interrogation.

2. Our attention is next called to the action of the court in directing a verdict for the defendant. This ruling is based upon the theory that the state has no right to employ a witness to purchase liquor from a defendant for the express purpose of securing evidence upon which to base a prosecution for violation of law. The trial court expressed its views thus: "The court's ruling is that when the state encourages a person to commit a crime, it cannot take advantage of its own wrong."

The evidence discloses that a witness named Hammond, employed by the state as a detective, purchased from defendant the liquor upon which the criminal proceeding is based. There was also other evidence in corroboration. Our attention has not been called to any authorities supporting the position taken by the trial court, and, in an independent investigation, we have been unable to find any. On the contrary, in State v. Barber, 2 Kan. App. 679, 43 Pac. 802, in a similar case, the Kansas court of appeals says: "And, finally, the defendant asks this court to reverse the judgment and order a new trial, on the ground that the only witness who testified to the particular sale of which the defendant was convicted admitted, upon cross-examination, that he had been furnished the money with which to make the purchases testified to by him; that he at that time expected to be used as a witness against the defendant; that he had been hired to make the complaint, and to become a witness; that he cared nothing about the enforcement of that law; and that, in making the complaint and becoming a witness in this case, he was prompted solely by the money which had been promised him by others. In other words, this court is asked to declare, as a matter of law, that such a witness is unworthy of belief, and that the defendant should not be deprived of his liberty, property, or reputation on the unsupported testimony of a 'spotter,' although such evidence was uncontradicted, and no attempt was made to impeach the witness, save by showing the

motives which prompted him to do what he did towards securing the conviction of the defendant. The trial court was not requested to submit to the jury an instruction embodying that proposition, and we know of no law which would have authorized such an instruction. Neither do we know of any precedent which we might follow, were we to declare the rule to be as argued, even if we entertained the views expressed by counsel."

Intoxicating liquors—inducing violation of law—effect.

This court has adopted the same view in State v. Emmons, 63 Or. 535, 127 Pac. 791. Therefore the trial court erred in directing a verdict of acquittal.

3. Finally, it is urged that the court had no jurisdiction to order the liquors seized under the warrant to be returned to the defendant. This proceeding is based upon the provisions of chapter 141, Laws of Oregon 1915. Section 15 of the act declares that all places where intoxicating liquors are manufactured, sold, bartered, or given away, in violation of law, and all intoxicating liquors kept for sale, barter, or delivery, in violation of law, are common nuisances. Sections 20, 21, and 22 of the act prescribe the procedure for punishing the keeper and destroying the liquors, and are as follows:

"Upon the filing of a complaint, information or indictment charging that a place is kept or maintained as a common nuisance by any person or persons, and that intoxicating liquors, bottles, glasses, kegs, pumps, bars or other property are kept or used therein in keeping and maintaining such place as a common nuisance, a warrant shall be issued commanding the officer to whom it is directed to arrest the person or persons charged or described as the keeper or keepers, and to search the place described in such complaint, information or indictment, and to seize and take into his custody all intoxicating liquors, glasses, bottles, kegs, pumps, bars or other property described in said complaint or information which he may find at such place, and safely keep the same subject to the orders of the court. The complaint or information shall be supported by oath or affirmation and shall describe the place to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquors, or other property alleged to be used in maintaining the same, as particularly as practicable, but any description, however general, that will enable the officer executing the warrant to identify the property to be seized, shall be deemed sufficient. Upon the return of the warrant, the court shall proceed as in other cases against the person or persons arrested." § 20.

"Whenever any intoxicating liquor or other property shall be seized under such a warrant, whether an arrest has been made or not, a notice shall issue within forty-eight hours after the return of the warrant in the same manner as a summons, directed to the defendant or defendants in such action, and to all persons claiming any interest in the intoxicating liquors, or other property, and fixing a time not less than five days from the service thereof and a place at which any and all persons claiming any interest therein may appear and answer the complaint made against such intoxicating liquors or other property, and show cause, if any they have, why the same shall not be adjudged a nuisance and ordered destroyed. Such notice shall be served upon the defendant or defendants in such action in the same manner as a summons, if they be found within the jurisdiction of the court, or otherwise by publication according to the laws governing publication of summons in civil suits, and a copy thereof shall also be posted in a conspicuous place upon the premises where such property was seized. If, at the time for filing answer, such notice has not been duly served, or other sufficient cause appear there-

for, the time for answering may be by the court extended and such other notice issued as will supply any defect in the previous notice and give reasonable time and opportunity for all persons interested to appear and answer. At or before the time fixed by notice, any person claiming an interest in the intoxicating liquors, or other property seized, may file his answer in writing, setting up his claim thereto, and shall thereupon be deemed a party defendant to the proceedings against such liquor or other property. The complaint or information and answer or answers that may be filed shall be the only pleadings required; and at the time fixed for answer, or any other time then to be fixed by the court, a trial shall be had in a summary manner before the court, sitting without a jury, of the allegations of the complaint or information against the liquors or other property seized; and whether any answer shall be filed or not, it shall be the duty of the district attorney to appear and adduce evidence in support of such allegations." § 21.

"If the court shall find that said intoxicating liquors or other property, or any part thereof, were, at the time the complaint or information were filed, being used in maintaining a common nuisance, he shall adjudge forfeited so much thereof as he shall find was being so used, and shall order the officer, in whose custody it is, publicly to destroy the same, and such officer shall make a return thereof to the court in which such action is pending, showing that he has complied with the said order so made and entered. So much of the intoxicating liquor or other property as the court shall not find to have been used in maintaining a common nuisance he shall order returned by the officer, in whose custody it is, to the place or as near as possible to the place from which it was taken, or delivered to the person establishing his claim to the same. If the court shall find that any of such liquors or other property was, at the time the complaint or information was filed, being used in maintaining a common nuisance, and also find that it was being used by any person served with the notice provided for in the previous section of this act, or by any person filing an answer, as in said section provided, so that it was then owned or claimed by any such person and by him knowingly allowed to be so used, the court shall render judgment against such person for the costs of the proceedings against the intoxicating liquors or other property so used or owned by him. If the court shall not find that any of the said intoxicating liquors or other property seized was, at the time the complaint or information was filed, being used in maintaining a common nuisance, or shall not find that any of it was being so used, or so owned and allowed to be used, by any person served with the notice aforesaid, or voluntarily becoming a party as aforesaid, the costs of the proceedings against such property shall be paid as in criminal cases. Either the state, or any defendant or other person claiming the property seized, may appeal from the judgment of the court, in any such special proceeding against property seized, in the manner provided for the taking of appeals in criminal cases, except that the appeal must be taken within ten days, unless the time be extended by the court, for good cause shown; and any claimant of such property who appeals, in order to stay the proceedings, must give an undertaking with two or more sureties to the state of Oregon, to be approved by the trial court, in a sum of not less than $100 nor less than double the costs adjudged against him, conditioned that he will prosecute his appeal without unnecessary delay and that if judgment be rendered against him on appeal, he will satisfy such judgment and costs. No bond shall be required for an appeal by the state, and such appeal shall stay the execution of judgment." § 22.

It will be seen at once that there is

but one complaint and one warrant, upon which are based two distinct proceedings. One against the keeper for the misdemeanor involved in maintaining the nuisance, and the other a proceeding in rem against the liquors. The last sentence of § 20 says: "Upon the return of the warrant, the court shall proceed as in other cases against the person or persons arrested."

Section 21 provides for condemnation proceedings against the liquors in a separate action upon the same complaint, but with different answers, and, if the circumstances of the particular case warrant it, with different parties, and upon this branch of the case the property is either destroyed or returned to the owner as the facts disclosed upon the trial may indicate. The case before us for present consideration is the criminal action against the keeper, and when it was taken by appeal from the district court the proceeding in rem did not accompany it.

The state of Maine has a somewhat similar statute, enacted in 1858, and the supreme court of that state in the case of State v. Bartlett, 47 Me. 388, 400, says:

"The statute, chap. 33, Laws of 1858, under which the liquors in controversy were seized, contemplates that liquors may be found in the custody of one person, but may be owned and intended to be used for lawful or unlawful purposes by other persons. It therefore provides for the punishment of the persons who keep or have in their possession liquors with intent to sell the same unlawfully. It also provides that the owner of the suspected liquors, or those entitled to their possession, may come in and defend them against the charge of being intended for sale in violation of law.

"These two proceedings, though originating in the same preliminary charge, are, in the end, entirely distinct. One terminating in a judgment in which the status of the liquors is determined; the other in a judgment in which the guilt or innocence of the party having such liquors in custody is determined."

This excerpt is a very clear exposition of our own statute. In the case at bar, the only question which was before the Circuit Court was the guilt or innocence of George L. Hoffman, and the order for the return of the liquors was without jurisdiction and therefore void.

Same—acquittal—effect on liquors.

If the other branch of the proceeding is still pending in the District Court, as we understand that it is, there is nothing to prevent that court from disposing of it.

The question of the effect of the judgment of acquittal in this case is not before us, and we do not undertake to decide whether it is a bar to the action against the liquors. Neither do we pass upon the problem as to whether a "John Doe" warrant of search and seizure, issued upon a complaint which discloses the true name of the keeper, will justify such search and seizure.

McBride, Ch. J., and **Burnett** and **Harris**, JJ., concur.

ANNOTATION.

Right to interrogate juror on voir dire as to prejudice for or against particular class of witnesses.

I. Prejudice against accomplice, 1688.
II. Prejudice against detective or informer, 1689.
III. Prejudice for or against member of particular race or religious denomination, 1689.
IV. Prejudice against person engaged in liquor business, 1690.
V. Prejudice against accused as witness in own behalf, 1691.

I. Prejudice against accomplice.

It has been held that, in a criminal prosecution, the prosecuting attorney has a right to ask prospective jurors whether they would disregard the testimony of an accomplice who has turned state's evidence. People v. O'Neil (1888) 109 N. Y. 251, 16 N. E.

68; State v. Flint (1888) 60 Vt. 304, 14 Atl. 178.

Thus, in the case last cited it was said: "It is plain that if a juror had such a settled view of his duty that he would wholly disregard such a witness's testimony on that account, he would not be a suitable man for a juror. It being legal evidence in the case, the trier is bound to regard it. He is not bound to believe any witness. An accomplice's testimony is to be weighed for what it is worth, like that of other witnesses. It may not be believed, but it cannot be wholly disregarded. The propriety of such inquiry must rest largely in the discretion of the trial court. This case illustrates such necessity. It had been tried twice without an agreement; it was known that the state's case depended on the testimony of an accomplice to such an extent that without his testimony a conviction would not be warranted; it is not uncommon to hear men say they would not believe an accomplice in any case. Should a court under such circumstances be powerless to find out whether the jurors were so mentally constituted that they could not try the case according to their oath? We think the ruling was clearly correct."

In People v. O'Neil (1888) 109 N. Y. 251, 16 N. E. 68, affirming (1888) 48 Hun, 36, a number of aldermen were indicted for bribery. In the voir dire examination of the jurors the district attorney asked them whether they would be prejudiced against the testimony of two of the aldermen, who had turned state's evidence. It was held that the question was proper and permissible.

II. Prejudice against detective or informer.

In a prosecution for selling liquors unlawfully it has been held that the prosecuting attorney may ask the jurors on their voir dire whether they are prejudiced against the testimony of a person who is employed in the sheriff's office for the purpose of ferreting out violators of the local option laws. Irvine v. State (1909) 55 Tex. Crim. Rep. 347, 116 S. W. 591. In that case the defendant was prosecuted for unlawfully selling intoxicating liquor. The state's attorney asked the jurors the following question: "Have you any prejudice against a witness or his testimony who has been employed by the sheriff to hunt up local option violations and receive money for his services?" The court held that the question was properly allowed, saying: "It is always proper to probe the conscience of a juror to ascertain thereby whether he would be a fair and impartial juror both to the state and the defendant. This prosecution being predicated upon the testimony of a hired detective, it was germane and proper to ask the jurors the question complained of." But in Ellis v. State (1913) 69 Tex. Crim. Rep. 468, 154 S. W. 1010, the defendant was prosecuted for unlawfully selling intoxicating liquor. His counsel attempted to ask the jurors on voir dire the following question: "Should it develop in the progress of this case that the state's witness, Charles Koethe, is in the employment of the sheriff's department, would you give the same weight and credence to the testimony of said witness, as were he not in such employment?" The trial court ruled this question out, and on appeal the ruling was sustained, apparently on the ground that the question did not indicate in what capacity the witness was employed by the sheriff.

In the reported case (STATE v. HOFFMAN, ante, 1683), it is held that in a criminal prosecution for unlawfully selling intoxicating liquors the state is not entitled to ask the prospective jurors whether they are prejudiced against the testimony of an informer.

III. Prejudice for or against member of particular race or religious denomination.

It is improper to ask prospective jurors whether they would give more weight and credit to the testimony of a witness professing a particular religious faith than to that of one professing a different religion. Com. v. Buzzell (1834) 16 Pick. (Mass.) 153; State v. Holedger (1896) 15 Wash. 443, 46 Pac.

652; Horst v. Silverman (1898) 20 Wash. 233, 72 Am. St. Rep. 97, 55 Pac. 52.

In the case first cited it was held that a juror should not be asked on his voir dire examination whether he entertains the opinion that a Roman Catholic cannot be believed on oath.

In Horst v. Silverman (Wash.) supra, it was held that a question of the prospective jurors whether they would give as much credit to the testimony of witnesses professing the Jewish faith as they would to the testimony of members of any other faith was properly excluded.

In State v. Holedger (1896) 15 Wash. 443, 46 Pac. 652, it was held that it was improper to ask a prospective juror whether he would attach more credit to the testimony of a minister of the Gospel than that of anyone else.

In People v. Car Soy (1880) 57 Cal. 102, the defendant was a Chinaman. His counsel asked the prospective jurors the following questions: "1. Other things being equal, would you take the word of a Chinaman as soon as you would that of a white man?" "2. If the defendant, a Chinaman, should be sworn as a witness in his own behalf, would you give his testimony the same credit that you would give to the story told by a white person, under the same circumstances?" To both these questions the trial court sustained objections made by the district attorney. On appeal this ruling was held to be erroneous.

But in Jenkins v. State (1893) 31 Fla. 196, 12 So. 677, a question put to a juror on voir dire, whether he could, in a prosecution against a negro, give the same weight to the testimony of a negro as he would give to that of a white man, was held to be improper. The court said: "This question was not at all a proper one to be put to a juror on the voir dire, as it did not seek or tend to demonstrate the juror's bias for or prejudice against the prisoner, but was an effort to make the juror, in advance of the production of evidence in the cause, disclose what class of witnesses he would or would not give credence to,—a field of inquiry that is not proper to be gone into in testing the qualification of jurors on the voir dire."

IV. Prejudice against person engaged in liquor business.

It is improper to permit a juror to be asked on a voir dire examination whether he has a prejudice against the testimony of a person engaged in the sale of intoxicating liquors.

Thus, in Com. v. Poisson (1893) 157 Mass. 510, 32 N. E. 906, it was held that in a prosecution for unlawfully selling intoxicating liquors the defendant was not entitled to ask a prospective juror whether he could give the same weight to the testimony of a witness who was engaged in selling liquors as he would give to the testimony of any other witness. The court said: "If a juror should admit that he regarded as more or less discredited a witness who, so far as the evidence had gone at the moment of his testifying, appeared probably to be a liquor seller, the admission would go only to the juror's general opinions concerning circumstances which affect the value of evidence. It is to get the benefit of such opinions formed by men of the world that jurors are summoned. It seems to us that the existence of such a one as we have supposed would not prevent the juror from standing indifferent in this particular case."

In People v. Thiede (1895) 11 Utah, 241, 39 Pac. 837, the prosecution was for murder. The defendant was a saloon keeper. One of the jurors was asked on voir dire whether he had any prejudice against a witness who was engaged in the saloon business. The witness stated that if the defendant went on the stand as a witness, the fact that he was a saloon keeper might have some weight in his (the juror's) mind as to his credibility as a witness. But he further stated that he did not know the defendant and would not allow the fact that he thought less of a saloon keeper than of men of other occupations to influence him in any way in passing upon his guilt or innocence. It was held that the juror was not disqualified,

as he could not be required to state in advance that he would give the same weight and credit to the testimony of one class of witnesses as he would to another class. The court said: "It is not required that jurors close their eyes to just observations and experiences in life. It is their exclusive province to weigh the evidence, and determine the credibility of the witnesses; and they cannot be required to state in advance—as a prerequisite to competency—that they will give the same credit to one witness that they will give to another, or to one class of witnesses that they would to other classes."

V. Prejudice against accused as witness in own behalf.

A juror should not be asked if he would give the same weight and credit to the testimony of the defendant in a criminal prosecution, should the latter take the stand, as he would to that of any other witness. People v. Fowler (1918) — Cal. —, 174 Pac. 892; State v. Everitt (1896) 14 Wash. 574, 45 Pac. 150.

The case first cited was a prosecution for murder. The defendant's counsel asked one of the prospective jurors whether he could give the same credit to the testimony of the defendant, in case he went on the stand, as he would give to that of any other witness. It was held that an objection to this question was properly sustained. The court said: "The defendant had no right to ask this question of the proposed juror. The defendant's interest in the result was only one of the things to be taken into consideration. His demeanor on the stand, his manner of testifying, the character of his testimony, his appearance, and possibly other circumstances, were all to be considered in determining the weight of his testimony. The juror could not answer the question properly upon the premises laid in the question. If the defendant wished to ascertain whether or not the juror had any bias against him which would prevent him from giving the defendant a fair trial, he should have gone about it in some other way."

In State v. Everitt (Wash.) supra, a prosecution for cattle stealing, the defendant's counsel asked the jurors the following questions: (1) "If the defendant should avail himself of the privilege of going on the stand and testifying in this case, could you, after considering the fact that he is the defendant in the case, his interest in the result, and all the circumstances, give the testimony of the witness all the weight and credit the circumstance I have mentioned would justify?" (2) "Should the defendant go on the witness stand as a witness in his own behalf, taking into consideration that he is the defendant, interested in the result of the trial, and all the circumstances surrounding the defendant, could you then go into the jury box and give to his testimony such weight and credit as it would be entitled to under all the circumstances?" (3) "Would the fact that the defendant here is charged with stealing neat cattle, if he should go on the stand, in any way prejudice you against his testimony?" It was held that the questions were properly excluded. The court said: "When the defendant enters a witness stand, he enters it under the same rules and on the same footing as any other witness, and he has no right to attempt to ascertain in advance what the jury may think of his credibility as a witness. All questions of this character would simply have a tendency to confuse and entrap jurors and render the selection of a legal juror almost impossible." C. M.

WILLIAM A. SMITH
v.
JOHN W. BERRYMAN et al.

Missouri Supreme Court (In Banc) — December 1, 1917.

(272 Mo. 365, 199 S. W. 165.)

Election of remedies — mandamus — action for damages.

1. One securing a mandamus to compel the issuance of a license cannot, in the absence of a false return to the alternative writ, recover damages in an action at law for refusal of defendant to perform such duty.

[See note on this question beginning on page 1698.]

Evidence — judicial notice — facts in other case.

2. A court will not, in a case before it, judicially notice the facts in the record of another and different case.

CERTIFICATION by the St. Louis Court of Appeals for the determination by the Supreme Court of questions arising upon appeal by defendants from a judgment of the Circuit Court for Iron County in favor of plaintiff, in an action brought to recover damages for refusal of defendants to grant him a dramshop license. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **David W. Hill** and **John M. Atkinson** for appellants.

Messrs. **N. A. Mozley** and **Ernest A. Green,** for respondent:

The only authority and power which defendants, as members of the city council, had with reference to the granting of dramshop licenses, was "to levy and collect a license tax on liquor sellers." When the license tax was paid by plaintiff, he was entitled to the grant of a license, and it was the ministerial duty of defendants to grant it.

State ex rel. Smith v. Berryman, 142 Mo. App. 379, 127 S. W. 129; Joplin v. Jacobs, 119 Mo. App. 134, 96 S. W. 219; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; 29 Cyc. 1442; Montpelier v. Mills, 171 Ind. 175, 85 N. E. 6, 17 Ann. Cas. 57; Bennett v. Whitney, 94 N. Y. 302; Amy v. Supervisors (Amy v. Barkholder) 11 Wall. 136, 20 L. ed. 101.

Plaintiff is entitled to recover the damages sustained by him by reason of the failure and refusal of defendants to perform their ministerial duty towards him.

State ex rel. Wheeler v. Adams, 101 Mo. App. 468, 74 S. W. 497; Steadley v. Stuckey, 113 Mo. App. 582, 87 S. W. 1014; St. Joseph F. & M. Ins. Co. v. Leland, 90 Mo. 177, 59 Am. Rep. 9, 2 S. W. 431; State ex rel. Phillips v. Green, 124 Mo. App. 88, 100 S. W. 1115; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; 29 Cyc. 1442; Montpelier v. Mills, 171 Ind. 175, 85 N. E. 6, 17 Ann. Cas. 57; Baltimore County v. Baker, 44 Md. 1; Bennett v. Whitney, 94 N. Y. 302; Amy v. Supervisors (Amy v. Barkholder) 11 Wall. 136, 20 L. ed. 101.

Plaintiff had the right to recover his damages in a separate action, and was not precluded from doing so because he did not plead and claim them in the original mandamus proceedings.

State ex rel. Wheeler v. Adams, 101 Mo. App. 471, 74 S. W. 497; Steadley v. Stuckey, 113 Mo. App. 582, 87 S. W. 1014; St. Joseph F. & M. Ins. Co. v. Leland, 90 Mo. 177, 59 Am. Rep. 9, 2 S. W. 431; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Gardner v. Springfield Gas & E. Co. 154 Mo. App. 674, 135 S. W. 1023; People ex rel. Goring v. Wappingers Falls, 151 N. Y. 386, 45 N. E. 852.

Faris, J., delivered the opinion of the court:

This is an action for damages brought by plaintiff against the defendants, for that defendant Berryman as mayor, and the other defendants as members of the city council

of the city of Poplar Bluff, refused to grant to plaintiff a license to keep a dramshop in a certain building in the city of Poplar Bluff. Upon the trial nisi plaintiff recovered judgment for the sum of $150. From this judgment, after the conventional motions, defendants appealed to the St. Louis court of appeals. Therein an opinion was written in the case by Judge Reynolds, wherein Judges Nortoni and Allen concurred. Smith v. Berryman, 173 Mo. App. 148, 156 S. W. 40. But the learned St. Louis court of appeals, deeming the views held by them to be contrary to an opinion by the Springfield court of appeals, in the case of Gardner v. Springfield Gas & E. Co. 154 Mo. App. 666, 135 S. W. 1023, ordered that the cause be certified to this court for determination, pursuant to the Constitution, in such cases provided.

Since the facts are to be found in Smith v. Berryman, supra, and in State ex rel. Smith v. Berryman, 142 Mo. App. 1, l. c. 378, 127 S. W. 129, we need not cumber the books with a very lengthy recital of them. Suffice it to say that some years ago plaintiff herein presented to the mayor and town council of Poplar Bluff, composed then, as before stated, of these defendants, an application for a license as a dramshop keeper. Defendants herein refused to grant plaintiff such license. Thereupon, plaintiff brought his action in mandamus to compel defendants to issue a dramshop license to him. Ultimately, this mandamus proceeding was ruled by the learned Springfield court of appeals in such wise as that a peremptory writ of mandamus was ordered therein, which writ defendants promptly proceeded to obey, and issued the license to plaintiff, as originally prayed for by him. Vide, State ex rel. Smith v. Berryman, supra.

Thereafter the instant action was brought, and plaintiff, as stated, had judgment herein for $150. Upon defendants' appeal to the St. Louis court of appeals, that court reversed the judgment nisi, but deeming their opinion herein to be in conflict with an opinion by the Springfield court of appeals they ordered the case sent up to us, and it becomes our duty to rule it here in all respects as if it were a case wherein our appellate jurisdiction is original.

Further facts which we do not state will be found in the several opinions of the courts of appeals at the citations stated, but we reserve the right to refer to such of these facts as are necessary, or which we may find to be cogent in our discussion of the case.

We are of the opinion that in a proper situation an independent action will lie for damages accruing to a plaintiff in an antecedent mandamus proceeding; that such plaintiff, having obtained his peremptory writ, may, if he show that the return made to the alternative writ by the respondent in the mandamus proceeding was false, have his damages, which have accrued to him by reason of such false return, assessed either (a) in the mandamus proceeding itself, or (b) in an independent action brought directly for that purpose. But we are also of the opinion that, absent a false return, no damages, except ordinary costs (and these subject to the court's order), can be recovered in any action brought by the relator in the mandamus action against the respondents in such action. We think an examination into the common-law history of the proceeding by mandamus clearly demonstrates the correctness of this view.

At common law no issue of fact could be raised upon the return of the respondent to the alternative writ in mandamus. The return was the ultimate pleading in the case, and was conclusive upon the relator, whether such return was true or false, and therefore such return raised nothing but pure questions of law, which went solely to the legal sufficiency of the return. However, if such return were false, an independent ancillary action lay against

the respondent for making a false return. If, upon a trial of such latter action, the relator in the mandamus proceeding recovered damages for the making of the false return, he thereby became also entitled, ipso facto, to his peremptory mandamus. 18 R. C. L. 347. Such a circuitous proceeding being cumbersome and unsatisfactory, the Statute of 9 Anne, chap. 20, was passed in England to abolish it. 18 R. C. L. 347; State ex rel. Alexander v. Ryan, 2 Mo. App. l. c. 307. This statute was adopted substantially, if not literally, in this state in 1825. (Laws 1825, §§ 1–3 and 4, p. 522.) The second and third sections of the original Missouri act adopting the Statute 9 Anne, read thus:

"Section 2. Be it further enacted, That when any writ of mandamus shall be issued out of any court of this state, and return shall be made thereunto, it shall be lawful for the person or persons suing or prosecuting such writ, to plead to or to traverse all or any of the material facts contained in such return—to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return. And if any issue shall be joined upon such proceedings, the person or persons suing such writ shall and may try the same, in such place, as an issue joined on such action on the case should or might have been tried; and in case a verdict should be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by nil dicit, or for want of a replication or other pleading, he or they shall recover his or their damages and costs, in such manner as he or they might have done in an action on the case as aforesaid; and such damages and costs shall and may be levied by execution, as in other cases —and a peremptory writ of mandamus shall be granted, without delay, for him or them for whom judgment shall be given, as might have been if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid.

"Section 3. Be it further enacted, That if any damages shall be recovered, by virtue of this act, against any person or persons making such returns to such writ as aforesaid, he or they shall not be liable to be sued in any other action or suit, for the making such return, any law, usage or custom to the contrary notwithstanding."

The above provisions have been carried forward in our statutes practically unchanged in substance, and without any material changes even in verbiage. The legislature has contented itself with dividing the pronouncement into more convenient sections (cf. Rev. Stat. 1909, §§ 2547–2551 and 2554. While the meaning of § 2551, supra, is not as clear as it might have been made, we are of the opinion that, read in the light of the common-law history of mandamus, as well as in the light thrown upon the meaning thereof by § 2554, supra, which was § 3, supra, of our original enactment, it is fairly apparent that no action lies for damages, *absent a false return.* In short, that, within the purview of both the common law and our present statute, no recoverable damages accrue to the relator for that he was compelled to bring mandamus, unless the respondent, by making a false return and thereby raising a false issue of fact, as contradistinguished from pure issues of law, puts the relator to vexation and expense in disproving such false issue of fact. In such cases, and in no other, can a successful relator in mandamus recover damages. In other words, if there is no false return, no damages can be re-

covered. If there is a false return, damages therefor may be recovered, either in the mandamus proceeding itself or by an independent action brought solely for that purpose. As forecast above, § 2554, supra, strongly (in the light of the common law, conclusively) points to this view. For the latter section says that if damages "shall be recovered, by virtue of this article [referring specially to § 2551, supra], against any person *making return to such writ,* he shall not be liable to be sued in any other action or suit *for making such return.*" (Italics are ours.) State ex rel. Alexander v. Ryan, 2 Mo. App. l. c. 308. Since, therefore, at common law, the only possible mode of procedure in case of a false return was to sue for damages therefor in a separate action, the language of § 2554, supra, is seen to be a conditional abrogation of the common law; that is to say, said section took away the existing common-law right to a separate action for damages, only in the event that those damages had been previously recovered in the mandamus suit. It will be noted that the above statutory provision for the independent action for damages thus negatively allowed is not bottomed on any *wilful refusal to do* the thing which the mandamus commanded, but "*for making such return,*" i. e., for making the false return, and by such false return putting the relator to trouble and expense to disprove the same.

Election of remedies—mandamus—action for damages.

While liability for neglect, or refusal to perform, or for misfeasance or malfeasance in the performance of simple ministerial duties is concededly a living part of the law, we think this view is in consonance with the policy of this state and tends to safeguard ministerial and even judicial officers, in their ministerial functions, in the performance of the duties which they owe to the public, and makes for freedom from personal financial constraint in the exercise of their official discretion. If an officer is to be put in fear of financial loss at every exercise of his official functions, manifestly the interest of the public will inevitably suffer from the too complacent attitude thus engendered.

So much having been said upon the general rule, how stands this case upon the concrete facts? Manifestly, the plaintiff cannot recover unless he shows that defendants made a false return to the antecedent alternative writ of mandamus. There is no evidence upon this record that they did so. For while the peremptory writ was offered upon the trial nisi of the instant case, the opinion of the Springfield court of appeals, which sets forth the facts and the legal reasons for the issuance of this writ, was not offered. This peremptory writ, which is before us, referring to the return, plainly says that defendants (respondents in the mandamus case) "*returned to said court an insufficient cause*" for refusing to affirmatively obey the command of the alternative writ. It nowhere says that respondents in the mandamus proceeding *made a return which was false.* It may be that the learned Springfield court of appeals so found and so ruled in the opinion which they filed in the mandamus proceeding, but that opinion was not offered below in this case, and so it is not before us, since we do not judicially notice the facts in the record of another and different case. We notice the law in all cases; we notice the record here even upon successive appeals in the same case (Keaton v. Jorndt, 259 Mo. l. c. 189, 168 S. W. 734); but we do not notice the record of one case upon the hearing of another and different case (Banks v. Burnam, 61 Mo. 76), even in our own court. A fortiori the rule prevents us from noticing the facts set out in an opinion of one of the courts of appeal in any given case, when we are considering here a separate and independent case. Haber v.

Evidence—judicial notice—facts in other case.

Klauberg, 3 Mo. App. 342. If there were any showing upon the record before us that the return made by defendants here, who were the respondents there, was false, then the other question would arise touching whether the sum recovered is made up of proper elements of damage. As the case now stands, there is no evidence whatever that defendants here made, in their capacity as respondents in the mandamus case, any false return whatever. Such showing as there is clearly demonstrates that the showing made by them was true, but merely insufficient as a matter of law.

But plaintiff urges that his action is not under the statutes relating to the procedure in mandamus, which statutes we quote. He contends that he is suing at common law to recover the damages which have accrued to him by reason of the refusal of defendants to perform a ministerial duty. He correctly characterizes his pleadings, but the answer is still the same; he cannot recover. No such action existed at common law *following the issuance of a peremptory writ in mandamus*, and none (as we have labored to show by our brief examination into the common-law history of mandamus) has been given by our statute, save and except such damages as directly flow from a false return.

The cases cited to us by learned counsel, as is so clearly pointed out by Judge Reynolds (Smith v. Berryman, 173 Mo. App. 161, 156 S. W. 40), are not in point, and are readily to be distinguished from the situation confronting us. Those cases simply hold that an action will lie against an officer whose duty it is to perform, but who refuses to perform, a ministerial act. There can be no doubt upon this point, and no one would be so bold as to contend otherwise, especially in a case which does not call for the exercise of official discretion. If the rule were not so, no suit would lie against an officer upon his official bond by a citizen, injured by a failure to correctly or timely perform a ministerial duty.

The writ of mandamus is an extraordinary prerogative writ, and, while it issues from a law court, or the law side of our circuit courts (Ward v. Gregory, 7 Pet. 633, 8 L. ed. 810), it has at least one attribute in common with the extraordinary writs of equity jurisprudence, in that its issuance is within the court's legal discretion. This discretion requires a refusal of the writ, if the petitioner therefore have any other adequate remedy by which he may redress the wrong of which he complains. Therefore, if the petitioner bring mandamus, he thereby tacitly admits that he has no adequate remedy by any other action or proceeding. The bringing of the mandamus suit is therefore logically an election between remedies which are antagonistic to each other. State ex rel. Koppstein v. Lipa, 28 Ohio St. 665; 19 Am. & Eng. Enc. Law, 904. Petitioner may not have both his remedy by mandamus *to compel the* [illegible] *for damage*- ministerial act and his action for damages for the refusal *to perform such act*, unless some statute gives him both of these remedies. In some jurisdictions the statutes seem to allow both remedies (Columbia Knickerbocker Trust Co. v. Finney, 93 Kan. 302, 144 Pac. 222); but, as we have already ruled, this is not true in the case of our own statute on the subject. At common law an application for mandamus never had both remedies, except upon a condition, and that condition was that his adversary should make a false return, and the reason back of that condition was that the petitioner was concluded by such return. As stated, the Statute 9 Anne, chap. 20, and our own statute, which is a rescript thereof, simply had the effect to change the cumbersome circumlocution of the procedure. It permitted a traverse of the return and allowed damages to be recovered for a false return in the mandamus proceeding itself.

Neither the research of learned

counsel has found for us, nor have our own somewhat exhaustive investigations of the question unearthed, a single case at common law wherein an action for damages has been allowed, absent a false return, *after the granting of relief by the issuance of a peremptory writ of mandamus*. On the other view, what was said by Mr. Chief Justice Taney, in the case of Kendall v. Stokes, 3 How. l. c. 100, 11 L. ed. 512, seems apposite: "This objection applies with still more force, when, as in this instance, the party has proceeded by mandamus. The remedy in that form, originally, was not regarded as an action by the party, but as a prerogative writ commanding the execution of an act, where otherwise justice would be obstructed; and issuing only in cases relating to the public and the government; and it was never issued when the party had any other remedy. It is now regarded as an action by the party on whose relation it is granted, but subject still to this restriction, that it cannot be granted to a party where the law affords him any other adequate means of redress. Whenever, therefore, a mandamus is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding. And to allow him to bring another action for the very same cause, after he has obtained the benefit of the mandamus, would not only be harassing the defendant with two suits for the same thing, but would be inconsistent with the grounds upon which he asked for the mandamus, and inconsistent also with the decision of the court which awarded it. If he had another remedy which was incomplete and inadequate, he abandoned it by applying for and obtaining the mandamus. It is treated both by him and the court as no remedy. Such was obviously the meaning of the supreme court in the opinion delivered in the former suit between these parties, where they speak of the action on the case, and give him the mandamus, because the other form of action was inadequate to redress the injury, and they would not, therefore, require the plaintiffs to pursue it."

The demurrer to the evidence ought to have been sustained and the case should be reversed without remanding. Let this be done.

Graves, Ch. J., **Bond**, **Walker**, and **Woodson**, JJ., concur; **Williams**, J., concurs in separate opinion, in which **Blair**, J., concurs.

Williams, J., concurring:

I concur in the result of the majority opinion and in that portion thereof which holds that the plaintiff, having elected to proceed by mandamus to compel the performance of a ministerial duty, thereby abandoned or waived whatever right he theretofore had to bring a common-law action for damages resulting from the original refusal of the officer to perform such ministerial duty.

As to the other question, whether or not a person seeking to recover damages resulting from *a false return* in a mandamus suit must recover his damages in the mandamus proceeding, or may proceed in a separate suit, as in the ancient common-law manner of a suit upon a false return, I express no opinion, because such question is not lodged in this case. The petition in this case *does not* seek damages arising from a false return. *No mention of false return is made in the petition nor does the evidence in this case show that a false return was in fact made.*

It therefore follows that the question as to which way and how he must travel when he does so seek, whether he must go the modern way pointed out by statute (Rev. Stat. 1909, § 2551), and have his damages assessed in the mandamus proceeding, or, if he prefer, go the "*obsolete*" way (Merrill, Mandamus, § 268, p. 334), as by independent suit upon a false return, is an interesting question, but one which we need not and therefore should not now determine.

Blair, J., concurs herein.

ANNOTATION.

Election of remedies as between mandamus and an action for damages.

I. In general, 1698.
II. In absence of statute:
  a. Mandamus as election against action for damages, 1698.
  b. Action for damages as precluding mandamus, 1699.
III. Under statute, 1699.

I. In general.

The present annotation treats merely the question whether a resort to mandamus to enforce performance of an act constitutes an election of remedies, precluding the bringing of an independent action to recover damages arising out of the failure to perform such act, and the converse question whether the bringing of an action for damages precludes a subsequent resort to mandamus; and consequently does not cover either the general question as to the right to be awarded damages in a mandamus proceeding itself, or the question as to the right to recover damages for the making of a false return to an alternative writ.

The general rule is, that the injured person may have his choice between an action for damages and a remedy by mandamus, but that he cannot pursue both remedies unless both are given by statute. However, as subsequently shown, statutes which control or affect the situation have been enacted in a considerable number of jurisdictions.

II. In absence of statute.

a. Mandamus as election against action for damages.

The decision in the reported case (SMITH v. BERRYMAN, ante, 1692), to the effect that in the absence of controlling statute one who resorts to mandamus to enforce an act, for the nonperformance of which an action for damages could have been maintained, thereby elects not to sue for such damages, based as it is upon the theory that the bringing of the mandamus proceeding was an election between antagonistic remedies, and that the adoption of the remedy by mandamus was at least a tacit admission that the remedy by an action for damages was inadequate, finds direct support in the opinion of the majority of the court in the case of Kendall v. Stokes (1845) 3 How. (U. S.) 87, 11 L. ed. 506, which is quoted in the SMITH CASE, and in which it was held that the selection of the remedy of mandamus to enforce the performance by a public official of an official act was an election of remedies, so as to preclude the bringing of a subsequent action for damages growing out of the breach of duty in not performing the act until compelled to do so; and this, although elements of damages claimed in the action for damages could not have been recovered in the mandamus proceeding. However, Mr. Justice McLean, in a dissenting opinion (1845) 3 How. 789, 11 L. ed. 833), maintained that the two actions were distinct in their character and object, and that the mandamus could not be pleaded in bar of the action for damages.

And again in Achey v. Creech (1899) 21 Wash. 319, 58 Pac. 208, the rule that when a party has a choice of remedies, by mandamus, or suit for damages, the adoption of one bars the right to invoke the other, was applied, the court holding that prosecution of a suit for a writ of mandamus barred a right to maintain an independent action for damages occasioned by the omission to perform the act complained of in the mandamus proceeding. And see State ex rel. Alexander v. Ryan (1876) 2 Mo. App. 303, and State ex rel. Taylor v. Moss (1889) 35 Mo. App. 441.

The case of Ransom v. Boston (1907) 193 Mass. 537, 79 N. E. 823, wherein it was held that the bringing of an action by a veteran employed under the Massachusetts Civil Service Law to recover wages lost while wrongfully excluded from such employment was not an election between inconsistent remedies, which would bar a subsequent proceeding to compel his reinstatement by mandamus, should not be confused with the fore-

going cases, since, as the court pointed out, the first action was one of contract and in recognition of it, and not for its wrongful breach, in which case the remedies would have been inconsistent.

See also the following cases, wherein, without discussing the question of election of remedies, an independent action to recover damages was maintained subsequent to the obtaining of relief by mandamus: Grider v. Tally (1884) 77 **Ala.** 422, 54 Am. Rep. 65; State ex rel. Wheeler v. Adams (1903) 101 **Mo.** App. 468, 74 S. W. 497; Steadley v. Stuckey (1905) 113 **Mo.** App. 582, 87 S. W. 1014.

b. Action for damages as precluding mandamus.

In State ex rel. Koppstein v. Lipa (1876) 28 **Ohio** St. 665, where a person was expelled from membership in a benefit society, it was held that the bringing by him of a civil action to recover damages caused by the expulsion constituted a waiver of any right to a writ of mandamus to restore him to membership, the two remedies being regarded as inconsistent, and the selection of one an election, barring subsequent resort to the other.

III. Under statute.

In a considerable number of jurisdictions statutes have been enacted which materially affect the question under consideration.

Thus, in some instances the statutes expressly allow both an action for damages and a remedy by mandamus in certain cases. For example in Iowa, § 1056—a15 of the Code Supp. of 1917 provides that where honorably discharged veterans of the Civil War have been denied the preference of appointment, or discharged without hearing, they shall have a right of action for damages, "and also a remedy by mandamus for righting the wrong." See Thurber v. Duckworth (1914) 165 **Iowa,** 685, 147 N. W. 158.

In several other states the statutory provisions are to the general effect that, if the application for a writ of mandamus be granted the applicant may recover the damages which he has sustained. Statutes of this character are illustrated by Mills's Anno. Code (Colo.) § 317 (see Bell v. Thomas (1910) 49 **Colo.** 76, 31 L.R.A.(N.S.) 664, 111 Pac. 76); Idaho Rev. Stat. § 4987 (see Hill v. Morgan (1904) 9 **Idaho,** 777, 76 Pac. 765); Kansas Civ. Code, § 723 (see Reeves v. Ryder (1914) 92 **Kan.** 168, 139 Pac. 1028, and Columbia Knickerbocker Trust Co. v. Finney (1914) 93 **Kan.** 302, 144 Pac. 222); Ohio Rev. Stat. § 6753 (see State ex rel. Parrott v. Public Works (1881) 36 **Ohio** St. 409, and State ex rel Tucker v. Newark (1899) 19 **Ohio** C. C. 5, 10 Ohio C. D. 440); and S. D. Comp. Laws, § 5522, which provides that a jury which has determined any question of fact in a mandamus proceeding may also be ordered to fix plaintiff's damages, and § 5527, which provides that if judgment be given for plaintiff he may recover damages "as found by the jury" (see Hollister v. Donahoe (1902) 16 S. D. 206, 92 N. W. 12). And while, as a general rule, recovery under statutes of this character is had in a single proceeding, some question has been made as to whether recovery must be confined to a single action, or whether resort may be had to both remedies in independent actions. For instance, in the reported case (SMITH v. BERRYMAN, ante, 1692) the court, evidently referring to the above-cited section of the Kansas Code, said that "in some jurisdictions the statutes seem to allow both remedies." And perhaps some foundation for this conclusion can be derived from the decision in Columbia Knickerbocker Trust Co. v. Finney (1914) 93 **Kan.** 302, 144 Pac. 222, it having been held therein that in some cases, at least, damages may be allowed without the issuance of a peremptory writ. However, in Achey v. Creech (1899) 21 **Wash.** 319, 58 Pac. 208, it was expressly held that where the statutes provide that, if judgment be given for plaintiff in a mandamus proceeding he may recover the damages which he has sustained, the law will presume that the applicant in the mandamus proceeding demanded and received all that he was entitled to, so that a subsequent action for damages cannot be sustained even though

no damages were asked in the mandamus proceeding, the court saying that the defendant should not be subjected to the defense of a multiplicity of suits, when all the subjects of controversy could be decided in one action.

Still another class of statutes in effect merely extend to the applicants for mandamus a right to recover damages for the making of false returns upon alternative writs, wherefore it seems clear that such statutes do not permit both the obtaining of relief by mandamus and the maintaining of an action for damages of the character under consideration herein, at least, in the absence of a false return. See SMITH v. BERRYMAN which seems to indirectly overrule Gardner v. Springfield Gas & E. Co. (1911) 154 Mo. App. 666, 135 S. W. 1023, wherein it was held that, where the relator in a mandamus proceeding does not demand damages for the wrongful act complained of, he may, in a subsequent independent action, sue for any damages he may have sustained; and People ex rel. Goring v. Wappingers Falls (1897) 151 N. Y. 386, 45 N. E. 852, reversing (1895) 91 Hun, 517, 37 N. Y. Supp. 1148, which affirmed (1895) 13 Misc. 732, 35 N. Y. Supp. 213, wherein in construing and applying New York Code of Civil Procedure, § 2088, it was held that in proper cases the damages may be awarded in a separate proceeding. G. J. C.

ETTA F. HERRINGTON, Respt.,

v.

IDA A. DAVITT et al., Exrs. of Albert W. Davitt, Deceased, Appts.

New York Court of Appeals — February 27, 1917.

(220 N. Y. 162, 115 N. E. 476.)

Bankruptcy — promise to pay after discharge — composition — consideration — moral obligation.

1. The moral obligation to pay a debt discharged in bankruptcy is sufficient consideration to support a promise to pay, even though there was a composition of the creditors assented to and accepted by the one seeking to enforce the unpaid debt.

[See note on this question beginning on page 1704.]

Action — on note discharged in bankruptcy.

2. An action to enforce a note revived by new promise after being discharged in bankruptcy proceedings may be based upon the original note rather than on the new promise.

Bankruptcy — promise to revive debt.

3. A promise sufficient to revive a debt discharged in bankruptcy is made by a letter stating: "In regard to your claim against me, you will be paid every dollar of it, with interest, as soon as I sell the mill."

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Rensselaer County in favor of plaintiff, in an action on a promissory note. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Mr. **Thomas O'Connor**, for appellants:

The letter written by testator was not a sufficient acknowledgment or promise to pay to relieve the note sued upon from the bar of the Statute of Limitations.

Tompkins v. Hazen, 165 N. Y. 18, 58 N. E. 762; Crandall v. Moston, 24 App. Div. 547, 50 N. Y. Supp. 145; Zinn v. Stamm, 152 App. Div. 76, 136 N. Y. Supp. 737.

The letter did not waive the discharge.

Tompkins v. Hazen, supra; Scheper v. Briggs, 28 App. Div. 117, 50 N. Y. Supp. 869; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Allen v. Ferguson, 18 Wall. 1, 21 L. ed. 854; Elwell v. Cumner, 136 Mass. 102; Mandell v. Levy, 47 Misc. 147, 93 N. Y. Supp. 545.

The voluntary joining in the composition agreement by the plaintiff discharged not only the legal, but also the moral, obligation of the defendant. There was, therefore, no consideration for the new promise to pay, and the promise cannot be enforced.

Warren v. Whitney, 24 Me. 561, 41 Am. Dec. 406; Fellows v. Stevens, 24 Wend. 294; Zoebisch v. Von Minden, 47 Hun, 213; Robinson v. Striker, 47 Hun, 546; Bartlett v. Rogers, 3 Sawy. 62, Fed. Cas. No. 1,079; Blair v. Wait, 69 N. Y. 113; Stafford v. Bacon, 1 Hill, 532; Hale v. Rice, 124 Mass. 292; Samuel v. Fairgrieve, 21 Ont. App. Rep. 418; Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; Ingersoll v. Martin, 58 Md. 67, 42 Am. Rep. 322; Phelps v. Dennett, 57 Me. 491; Callahan v. Ackley, 9 Phila. 99; Rasmussen v. State Nat. Bank, 11 Colo. 301, 18 Pac. 28; Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258; Re Merriman, 44 Conn. 587; Snevily v. Read, 9 Watts, 400.

Messrs. **William W. Morrill** and **Northrup R. Holmes**, for respondent:

The letter was a sufficient promise to relieve the note from the Statute of Limitations.

Story v. Bishop, 4 E. D. Smith, 423; Strough v. Wilder, 119 N. Y. 530, 7 L.R.A. 555, 23 N. E. 1057; Bowdoin v. Colman, 6 Duer, 182; Smith v. Smith, 125 N. Y. 224, 26 N. E. 259; Post v. Manhattan R. Co. 125 N. Y. 697, 26 N. E. 14; Fletcher v. Daniels, 52 App. Div. 67, 64 N. Y. Supp. 861; Kiernan v. Fox, 43 App. Div. 58, 59 N. Y. Supp. 330; Hodnett v. Gault, 64 App. Div. 163, 71 N. Y. Supp. 831; Manchester v. Braedner, 107 N. Y. 346, 1 Am. St. Rep. 829, 14 N. E. 405; Clarke v. Dutcher, 6 Cow. 674.

The promise to pay was sufficient to satisfy the Statute of Frauds.

Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543; Shippey v. Henderson, 14 Johns. 178, 7 Am. Dec. 458; Hopkins v. Ward, 67 Barb. 452; Graham v. O'Hern, 24 Hun, 221; Gruenberg v. Treanor, 40 Misc. 232, 81 N. Y. Supp. 675; Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869; Dean v. Hewit, 5 Wend. 262; Inman v. Foster, 8 Wend. 602; Scouton v. Eislord, 7 Johns. 36; Erwin v. Saunders, 1 Cow. 249, 13 Am. Dec. 520; Fitzgerald v. Alexander, 19 Wend. 402; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338.

The composition agreement, when confirmed and the proceedings dismissed, operated as a discharge of the debtor from his debts by operation of law. The moral obligation to pay the debt remained, and the new promise in writing, after the discharge, was valid and binding.

Re Merriman, 44 Conn. 587; Cohen v. Lachenmaier, 147 Wis. 649, 133 N. W. 1099, 27 Am. Bankr. Rep. 416; Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; Mason & H. Organ Co. v. Bancroft, 1 Abb. N. C. 415; Eastern Furniture Mfg. Co. v. Caminez, 146 App. Div. 436, 131 N. Y. Supp. 157; First Nat. Bank v. Wood, 53 Vt. 491.

Collin, J., delivered the opinion of the court:

The action is upon a promissory note made by the defendants' testator. After the note was delivered the maker was adjudicated a bankrupt, under the Federal Act of 1898, and thereunder received his discharge. A composition was effected, under the provisions of the act, between the bankrupt and his creditors. The plaintiff duly accepted the offer of the composition and the 20 per centum of the face value of the note payable under it. The defendants' testator thereafter wrote to the plaintiff a letter as follows:

Troy, N. Y., Dec. 6, 1904.

My dear sister:—

Your letter received. Was somewhat surprised at its contents. In regard to your claim against me, you will be paid every dollar of it with inst. as soon as I sell the mill. If anything happens to me the farm is in my name, and you will be paid. I have left orders to that effect. Tell Lester to see what balance there is due me on the books for wood and to pay it to you for inst. money.

Yours truly,

A. W. Davitt.

The claim mentioned in the letter was the note. The mill referred to in the letter was sold and conveyed by the testator in January, 1907.

This action upon the note was commenced June 8, 1912. Upon the trial, judgment in favor of the plaintiff for the unpaid balance payable by the terms of the note was ordered. The appellate division unanimously affirmed the consequent judgment.

The action was properly brought upon the note. For the purpose of the remedy, the original debt might still be considered the cause of action. Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543. It might, had the plaintiff so elected, have been brought upon the new promise. It would be more accurate and consistent with the provisions of § 481 of the Code of Civil Procedure, and the other sections regulating the pleadings in an action, to allege the new promise as the real foundation of the action. The note was a debt, provable in the bankruptcy proceedings. The legal obligation which it created or evidenced was, by virtue of the confirmation of the composition offer and the discharge in the proceedings, discharged by force of the statute, and the remedy of plaintiff existing at the time the discharge was granted, to recover her debt by action, barred. The right of action is given by a new and efficacious promise. The practice of bringing the action upon the original demand is, however, sanctioned by usage. The discharge in bankruptcy is, under such practice, regarded as a discharge of the debt sub modo only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. The new promise, with such other facts as are essential to constitute it a valid cause of action, may, however, be alleged. See Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Taylor v. Hotchkiss, 81 App. Div. 470, 80 N. Y. Supp. 1042, affirmed in 179 N. Y. 546, 71 N. E. 1140; Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869.

Action—on note discharged in bankruptcy.

The appellants assert and argue that the letter of December 6, 1904, does not contain or constitute a promise or agreement to pay the sum unpaid. At its writing, a statute provided: "Every agreement, promise, or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; . . . 5. Is a subsequent or new promise to pay a debt discharged in bankruptcy; . . . " Personal Property Law, Laws 1897 chap. 417, § 21.

The statute has remained in force. Personal Property Law, Consol. Laws, chap. 41, § 31. The debtor does not promise to pay the debt discharged in bankruptcy, unless there is a distinct and unequivocal expression by him, by a writing of the prescribed form, of a clear intention to bind himself to its payment. The acknowledgment of the existence of the debt by the payment of a part of it or of interest upon it, or by express written words, is not sufficient. For the purpose of creating anew the liability, the law does not imply a promise. The promise need not be made to the creditor, but it must with certainty refer to the debt. No particular form of words need be used. The promise is constituted by words which, in their natural import, express the present intention to obligate or undertake to pay. The payment may, however, depend upon a contingency or condition. If so dependent, it must be proved that the contingency has happened or the condition has been performed. Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Nathan v. Leland, 193 Mass. 576, 79 N. E. 793; Elwell v. Cumner, 136 Mass. 102; Bigelow v. Norris, 139 Mass. 12, 29 N. E. 61; Kraus v. Torry, 146 Ala. 548, 40 So. 956; Meech v. Lamon, 103 Ind. 515, 53 Am. Rep. 540, 3 N. E. 159; Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869. A promise made at any time after the adjudication, and perhaps after the filing of the petition, is actionable.

Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; Everett v. Judson, 228 U. S. 474, 57 L. ed. 927, 40 L.R.A.(N.S.) 564, 33 Sup. Ct. Rep. 568.

The letter of the defendants' testator constituted a distinct and unqualified promise to pay the debt. In effect and in truth it said to the plaintiff: I will pay you every dollar remaining unpaid upon the note with interest and will so pay you as soon as I sell the mill. He stated positively that he then undertook and obligated himself to pay. The construction of the words used by the debtors and the conclusions stated in the judicial decisions above cited adequately support such decision.

Bankruptcy—promise to revive debt.

The rule of law is well-nigh universal that such a promise made has an obligating and validating consideration in the moral obligation of the debtor to pay. The debt is not paid by the discharge in bankruptcy. It is due in conscience, although discharged in law, and this moral obligation, uniting with the subsequent promise to pay, creates a right of action. Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543. The appellants assert that the rule does not obtain or have applicability where, as in the present case, there was a composition between the bankrupt and his creditors, assented to and accepted by the creditors seeking to enforce the unpaid debt. The clear weight of judicial opinion and correct reasoning declare such assertion erroneous. In Cohen v. Lachenmaier, 147 Wis. 649, 133 N. W. 1099, the facts in particular under consideration were as are the facts here. The trial court awarded judgment for the balance unpaid on the note. The supreme court of Wisconsin, in affirming the judgment, said: "It is further contended that each promise, if made, is nudum pactum, because the plaintiff, as one of the creditors, joined with the majority of the creditors in number and amount in accepting the defendant's offer of a composition with the creditors in settlement of their claims. This claim is based upon the ground that a discharge in bankruptcy in a composition is not a discharge by operation of law, but is one affected by the voluntary assent of the creditors. The adjudications are to the effect that a debt which has been extinguished by a voluntary agreement of the debtor and creditor will not support a new promise, and that one discharged by operation of law will support one. The proceeding resulting in the discharge of a debtor from liability, based on a composition after bankruptcy proceedings are instituted, is not in its nature such a voluntary act of the creditor as is considered in law as being a voluntary assent of the creditor to the satisfaction of the debt."

Same—promise to pay after discharge—composition—consideration—moral obligation.

In Re Merriman, 44 Conn. 587, the court stated the principal question as being: "Whether an express promise made by a bankrupt to a creditor to pay the amount of his debt is valid, such creditor having theretofore expressly assented to a composition, made and confirmed under the 17th section of the amended Bankrupt Act of June 22, 1874," and carried into effect, and held that the promise was valid. It enunciated that an express promise to pay a debt, which had been theretofore discharged by operation of law, was valid. The adequate consideration was the moral obligation to keep the original promise; this rule does not apply to a composition inter partes which derives its validity merely from the will of the parties; and, if a debt is legally discharged by the voluntary act of the party, there remains no obligation which can be deemed a consideration for a promise; a discharge by performance of the terms of a bankruptcy composition is a discharge by operation of law; the composition is, as to the assenting creditor, both a voluntary act and an act of

the law, but its efficiency is derived from the compulsory power of the law. There are other decisions of like reasoning and effect. Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; First Nat. Bank v. Wood, 53 Vt. 491; Mason & H. Organ Co. v. Bancroft, 1 Abb. N. C. 415; Easton Furniture Mfg. Co. v. Caminez, 146 App. Div. 436, 131 N. Y. Supp. 157. In Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664, the plaintiffs accepted the composition offer of the defendant in bankruptcy proceedings. Thereafter the defendant promised plaintiffs, upon a loan to them of $500, that he would pay the balance of their claim proved in the proceedings. The action was to recover such balance. The plaintiffs recovered. Mr. Justice Pitney, in the opinion of the court, recognized the general rule that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt, and ignored the composition and its acceptance.

The reasoning and the conclusions of those decisions are harmonious with and applicable to the provisions of the Bankruptcy Act of 1898.

The case of Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258, conflicts with the decisions cited and others of like import. Therein it is stated: "It is very generally held that, in the case of a discharge of a debt under insolvent or bankrupt laws, a subsequent promise to pay by the insolvent or bankrupt will revive the original debt and make it enforceable at law. But it is otherwise where the creditor comes to terms with his debtor under a valid composition, and agrees to and does accept a part of his debt for the whole. When this is done, the debt is extinguished. The parties having met on common ground, and agreed on terms of settlement which have been carried out, there is no longer even a moral obligation resting upon the debtor as to the balance of the original liability. So that a new promise after composition is without consideration, and will not afford a cause of action. Warren v. Whitney, 24 Me. 561, 41 Am. Dec. 406; Stafford v. Bacon, 1 Hill, 532; Evans v. Bell, 15 Lea, 569." It is to be noted that the decisions thus cited sustain the proposition that a promise to pay a debt voluntarily discharged is not binding for want of a legal consideration, but do not hold that a discharge in bankruptcy through a composition is a voluntary release or extinguishment of the debt.

We do not find merit in the other grounds for reversal urged by the appellant.

The judgment should be affirmed, with costs.

Hiscock, Ch. J., and Chase, Cuddeback, Hogan, Cardozo, and Pound, JJ., concur.

ANNOTATION.

Binding effect of promise to pay debt discharged in bankruptcy where compromise was made by bankrupt with creditors.

The general rule that while a discharge in bankruptcy operates to release the bankrupt from all legal liability, the moral obligation to pay the debt remains, and a new promise given after the discharge is sufficiently supported by that moral obligation (see 3 R. C. L., title, "Bankruptcy," p. 324), is not altered by the fact that the discharge is had after a compromise assented to by the creditors. In such cases it is held that the discharge is one by operation of law, and not one effected solely by the voluntary assent of the creditors, whereby the obligation to pay the debt, both legal and moral, is wiped out. Spann v. Read Phosphate Co. (1916) 151 C. C. A. 354, 238 Fed. 338; Re Merriman (1877) 44 Conn. 587, Fed. Cas. No. 9,479; Coon's

Appeal (1884) 52 **Conn.** 186; Higgins v. Dale (1881) 28 **Minn.** 126, 9 N. W. 583, 15 Am. Neg. Cas. 759; Hill v. Trainer (1880) 49 **Wis.** 537, 5 N. W. 926; Cohen v. Lachenmaier (1912) 147 **Wis.** 649, 133 N. W. 1099. And see the reported case (HERRINGTON v. DAVITT, ante, 1700). And compare Taylor v. Skiles (1904) 113 **Tenn.** 288, 81 S. W. 1258, quoted in the reported case (HERRINGTON v. DAVITT), which seems to stand alone in holding that a composition in bankruptcy is in the nature of a voluntary compromise, and that a new promise to pay cannot therefore be enforced.

In Higgins v. Dale (1881) 28 **Minn.** 126, 9 N. W. 583, 15 Am. Neg. Cas. 759, the court pointed out the difference between a discharge by composition in bankruptcy and a voluntary composition as follows: "A distinction is attempted to be drawn between a discharge by composition in bankruptcy and the usual discharge. So far as the legal obligation is concerned, there is no difference. In either case the debt, as an obligation which the law will recognize and enforce, is extinguished. Whether the discharge by composition discharges the moral obligation depends on whether its effect is derived from the voluntary assent of the creditor, or from the law. The entire proceeding is regulated by law, is under the control of the court, and has no validity unless confirmed by the court. The law declares its effect when so confirmed. It is a part of bankruptcy proceedings; is one of the modes provided in such proceedings for distributing the assets of the bankrupt, and working his discharge. It has, indeed, one element of assent by the creditor, as he has a right to vote to accept or reject the debtor's offer of composition; but he cannot act for himself alone, and accept or reject the offer, so far as his debt is concerned and as his separate interests may require, independent of the other creditors. The offer is not made to him alone. The power to accept or reject is not left to each creditor as to his one demand. It is lodged by the law in the body of creditors, the requisite number of whom voting to accept or reject, all the others are bound. The composition thus effected differs wholly in nature and effect from a voluntary composition deed, which binds only those who execute it, and for the reason that a release or discharge of the debt by such a composition is not the voluntary act of the creditor, but takes effect by act or operation of law." In that case it was held that a note given by a bankrupt to a creditor for the balance due on his account after composition was founded on a valid consideration and was enforceable.

Similarly, in Cohen v. Lachenmaier (1912) 147 **Wis.** 649, 133 N. W. 1099, it was held that a promise to pay the balance due after a composition in bankruptcy, made before the composition was had, and reaffirmed afterwards, was enforceable, it appearing that the promises were not made in consideration of the creditors acting or not acting in the bankruptcy proceedings, and were in no way induced by fraud of the parties.

In Hill v. Trainer (1880) 49 **Wis.** 537, 5 N. W. 926, it was held that the discharge of one partner in bankruptcy on a composition with the creditors did not release the other partner, and that a promise by the discharged partner to pay the balance due on certain of the firm debts after the compromise was based on a good consideration and was enforceable.

Likewise, it has been held that where a debtor is discharged after a composition in bankruptcy, and subsequently goes into bankruptcy again, the creditors becoming such after the first discharge have no preference in the second proceeding over a creditor holding a note given for the residue of a claim after composition in the first proceeding. Re Merriman (1877) 44 Conn. 587, **Fed.** Cas. No. 9,479.

In Coon's Appeal (1884) 52 **Conn.** 186, wherein it appeared that a creditor waived his right to the 15 per cent fixed by the composition, in consideration of the bankrupt's promise to pay his entire claim, it was held that such a promise was based on a valuable consideration and was enforceable.

In Spann v. Read Phosphate Co.

(1916) 151 C. C. A. 354, 238 **Fed.** 338, it appeared that after a composition in bankruptcy whereby one of the creditors received $1,000 on his claim of $4,000, the bankrupt borrowed additional sums from the creditor and gave a note and mortgage for the amount borrowed and the old debt of $4,000. It was insisted by a subsequent creditor that the mortgage was void as to the $4,000, which had been discharged in the bankruptcy proceedings. Applying the general rule the court held that the mortgage was valid as to the full amount, except that the $1,000 received by the creditor in the composition should be deducted. On this point it was said: "On the present record it appears that Spann Brothers received a dividend of 25 per cent of their claim, and also got a note for the whole amount. If this be the fact, it is evident that the note included $1,000 for which there was no consideration, and therefore the mortgage should be reduced by that sum, with interest thereon from the date of the note. It may turn out upon further investigation that this dividend was not actually paid in money, but included instead in the note. In that case the mortgage would not be subject to deduction."

In Javelo v. Reeves (1913) 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664, the court sustained a judgment on a note for the residue of a claim after composition in bankruptcy, although the question of the effect of a creditor assenting to a composition was not directly brought up nor discussed.

However, a creditor guilty of fraud on the other creditors in obtaining a secret preference cannot recover on a note for the balance of his original claim remaining after receiving payment under the composition. Ferguson-McKinney Dry Goods Co. v. Beuckman (1917) 198 **Mo. App.** 41, 198 S. W. 504, wherein it was said: "In the case at bar, while the note sued on purports to be a new contract, in point of fact it is but a substitute for the original note, which was given for the portion of plaintiff's claim against defendant remaining unpaid when plaintiff signed the composition agreement. That note originally given, undoubtedly, . . . was void. . . . This was a mere substitute for the first note, and left the present note dependent for any consideration whatever, morally or otherwise, upon the first note given, and which had been surrendered or destroyed. Under these circumstances we conclude that the note now in suit rests on no obligation of any kind, moral or otherwise, and is not enforceable in the hands of plaintiff."

In Citizens' Nat. Bank v. Kerney (1915) 59 **Ind. App.** 96, 108 N. E. 139, wherein it appeared that a bank entered into an agreement with a bankrupt to loan him enough to pay the amount of a compromise settlement, but insisted that he give the bank his note for a balance due to it as one of the creditors, which fact was kept secret from the other creditors, it was held that the note was unenforceable.

M. B.

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Parol evidence to prove title to real property when the title is only collaterally involved. 1 A.L.R. 1143 (with case on page 1140).

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